

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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THE NEW YORK STATE RIFLE & PISTOL
ASSOCIATION, ROMOLO COLANTONE, EFRAIN
ALVAREZ, and JOSE ANTHONY IRIZARRY,

Plaintiffs,

**DECLARATION OF
MICHELLE
GOLDBERG-CAHN**

-against-

THE CITY OF NEW YORK, THE NEW YORK CITY
POLICE DEPARTMENT LICENSE DIVISION,

Defendants.

13 CV 2115 (RWS)
ECF Case

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MICHELLE GOLDBERG-CAHN, declares under the penalty of perjury,
pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct:

1. I am an Assistant Corporation Counsel in the office of MICHAEL A. CARDOZO, Corporation Counsel of the City of New York, attorney for defendants the City of New York and the New York City Police Department License Division (“License Division”). I submit this declaration in opposition to plaintiffs’ motion for a preliminary injunction, and to place certain documents on the record of this motion.

2. Annexed for this Court’s consideration are the following documents:

- A copy of Title 38 of the Rules of the City of New York (“RCNY”), chapter 5, section 23 (38 RCNY § 5-23) printed from the LEXIS legal publishing company is annexed hereto as Exhibit “A.” The historical note under the rule reflects that § 5-23(a) was amended by publication in the *City Record* on May 31, 2001. Exhibit “A.”

- A copy of the relevant page from the May 31, 2001 *City Record* reflecting the Statement of Basis and Purpose of the rule changes promulgated by the License Division, is annexed hereto as Exhibit "B."

Dated: New York, New York
June 5, 2014


MICHELLE GOLDBERG-CAHN

EXHIBIT

A



Rules of the City of New York

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***** Current through August 2012 *****

38 RCNY 5-23

New York

RULES OF THE CITY OF NEW YORK

Title 38 Police Department

CHAPTER 5 HANDGUN LICENSES*1

SUBCHAPTER B LICENSEE RESPONSIBILITIES

§5-23 Types of Handgun Licenses.

(a) **Premises License-Residence or Business.** This is a restricted handgun license, issued for the protection of a business or residence premises.

(1) The handguns listed on this license may not be removed from the address specified on the license except as otherwise provided in this chapter.

(2) The possession of the handgun for protection is restricted to the inside of the premises which address is specified on the license.

(3) To maintain proficiency in the use of the handgun, the licensee may transport her/his handgun(s) directly to and from an authorized small arms range/shooting club, unloaded, in a locked container, the ammunition to be carried separately.

(4) A licensee may transport her/his handgun(s) directly to and from an authorized area designated by the New York State Fish and Wildlife Law and in compliance with all pertinent hunting regulations, unloaded, in a locked container, the ammunition to be carried separately, after the licensee has requested and received a "Police Department-City of New York Hunting Authorization" Amendment attached to her/his license.

(b) **Carry Business License.** This is an unrestricted class of license which permits the carrying of a handgun concealed on the person.

(c) **Limited Carry Business License.** This is a restricted handgun license which permits the licensee to carry a handgun listed on the license concealed on the person to and from specific locations during the specific days and times set forth on the license. Proper cause, as defined in §5-03, shall need to be shown only for that specific time frame that

the applicant needs to carry a handgun concealed on her/his person. At all other times the handgun shall be safeguarded at the specific address indicated on the license and secured unloaded in a locked container.

(d) **Carry Guard License/Gun Custodian License.** These are restricted types of carry licenses, valid when the holder is actually engaged in a work assignment as a security guard or gun custodian.

(e) **Special Licenses.** Special licenses are issued according to the provisions of §400.00 of the New York State Penal Law, to persons in possession of a valid County License. The revocation, cancellation, suspension or surrender of her/his County License automatically renders her/his New York City license void. The holder of a Special License shall carry her/his County License at all times when possessing a handgun pursuant to such Special License.

(1) **Special Carry Business.** This is a class of special license permitting the carrying of a concealed handgun on the person while the licensee is in New York City.

(2) **Special Carry Guard License/Gun Custodian License.** These are restricted types of Special Carry Licenses. The handgun listed on the license may only be carried concealed on the licensee's person while the licensee is actively on duty and engaged in the work assignment which formed the basis for the issuance of the license. The licensee may only transport the handgun concealed on her/his person when travelling directly to and from home to a work assignment.

HISTORICAL NOTE

* Section amended City Record May 31, 2001 eff. June 30, 2001. [See T38 Chapter 1 footnote] *

DERIVATION

Section amended City Record Apr. 12, 1993 eff. May 12, 1993.

Section amended in part City Record Aug. 2, 1991 eff. Sept. 1, 1991.

Section in original publication July 1, 1991.

Subd. (b) par (1) amended City Record Sept. 23, 1994 eff. Oct. 23, 1994. This subd. (b) was repealed by City Record May 31, 2001 amendment.

CASE NOTES

\xB6 1. The Police Department's creation of the new premises license, which permits the transport of firearms to authorized target ranges and hunting areas did not exceed the jurisdiction of the department. Penal Law §400.00; the state's enabling statute, did not pre-empt all regulations in this field. *De Illy v. Kelly*, 6 A.D.3d 217, 775 N.Y.S.2d 256 (1st Dept. 2004).

FOOTNOTES

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1.

[Footnote 1]: * Chapter amended City Record May 31, 2001 eff. June 30, 2001, see footnote to T38 Chapter

EXHIBIT

B

requesting person that such authorization has or has not been granted.

(a) In addition to any other applicable penalties, the Police Commissioner may deny an application submitted pursuant to this chapter if the applicant has previously failed to comply with the provisions of this chapter.

§ 16-04 Surrender of Firearms Not Authorized for Transportation or Delivery. (a) Any person who transports or delivers firearms without obtaining authorization pursuant to the requirements of this chapter shall be liable for the penalties set forth in Article 265 of the New York State Penal Law and the New York City Administrative Code, and shall further be directed by any member of the Police Department to (either) surrender the firearms weapons to the Police Department for immediately return such firearms to the sender. In addition, the property being transported, as well as the means of transport, may be seized and forfeited pursuant to law.

§ 16-05 Required Security Measures for Weapons Shipments in Transit. Any person, corporation, partnership, or other business entity using a vehicle to transport weapons within or through the City of New York shall, at a minimum, employ the following security measures while such weapons are in transit:

(a) All weapons shall be transported unloaded. (b) All weapons shall be placed in one or more containers located within the vehicle used for transportation of the weapons. Such containers shall be constructed of materials of such a sturdy character that when the container is closed and locked, it cannot be forced open by hands alone, or sliced open with a common tool such as a knife or box cutter.

(c) The above referenced containers shall be securely fastened, with a combination or key locking device, to the interior body structure of the transporting vehicle, in such a manner that the containers cannot be manually removed without releasing the locks.

(d) Such containers, while in transit and carrying weapons, shall be closed and locked with a heavy-duty combination or key-type lock.

(e) Ammunition shall not be stored in the same container as weapons.

(f) At all times other than loading and unloading, the cargo area of the transporting vehicle in which all of the above referenced containers shall be stored shall be closed and locked with a heavy-duty combination or key-type lock.

(g) The driver of the transporting vehicle shall carry a manifest which declares the number and types of weapons being transported, and the intended point of delivery. Such manifest shall not be considered valid unless it shall have written upon it the permit/escort number issued by the New York City Police Department License Division.

(h) (1) The Police Commissioner may require, as a condition of the authorization to transport or deliver weapons, that shipments of weapons which will be offloaded from one means of transportation and subsequently on-loaded to the same means or another means of transportation within the city of New York, be escorted by a uniformed member of the New York City Police Department, from the time of on-loading until such point that the shipment has left the jurisdictional boundaries of the City of New York.

(2) If the Police Commissioner elects to impose the escort requirement as a condition of the authorization to transport or deliver weapons, the applicant shall notify the Commanding Officer, License Division, of the day, date, estimated time and place of on-loading of the shipment to the second means of transportation. The escort requirement shall be deemed waived if the escort is not present at the place within the City of New York where the weapons will be on-loaded within thirty minutes of the shipment's estimated time of on-loading and departure.

§ 16-06 Requirement to Report Theft, Loss or Misdelivery

(a) Any person, firm, corporation, or other business entity who has received permission to transport weapons pursuant to the provisions of this chapter, and who suffers a loss or theft of any part of her/his weapons shipment while it is located within New York City, shall forthwith report such loss or theft to the nearest Police Department facility and shall comply with all reasonable requests for assistance by police officers who investigate the circumstances of the loss or theft.

(b) Any person, firm, corporation or other business entity who has received permission to transport weapons pursuant to the provisions of this chapter, and who knows or reasonably should know that any part of her/his weapons shipment was delivered to a person other than the person designated as the recipient of the shipment shall forthwith report such misdelivery to the Police Department's Operations Unit, at 212-312-3429

Note: References within this chapter to masculine shall be presumed to include the feminine as a neuter. References in the singular shall be presumed to include the plural.

STATEMENT OF BASIS AND PURPOSE

The Police Commissioner is responsible for the licensing and regulation of handguns, rifles, shotguns and other weapons in New York City, including activities such as possessing, carrying, selling, manufacturing, transporting or repairing such weapons. In addition, the Police Commissioner is authorized to designate individuals as "Special Patrolmen" pursuant to Section 14-106 of the New York City Administrative Code. This administrative arm of the Police Department which fulfills these functions at his direction is the New York City Police Department's License Division.

Since early 1997, the operation of the License Division has undergone extensive review and analysis. This continuous effort to improve the quality and timeliness of the application and renewal process, the investigation of incidents, the determination of fitness, and the safe transport of weapons through New York City has resulted in significant policy changes and organizational improvements under the present rules and practices. However, it became clear that in the interest of consistency, fairness, and efficiency, a close examination and restructuring of Chapters 1, 2, 3, 4, 5, 13, 15 (Subchapter B), and 16 of Title 36 of the Rules of the City of New York was equally necessary.

Chapters 1 through 5, regarding licensing and possession of handguns and rifles/shotguns, as well as the licensing of dealers in weapons (including air pistols and air rifles), have been amended to be internally consistent in application, renewal, and suspension/revocation procedures. The amendments incorporate recent changes to the law, such as federal and state law prohibitions against possession of firearms by perpetrators of domestic violence, as well as local laws regarding the possession and use of safety locking devices and the establishment of domestic partnership registration in New York City. The amendments clarify and streamline the application and review process, clarify the conditions of the issuance of a license including the obligation to observe applicable laws and rules, and set forth consistent procedures for the appeal of revocation or suspension of a license or permit. Specifically with respect to handgun licensing, the amendments eliminate as a separate category the "Target" handgun license, clarify the requirements for particular categories of handgun licenses, and require inspection of all handguns with each renewal of the license.

Chapter 13, "Special Patrolmen," has been similarly amended to streamline and clarify application, renewal, and suspension/revocation procedures, including criteria to be considered when evaluating whether employers demonstrate sufficient need for the appointment of special patrolmen.

Subchapter B of Chapter 15, governing hearings conducted by the License Division, has been amended to uniform the hearing process to the License Division rules as amended herein, as well as to clarify and streamline the hearing and disposition process.

Chapter 16 is amended to strengthen the already existing rules regarding the transport of weapons in New York City. The amendments clarify the definitions of applicable terms, strengthen notification requirements and security requirements when weapons are transported in and through New York City, and provide an appropriate procedure when a weapons shipment destined for a location outside of New York City is unexpectedly delayed in New York City. The chapter is also amended to exempt weapons shipments of five or fewer between licensed dealers within New York City from the operation of these rules.

In response to public comment on the proposed rule amendments and additional review by members of the Police Department, modifications have been made to rules contained in Chapters 1, 2, 3, 4, 5, 13, and 16, which include: addition of a provision requiring license or permit applicants to notify the License Division in the event that their circumstances change during the pendency of the application; restoration of the thirty-day period within which to request a hearing following suspension or revocation of a license or permit, rather than the ten-day period originally provided; addition of a provision requiring that a license or permit whose license was suspended or revoked due to their becoming the subject of an order of protection must wait until the order of protection is expired or voided in order to request a hearing; and modification of a requirement in Chapter 5 providing that licensees may, rather than shall, be required to produce all handguns possessed for inspection upon renewal of a handgun license.

Consistent with the intent of the New York State Penal Law and the New York City Administrative Code, and pursuant to the powers of the Commissioner

under sections 434(b) and 1043 of the New York City Charter, Title 10 of the New York City Administrative Code, and Articles 265 and 400 of the New York State Penal Law, the Police Department is now acting to amend its rules to create a comprehensive and reasonable regulatory scheme for the licensing and regulation of deadly weapons in New York City, and for the appropriate designation of Special Patrolmen.

TAXI AND LIMOUSINE SERVICES

Notice of Final Publication

Notice is hereby given in accordance with Section 1043(b) of the Charter of the City of New York, that the Taxi and Limousine Commission hereby amends the Taxicab Owners Rules to adjust the Flat Rate of Fare between Kennedy Airport and Manhattan.

The Taxi and Limousine Commission ("TLC") is promulgating such regulations pursuant to the authority vested in the TLC under Charter Sections 2302(a) and (b), and 2304, and under Section 19-503 of the Administrative Code of the City of New York.

A public hearing in connection with these proposed regulations was held on May 24, 2001, by the NYC Taxi and Limousine Commission at 40 Rector Street, New York, NY 10008.

Section 1, Title 36 of the Rules of the City of New York ("RCNY"), Chapter 1, Taxicab Owners Rules, Section 1-05, Flat Rates from Kennedy Airport to Manhattan, subdivisions (a) and (b), is amended to read as follows:

Italics indicate new material. [] Brackets indicate deleted material.

Section 1-05 Flat Rates From Kennedy Airport to Manhattan

(a) Notwithstanding the rate of fare set forth in Sections 1-70 (a) and (b), the fare for trips beginning at Kennedy Airport with a Manhattan destination shall be a flat rate of [Thirty Dollars (\$30)] *Thirty-Five Dollars (\$35)*, plus any tolls.

(1) The night surcharge set forth in Rule 1-70 (b) shall not be added to this flat rate.

(2) The taximeter shall reflect that this trip is a flat fare.

(b) If passengers request multiple stops, the fare shall be as follows: the first stop in Manhattan is paid in accordance with subdivision (a) of this section; the meter is then turned on for a separate trip at the rate of fare as set forth in Section 1-70, and the total on the meter is paid at the last stop by the remaining passenger. (For example, if three passengers request stops at 42nd St., 18th St. and 4th St., then \$30/\$35 will be charged at 42nd St. and the meter will be turned on. When the second passenger exits at 18th St., the meter remains on, and no money is paid to the driver. The passenger dropped off at 4th St. must pay the fare on the meter.)

Statement of Basis and Purpose

The regulations promulgated herein by the New York City Taxi and Limousine Commission ("TLC") are authorized under Section 2303(a) of the Charter of the City of New York, which empowers the TLC to regulate and supervise the business and industry of transportation of persons by licensed vehicles for-hire in the City. Section 2303(b) of such Charter, authorizing the TLC to enact rules and regulations relating to standards and conditions of service which are reasonably designed to carry out its purposes; Section 2304(b) of such Charter, authorizing the Commission to establish rates of fare for taxicabs; and Section 19-503 of the Administrative Code of the City of New York, authorizing the TLC to promulgate rules and regulations necessary to exercise authority conferred upon it by the Charter.

The regulations promulgated herein raise the Flat Fare rate for a trip from Kennedy Airport in Manhattan from the present rate of \$30, to a rate of \$35, exclusive of tolls. The \$30 flat fare rate has been in effect since April 29, 1996.

The Commission adopted the JFK flat fare rate in 1996 to provide passengers with a consistent and uniform fare that approximated the average cost of a metered trip from Kennedy Airport to typical destinations in Manhattan, taking into account differences in traffic conditions and other variables such as the selection of a meter, but longer alternative routes by drivers or passengers. The flat fare was also adopted in 1996 to prevent overcharging of passengers by drivers. The purpose of this increase in the flat fare rate by \$5 per trip is to more closely approximate the average cost of a metered trip between Kennedy Airport and various locations in Manhattan, based upon average distance and time traveled. Since 1996, the Commission has conducted analyses of sample trips from Kennedy Airport to various destinations in midtown, lower and upper Manhattan. The results of these studies demonstrate that the average recorded meter charge for trips to midtown Manhattan was approximately \$30. However, fares for trips to destinations in lower Manhattan averaged in excess of \$35, while fares for trips to destinations in the northern end of Manhattan were approximately \$35.

Lower Manhattan has developed in recent years into a primary residential and commercial area. In 1970, the Community Planning District comprising lower Manhattan (generally below the City Hall area) had a population of approximately 5,000 persons. By 1990, the population had increased to in excess of 26,000, and preliminary census data for the year 2000 indicates that more than 30,000 people now live in lower Manhattan—a five-fold increase in thirty years. This demographic change has significantly impacted upon the use of taxicabs to destinations in lower Manhattan.

EXHIBIT

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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THE NEW YORK STATE RIFLE & PISTOL
ASSOCIATION, ROMOLO COLANTONE, EFRAIN
ALVAREZ, and JOSE ANTHONY IRIZARRY,

Plaintiffs,

13 Civ. 2115(RWS)

-against-

OPINION

THE CITY OF NEW YORK and THE NEW YORK CITY
POLICE DEPARTMENT - LICENSE DIVISION,

Defendants.

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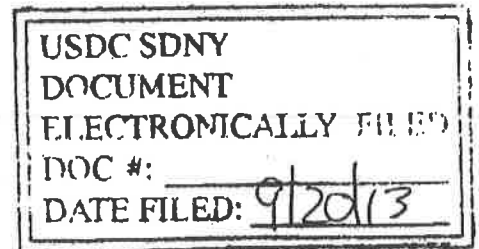
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Sweet, D.J.

Plaintiffs New York State Rifle & Pistol Association ("NYSRPA"), Romolo Colantone ("Colantone"), Efain Alvarez ("Alvarez") and Jose Anthony Irizarry ("Irizarry" and, collectively, "Plaintiffs") have moved for a preliminary injunction enjoining the enforcement of 38 RCNY § 5-23(a) ("§5-23"), a regulation promulgated by defendant the City of New York that governs the use of handguns by individuals who have been granted a handgun license by defendant the New York City Police Department - License Division (the "NYPD License Division").

For the reasons set forth below, the motion is stayed pending a decision by the New York Court of Appeals in Osterweil v. Bartlett, see 20 N.Y.3d 1058 (2013).

The Motion Is Stayed

Section 5-23(a) provides that with respect to the type of handgun license known as a "premises license"

(3) To maintain proficiency in the use of the handgun, the licensee may transport his/her handgun(s) directly to and from an authorized small arms range/shooting club,

unloaded, in a locked container, the ammunition to be carried separately.

(4) A licensee may transport his/her handgun(s) directly to and from an authorized area designated by the New York State Fish and Wildlife Law and in compliance with all pertinent hunting regulations, unloaded, in a locked container, the ammunition to be carried separately, after the licensee has requested and received a "Police Department - City of New York Hunting Authorization" Amendment attached to her/his license.

38 RCNY § 5-23(a)(3) & (4). This language has been construed by the NYPD License Division to mean that the holder of a premises license who possesses a handgun located in his New York City residence is prohibited by law from transporting that handgun outside the borders of New York City except for the purpose of hunting. See Affidavit of Romolo Colantone ("Colantone Aff.") ¶¶ 8, 11-12 & Exs. A & B.

Plaintiffs have contended that §5-23 violates their right to bear arms under the Second Amendment because, *inter alia*, it effectively precludes them from using a handgun to protect themselves and their families if and when they reside at a secondary residence that is located outside of New York City. See Memorandum in Support of Plaintiffs' Motion for a Preliminary Injunction ("Pl. Mem.") at 10-12. According to

Plaintiffs, because §5-23 prohibits them from transporting a handgun outside of New York City for any reason other than hunting, the regulation makes it illegal for a duly licensed New York City resident to transport his handgun from his primary residence in New York City to a second home that is located outside of New York City.

The strength of Plaintiffs' argument is dependent in large part upon the construction of New York Penal Law § 400.00 ("§400.00"), which is the New York State law governing firearm licenses. Subsection (a)(3) of §400.00 provides that an application for a license to carry a firearm

shall be made and renewed, in the case of a license to carry or possess a pistol or revolver, to the licensing officer in the city or county, as the case may be, where the applicant resides, is principally employed or has his principal place of business as merchant or storekeeper.

N.Y. Penal L. § 400.00(a)(3) (emphasis added). If the underlined language - and particularly the word "resides" - is understood literally, and therefore read as permitting an individual to apply for a handgun license with the licensing officer of the city or county in which he has a residence, the

cogency of Plaintiffs' second-home argument suffers considerably, as their complaint could be met with a rejoinder to simply acquire a handgun license from the county in which the second home is located, and keep a gun in that home for use when it is being used as a residence. See Memorandum in Reply and Further Support of Plaintiffs' Motion for a Preliminary Injunction ("Pl. Reply") at 6 & n. 6.

However, if the underlined language above is understood as creating a domicile requirement - *i.e.*, mandating that an individual may only apply for a handgun license in the city or county in which his *primary* residence is located - the combined effect of §400.00(a)(3) and §5-23 would be to preclude an individual whose primary residence is in New York City from applying for a handgun license from any licensing authority other than the NYPD License Division, which as noted above only grants licenses that are subject to the restrictions set forth in §5-23, including the prohibition on transporting a handgun outside of the city limits for reasons other than hunting. Accordingly, reading a domicile requirement into §400.00(a)(3) would essentially render it impossible for a resident of New York City to lawfully exercise what the Supreme Court has held to be the "core" right protected by the Second Amendment - "the

right to self-defense in the home.” Osterweil v. Bartlett, 706 F.3d 139, 141 (2d Cir. 2013) (citing District of Columbia v. Heller, 554 U.S. 570 (2008)). Under this statutory rubric, the regulation at issue in this case would demand a far more rigorous level of judicial scrutiny than would be employed if the requirement were merely residential in nature.

The question of whether §400.00(a)(3) implicates an individual’s domicile or residence has been certified by the Second Circuit to the New York Court of Appeals,¹ see Osterweil, 706 F.3d at 140-45, and the New York Court of Appeals has accepted the certified question, see Osterweil v. Bartlett, 20

¹ The precise question that has been certified to the Court of Appeals is as follows:

Is an applicant who owns a part-time residence in New York but makes his permanent domicile elsewhere eligible for a New York handgun license in the city or county where his part-time residence is located?

Osterweil, 706 F.3d at 145. While the circumstances in Osterweil that gave rise to this question are different than those present in the instant case, as the plaintiff there is domiciled in another state, see id. at 140, rather than (as here) in a different licensing jurisdiction, it appears likely that the Court of Appeals’ response to the question will entail a determination of the question that is relevant to the instant case, namely whether or not §400.00(a)(3) permits an individual to apply for a handgun license in the city or county where he merely has a residence, even if he is not domiciled in that licensing jurisdiction.

N.Y.3d 1058 (2013), and the matter is scheduled for oral argument on September 12, 2013.²

Since the Court of Appeals' determination of this question is likely to have a material effect upon the analysis of the instant motion, and since argument on the question is scheduled for the near future, it is appropriate to stay the motion pending a decision from the Court of Appeals in Osterweil. See Cobalt Multifamily Investors I, LLC v. Shapiro, 857 F. Supp. 2d 419, 423-24 (S.D.N.Y. 2012) (finding that grounds for a stay existed where the Second Circuit certified a series of questions to the New York Court of Appeals in an unrelated case, and the answers to those questions "would impact adjudication of the claims pending in this litigation"); Salcedo v. Phillips, No. 04 Civ. 7964 (PAC) (GWG), 2007 WL 3097208, at *1 (S.D.N.Y. Oct. 22, 2007) (same); cf. In re CBI Holding Co., Inc., No. 01 Civ. 0131 (KMW), 2010 WL 2287013, at **5-6 (denying motion to stay despite pending question to the Court of Appeals since it was unclear that the Court of Appeals' determination would in fact impact the case, and additionally "[t]he Court

² See Court of Appeals, State of New York - Certified Questions (500.27), <http://www.nycourts.gov/ctapps/certquest.htm> (last visited August 19, 2013).

cannot determine when the New York Court of Appeals is likely to rule on the Certified Questions).

Conclusion


Based on the conclusions set forth above, Plaintiffs' motion for a preliminary injunction is stayed pending the Court of Appeals' decision in Osterweil.

It is so ordered.

New York, NY

~~August~~ 2013

September 18


ROBERT W. SWEET
U.S.D.J.