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Overruled

Superior Court of California
County of Los Angeles

Jennifer Lynn Lu, et al Plaintiffs, vs. County of Los Angeles, et al Defendants.	Case No.: **BC480493** ~~[Tentative]~~ Ruling

Hearing Date: **October 23, 2013**
Department 49, Judge Deirdre Hill

(1) Motion for Summary Judgment/Adjudication
(2) Motion for Issuance of Writ of Mandamus

(1) Moving Party: Defendants, County of Los Angeles and Sheriff Leroy Baca ("Defendants")
(1) Responding Party: Plaintiffs, Roy Torivio Vargas, Michael Saulibio, and The CalGuns Foundation, Inc. ("Plaintiffs")

(2) Moving Party: Plaintiffs, Roy Torivio Vargas, Michael Saulibio, and The CalGuns Foundation, Inc. ("Plaintiffs")
(2) Responding Party: Defendants, County of Los Angeles and Sheriff Leroy Baca ("Defendants")

Ruling: The motion for summary judgment/adjudication is DENIED.
The motion for issuance of a writ of mandamus is GRANTED.

The Court considered the moving papers, opposition, and reply.

On 1/10/13, Plaintiffs filed a verified second amended complaint (SAC) and petition for writ of mandate against Defendants. On 7/18/13, Jennifer Lynn Lu and Sean Allen Lu stipulated to dismiss their claims since they no longer reside in the County of Los Angeles. As such, they are no longer parties to this action.

By this action, Plaintiffs seek to require Defendants to exercise their statutory duty to determine whether applicants for licenses to carry handguns are of good moral character, are residents of the County, and have good cause for the licenses, as required by Penal Code§§17020 and 26150-26225. Plaintiffs each seek a license to carry handguns pursuant to Penal Code §26150, et seq., and assert that they should not have

to apply to their own cities for issuance of a concealed weapons license (CCW), as it violates their constitutional rights under the 14th Amendment to be prohibited from going directly to the Los Angeles Sheriff's Department (LASD).

MOTION FOR SUMMARY JUDGMENT/ADJUDICATION:

Defendants seek summary judgment/adjudication arguing that the policy requiring residents to seek a CCW permit from their respective city before seeking a CCW permit from the LASD does not violate the law, Plaintiffs fail to prove essential elements of their causes of action for violation of equal protection under the 14th Amendment of the U.S. Constitution, Plaintiffs are not entitled to writ, injunctive, or declaratory relief as they cannot show that the LASD's policy is arbitrary, capricious, or without support, and naming the LASD and Sheriff Baca as defendants is redundant of suing the County of Los Angeles.

Plaintiffs argue that this case is really only about whether the LASD must follow the law as written by the legislature and as interpreted by the California Court of Appeal. The Second District Court of Appeal has expressly ruled that Penal Code §§26150-26225 impose a duty on the LASD to make an investigation and determine an application for a CCW permit on an individual basis. The sole issue in this case is whether the LASD has to follow that law.

A motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The court must consider all of the evidence in the moving papers, except the objectionable evidence, and all inferences reasonably deduced from the evidence. But summary judgment shall not be granted based on inferences if contradicted by other inferences or evidence raising a triable issue as to any material fact. See CCP §437c(c).[1] A party may move for summary adjudication as to one or more causes of action, affirmative defenses, claims for damages, or issues of duty if that party contends that there is no merit to the cause of action, defense, or claim for damages, or if the party contends that there is no duty owed. See CCP §437c(f)(1). "A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." See Id.

At the outset, the court notes that Penal Code §12070 has been repealed effective January 1, 2012. Thus, it cannot, and does not, apply to this action.

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[1] Under summary judgment law, the moving party has the burden of showing that there is no issue requiring a trial as to any fact that is necessary under the pleadings. The motion must be supported by admissible evidence. Once the moving party has met this burden, the opposing party cannot rest upon the mere allegations of the pleadings but must present admissible evidence showing that there is a genuine issue for trial. See Aguilar v. Atlantic Richfield Company, 25 Cal.4th 826, 844 (2001). "In ruling on the motion, the court must consider all of the evidence and all of the inferences reasonably drawn therefrom...and must view such evidence...in the light most favorable to the opposing party." See Id., at p. 844-845.

However, Penal Code §26150, which became effective on January 1, 2012, provides as follows:

(a) When a person applies for a license to carry a pistol, revolver, or other firearm capable of being concealed upon the person, the sheriff of a county may issue a license to that person upon proof of all of the following:
(1) The applicant is of good moral character.
(2) Good cause exists for issuance of the license.
(3) The applicant is a resident of the county or a city within the county, or the applicant's principal place of employment or business is in the county or a city within the county and the applicant spends a substantial period of time in that place of employment or business.
(4) The applicant has completed a course of training as described in Section 26165.

(b) The sheriff may issue a license under subdivision (a) in either of the following formats:
(1) A license to carry concealed a pistol, revolver, or other firearm capable of being concealed upon the person.
(2) Where the population of the county is less than 200,000 persons according to the most recent federal decennial census, a license to carry loaded and exposed in only that county a pistol, revolver, or other firearm capable of being concealed upon the person.

Plaintiffs present no evidence in opposition to Defendants' motion for summary judgment to demonstrate the existence of triable issues of material fact. Under the law, the opposing separate statement shall "set forth plainly and concisely any other material facts that the opposing party contends are disputed. Each material fact contended by the opposing party to be disputed shall be followed by a reference to the supporting evidence." See CCP §437c(b)(3). "Failure to comply with this requirement of a separate statement may constitute a sufficient ground, in the court's discretion, for granting the motion." See Id.

It is improper for Plaintiffs to simply refer to their declarations filed in support of their motion for writ of mandamus as evidence in support of the opposition to the motion for summary judgment. Evidence must be cited in the opposing separate statement. In Magana Cathcart McCarthy v. CB Richard Ellis, Inc., 174 Cal. App. 4th 106, 118 (2009) the Court states as follows:

> The goal of expeditious review of summary judgment motions "is defeated where, as here, the trial court is forced to wade through stacks of documents, the bulk of which fail to comply with the substantive requirements of [Code of Civil Procedure] section 437c, subdivision (b)(3), or the formatting requirements of [former] rule 342, in an effort to cull through the arguments and determine what evidence is admitted and what remains at issue. The realization of this goal is so important that the Legislature has determined '[f]ailure to comply with this requirement of a separate statement may constitute a sufficient ground, in the court's

discretion, for granting the motion.' ([Code Civ. Proc.,] § 437c, subd. (b)(3).)" (*Collins v. Hertz Corp., supra*, 144 Cal.App.4th at pp. 72–73.)[2]

Despite these defects in Plaintiffs' separate statement, the court finds that summary judgment/adjudication is not proper in this matter. Because Defendants have not met their burden of demonstrating that they are entitled to summary judgment/adjudication, Plaintiffs have no burden of presenting evidence showing a triable issue of fact. See Hagen v. Hickenbottom, 41 Cal.App.4th 168, 178 (1995). See also Hawkins v. Wilton, 144 Cal. App. 4th 936, 940 (2006) citing *Duckett v. Pistoresi Ambulance Service, Inc.* (1993) 19 Cal.App.4th 1525, 1533 [the Hawkins court quoted *Duckett* saying that "[w]here the evidence presented by defendant does not support judgment in his favor, the motion must be denied without looking at the opposing evidence, if any, submitted by plaintiff"].

Plaintiffs' opposition heavily relies on Salute v. Pitchess, 61 Cal. App. 3d 557 (1976) to support their argument that Defendants are violating the law. The court finds that the discussion in Salute supports a denial of this motion.

In Salute the plaintiffs "were duly licensed private investigators" seeking CCW permits. See Id., at p. 559. The Court acknowledged that "[t]he petitioners allege, and the sheriff admits, that the sheriff has a fixed policy of not granting applications under section 12050 except in a limited number of cases." See Id., at p. 560. In Salute, that policy was stated as follows:

> "The Sheriff's policy is not to issue any concealed weapons permit to any person, except for judges who express concern for their personal safety. In special circumstances, the request of a public office holder who expresses concern for his personal safety would be considered. . . ." and "the outstanding permits issued by the Sheriff are only 24 in number." See Salute, Id.

Plaintiffs successfully argue that the LASD's current policy in this matter is akin to the improper "fixed policy" in Salute. Here, the LASD admits that, where the applicant lives in an incorporated city which is not policed by the LASD, it has a policy requiring that before the LASD will consider an application for a CCW permit such applicant must first apply with the Chief of Police of the city in which the resident lives and be denied a CCW permit. (Motion, Rogers Dec., ¶9) Such a policy is similar to a fixed policy of only granting a limited number of applications because in essence the LASD will not consider any applications that have not been first tendered to the local Chief of Policy of the applicable city

It is clear to this court that the decision in Salute was meant to address strict policies by the LASD that ultimately result in the agency not considering applications on a case-by-case basis. The Court stated the following:

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[2] See also Hodjat v. State Farm Mutual Automobile Ins. Co., 211 Cal. App. 4th 1, 10 (2012) [court explains that it is the duty of an opposing party "to direct the court to evidence that supports his arguments... [and it] is not the court's duty to attempt to resurrect [a party's] case or comb through the record for evidentiary items to create a disputed issue of material fact"].

> While a court cannot compel a public officer to exercise his discretion in any particular manner, it may direct him to exercise that discretion. **We regard the case at bench as involving a refusal of the sheriff to exercise the discretion given him by the statute**. Section 12050 imposes only three limits on the grant of an application to carry a concealed weapon: the applicant must be of good moral character, show good cause and be a resident of the county. To determine, in advance, as a uniform rule, that only selected public officials can show good cause is to refuse to consider the existence of good cause on the part of citizens generally and is an abuse of, and not an exercise of, discretion. (Emphasis added.) See Salute, Id.

The Court further stated that "[i]t is the duty of the sheriff to make such an investigation and determination, on an individual basis, on every application under section 12050." See Id., at p. 560-561.

Defendants have instituted an improper policy requiring certain applicants such as Plaintiffs to first apply with their city's Chief of Police before filing a separate application with the LASD. While this court cannot direct Defendants how to exercise their discretion in making the good cause determination during the application process, this court can direct LASD to exercise its discretion and consider the application without first requiring the applicant to seek the CCW permit with his/her local police chief. Indeed, Penal Code §26175(g) says that "[a]n applicant shall not be required to complete any additional application or form for a license, or to provide any information other than that necessary to complete the standard application form described in subdivision (a), except to clarify or interpret information provided by the applicant on the standard application form." LASD's policy effectively requires Plaintiffs to present two (2) applications – first to the local Chief of Policy and then to LASD. This is not proper. LASD's policy in this case is not consistent with the statutory scheme for issuance of CCW permits as set forth in Penal Code §§26150, et seq., and the policy is not consistent with the Salute case.

It is true that in Nichols v. County of Santa Clara, 223 Cal. App. 3d 1236, 1241 (1990) the Court said that sheriffs have extremely broad and unfettered discretion concerning the issuance of such CCW permits. But this case is different from Nichols because here LASD is not exercising its discretion at all as to Plaintiffs who live in an incorporated city not policed by LASD, whereas in Nichols discretion was exercised to revoke a license after consideration of the facts concerning an arrest of the plaintiff in that case. Here, LASD won't even consider the applications of Plaintiffs unless they first apply with their local police chief(s). The Nichols case is not on point. The CBS, Inc., Peruta, and Richards cases are also not on point with this case, and this court will not consider the unpublished case of March v. Rupf cited in the motion and reply papers.

Accordingly, Defendants are not entitled to summary judgment/adjudication in this matter, and therefore, the motion is DENIED.

Plaintiffs' evidentiary objections are ruled on as set forth in the proposed order.

MOTION FOR ISSUANCE OF WRIT OF MANDAMUS:

Plaintiffs seek a writ of mandamus ordering Defendants to cease their policy and practice of refusing to consider applications for CCW permits of individuals similarly situated to Plaintiffs, and seek an order directing Defendants to consider, investigate and make a decision, on an individual basis, every application for a CCW permit on the ground that Defendants are directly violating their duty under the statute.

Defendants argue that a writ of mandate should not issue because their policy of requiring Plaintiffs to first apply for a CCW permit with their Chief of Police is a reasonable exercise of discretion, the policy does not violate equal protection because there is no constitutional right to carry a concealed weapon and the policy is rationally related to a legitimate governmental interest, and the policy is not arbitrary, capricious, or without support.

"A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by such inferior tribunal, corporation, board, or person." See CCP §1085(a). "[W]hen review is sought by means of ordinary mandate 'judicial review is limited to an examination of the proceedings before the [agency] to determine whether [its] action has been arbitrary, capricious, or entirely lacking in evidentiary support, or whether [it] has failed to follow the procedure and give the notices required by law.'" See Strumsky v. San Diego County Employees Ret. Ass'n, 11 Cal. 3d 28, 35, fn. 2 (1974). "What is required to obtain writ relief is a showing by a petitioner of '(1) A clear, present and usually ministerial duty on the part of the respondent...; and (2) a clear, present and beneficial right in the petitioner to the performance of that duty...'" See Santa Clara County Counsel Attys. Assn. v. Woodside, 7 Cal. 4th 525, 539-540 (1994).

As discussed above, Defendants admit that they have a policy of requiring persons similarly situated to Plaintiffs to first apply and be denied a CCW permit with their local police chief before Defendants will consider an LASD application for a CCW permit. (Opposition, Lehman Dec., ¶3, Ex. A, Rogers Dec., ¶9) This policy is an arbitrary one that essentially permits LASD to not consider any applications at all unless the applicant has first applied with the local police chief. There is no justification for LASD not exercising its discretion at all. Again, this court cannot tell Defendants how to exercise their discretion in reviewing applications and conducting an investigation to determine if a CCW permit should be issued. However, this court can direct LASD to exercise its discretion and consider all applications in the first instance on a case-by-case basis without requiring the applicant to first seek a CCW permit with his/her local police chief. See Salute, *supra*. Plaintiffs present their declarations in support of this motion, which clearly show that they would benefit from issuance of a writ of mandate because they would obtain review of their LASD applications and a decision from the LASD without having to first apply with their local police chief. (Motion, Vargas Dec., ¶4 and Ex. 1; Saulibio Dec., ¶7 and Ex. 2)

Accordingly, the court GRANTS the writ of mandate and orders LASD to consider the applications of all persons seeking a CCW permit in the first instance without requiring any applicant to first seek a CCW permit with his/her local police chief or city.

Plaintiffs' evidentiary objections are ruled on as set forth in the proposed order.

Date: January 13, ~~October 23~~, 2014

Judge Deirdre Hill