

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

M. PETER KUCK	:	CIVIL ACTION NO. 3:07cv1390(VLB)
<i>Plaintiff</i>	:	
	:	
v.	:	
	:	
JOHN A. DANAHER, III, et al.	:	SEPTEMBER 11, 2008
<i>Defendants</i>	:	

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION

Because there has been no intervening change of controlling law that affects this case, plaintiff has not provided any new evidence, and no clear error or manifest injustice attaches to this Court's prior judgment, this Court should deny plaintiff's motion for reconsideration of and/or to alter or amend this Court's July 25, 2008 decision (the "Decision"), which dismissed plaintiff's claims against the State Defendants John A. Danaher and Albert J. Masek, Jr. (collectively the "State Defendants") and denied plaintiff's motion to amend and for joinder. If this Court does grant the motion for reconsideration, the State Defendants respectfully moves that the Court reaffirm its July 25, 2008 decision.

In his memorandum in support of his motion for reconsideration ("pl. br."), plaintiff proffers only one newly issued precedent, the U.S. Supreme Court's recent decision on Second Amendment, District of Columbia v. Heller, ___ U.S. ___, 128 S. Ct. 2783 (2008) ("Heller"). Pl. br. 2, 12. Although intellectually interesting, the Court's decision in Heller that the Second Amendment confers an individual right to keep and bear arms does not affect the case at bar. Under the state constitution,

plaintiff already had a liberty interest in the renewal of his permit, as this Court had already acknowledged and incorporated into its analysis. See Decision at 5, *citing* Conn. Const. art. I, § 15 and Rabbitt v. Leonard, 36 Conn. Supp. 108, 112 (1979) (“The defendants concede that under Connecticut state law, Kuck has a liberty interest in obtaining renewal of his pistol permit”). Thus the Supreme Court’s recent Second Amendment decision regarding the federal constitution simply does not affect the analysis to the case at bar.

The remainder of plaintiff’s lengthy reasons for reconsideration simply are a rehash of prior arguments that were considered and properly rejected by this Court.¹ Because plaintiff fails to assert the availability of new evidence or an intervening change in controlling law, and the Court was correct in its July 25, 2008 decision, this Court should deny plaintiff’s motion.

I. STANDARD OF REVIEW

The “standard for granting a motion for reconsideration is strict.” Palmer v. Sena, 474 F. Supp. 2d 353, 355 (D. Conn. 2007); Shrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir. 1995). The limited grounds that may justify reconsideration are “an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.” Doe v. New York City Dept. of Soc. Servs., 709 F.2d 782, 789 (2d Cir. 1983); Virgin Atl. Airways, Ltd. v.

¹ The sole exception is a clerical error in the statutory citation applicable to plaintiff’s gun permit renewal. See pl. br. 5, 5 n.5, 19, 19 n.16. Conn. Gen. Stat. § 29-28(b)(9) governs pistol permits to carry a firearm, where as an eligibility certificate pursuant to Conn. Gen. Stat. § 29-36f(b)(9) concerns the right to own a firearm maintained in the home. As plaintiff acknowledges, the statutory language prohibiting a permit to illegal alien in both statutes is identical, (pl. br. 5 n.5.). The citation error has no impact on the Court’s analysis or conclusions.

Nat'l Mediation Bd., 956 F.2d 1245, 1255 (2d Cir. 1992). A motion for reconsideration “may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment.” Graham v. United States, 2006 U.S. Dist. LEXIS 84155, at *8 (D. Conn. 2006) (internal quotations omitted) (emphasis supplied). A “motion to reconsider should not be granted where the moving party seeks solely to relitigate an issue already decided.” Palmer, 474 F. Supp. 2d at 355. A motion for reconsideration should “be denied unless the moving party can point to controlling decisions or data that the court overlooked – matters, in other words, that might be reasonably expected to alter the conclusion reached by the court.” Palmer, 474 F.Supp.2d at 355 (internal quotations omitted); see also Key Mechanical Inc. v. BDC 56 LLC, 330 F. 3d 111, 123 (2d Cir. 2003).²

II. Procedural History

In his September 17, 2007 complaint, plaintiff brought suit solely against the Commissioner of Public Safety, John A. Danaher III, and the Captain in charge of the Department of Public Safety's Special Licensing and Firearms Unit, Albert J. Masek, Jr., in their official and individual capacities (collectively, the “Public Safety Defendants”). Plaintiff's original complaint is based upon the delays in the adjudication of administrative appeals from the denial of pistol permits by the Commissioner, and the fact that plaintiff's own pistol permit renewal was denied because he refused to provide any proof of citizenship or legal residency. See

² In his motion for reconsideration, plaintiff improperly relies upon the standard of review for a motion to dismiss, and fails to present the applicable standards for a motion for reconsideration. See pl. br. 3-4.

Original Complaint ¶¶ 26-40, 44-47. On November 30, 2007, the Public Safety Defendants moved to dismiss plaintiff's claims in their entirety (doc. #13), on grounds of standing, qualified immunity, Eleventh Amendment immunity and failure to state a claim for which relief could be granted. The primary force behind the motion to dismiss was the structural fact that the Board of Firearm Permit Examiners ("the Board") (of which plaintiff is a member) adjudicated administrative appeals from the denial of pistol permits, not the Department of Public Safety ("DPS"). Plaintiff filed his opposition to the Public Safety Defendants' motion on January 22, 2008 (doc. #18), and the Public Safety Defendants filed their reply brief on February 5, 2008 (doc. #21).

Simultaneously with the filing of his opposition to the motion to dismiss, the plaintiff filed his motion to join six additional defendants (doc. #20) and to amend his complaint (doc. #19).³ In this proposed amended complaint, plaintiff maintained the same three causes of action: procedural due process, substantive due process and First Amendment retaliation. Moreover, the factual gravamen of his complaint remained the same – plaintiff's pistol permit was not renewed because he refused to provide proof of U.S. citizenship or legal residency, and he objected to the length of time it took for a hearing to be held on his administrative appeal. On March 3, 2008, the State opposed the motion to amend and for joinder (doc. #26), and plaintiff replied on April 3, 2008 (doc. #32).

³ In his motion for joinder, plaintiff sought to add four members of the firearm licensing unit at DPS and the chair and executive director of the Board.

On July 25, 2008, this Court entered judgment in favor of the defendants, granting defendants' motion to dismiss and denying as futile plaintiff's motions to amend and for joinder (doc. ##33, 34). On August 4, 2008, plaintiff filed a motion for reconsideration of the Court's July 25, 2008 decision (doc. #35).

III. ARGUMENT

In his motion for reconsideration, plaintiff asks the Court to "reconsider eight of its findings of facts and conclusions and the standards used" in its July 25, 2008 decision, and then proceeds with lengthy argument on each of the eight points. Pl. br. 1. Because this Court did not make any "findings of fact" and properly applied the applicable legal standards to plaintiff's allegations, the motion for reconsideration should be denied in its entirety.

Moreover, on a motion for reconsideration, plaintiff must provide controlling intervening authority or new evidence in order to prevail. With the sole exception of the U.S. Supreme Court's decision in Heller, plaintiff simply regurgitates the same arguments that this Court considered and properly rejected. Because Heller does not affect the legal analysis in this case, and plaintiff fails to proffer new arguments, the motion for reconsideration should be denied in its entirety.

Finally, if the Court does revisit its prior decision, the State asks the Court to reaffirm its July 25, 2008 ruling and, if so inclined, to also grant the State's alternative arguments presented in its motion to dismiss, namely that the plaintiff's claims are barred by qualified immunity for the named and proposed defendants and that plaintiff lacks standing to bring these claims against the named defendants.

A. The Supreme Court's Decision in *District of Columbia v. Heller* Has No Impact on This Case.

Plaintiff contends that the recently-issued decision in Heller requires a different result on the State's motion to dismiss his procedural due process claim, because of the "importance" of his new Second Amendment right. Pl. br. 11-13. Plaintiff's reliance upon Heller is misplaced.

In its recently-issued decision regarding the parameters of the Second Amendment, the majority of the Supreme Court held that the Second Amendment confers "an individual right to keep and bear arms." District of Columbia v. Heller, 128 S. Ct. 2783, 2797, 2799 (2008). In its discussion of the federal constitutional right, the Heller Court noted that Connecticut's constitutional provision "used the even more individualistic phrasing that each citizen has the 'right to bear arms in defense [sic] of himself and the State.'" Heller, 128 S. Ct. at 2803. The Heller Court also noted with approval its prior decisions holding that the "the Second Amendment applies only to the Federal Government." Heller, 128 S. Ct. at 2812-13, n.23.

As a practical matter, whether the Second Amendment applies in the instant matter is completely irrelevant because plaintiff has an individual **state** constitutional right to keep and bear arms. See Conn. Const. art. I, § 15; Rabbitt v. Leonard, 36 Conn. Supp. 108, 112 (1979). Thus this Court already has incorporated plaintiff's state constitutional property interest into its analysis. See Decision at 5.

It is uncontroverted that in order to establish a violation of procedural due process, the plaintiff must show that he had a legally protected liberty or property interest and that the state defendants denied him that interest without due process of

law. O'Connor v. Pierson, 426 F.3d 187, 196 (2d Cir. 2005).⁴ Because plaintiff already has a state constitutional right, he already satisfied the first prong of the analysis, without the need for to establish a federal constitutional right.

Plaintiff apparently seeks to shoehorn the Heller decision into the second prong of the due process analysis, and in particular, seems to contend that a post-deprivation hearing may be insufficient and that he is entitled to a “pre-deprivation” hearing because of the importance of the Second Amendment. Pl. br. 12-14. Setting aside the fact that this is a completely new argument, it also lacks any mooring in the underlying facts of this case. Plaintiff’s permit was not revoked, it simply was not renewed because plaintiff refused to submit proof of citizenship or legal residency.

The Heller decision has no impact on this court’s due process analysis. The State has a compelling state interest in not issuing gun permits for inappropriate persons, and a flat statutory prohibition against issuing permits to illegal aliens. The sole fact that the administrative adjudicatory process may take 19- 22 months does not render the process meaningless nor does it violate due process. See Decision at 5-6; State’s br. (doc. #13-2) at 11-13; State’s reply br. (doc. #21) at 3-4.

B. Plaintiff’s Eight Points Lack Merit.

Plaintiff’s motion for reconsideration primarily objects to the Court’s description of his claims in its recitation of allegations. He raises one clerical error. The other claims were raised before and were properly rejected, and the remaining points do not affect the Court’s analysis.

⁴ Indeed, in his opposition to the motion to dismiss, plaintiff failed to cite a single case on due process standards. See doc. #18 at 3-8.

As an initial matter, Plaintiff notes the clerical error in the Court's reference to Conn. Gen. Stat. § 29-36f(b)(9), as it applies to "eligibility certificates" to own a pistol rather than a permit to carry a pistol, and he was seeking to renew a pistol permit to carry. Pl. br. 5. The applicable statute to plaintiff's permit is Conn. Gen. Stat. § 29-28(b)(9). As plaintiff concedes, § 29-28(b)(9) has the exact same language and legal restriction as Conn. Gen. Stat. § 29-36f(b)(9), namely, that DPS may not issue either a eligibility certificate to own a pistol, or a permit to carry a pistol "an alien illegally or unlawfully in the United States." Pl. br. 5 n.3. See *also* Conn. Const. art. I, § 15 (right to bear arms applies only to citizens). Therefore, the clerical error in the statutory citation has no impact on this Court's analysis or decision.

Plaintiff also renews his prior arguments that that the DPS must prove that he is an illegal alien, and that an un-enacted state bill "proves" that he does not need to provide citizenship or residency documentation. *Compare* pl. br. 9-10 *with* doc. #18 at 6-8. Plaintiff's effort to impose an affirmative obligation on DPS to prove a negative rather than require an applicant to provide proof of citizenship remains unavailing. Plaintiff fails to provide a scrap of legal authority for this ludicrous proposition. Rather, plaintiff simply repeats the proposition as though it was dogma. Plaintiff made this same argument before (doc. #18 at 6-8), the State opposed it (doc. #21 at 4-5) and this Court properly rejected it. This completely unsupported and unsupportable proposition undermines rather than supports plaintiff's motion for reconsideration, and should be rejected. Likewise, for the reasons set forth at length in the State's reply brief, (doc #21at 4) Plaintiff's reliance upon unenacted bill no. 307 is unavailing.

Third, Plaintiff tries to resuscitate his substantive due process claim by repeating allegations from his proposed amended complaint for three pages of footnotes, and reliance upon the Second Circuit's decision in Natale v. Town of Ridgefield, 170 F.3d 258 (2d Cir. 1999). Pl. br. 15-18. The Natale decision was cited by, and supports, the State. See doc. #13-2 at 13. The Natale court reversed a jury verdict for the plaintiffs and directed that judgment be entered for the defendant town in a zoning dispute because the jury instructions failed to include the proper legal standard for a substantive due process claim, namely that "substantive due process standards are violated only by conduct that is so outrageously arbitrary as to constitute a gross abuse of governmental authority." Natale, 170 F.3d at 262.

Moreover, Plaintiff's citations to the myriad of personal slights and opinions attributed to the defendants in the proposed amended complaint support rejection of his substantive due process claim. Plaintiff's core claim is that his gun permit was not renewed. He has no property interest in being a member of the Board of Firearm Permit Examiners, nor Secretary thereto. Moreover, none of the named defendants, in either complaint, have any role in his membership or title. In short, there is absolutely nothing outrageous for declining to renew a gun permit because the applicant refuses, as a matter of principle, to provide proof of U.S. Citizenship or legal residency. Moreover, there is nothing outrageous about individuals exercising their First Amendment rights to state opinions. There simply is no basis for a substantive due process claim.

Plaintiffs' remaining points are equally unavailing. Plaintiff contends that he did not say that the requirement for proof of citizenship or legal residency was

unconstitutional, but simply that it was illegal. Pl. br. 8-9. The simple answer is that the requirement is neither unconstitutional nor illegal. See Conn. Const. art. I, § 15; Conn. Gen. Stat. §§ 29-28(b)(9), 29-28(f), 29-36f(b)(9). Moreover, Plaintiff sought to serve as class representative for those who were denied permits because they failed to provide documentation of citizenship or legal residency. Any confusion is solely of Plaintiff's making. See State's reply for (doc #21) at 4.

This court properly ruled that plaintiff's three claims were legally insufficient. Plaintiff has failed to present sufficient grounds for reconsideration.

C. In the Alternative, the State Defendants are Entitled to Qualified Immunity.

Given the state of law on not issuing gun permits to illegal aliens, no reasonable state official would have any reason to believe that he or she was violating a citizen's constitutional rights by requiring, as part of the application process for a renewal, documentation of either U.S. citizenship or legal residency. Defendants set forth in the State's memorandum in support of its motion to dismiss (doc. #13-2 at 16-18), all of the defendants named in the original and proposed amended complaint are entitled to qualified immunity.

IV. CONCLUSION

In summary, plaintiff fails to meet the requirements for reconsideration. Since plaintiffs' motion for reconsideration is simply an attempt to re-litigate issues already decided – and decided correctly – this Court should deny the motion. To the extent, however, this Court desires to entertain or grant plaintiff's motion, the State Defendants respectfully point out the alternative grounds for dismissal presented in their motion to dismiss.

For the foregoing reasons, the State Defendants respectfully request that this Court deny plaintiff's motion for reconsideration.

DEFENDANTS
JOHN A. DANAHER, III and
ALBERT J. MASEK, JR. in their individual and
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CERTIFICATION

I hereby certify that on September 11, 2008, a true and accurate copy of the foregoing Defendants' Opposition to Plaintiff's Motion for Reconsideration was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of electronic Filing. Parties access this filing through the court's CM/ECF System.

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