IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

GEORGIACARRY.ORG, INC., TAI TOSON, JEFFREY HUONG, JOHN LYNCH, MICHAEL NYDEN, and JAMES CHRENCIK Plaintiffs,	)	
	)	Civil Action No. 2007 CV 138552
v.	)	
FULTON COUNTY, GEORGIA, CITY OF ATLANTA, GEORGIA, CITY OF EAST POINT, GEORGIA, CITY OF ROSWELL, GEORGIA, and CITY OF SANDY SPRINGS, GEORGIA Defendants	)	

PLAINTIFFS' REPLY TO ROSWELL, EAST POINT, FULTON COUNTY, AND SANDY SPRINGS IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I.

INTRODUCTION

Defendants primarily oppose Plaintiffs' Motion for Summary Judgment on the ground that the issue is moot because they have amended their ordinances. With the exception of Fulton County and East Point, the amendments to Defendants' ordinances are preempted by state law. The case is not moot, and Plaintiffs are entitled to summary judgment as a matter of law. Plaintiffs first will address issues common to Defendants Roswell and Sandy Springs, followed by issues unique to particular Defendants.

II.

ARGUMENT[1]

II.A. The Modified Ordinances Still Are Illegal And the Case is Not Moot

Roswell and Sandy Springs made or planned to make[2] substantially identical modifications to their Ordinances. Roswell's revised Ordinance states, "The following activities are prohibited in all City of Roswell public parks including the Roswell Trail System: … b) … Pursuant to O.C.G.A. § 16-11-127, ***it is unlawful to carry a firearm to a public gathering within the City***." Roswell Ordinance 14.2.4. [Emphasis supplied].

Sandy Springs' revised Ordinance states, "Pursuant to O.C.G.A. § 16-11-127, ***it is unlawful to carry a firearm to a public gathering, as defined in O.C.G.A. § 16-11-127, within the City***." Sandy Springs' Ordinance Chapter 8, Article 2, Section 4, Subsection (g).[3] [Emphasis supplied].

Defendants mistakenly claim that their ordinance changes make the case moot. Defendants contend that because they no longer prohibit carrying firearms in parks, an order from the Court would be an advisory opinion. The flaw in their argument is that, even if they enacted their proposed ordinance changes, they still would be violating state preemption law by

[1] No Defendants opposed Plaintiffs' Statement of Facts, so those facts must be taken as true. Roswell and Sandy Springs complained about the form of Plaintiffs' testimony in support of their Motion, but that complaint is addressed below.

[2] Plaintiffs note that none of the Defendants properly filed their amended ordinances with the Court as instructed during the hearing on Roswell's Motion to Dismiss. Plaintiffs nevertheless address those amended ordinances as though they have been enacted and are properly before the Court.

[3] Sandy Springs did not file a response to Plaintiffs' Motion within the time required by Uniform Superior Court Rule 6.2, but it did file a Notice of Continuance after that time, and later filed a response. It does not appear to Plaintiffs that an attorney who is a member of the General Assembly is authorized to assert the existence of a continuance unilaterally under O.C.G.A. 9-10-150. As a courtesy to Attorney Willard, however, Plaintiffs are not objecting to the late filing.

regulating in some manner the carrying and possession of firearms. *See Sturm, Ruger & Co. v. City of Atlanta*, 253 Ga. App. 713 (2002) ("The legislature made no exclusion for [ordinances regulating] 'unlawful' conduct.").

One of the cases cited by Defendants contradicts Defendants' position. A claim is not moot if it is capable of repetition yet evading review. *Collins v. Lombard Corp.*, 270 Ga. 120, 121(1998). In the case at bar, Defendants have modified their illegal ordinances (by regulating carrying firearms in parks) to different illegal ordinances (by regulating carrying firearms to public gatherings in their respective jurisdictions). The recalcitrant Defendants have established they intend steadfastly to continue to regulate carrying of firearms. If they can escape by modifying their ordinance into another, equally unlawful ordinance every time one is challenged, and thereby moot the case, a court never will be allowed to address the issue. Defendants would be free to enact serial changes to their ordinances, frustrating Plaintiffs and defying the jurisdiction of the Court.

"[V]oluntary cessation of offensive conduct will only moot litigation if it is clear that the defendant has not changed course ***simply to deprive the court of jurisdiction***." *National Advertising Company v. City of Miami*, 402 F.3d 1329, 1333 (11th Cir 2005) [emphasis supplied]. In the case at bar, Defendants have signaled their continued interest in regulating the carrying of firearms by enacting new ordinances regulating such carry. If they truly intended to comply with the law, they would have repealed their illegal ordinances without enacting new ones. Instead, they are attempting to thwart the law by engaging Plaintiffs and the Court with a game of ordinance "Whack-a-Mole," where each illegal ordinance defeated by Plaintiffs causes a new one to pop up.

Roswell claimed during oral argument on its Motion to Dismiss that its revised ordinance is not regulating carrying firearms, but instead is an advisory "courtesy" to its residents, telling them that Roswell will enforce the state public gathering law. This claim is incredible. For each Defendant, the revised ordinance appears in a list of activities prohibited or regulated in city parks, in the same place the ban on carrying firearms in parks used to be. Despite the fact that most "public gatherings," as that term is defined in O.C.G.A. § 16-11-127, are not in city parks (e.g., publicly owned and operated buildings, churches and church functions), Roswell claims to extend this "courtesy" to their residents by burying the "notice" in a list of park regulations.

A much more logical reading of the revised ordinances is that they independently make it a violation to carry a firearm to a public gathering "within the City." This was, in fact, Defendants' concerted intent. In a written memorandum to the mayor and council of Sandy Springs, Sandy Springs' attorney of record advised them to "mak[e] it unlawful to carry a firearm to a 'public gathering' as that term is defined in O.C.G.A. § 16-11-127." Affidavit of John Monroe, ¶ 4. Attorney Willard did not advise them to "provide a notice to residents that city police officers will enforce state law" (as if such a ridiculous notice is needed). He advised them to create a new, independently enforceable ordinance. They took his advice.

It is inconceivable that Roswell believes the same language means a very different thing on the opposite side of the Chattahoochee River. Roswell and East Point amended their ordinances using virtually identical language to that of Sandy Springs. Roswell is taking the position that language creating a city crime in Sandy Springs is a mere notice of a state crime in Roswell. An ordinary reading of each ordinance leads one to believe each Defendant is regulating carrying firearms to a public gathering.

Moreover, each Defendant amended its ordinance so that the "notice" is the last sentence of a paragraph describing other things that the Defendant regulates. The title of Roswell's Ordinance 14.2.4 is *Activities Prohibited in Parks and Public Places.* Roswell's complete Ordinance 14.2.4(b) says:

> b) Weapons. It shall be unlawful for any person to possess any explosive substance (including fireworks) in any of the City parks, unless written permission for such has been authorized by the Mayor and City Council. It shall further be unlawful for any person to discharge any firearm within City parks unless expressly allowed by Section 13.1.3 of the Roswell City Code. Pursuant to O.C.G.A. § 16-11-127, it is unlawful to carry a firearm to a public gathering within the City.

Roswell's Amended Answer, Exhibit A. Roswell would have this Court believe that the first two sentences define crimes (possessing explosives in parks and discharging firearms in parks), while the third sentence is merely advisory. Roswell offers no explanation as to why it selected a single relatively minor crime from the entire state criminal code to advise its residents it will enforce. Are Roswell residents to believe Roswell will not enforce any other provisions of the criminal code (the inclusion of some implies the exclusion of all others)? Finally, Roswell's new carry prohibition applies "within the City," a clear indication that Roswell is attempting to use their police powers to regulate activity (as opposed to provide a "courtesy" notice). The phrase "within the City" also constitutes a separate element of the crime Roswell has created.

It also is clear from correspondence with Roswell's attorney that he believes all of Roswell's parks are "public gathering places" that are off limits for carrying firearms under state law. Affidavit of John Monroe, ¶ 3. Plaintiffs refer the Court to their arguments in their Reply to Atlanta in Support of Plaintiffs' Motion for Summary Judgment, which clearly demonstrate that a park is not a public gathering in and of itself. Given Roswell's misunderstanding of

O.C.G.A. § 16-11-127 (the public gathering law), it is all the more important that Roswell's ordinance not regulate carrying firearms.

Sandy Springs' complete Chapter 8, Article 2, Section 4, Subsection (g) states:

> (g) *Firearms.*
>
> 1. It shall be unlawful for any person to possess any explosive substance (including fireworks) in any of the City parks, unless written permission for such has been authorized by the Mayor and City Council.
> 2. It shall be unlawful for any person to discharge any firearm within City parks unless expressly authorized by the Mayor and City Council. Pursuant to O.C.G.A. § 16-11-127, it is unlawful to carry a firearm to a public gathering, as defined in O.C.G.A. § 16-11-127, within the City.

Sandy Springs' new ordinance, which is known to have been enacted for the purpose of creating a new crime on advice of counsel, is virtually identical to Roswell's new ordinance. It simply cannot be that Roswell's new ordinance is merely advisory. Defendants' ludicrous justification for their new ordinances implies that residents might be curious whether Defendants' police enforce the State's public gathering law generally "within the City," and residents obviously would look in park regulations to find the answer.

It is important to keep in mind that these ordinances only can be of interest to people such as Plaintiffs who have Georgia firearms licenses. All others are subject to arrest and prosecution for carrying a pistol without a license (O.C.G.A. § 16-11-128) and carrying a concealed weapon (O.C.G.A. § 16-11-126). By statute, the public gathering law is printed on the reverse of each and every firearms license issued. *See* O.C.G.A. § 16-11-129(f). A firearms license is revocable for conviction of carrying a firearm to a public gathering. O.C.G.A. § 16-11-129(e). A person convicted of carrying a firearm to a public gathering is ineligible for a firearms license for a period of three years after being free of all restraint and supervision associated with the

conviction. O.C.G.A. § 16-11-129(b)(3). Firearms license holders know full well not to carry firearms to public gatherings, know that the prohibition applies state wide, and would not risk relying on the vagaries of local enforcement of the law.

II.B. Plaintiffs Did Not Raise Expenses of Litigation in their Motion

Roswell, Sandy Springs, Fulton County, and East Point all raised arguments pertaining to Plaintiffs' claims for expenses of litigation, pursuant to O.C.G.A. § 13-6-11, in their responses to Plaintiffs' Motion for Summary Judgment. Plaintiffs, however, did not move for summary judgment on this issue (Plaintiffs' Motion is limited on its face to Counts I, II, III, V, and VI of the Complaint and Verified Amended Complaint), because a claim for litigation expenses is not appropriately addressed in a motion for summary judgment. See, for example, *American Medical Transport Group, Inc. v. Glo-An, Inc.*, 235 Ga. App. 464, 509 S.E. 2d 739 (1998). Plaintiffs note that two Defendants, Roswell and Sandy Springs, raised the issue in their own Motions to Dismiss (now converted to Motions for Summary Judgment by the Court)[4]. Plaintiffs will address those arguments in their Responses to Defendants' Motions for Summary Judgment.

III. Defendants' Miscellaneous Arguments Are Unavailing

III.A. Sandy Springs Adopts Atlanta's Illogical Confusion of ***Discharging*** With ***Carrying***

Without the elaboration of Atlanta's misguided arguments, Sandy Springs appears to adopt the same mistaken logic that the power to regulate the ***discharge*** of firearms equates to the power to regulate the ***carry*** of firearms. As discussed in Plaintiffs' Reply to Atlanta's Response to Plaintiffs' Motion for Summary Judgment, this argument cannot stand. Rather than repeat that discussion here, Plaintiffs refer the Court to Section II.B. of their Reply to Atlanta.

[4] Neither East Point nor Fulton County separately filed their own Motions to Dismiss within the deadline set by the Court's Preliminary Scheduling Order. Those two Defendants have, therefore, waived the right to raise the issue at any time in this litigation.

III. B. Roswell's and Sandy Springs' Criticism of Plaintiffs' Affidavit is Misguided

Roswell and Sandy Springs both mistakenly criticize Plaintiffs for relying on the Verification of their Verified Amended Complaint as an affidavit to support their Motion for Summary Judgment. They cite their answers, saying they lack sufficient information to admit or deny the allegations in their complaint.

In responding to a motion for summary judgment, "an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this Code section, must set forth specific facts showing that there is a genuine issue of material fact for trial." O.C.G.A. § 9-11-56(e). Defendants have done just what the Civil Practice Act forbids. Neither Roswell nor Sandy Springs filed any affidavits or Rule 6.5 statements of their own, showing that specific facts are in dispute. The reason, of course, is that there are no facts in dispute, and Defendants know it. Instead, they criticize Plaintiffs' economy in using a sworn statement already on file with the Court as their affidavit to support their Motion. To assuage Defendants (in yet another example of Defendants causing Plaintiffs unnecessary trouble and expense), Plaintiffs are filing standalone affidavits contemporaneously with this Brief. It is clear from these affidavits that Plaintiffs have the requisite standing. Affidavit of Edward Stone, Affidavit of Jeffrey Huong, Affidavit of Michael Nyden.

IV. Plaintiffs' Motion Against Fulton County and East Point is Withdrawn

Because Fulton County has repealed its illegal ordinance, Plaintiffs withdraw their Motion for Summary Judgment against Fulton County. Moreover, Plaintiffs and Fulton County are in settlement discussions and Plaintiffs are hopeful that Plaintiffs' entire case against Fulton County will be settled very soon. In addition, Plaintiffs withdraw their Motion for Summary Judgment because they have entered into a settlement agreement with East Point. Plaintiffs

expect to file a motion to drop East Point as a defendant in the very near future, when the terms of the settlement agreement are fully performed.

IV.

CONCLUSION

Roswell and Sandy Springs repealed their illegal ordinances, only to replace them with new illegal ordinances. Because they have not abated their illegal behavior, the cases against them are not moot and this Court retains jurisdiction. Neither Defendant has raised an issue of fact, material or otherwise, and Plaintiffs are entitled to a judgment as a matter of law on Counts I, II, III, V, and VI of their Complaint and Verified Amended Complaint.

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