UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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JAMES M. MALONEY,

Plaintiff,

- against -

KATHLEEN M. RICE,

Defendant.
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03 CV 786 (PKC) (AYS)

MOTION *IN LIMINE*

PRELIMINARY STATEMENT

Plaintiff hereby files this motion *in limine* seeking the exclusion of any and all evidence relating to: (1) "[P]laintiff's consent to the destruction of illegally possessed weapons inclusive of his nunchucks"; and (2) the proposition that "possession of certain weapons is presumptive proof of an intent to utilize them for illegal purposes, and the fact that Plaintiff never challenged or attempted to rebut that presumption." Defendant has proposed to have ADA Robert Formichelli testify as to these matters at trial. See Amended Proposed Joint Pretrial Order ("APJPTO"), ECF Document No. 173, filed December 2, 2016, at 4-5.

ARGUMENT

POINT I

Plaintiff's Consent to the Destruction of One Pair of Nunchaku Is Irrelevant

Plaintiff's oral consent, through counsel in open court in 2003, to the destruction of the single pair of nunchaku seized from his home by police in 2000 is not disputed,[1] but that fact has

[1] This makes it odd that such testimony would even be required, let alone relevant. Plaintiff would happily stipulate that he consented to the destruction of the single pair of nunchaku seized from his home, but of course that is not the same as consenting to relinquish forever the constitutional right to possess others in his home in the future. Such a stipulation would be fatal to the case, and was of course never made. In fact, Plaintiff filed the instant action

no relevance whatsoever to the sole ultimate question of fact at issue here, i.e., ***whether nunchaku are commonly used for lawful purposes and therefore a weapon entitled to Second Amendment protection***. To borrow from and paraphrase Rudyard Kipling,[2] Plaintiff would resign himself to hearing the words he had spoken "twisted by knaves to make a trap for fools" (i.e., to hear—and argue against in post-trial briefing—the proposition that by giving up his property rights to one pair of nunchaku he had unwittingly given up the right ever to possess any nunchaku in his home again) if there were the *slightest* arguable basis to present Mr. Formichelli's testimony in supporting that argument. But there is not.

The transcript of the 2003 proceeding issue, which Plaintiff provided to Defendant at counsel's request a few days before the APJPTO was filed, is annexed hereto as Appendix 1 and also appears elsewhere in the record. It is submitted that the transcript speaks for itself. As to the basis for letting the proffered testimony from Mr. Formichelli be heard at the forthcoming trial, were it a jury trial it could be argued that the jury should hear what both Mr. Formichelli and the Plaintiff have to say about the import of the words Plaintiff uttered and—subject to the Court's instructions on the law—reach a verdict about what rights Plaintiff did or did not relinquish. It would be a weak argument, and may well not even prevail, but it would at least be an argument. Here, even *that* argument is unavailable: what is forthcoming is a bench trial, and the sole issue of ultimate fact has already been clearly framed by the Court after years of prior litigation. The interpretation to be made about the import of Plaintiff's "consent to the

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less than three weeks after the day he consented to the destruction of the nunchaku, *compare* Appendix hereto (discussed *infra*) (dated January 28, 2003) *to* ECF Document 1 (Complaint, filed February 18, 2003), so waiving the very right he would soon be seeking to vindicate was certainly not his intention, nor could he reasonably be said to have done so.

[2] From the poem, "If."

destruction of illegally possessed weapons" is irrelevant to the determination of the framed issue or to any related one. Put another way, if indeed Plaintiff in 2003 by consenting to the destruction of the seized nunchaku also somehow waived the very right that he has subsequently been seeking to vindicate for some 14 years, the Court, having long had both the transcript at its disposal and the authority to interpret it, need not hear Mr. Formichelli's viewpoint on the matter at all, but should have made that determination and simply dismissed the action on that basis rather than ever go to trial at all. (It is respectfully submitted, of course, that to do so would have been error. But now, there is simply no need to hear testimony to interpret the transcript.)

POINT II

It Is Already the Law of the Case That the Criminal Charge Against Plaintiff for Possession of a Nunchaku Was Unsupported by Any Allegations That He Had Used the Nunchaku in the Commission of a Crime, Carried the Nunchaku in Public, or Engaged in Any Other Prohibited Conduct in Connection with Said Nunchaku Except for Possession in His Home; Accordingly, The Proffered Presumption Is Irrelevant

As Plaintiff wrote in the APJPTO at 3:

> Plaintiff further posits as background factual material (the need and means for proof of which at trial will be addressed in *in limine* motions) that the criminal charge against him for possession of a nunchaku (see stipulated fact at Part IX, *infra*) was not supported by any allegations that the Plaintiff had used the nunchaku in the commission of a crime, that he had carried the nunchaku in public, or that he had engaged in any other prohibited conduct in connection with said nunchaku except for possession in his home. Authority that this proposition is already the law of the case may be found in the record, *see* Memorandum of Decision and Order dated August 31, 2005 (Spatt, J.) (ECF Doc. No. 41 herein), at 3.

The full Memorandum of Decision and Order dated August 31, 2005 ("Opinion"), is annexed hereto as Appendix 2 for the Court's ready reference. See page 3 (paragraph beginning with "It is undisputed . . ."). Defendant now seeks, in effect. to dispute what was one not in dsipute, by constructing and supporting a "presumption" that has never yet been asserted in this case and by offering Mr. Formichelli's testimony in support of its existence and application.

The core "fact"—or at least the proposition, for it is hardly a purely factual matter—that Defendants now seek to offer into evidence by means of Mr. Formichelli's testimony is that "possession of certain weapons is presumptive proof of an intent to utilize them for illegal purposes." APJPTO at 5. This "presumptive proof" presumably will be introduced in an attempt to lead to the conclusion that Plaintiff's use of nunchaku must have been for "illegal purposes," presumably extending beyond mere possession (e.g., robbery, extortion, murder). Under Defendant's proffered "presumption," there need of course be no specific unlawful activity described, let alone proven, other than the mere possession of the nunchaku (which is undisputed), and it is obvious that the sole purpose of the testimony would be to support that ultimate but wholly unfounded conclusion, a conclusion that was preempted by Judge Spatt's finding more than eleven years ago that is by now the well-established law of the case.

CONCLUSION

For all of the foregoing reasons, any and all evidence relating to: (1) "[P]laintiff's consent to the destruction of illegally possessed weapons inclusive of his nunchucks"; and (2) the proposition that "possession of certain weapons is presumptive proof of an intent to utilize them for illegal purposes, and the fact that Plaintiff never challenged or attempted to rebut that presumption."

Dated: December 16, 2016
Port Washington, New York

Respectfully submitted,

/s

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