

**IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA**

GEORGIACARRY.ORG, INC.,)	
<i>et. al.</i>)	
Plaintiffs,)	
)	Civil Action No. 2007 CV 138552
v.)	
)	
CITY OF ATLANTA, GEORGIA,)	
Defendant)	

**BRIEF IN SUPPORT OF PLAINTIFFS' SECOND MOTION FOR SUMMARY
JUDGMENT¹**

I.

INTRODUCTION

On May 9, 2008, the Court granted Plaintiffs' Motion for Summary Judgment against Atlanta and granted temporary relief against Atlanta's enforcement of its illegal ordinance that bans carrying firearms in city parks. Before the Court now is Plaintiffs' remaining count against Atlanta, Count VIII, for violating Plaintiffs' civil rights under 42 U.S.C. § 1983. Plaintiffs will show that Atlanta deprived them of their property without due process of law. In addition, Plaintiffs request permanent relief against Atlanta, both for the violations found in Plaintiffs' first Motion and for the instant Motion.

II.

STATEMENT OF FACTS

Plaintiff James Chrencik is a natural persons who reside in or work in one or more of the Defendant governmental entities. Complaint, ¶ 10.² He is a member of Plaintiff

¹ This Motion applies only to Defendant City of Atlanta, the remaining Defendants having been dropped from the case via judgment or settlement. Moreover, the Court already granted Plaintiffs' Motion for Summary Judgment against Atlanta on Counts I, II, III, V, and VI. Count IV applied only to Defendants Roswell and Sandy Springs, and Count VII was dropped. This Motion, therefore, applies to Count VII and addresses remaining remedies on all counts.

Georgiacarry.Org, Inc. (“GCO”), a non-profit corporation organized under the laws of the State of Georgia. GCO is a member-oriented corporation whose goals include protecting the right of its members, including the Individual Plaintiffs, to own and carry firearms. Complaint, ¶ 15. Chrencik, plus hundreds more members of GCO, possess valid Georgia firearms licenses (“GFLs”) issued by the Fulton County Probate Court (and other county probate courts) pursuant to O.C.G.A. § 16-11-129. Amended Complaint, ¶¶ 4-6; Complaint, ¶ 33. Chrencik and other members of GCO desire to exercise their rights to carry firearms in compliance with state law while visiting Atlanta’s Defendants’ recreation facilities, sports fields, or any surrounding areas being property of the Defendants, but they are in fear of unlawful arrest and prosecution under Atlanta’s preempted ordinances for doing so. Complaint, ¶ 34. Atlanta admits that its ordinance bans the carrying of firearms in their parks. Defendants’ Brief in Opposition to Plaintiffs’ Motion for Interlocutory Injunction, p. 2.

III.

STANDARD OF REVIEW

“To prevail at summary judgment under OCGA § 9-11-56, the moving party must demonstrate that there is no genuine issue of material fact and that the undisputed facts, viewed in the light most favorable to the nonmoving party, warrant judgment as a matter of law.” Lau's Corp. v. Haskins, 261 Ga. 491, 405 S.E.2d 474 (1991). "The movant has the original burden of making this showing. Once the movant has made a prima facie showing that it is entitled to judgment as a matter of law, the burden shifts to the respondent to come forward with rebuttal evidence." Kelly v. Pierce Roofing Co., 220 Ga. App. 391, 392- 393, 469 S.E.2d 469 (1996).

² The allegations contained in the Complaint were restated and verified in the Amended Complaint. All allegations in the Complaint and Amended Complaint are therefore verified upon oath and tantamount to an affidavit.

"In rebutting this prima facie case, 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 O.C.G.A. § 9-11-56 must set forth specific facts showing that there is a genuine issue for trial." Entertainment Sales Co. v. SNK, Inc., 232 Ga. App. 669-670, 502 S.E.2d 263 (1998).

IV.

ARGUMENT AND CITATION OF AUTHORITY

Except for Atlanta's ordinance, Chrencik and other members of GCO are entitled under law to carry a firearm in Defendants' parks, recreation facilities, sports fields, or any surrounding areas being property of the county, subject only to applicable state law regulating his carry of a firearm³. The Court already found that Atlanta's ordinance is preempted, unenforceable, and interferes with Plaintiffs' property interests in their GFLs. Because Atlanta had no authority to interfere with those property interests, the ordinance deprived Plaintiffs of their property without substantive due process.

It is well-established that licenses issued by the state, including GFLs, are "property" for the purpose of the 14th Amendment. *Wells Fargo Armored Service Corporation v. Georgia Public Service Commission*, 547 F.2d 938, 941 (5th Cir. 1977) ("Privileges, licenses, certificates, and franchises now do qualify as property interests for purposes of procedural due process"); *Gun South, Inc. v. Brady*, 877 F.2d 858, 867 (11th Cir. 1989) ("license to operate motor vehicle is substantial property interest"); *Cochran v. State Bar of Georgia*, 790 F.Supp. 1568, 1572 FN 5 (N.D. Ga. 1992) ("Defendants' argument that plaintiff has no property interest in his license or right to practice law is clearly contradicted by a long line of federal and state constitutional case law.")

³ The Court of Appeals determined in this case that O.C.G.A. § 16-11-127(e), which took effect during the pendency of the appeal, decriminalizes the carrying of firearms in all parks and park buildings by people with firearms licenses, thus clarifying any remaining confusion on Atlanta's part related to this matter.

Moreover, the right to bear arms has been deemed a fundamental right by both the Supreme Court of the United States and the Supreme Court of Georgia. *District of Columbia v. Heller*, 128 S.Ct. 2789, 2797 (2008); *Nunn v. State*, 1 Ga. 243, 250 (1846). Deprivation of a fundamental right implicates the “substantive component of the Due Process Clause.” *McKinney v. Pate*, 20 F.3d 1550, 1555 (11th Cir. 1994). “A finding that a right merits substantive due process protection means that the right is protected against certain government actions regardless of the fairness of the procedures used to implement them.” *Id.* [Internal citations omitted].

V.

REMEDIES

Significant in a substantive due process claim is that “A violation of a substantive due process right...is complete when it occurs; hence, the availability *vel non* of an adequate post-deprivation state remedy is irrelevant.” *McKinney*, 20 F.3d at 1557. Because Atlanta infringed on Plaintiffs’ fundamental right to bear arms, and in the process deprived Plaintiffs of a portion of the value of their GFLs, Atlanta has violated Plaintiffs’ substantive due process rights. The fact that Atlanta is enjoined from enforcing its ordinance only mitigates the damage. The violation is complete because it already occurred. Plaintiffs are entitled to damages in an amount to be determined at trial.

In addition, the injunction already in place against Atlanta must be made permanent and expanded. At the May 9, 2008 hearing, the Court granted Plaintiffs’ request for an interlocutory injunction against Atlanta’s enforcement of its ordinance. Plaintiffs’ counsel emphasized, to allay concerns of Atlanta’s counsel, that Plaintiffs were not seeking an injunction to change park signage at that time, but would do so at the conclusion of the case. Transcript of proceedings, p. 58. Over a year later, the time has come for the permanent injunction, including one to alter

signage. Specifically, Plaintiffs request that the Court permanently enjoin Atlanta from enforcing its ordinance banning firearms in city parks. Furthermore, the Court should require Atlanta to modify its park signs, web sites, brochures, and all other public communications so as not to indicate that possession of firearms is prohibited or otherwise regulated by the city.⁴

CONCLUSION

Atlanta infringed on Plaintiffs fundamental property rights by wrongfully banning them from carrying firearms in city parks. This infringement constituted a violation of Plaintiffs' substantive due process rights for which Plaintiffs are entitled to damages in amount to be determined at trial. Furthermore, the interlocutory injunction issued against Atlanta should be made permanent and expanded to require Atlanta to cease all communications to the public that indicate firearms are prohibited in city parks.

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⁴ As of this writing, Atlanta's web site continues to indicate that firearms are prohibited in city parks. <http://www.atlantaga.gov/government/parks/burparksrules.aspx>