UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

BARBARA C. DOUTEL,

Plaintiff — Civil No. 3:11-CV-001164 (VLB)

v.

CITY OF NORWALK, et al,

Defendants — OCTOBER 31, 2012

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT/MOTION TO DISMISS

I. **Preliminary Statement**:

A. Factual Background:

On February 15, 2011, the Plaintiff's husband, Duane Doutel, made a threatening phone call to the medical offices of his former general practitioner, Dr. Staw. It was known to Dr. Staw and his staff that Mr. Doutel seemed to always arrive for his medical appointments fully armed with a loaded handgun. It appears that Mr. Doutel became exceedingly irate over a procedure that was performed by Dr. Staw and he had insisted that Dr. Staw's office forward his test results to another medical office (through which he was going to have shoulder surgery performed). It further appears that the transfer of this information did not happen fast enough for Mr. Doutel and that he became highly agitated.

On February 15, 2011, Mr. Doutel left a threatening message on Dr. Staw's voice mail. In this telephone message he used a very animated voice that he

modulated in such a way that it would come across to the reasonable person as being at the very least unsettling. However, coupled with the fact that Mr. Doutel, for some unknown reason, found it necessary to carry a loaded firearm with him when he appeared at the doctor's office, the net afffect was that the staff became nervous and felt threatened (for example, in this telephone call Mr. Doutel indicated that if his wishes were not obeyed "I will be walking into the office, and it will not be pretty, do you understand me?").

As a result of this the staff made a call to the Norwalk Police Department. After responding, listening to the voicemail and talking to the staff it was determined that Mr. Doutel would be arrested on charges of Threatening in the Second Degree. Mr. Doutel refused to come down to headquarters to be arrested. This necessitated that the police officers come to his property in order to effectuate this arrest. Once there, they had asked Mr. Doutel if they could retain the firearms in his house for safekeeping. It is the officer's position that he consented to their entry into his residence and further that he consented to the removal of the numerous firearms (loaded) from his house.

Now comes the Plaintiff who alleges that one or more of these weapons belong to her. She alleges in her Complaint, dated July 25, 2011, that her Fourth Amendment Rights were violated in that these weapons were removed from the property without due process of law. She further alleges that the City of Norwalk is liable in that Police Chief Harry Rilling and other supervisors failed to adequately train the police officers who responded to this scene. Next, in Count Three the Plaintiff alleges that her Second Amendment Right to bear arms was violated. Finally, in Count Four the Plaintiff alleges that her Connecticut Constitutional Right to bear

arms was violated.

It should also be mentioned that in connection with Mr. Doutel's criminal matter the Court, exercising its discretion, issued a non-financial condition upon release as allowed by Connecticut State Law requiring that Mr. Doutel not possess a handgun and that he not apply for a temporary state permit. Later in the proceedings the Court issued a Protective Order requiring that Mr. Doutel keep at least a hundred yards away from one of the members of Dr. Staw's office staff.

Further, in connection with the criminal proceedings a motion was made by Mr. Doutel's attorney, Rachel Baird, to have the conditions of release vacated. However, after a two-day hearing the Court found that based on the totality of the circumstances (including Mr. Doutel's voice mail message) that the Judge's order denying him the right to possess a fire arm or to have a pistol permit was reasonable.

In addition, through the course of the criminal proceedings Duane Doutel's legal counsel (Attorney Rachel Baird) filed a motion for the return of his weapons in the State court. However, she completely failed to file a motion on behalf of Barbara C. Doutel (though this option was available to her both pursuant to the Connecticut Practice Book (Practice Book Section 41-13) and the Connecticut Statutes (C.G.S. Section 54-33f). Thus, while the Plaintiff in this matter complains that she was unlawfully deprived of her property, she did absolutely nothing legally to receive this property back.

Furthermore, it should be mentioned that the Plaintiff re-armed herself in April 2011, when she purchased another handgun (which was registered with the State in May 2011).

B. Defendants' contentions:

The Defendants maintain that at all times they were allowed into the residence by Mr. Doutel. Further, they maintain that Mr. Doutel did not object and in fact acquiesced and consented to the removal of these weapons at the time of their visit. Further, the Defendants would argue that the Plaintiff has failed to exhaust her administrative remedies and that she took no action to have the property returned to her.

In addition, the Defendants would challenge the allegations contained in Count Two in that the Plaintiff has not successfully set out a cause of action based on a failure to train.

Regarding the allegations contained in Counts Three and Four, the Defendants would argue that no private cause of action such as the one asserted by the Plaintiff in her Complaint is actionable to enforce the Second Amendment and Article I Section 15 of the Connecticut Constitution.

II. Law and Argument:

A. Standard for Summary Judgment.

Summary Judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law", Fed. R. Civ. P. 56(a), see Kuck v. Danaher, 2012 WL 4904387 (D .Conn.) (October 16, 2012, Bryant, J.). "The movant party bears the burden of proving that no factual issues exists (citation omitted) in determining whether that burden has been met, the court is required to

resolve all ambiguities and credit all factual inferences that could be drawn in favor of the party against whom summary judgment is sought (internal quotation marks and citations omitted). If there is any evidence in the record that could reasonably support a jury's verdict for the non-movant party, said summary judgment must be denied (internal quotation marks and citation omitted)", Kuck v. Danahere, supra.

"A party opposing summary judgment cannot defeat the motion by relying on the allegations in his pleading, or on conclusory statements, or on mere assertions that affidavits supporting the motion are not credible. At the summary judgment stage of the proceeding, plaintiffs are required to present admissible evidence in support of their allegations; allegations alone, without evidence to back them up, are not sufficient (internal quotation marks and citation omitted) where there is no evidence upon which a jury could properly proceed to find a verdict for the party producing it and upon whom the onus of proof is imposed, such as where the evidence offered consist of conclusory assertions without further supporting the record, summary judgment may lie (citation omitted)", Kuck v. Danahere, supra.

B. Defendants Are Entitled To Judgment As A Matter Of Law As To The Due Process Claims Set Forth By The Plaintiff In Count One.

1. The Plaintiff failed to exercise her adequate post – deprivation remedies.

In Count One of her Complaint the Plaintiff alleges that one or more firearms belonging to her were taken from her home. She alleges that this seizure was "unreasonable" and constituted a violation of her Fourth and Fourteenth Amendment rights.

The Fourth Amendment provides, in part, as follows:

> "The right of the people to be secure and their persons, houses, paper, and effects, against unreasonable searches and seizures, shall not be violated…".

Similarly, the Fourteenth Amendment provides, in Section One, in part as follows:

> "(N)or shall any State deprive any person of life, liberty, or property, without due process of law…".

This Court (Bryant, J.) recently set out the contours of a procedural due process claim in its decision in the case of Peruta v. City of Hartford, NO. 3:09-CV-1946 (VLB), 2012 WL 3656366 (D. Conn.)(August 24, 2012, Bryant, J.). In its decision in that matter this Court held, in part, as follows:

"Procedural due process 'imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment', Mathews v. Eldridge, 424 U.S. 319, 332, 96 S. Ct. 893, 47. L. Ed. 2d 18 (1976). 'In procedural due process claims, the deprivation by state action of a constitutionally protected interest in 'life, liberty, or property' is not itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law'* Zinermon v. Burch, 494 U.S. 113, 125, 110 S. Ct. 975, 983, 108 L.Ed. 2d 100 (1990) (emphasis in original). Due Process is a 'flexible concept' that 'varies with the particular situation' id at 127. The Supreme Court has articulated a test to determine what procedural protections the Constitution requires in a particular case:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail, Mathews v. Eldridge, 424 U.S. 319, 335", Peruta v. City of Hartford, supra at *10-11.

"In applying this test, the Court usually has held that the Constitution requires a hearing before the State deprives a person of liberty or property, see, e.g., Cleveland Board of Education v. Loudermill, 470 U.S. 532, 542, 105 S. Ct. 1487, 84 L.Ed. 2d.494 (1985)('The root requirement of the Due Process Clause is that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest' (emphasis in original). Indeed, 'an essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case. Id… 'The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings'. Id. At 545", Peruta v. City of Hartford, supra at *11.

"In order to sustain an action for deprivation of property without due process of law, a plaintiff must first identify a property right, second show that the state has deprived him of that right, and third show that the deprivation was effected without due process (internal quotation marks and citations omitted). 'The availability of adequate

pre-deprivation and post-deprivation remedies under state law will defeat a §1983 action brought against state actors' Rackley v. City of New York, 186 F. Supp. 2d 466, 481 (S.D.N.Y. 2002)", Peruta v. City of Hartford, supra at *11.

As set forth above, the Plaintiff's claim is that one or more of her deadly weapons was removed from her premises without the reasonable due process of law. However, it is quite clear that in the State of Connecticut there were adequate post-deprivation remedies available to the Plaintiff.

The Connecticut Superior Court Rules-Criminal provide at §41-13 as follows:

> 'A person aggrieved by a search and seizure may make a motion to the judicial authority who has jurisdiction of the case… for the return of specific items of property… on the grounds that: (1) The property was illegally seized without a warrant under circumstances requiring a warrant'.

In addition, Connecticut General Statute §54-33f provides, in part, as follows:

> '(a) A person aggrieved by search and seizure may move the court which has jurisdiction of such person's case…for the return of the property…on the ground that: (1) The property was seized without warrant…
> (c) The court shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted, the property shall be restored…".

As set forth in the Local Rule 56(a)(2) Statement of Facts, the Defendant in the matter of State of Connecticut v. Duane Doutel (Docket No. S20N-CR-110128328S) was represented by Attorney Rachael M. Baird. Duane Doutel is the Plaintiff, Barbara C. Doutel's, spouse. During the course of the Duane Doutel criminal proceedings Attorney Baird filed a '*Motion for Return of Seized Property*', dated April 22, 2011

(Exhibit "R" attached to the Statement of Fact). In said '*Motion for Return of Seized Property*', counsel for Duane Doutel sought the return of all of the weapons to Duane T. Doutel.

As set forth in the Statement of Facts, the Court (Hudock, J.) issued certain conditions upon Mr. Doutel's release including that he not possess any weapons and that he not apply for a pistol permit. In addition, the Court (Hudock, J.) later issued a Protective Order on behalf of one of Dr. Staw's office staff members. Accordingly, faced with these collateral orders, it is clear that the Court was not going to release the weapons to Mr. Doutel.

Based on this, counsel in the present matter for the Defendants communicated with Attorney Baird and specifically requested that Attorney Baird file a motion on behalf of the Plaintiff in this case (Mrs. Barbara C. Doutel) to have the Court order the release of the weapons. Unfortunately, legal counsel for Duane Doutel (Baird) never filed a motion with the criminal court for the release of the firearms to the Plaintiff in this action, Mrs. Barbara C. Doutel. Furthermore, since the Plaintiff, Barbara C. Doutel, had inexplicably failed to file the necessary motions with the State Court in order to have her weapons released to her, counsel for the Defendants in this case filed a '*Motion for Disposition of Seized Property*', dated April 17, 2012. In that case the City of Norwalk (petitioner) sought the assistance of the Court "concerning the disposition of those weapons allegedly owned by Mrs. Doutel". The City of Norwalk requested that the Court "make a determination as to which weapons are lawfully owned by Barbara C.

Doutel and, in the discretion of the Court, enter such order as is just – and not in conflict with any other orders presently in existence".

This motion though filed with the best intentions was never acted upon.

It is clear, therefore, that the Plaintiff in this case, Barbara C. Doutel, had an adequate post-deprivation remedy available to her. That is, she could have – and should have – petitioned the court for the release of those guns owned by her. Accordingly, there was no violation of her Fourteenth and Fourth Amendment Rights in that she was provided with an ample due process opportunity.

It should be noted that the Defendants are raising a double – edged argument at this juncture. First, they are alleging that the Plaintiff has failed to show that her property rights were violated. In order to establish a claim she would have to show that she was subjected to an unreasonable seizure and deprivation of property without due process of law. The Defendants are arguing that there was a sufficient and adequate post-deprivation remedy.

In addition, the Defendants are arguing that she failed to avail herself of that post-deprivation remedy. Therefore, the Defendants would argue that since she failed to exhaust this remedy she has failed to set forth an adequate claim against the Defendants, see Crawford v. Van Buren County, Arkansas, 678 F. 3d 666 (May 21, 2012) (Dog kennel operator brought §1983 action against the 'State' alleging the taking of property without just compensation, unreasonable search and seizure, and due process violations in relation to seizure of dogs. Held: Plaintiff failed to exhaust her

remedy under Arkansas Law that allows for the petition for the return of property).

This Court's attention is also directed to its decision in the Peruta v. City of Hartford case. In that case the Plaintiff alleged that his due process rights were violated when he was issued a traffic citation for parking in the streets of the City of Hartford. In deciding in favor of the defendants the Court held as follows:

> 'Even assuming arguendo that Plaintiff was deprived of some property or liberty interest or even his constitutional interest in travel, Plaintiff cannot plausibly state a claim that such deprivation was effected without due process. Plaintiff cites to no authority and the Court has not found any that procedural due process requires more than the process Plaintiff allegedly received. The Plaintiff cites no authority to support Plaintiff's argument that procedure due process required the City to use a particular type of signage regarding the P&D system.'
>
> "On the contrary, Plaintiff admits that he exercised his right to a hearing and ultimately prevailed. Because Plaintiff prevailed at the hearing and did not have to pay a fine, he cannot plausibly argue that he was deprived of due process", Peruta v. City of Hartford, supra at *11-12.

Similarly, in this case, had the Plaintiff filed a petition with the criminal court as allowed by State statute and the Connecticut Practice Book, she would have been entitled to have a hearing before the Court in order for the Court to entertain her petition to have her alleged property returned to her. Thus, whatever process that she was due, was available to her and would have been given to her.

Accordingly, it is clear that the Plaintiff had an adequate post-deprivation remedy that she failed to exercise. Accordingly, judgment should be entered in favor of the Defendants as to the Plaintiff's due process claims.

2. The Officers Entry Into Plaintiff's Residence Was Consensual.

In her Complaint the Plaintiff alleges that her Fourth and Fourteenth Amendment Rights were violated when the Defendant Officers entered her home and "seized" her property without a warrant. However, it is the Defendants' position that at all times the entry into the home was reasonably and objectively determined by them to have been consensual.

"The touchstone of the Fourth Amendment is reasonableness, Katz v. United States, 389 U.S.347, 360, 88 S. Ct. 507, 19 L.Ed. 2d 576 (1967). The Fourteenth Amendment proscribes searches which are unreasonable. Courts have long approved consensual searches because it is reasonable for the police to conduct a search once they have been permitted to do so, Schneckloth v. Bustamonte, 412 U.S. 218, 219, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). The Fourth Amendment test for valid consent to search is that the consent be voluntarily. 'Voluntariness is a question of fact to be determined from all the circumstances', Id. At 248-49", United States v. Lopez, No. 3:11-CR-139(WWE), 2012 WL 3231014 (D. Conn. August 6, 2012) at *2.

"Importantly, the test of voluntariness is neither subjective nor retrospective. Rather, 'the standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness – what would the typical reasonable person have understood by the exchange between the officer and the suspect?', (Florida v. Jimeno, 500

U.S. 248, 251, 111 S. Ct. 1801, 114 L. Ed. 2d. 297 (1991)", United States v. Lopez, supra at

*3.

The issue of consent is to be decided by the trial court on the basis of the evidence before it that if finds credible, along with reasonable inferences that may be drawn from that evidence, State v. Fields, 31 Conn. App. 312, 325 (1993); State v. Reagan, 209 Conn. 1, 8; Datson v. Warding, 175 Conn. 614, 619 (1978). The ultimate question is whether the will of the consenting individual was overborne, or whether the consent was his unconstrained choice, State v. MacNeil, 28 Conn. App. 508, 514.

Furthermore, it is an accepted principle that consent rendering a warrantless search permissible may be given when a person with "common authority" over the area to be searched voluntarily consents, United States v. Lopez, 547 F. 3d. 397, 399 (2d Cir. 2008).

In monitoring how these principles have been applied, it is clear that there is wide latitude given to the police officers in objectively and reasonably concluding that consent has been granted to them.

For example, in State v. Courchesne, 296 Conn. 622 (2010) the Connecticut Supreme Court ruled:

"It is well established that the question of whether consent has been freely and voluntarily give, or was the product of coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances and, ultimately, requires a determination regarding putative consenter's state of mind", at 654. In that case the defendant claimed that his consent was involuntarily because the officers (1) blocked him from leaving the scene, (2) were armed, (3) approached on both sides of his vehicle, (4) did not allow him to move his

vehicle from the middle to the side of the road, (5) sought his consent immediately after he was seized, (6) were blunt in their manner, and (7) had him ride to the police station in the back seat of the vehicle instead of having him drive his own vehicle. The Court ruled that while those factors were relevant to the determination of whether the defendant's consent was voluntarily, they were not necessarily dispositive of the issue and that the trial court was not bound to treat as such, supra at 660.

Furthermore, it is clear that knowledge of a right to refuse consent is not a necessary prerequisite to establishing that consent was voluntarily, State v. Courchesne, supra at 658.

In the Courchesne case a number of cases are cited giving us a flavor of the various forms of "consent" that have been found to have been rendered freely and consensually. In State v. Colon, 272 Conn. 106, the Defendant voluntarily accompanied the police to the station where he confessed to the fatal beating of a two-year old. The trial court had found that after the police confronted Colon in the hallway of his mother's apartment, they briefly detained him and asked him if he would go to the station with them to discuss the child's injuries. In response Colon nodded affirmatively and was transported to the station. This signal was deemed to constitute "consent".

In State v. Brown, 129 Conn. 552 (June 21, 2011) the Defendant was an overnight guest at a host apartment at the time of a police search. It was found that the host consented to the police search of her apartment voluntarily – even though the host was under arrest and in handcuffs in the back of the police car at the time she was found to have given consent. The court found that "(t)he mere fact that (the host) was under arrest at the time that she consented

to a search of the apartment is not enough to create a coercive environment", supra at 559.

"A person may voluntarily consent to a search even while handcuffed, United States v. Comstock, 531 F. 3d 667, 677 – 78 (8th Cir. 2008)…While we recognize that being handcuffed can be a factor in determining if consent was voluntarily (citation omitted) this Court previously has concluded that a Defendant's consent to a search of his car voluntary where he was arrested, handcuffed and placed in back of a police cruiser despite not having been read his Miranda rights,see State v. Winot, 95 Conn. App., 332, 336, 349 (2006) rev'd in part on other grounds, 294 Conn. 753", State v. Brown, supra at 561.

In the case of United States v. Garcia, 56 F. 3d 418 (2d Cir., 1995) the Court made it clear that the determination of whether or not consent was given would be judged by applying an objectively reasonable standard.

"In (Florida v. Jimeno, 500 U.S. 248) which involved ascertaining the scope of a consent to a search, the Court reiterated that 'the touchstone of the Fourth Amendment is reasonableness' 500 U.S. at 250 111 S. Ct. at 1803, and then held that: 'The standard for measuring the scope of a suspects consent under the Fourth Amendment is that of 'objective' reasonableness – what would the typical reasonable person have understood by the exchange between the officer and the suspect?' (citations omitted). Thus, 'the Fourth Amendment is satisfied when, under the circumstances, it is objectively reasonable for the officer to belief that the scope of the suspect consent permitted him to conduct the search that was undertaken'(citation omitted)", United States v. Garcia, supra at 423.

Furthermore, consent "need not be expressed in a particular form but can be found from

an individual's words, acts or conduct (quotation marks and citation omitted). Thus, the District Court must consider the totality of the circumstances to determine whether consent was freely given (citation omitted)", United States v. Deutsch, 987 F. 2d. 878 (2d. Cir. 1993).

Finally, "consent to search may voluntary even though the consenting party is being detained at the time consent is given and law enforcement agents fail to advise him of his Miranda rights (citations omitted; internal quotation marks omitted). The fact that custody alone has never been enough in itself to demonstrate a coerce confession or consent to search", State v. Winot, 95 Conn. App. 332, 349 (2006).

Further, this Court's attention is drawn to the case of State v. McColl, 74 Conn. App. 545 (2003). In that case the Defendant argued that the police unlawfully entered his home in violation of his constitutional rights. In that case a witness went to the police station and informed the police that she believed the defendant was responsible for a burglary. The police indicated that they were going to search for the defendant. Sometime later the police knocked on the side door of the defendant's home. When the defendant opened the door, it appeared to the officers that the Defendant had just gotten out of bed, but there was no indication that he was under the influence of any drugs or alcohol. At that point one of the officers informed the defendant that the police were investigating a burglary. At that point the defendant turned back into the house and the detectives follow him stepping into the kitchen. The defendant never objected to the police entry or presence in his home and fully cooperated thereafter. On the bases of those facts and the testimony of the officers, the court concluded that the entry was consensual, State v. McColl, supra at 558-559.

Basically, after sifting and sorting through all this, what we are left is that consent is an expression of intent (whether overt, implied, or perceived) that is deemed to result from an objectively reasonable examination of the totality of the circumstances.

In the present case, the police officers asked Mr. Doutel whether or not there were any weapons in the premises. They communicated to Mr. Doutel that they wished to place these weapons for safe keeping at the Norwalk Police Headquarters. In response, Mr. Doutel turned on his heels and led the police officers into his home. Once inside the home Mr. Doutel quickly and efficiently informed the police officers where those weapons were that were hidden (including the one under his pillow and at least one in a night stand). It is clear from the totality of the circumstances that Mr. Doutel clearly had consented to the police officers' entering into his home. It is also clear that Mr. Doutel consented to the removal of the weapons from his home. As verified by the police officers in the attached affidavits, at no time did Mr. Doutel ever object to the police officers' entering into his home. At no time did he object to the police officers retention of his weapons. And at no time did he ever object to the police officers removal of the weapons from his property to be placed in safe keeping at Norwalk Police Headquarters.

Clearly, if ever there was one, this is an instance where consent was given to entry and property removal. Accordingly, it is the Defendants' position that based upon the consent

rendered by Mr. Doutel the Plaintiff, Barbara C. Doutel, has failed to establish a Fourth or Fourteenth Amendment Claim.

C. Plaintiff Has Failed to Set Forth a Claim For a Municipal Liability in Count Two.

In Count Two of her Complaint, the Plaintiff alleges that she was subjected to unreasonable search and seizure "due to failure to train, in violation of the Fourth and Fourteenth Amendments to the United States Constitution. Specifically, in Paragraph 44, the Plaintiff alleges that she was injured and sustained a property loss "as the result of the City of Norwalk's failure to train its police officers in the application of exceptions to the search warrant requirements of the Fourth and Fourteenth Amendments to the United States Constitution". She alleges, in Paragraph 46 that the City of Norwalk's "failure to provide adequate and proper training for its officers was cause of Plaintiff's injuries, losses and harms".

It is the Defendants' position that the Plaintiff has failed to set forth a cognizable Monell – style complaint against the City of Norwalk. Further, she also fails to set forth a claim of supervisory liability. Simply put the Plaintiff has not presented any evidence or even sufficiently alleged a claim under §1983 for Monell – style liability based on lack of adequate training. Further, she has failed to state a cause of action against the individuals acting in their official capacity.

"Plaintiffs can only sue a municipality under 42 U.S.C. §1983 for constitutional violations of its employees occurring pursuant to an official policy or custom. Monell (v. Dep't. of Soc. Serv., 436, U.S. 658, 694 (1978)). 'A §1983 suit against a municipal officer in his official capacity is considered a suit against a municipality itself, and therefore the officer may be held liable only if the municipality is liable for an unconstitutional 'policy' or 'custom' under the

principles of Monell'. Oliphant v. Villano, No. 3:09 CV 862 (JBA) 2011 WL 3902741, at 4n 8(D. Conn., September 6, 2011)", Lewis v. City of West Haven, No. 3:11 CV 1451 (VLB), 2012 WL 444507 (D. Conn., September 25, 2012).

"In order to prevail on a claim against a municipality under §1983 based on acts of a public official, a plaintiff is required to prove: (1) actions taken under color of law; (2) deprivation of a constitution or statutory rights; (3) causation; (4) damages; and (5) that an official policy of the municipality caused the constitutional injury (internal quotations and citations omitted). A municipality may be held liable if a plaintiff proves the municipality violated a federally protected right through (1) municipal policy, (2) municipal custom or practice, (3) the decision of a municipal policy maker with final policy making authority (internal quotation marks and citations omitted)", Lewis v. City of West Haven, supra at *5.

"A plaintiff may establish municipal liability by showing policy or custom existed as a result of the municipality's deliberate indifference to the violation of constitutional rights, either by inadequate training or supervision (internal quotation marks and citation omitted). A municipal policy may be pronounced or tacit and reflected in either action or inaction. In the latter respect, a city's policy of inaction in light of notice that its program will cause constitutional violations is the functional equivalent of a decision by the city itself to violate the

Constitution (internal quotation marks and citation omitted)", Lewis v. City of West Haven, supra at *5.

"Where a 1983 plaintiff can establish that the facts available to city policy makers put

them on actual or constructive notice that the particular omission is substantially certain to result in the violation of the constitutional rights of their citizens, the dictates of Monell are satisfied(internal quotation marks and citation omitted). Where a policy making official exhibits deliberate indifference to constitutional deprivation caused by subordinates, such that the official's inaction constitute a deliberate choice, that acquiescence may be properly thought of as a city policy or custom that is actionable under §1983 (internal quotation marks and citation omitted)", Lewis v. West Haven, supra at *5.

"As the Supreme Court has cautioned, 'deliberate indifference' is 'a stringent standard of fault' and necessarily depends on a careful assessment of the facts at issue in a particular case (internal quotation marks and citations omitted). The Second Circuit has instructed that the operative inquiry is whether those facts demonstrate that the policymaker's inaction was the result of 'conscious choice' and not 'mere negligence' (citation omitted). Deliberate indifference then may be inferred where the need for more or better supervision to protect against constitutional violation was obvious, but the policy maker failed to make meaningful efforts to address the risk of harm to plaintiffs (internal quotation marks and citations omitted). In addition, a plaintiff must prove that action pursuant to official municipal policy caused the alleged constitutional injury (internal quotation marks and citation omitted)", Lewis v. City of West Haven, supra at *5.

"A claim for failure to train will trigger municipal liability only where the failure to train amounts to the deliberate indifference to the rights of those with the state officials will come into contact (internal quotation marks and citations omitted). The Second Circuit has outlined

three showings required to support a claim that a municipality's failure to train amount to 'deliberate indifference' to the rights of citizens (internal quotation marks and citations omitted). Therefore, to establish a claim of inadequate training, plaintiffs must show that (1) a policy maker of the municipality knows to a moral certainty that the employees will confront a given situation; (2) that the situation either presents the employee with a difficult choice of the sort that training or supervision will make less difficult or that there is a history of employees mishandling the situation; and (3) that the wrong choice by the employee will frequently cause the deprivation of citizen's constitutional rights (internal quotation marks and citations omitted). Therefore a municipality cannot be liable if the need for such training was not obvious (internal quotation marks and citations omitted). An obvious need may be demonstrated through proof of repeated complaints of civil rights violations; deliberate indifference may be inferred if the complaints are followed by no meaningful attempt on the part of the municipality to investigate or to forestall further incidents (internal quotation marks and citations omitted). In addition, a pattern of misconduct, while perhaps suggestive of inadequate training, is not enough to create a triable issue of fact on a failure-to-train theory. The plaintiff must offer evidence to support the conclusion that the training program was inadequate, not that a particular officer may be unsatisfactorily trained or that an otherwise sound program has occasionally been negligently administered, and that a hypothetically well – trained officer would have avoided the constitutional violation (internal quotation marks and citations omitted), Lewis v. City of West Haven, supra at *6.

"At the summary judgment stage, an additional requirement exists: a plaintiff must

identify a specific deficiency in the city's training program and establish that the deficiency is closely related to the ultimate injury, such that it actually caused the constitutional deprivation (quotation marks and citation omitted). The first and second requirements may be established through proof of repeated complaints of civil rights violations followed by no meaningful attempt on the part of the municipality to investigate or to forestall further incidents (internal quotation marks and citation omitted). The causation requirement may be satisfied by proof that the municipality's inaction actually caused or was the moving force behind the alleged violations", Greenwald v. Rocky Hill, No 3:09-CV-211 (VLB) at *15-16, 2011 WL 4915165.

Absent any formal governmental policy, a plaintiff has to establish a long-standing practice or custom which constitutes the standard operating procedure of the local government agency and this custom must be so "persistent and wide spread" that it constitutes a "permanent and well-settled city policy", Monell v. Department of Social Services, supra at 691.

Further, proof of a single incident of unconstitutional activity is not sufficient to impose custom or practice liability under Monell, City of Oklahoma City v. Tuttle, 471 U.S. 808, 823-24 (1985). In the present case there has been no allegation made or evidence referenced that there had been any similar incidents involving members of the Norwalk Police Department. The Plaintiff has not identified a specific policy at issue. The Plaintiff has only alleged that the City of Norwalk has inadequately trained its officers in the appropriate search and seizure procedures. Simply put, the Plaintiff has not offered any facts that would give rise to liability under Monell.

It is unclear how and in what manner the Plaintiff alleges that the individual Defendants,

Police Chief Harry Rilling (in his official capacity), Lieutenant Thomas Materra (in his official capacity) and Sergeant James Walsh (in his official capacity) are supposed to be liable. In the headline for Count Two the Plaintiff alleges that the claim is made that she suffered an "unreasonable search and seizure due to failure to train". Further, in the title it is alleged that the claim is made against the City of Norwalk as well as the individual police officers (asserting claims against them in their official capacity). However, in the body of Count Two there is no reference whatsoever how, and in what manner, it is alleged that these individuals supervisory officers are liable for having trained the other officers that responded to the scene. In fact, there is no allegation made whatsoever that they were even involved in training whatsoever.

"An individual cannot be held liable for damages under Sect. 1983 merely because he held a high position of authority, but can be held liable if he was personally involved in the alleged deprivation", Greenwald v. Rocky Hill, No. 3:09CV211 (VLB) at *14, 2011 WL 4915165 (D. Conn.)(2011 Bryant, J). The Second Circuit has recognized a number of factors that can be considered in assessing personal involvement, the Plaintiff asserts none of them, Id.

Accordingly, it is the Defendants' position that the Plaintiff has failed to set forth a cognizable cause of action against the City of Norwalk in Count Two of her Complaint. Furthermore, it is claimed that the Plaintiff has failed to set forth adequate claims against Police Chief Rilling, Lieutenant Matter, and James Walsh.

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides that a defendant may assert to the defense that the Plaintiff has failed to state a claim upon which relief can be granted. Furthermore, Rule 12 (c) of the Federal Rules of Civil Procedure provides that after

the pleadings are closed a party may move for judgment on the pleadings. The Defendants have closed the pleadings while leaving open their challenge to Count Two. Procedurally this may be imperfect – however, Defendants have proceeded to avoid waiving this challenge. The Defendants named in Count Two would, therefore, request that this Court dismiss the Count Two for having failed to state a claim upon which relief can be granted. In the alternative, if it is deemed that the pleadings are closed, the Defendants would request that pursuant to Rule 12 (c) and Rule 56 that this Court grant judgment in their favor.

D. Defendants Are Entitled To Judgment As A Matter Of Law As To The Plaintiff's Claims Set Forth In Count Three And Four Of Her Complaint Alleging A Violation of Her Federal And State Constitutional Right To Bear Arm.

In Count Three she alleges that the temporary removal of firearms from her house constitutes a deprivation of her "right to keep and bear arms, in violation of the Second and Fourteenth Amendments to the United States Constitution". Similarly, in Count Four she alleges that this temporary act constitutes a deprivation of her "right to keep and bear arms, in violation of Article I, §15 of the Connecticut Constitution".

It must be firmly stated that the Plaintiff was never "deprived of her right to bear arms". It is true that firearms were taken from her residence (alleged by the Plaintiff to include some owned by her). However, the removal of the physical weapons from her residence is not the same as depriving a person of their constitutional right to bear arms.

In fact, upon information and belief, the Plaintiff purchased a Glock Model 19 9mm

handgun (serial #PYY193) on April 2, 2011 and registered this firearm with the State Police on May 5, 2011. Thus, her "right to bear arms" was not only never "deprived", it was also never infringed upon. This case truly is a 'property deprivation' case. It is not a 'rights deprivation' case.

Furthermore, a §1983 cause of action based on the right to own firearms unrelated to the maintenance of a militia is not a recognized cause of action in the Second Circuit, Walczyk v. Rio, 339 F. Supp. 2d 385 (D. Conn. September 29, 2004); citing United States v. Toner, 728 F. 2d 115, 128 (2d Cir. 1984) (the right to possess a gun is clearly not a fundamental right); see also United States v. Miller, 307 U.S. 174, 59 S. Ct. 816, 83 L. Ed. 1206 (1939) (in the absence of evidence showing that firearm has "some reasonable relation to the preservation or efficiency of a well regulated militia", Second Amendment does not guarantee right to keep and bear such a weapon).

Similarly, Connecticut does not recognize the private cause of action under Article I, §15 of the Connecticut Constitution, Walczyk v. Rio, supra at 390-391 ("Plaintiff" also seeks damages for a violation of Article First, §15 which provides that 'every citizen has a right to bear arms and defense of himself in the State'. No Connecticut Appellate Court has recognized a private cause of action under this section and I decline to do so. Accordingly, Defendants' Motion for Summary Judgment on this claim is granted') (Chatigny, J.).

Accordingly, as a matter of law, the Defendants are entitled to judgment as the Plaintiff's Count Three and Count Four.

E. The Defendant Officers Are Entitled To Qualified Immunity.

The doctrine of qualified immunity protects governmental officials from liability for civil damages insofar as their conduct does violate clearly established statutory or constitutional rights of which a reasonable person would have known, Greenwald v. Town of Rocky Hill, No. 3:09-CV-211 (VLB), 2011 WL 4915165 (D. Conn. October 17, 2011)(Bryant, J.). "In Saucier v. Katz, 533 U.S. 194, 201 (2001), the Supreme Court mandated that first, a court must decide whether the facts that the plaintiff has shown make out a violation of a constitutional right, and then second the court must decide whether the right at issue was 'clearly established' at the time of the defendant's alleged misconduct. Subsequently, in Pearson v. Callahan, 555 U.S. 223 (2009), the Supreme Court ruled that the courts are permitted to exercise their discretion in determining which of the two prongs should be addressed first", Id.

Qualified immunity applies if the official's mistake is a mistake of law, mistake of fact, or mistake based on mixed questions of law and fact, Palmieri v. Kammerer, 690 F. Supp. 2d. 34, 46 (D. Conn. 2010)(citing Pearson, 555 U.S. at 231).

The purpose of qualified immunity is to protect officials when they must make difficult "on-the-job" decisions, Id. (citing Zieper v. Metzinger, 474 F. 3d. 60, 71 (2d. Cir. 2007). Thus, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law" by giving "ample room for mistaken judgments", Id. (quoting Hunter v. Bryant, 502 U.S. 224, 229, 112 S. Ct. 534, 116 L. Ed. 2d. 589 (1991).

In the Second Circuit, qualified immunity analysis consists of a three-step inquiry

examining whether there is an alleged violation of a constitutional right, whether the right was clearly established at the time of the conduct, and – if the right was clearly established – whether the defendant's actions were objectively reasonable, Palmieri v. Kammerer, supra citing Harhay v. Town of Ellington Bd. of Educ. 323 F. 3d. 206, 207 (2d. Cir. 2003).

"If the conduct did not violate a clearly established constitutional right, or if it was objectively reasonable for the official to believe that his conduct did not violate such a right, then the official is protected by qualified immunity, Kuck v. Danaher, No. 3:07-CV-1390(VLB), 2012 WL 4904387 (D. Conn.) (October 16, 2012, Bryant, J.).

Embarking on that analysis, we must determine if there was a 'clearly established right' that was violated by the Officers.

"It is by now well established that while a warrantless search of a home is generally unreasonable and therefore violates the Fourth Amendment, an individual may consent to a search, thereby rendering it reasonable, United States v. Garcia, 56 F. 3d 418, 422 (2d Cir. 1995)", Palmieri v. Kammerer, supra 690 F. Supp. 2d at 47.

We must now determine, based on the totality of the circumstances, whether the reasonable officer would have believed that Mr. Doutel had consented to the officers' entry into his house and the removal of weapons for safekeeping. The answer should be a resounding 'Yes'.

An analogy can be made in applying the qualified immunity test in cases where the officers believed the individual consented to the entry into his home with the excessive force cases. In both cases a test of 'objective reasonableness' is applied, e.g. Graham v. Connor,

490 U.S. 386 (1999); U.S. v. Lopez, No. 3:11-CR-139-WWWE, 2012 WL 3231014 (D. Conn. 2012) ("Importantly, the test of voluntariness is neither subjected nor retrospective. Rather, the standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness – what would the typical reasonable person have understood by the exchange between the officer and the suspect?(citation omitted)").

The "objective reasonableness" test is met – and the defendant is entitled to immunity – if officers of reasonable competence could disagree on the legality of the defendant's actions, Greenwald v. Rocky Hill, supra citing Lennon v. Miller, 66 F. 3d. 416, 420 (2d. Cir. 1995). Stated another way, qualified immunity protects all but the plainly incompetent or those who knowingly violate the law, Hunter v. Bryant, 502 U.S. 224, 229 (1991) cited in Parks v. Segar, No. 3:09-CV-1162 (HBF), 2012 WL 4051833 (D. Conn. 2012).

Thus, in the 'use of force' context the following query is addressed: 'whether a reasonable officer could have believed that the use of force alleged was objectively reasonable in light of the circumstances'.

Accordingly, in determining whether or not the individual may be deemed to have consented, the query would be as follows: 'whether a reasonable officer could have believed that the entry was consented to, was objectively reasonable in light of the circumstances.

Furthermore, it is well recognized that when reviewing the decisions that are made by the police officers in the context of a qualified immunity assessment the courts are to consider that officers are often required to make difficult and touch decisions in "tense, uncertain, and rapidly evolving circumstances", Graham v. Connor, supra 490 U.S. at 396-97.

It is the Defendants' position that under the totality of the circumstances facing these officers, the reasonable officer would have concluded that Mr. Doutel voluntarily consented to allowing the officers to enter his home and to have the deadly weapons held for safekeeping. That is, these officers would not have been joined by only the plainly incompetent or those who knowingly violated the law in reaching this conclusion. In this particular occasion Mr. Doutel led the police officers into his home. Further, the uncontested facts are that once inside the home he pointed out to the officers where the weapons were located – even those that had been hidden. Admittedly, Mr. Doutel never voiced any objection to the police removing his weapons. Further, it is not contested that Mr. Doutel never instructed the officers that one or more of the weapons were his wife's. Furthermore, all the evidence shows that at the time of this matter Mr. Doutel was cooperative and of great assistance to the officers in their efforts to remove these weapons for safekeeping.

In addition, in the context of removing weapons from a household for safekeeping the Defendants would argue that the contours of that process are not 'clearly established' so as to deprive them of qualified immunity.

The Court's attention is directed to the Connecticut Appellate Court's decision in the case of In re Nesbitt, 124 Conn. App. 400 (decided October 12, 2012 [after the Doutel matter]).

In that case Addie May Nesbitt was determined by State police officials to represent a risk of injury to herself. It was determined that at one point her husband had to wrest a weapon out of her hands to stop her from hurting herself.

Mrs. Nesbitt was transported to a hospital in an ambulance. While at the hospital a

trooper advised her husband that respondent's (Mrs. Nesbitt's) firearms had to be surrendered to the state police, Id. at 402. Mr. Nesbitt agreed to comply with this request. Accordingly, three firearms were removed from the house by the state police and brought to the evidence room at the Litchfield barracks. Later, another firearm that had been turned into a gun shop was brought to the barracks and logged in.

Later, a risk warrant was applied for and received. A challenge was raised as to the propriety of the retention of these firearms.

In this challenge respondent's attorney argued, in part, that the risk warrant statute was inapplicable since it applied only to the seizure of weapons that were in someone' "possession". She argued that since the weapons were in the property room of the state police, that they could not be considered to be in her 'possession.

The Appellate Court quickly disposed of this argument holding that the Respondent's interpretation of the term 'possess' was overly narrow. In reaching this decision the Appellate Court made note as follows:

"*The following colloquy occurred at trial between the court and Detective Karanda:*

'The Court: So, so- in your looking at the investigation, the officers took the weapons as an alternative to running to a judge and getting a judge to sign the warrant that afternoon, correct?

'[The Witness]: Correct.

'The Court: All right. But the point then comes, what are they supposed to do with the weapons? At some point, they don't belong to the police…

'[The Witness]: That's

'The court: That's, that's why we're here today.

'[The Witness]: That's correct, and if, if [the respondent] had shown up at Troop L the very next day and said, 'Give me my guns back', there would have been no legal authority for them to hold onto the guns at that particular point. That's why we go to court and ask for [its] approval on the matter", Id. at 411, n. 7.

Accordingly, it is quite clear that at the time of the Doutel matter (February 16, 2011) it was an accepted law enforcement practice to seek the removal of weapons from a residence or a person in advance of any judicial order to do so. The Norwalk Police Officers were following what is a widely established law enforcement practice.

As in the Nesbitt matter, the Plaintiff in this matter could have come to the Norwalk Police Station the very next day and asked for the return of her stockpile of weapons. She did not do so.

In addition, the Defendants would argue that their seizure of the weapons was later reviewed judicially and approved. On May 20, 2011 the Court (Hudock) issued a condition to Mr. Doutel's release that he not possess any firearms based on the events that had occurred. This ruling was hotly contested by Mr. Doutel and his attorney. After two days of hearings, the Court (Dennis, J) issued her ruling on November 28, 2011, when she found that the prior order of the Court was reasonable and should stand (See Memorandum of Decision, Exhibit P). In this ruling the Court held as follows:

"*The Second Amendment to the Constitution of the United States provides that '[a] well regulated Militia, being necessary to the security of a free State, the right of the people to bear Arms, shall not be infringed'. Article first, Section 15 of the Connecticut Constitution provides that every citizen has a right to bear arms in defense of himself and the state. Neither of these provisions has been found to*

be absolute.

Considering the weight of the evidence and the nature and totality of the circumstances in this case, the previous orders of the court, temporarily restricting the defendant's right to bear arms to ensure that the safety of any other person will not be endangered, are not unreasonable.

Accordingly, the defendant's motion to vacate May 20, (2011) court ordered conditions of release is denied".

The Defendants would argue, therefore, that there has already been a determination that their action in removing the weapons from the household was reasonable. Certainly, therefore, they would be entitled to qualified immunity.

Accordingly, it is the Defendants' position that, as stated above, reasonable officer would have believed that consent was given for their actions. Accordingly, they are entitled to qualified immunity.

III. Conclusion:

For the reasons as set forth above, the Defendants would request that Judgment be rendered in their favor as to all counts (and/or that the claims set forth in Count Two be dismissed).

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CERTIFICATION

This is to certify that a copy of the foregoing was electronically filed and served on anyone unable to accept the electronic filing. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system or by First Class Mail to any one unable to accept electronic filing through the Court's CM/ECF System.

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