

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF BONNER

SCOTT HERNDON, JEFF AVERY, IDAHO)	CASE NO. CV09-20-692
SECOND AMENDMENT ALLIANCE, INC.,)	
SECOND AMENDMENT FOUNDATION, INC.,)	
)	MEMORANDUM DECISION AND
Plaintiffs,)	ORDER RE: MOTIONS FOR
)	SUMMARY JUDGMENT
vs.)	
)	
CITY OF SANDPOINT, FESTIVAL AT)	
SANDPOINT, INC.,)	
)	
Defendants.)	
)	

Alexandria Kincaid, Attorney for Plaintiff
Peter Erbland, Attorney for City of Sandpoint
Arthur Bistline, Attorney for Festival at Sandpoint
Plaintiffs' Motion for Summary Judgment DENIED
Defendants' Motion for Summary Judgment GRANTED

I. FACTS AND PROCEDURE

On May 29, 2020, Plaintiffs filed a civil Complaint alleging:

Claim one – Judicial Declaration that the Idaho Legislature preempts the field of firearms regulation. That the City of Sandpoint (City) cannot ban firearms at War Memorial Park (WAR), and cannot delegate such authority to another entity by

operation of a lease. That the Festival at Sandpoint (Festival) is likewise bound by Idaho's legislative preemption.

Claim Two – Injunctive Relief that compels the City to insist on lease/contract terms that guarantee compliance with Idaho Law regulating possession and carrying of firearms in public, and compels the Festival to likewise comply.

Claim Three – Conspiracy by Defendants to deprive Plaintiffs' constitutional rights to bear arms per 42 U.S.C. § 1985.

Claim Four – Violation by Defendants of Plaintiffs' constitutional rights under the Second Amendment per 42 U.S.C. § 1983.

Claim Five – Violation by Defendants of Plaintiffs' constitutional rights to be free from unreasonable searches and seizures per 42 U.S.C. § 1983.

Claim Six – Violation by Defendants of Plaintiffs' constitutional rights of equal protection per 42 U.S.C. § 1983.

Plaintiffs' Complaint sought declarations and injunctions prohibiting Defendants from violating Plaintiffs' Second Amendment rights, Fourth Amendment rights, Fourteenth Amendment rights, and awarding Plaintiffs nominal damages for any such violations.

This Complaint arose out of a 2019 lease by the City to the Festival, a non-profit corporation, of WAR for the purpose of a multi-day music festival. WAR is a public park owned by the City. The Festival had a policy that banned the possession of firearms for attendees at the Festival events. In August of 2019, Plaintiffs Herndon and Avery attempted to enter the Festival grounds while each possessing/carrying a handgun, but were prevented from doing so by Festival security personnel. A City police officer was on standby and informed Plaintiffs that they could

be trespassed by the Festival if they entered with their weapons. A City attorney, attending a Festival event, also discussed the situation and Festival policy with the Plaintiffs. Plaintiffs made no further efforts to enter the event and received a refund on their tickets.

The City receives a fee from the Festival for providing the presence of City police officers, and also receives rent from the Festival based on attendance. The Defendants share utility costs, but the Festival is responsible for security including use of metal detectors and searches of containers. The City approves the Festival's security and traffic control arrangements, approves signage regarding alcohol sales, and requires compliance with City noise ordinances. The Festival provides its own insurance and handles sanitation at the events.

Plaintiffs and both Defendants filed Motions for Summary Judgment. Oral argument was heard on April 26, 2021, and the Court took under advisement the competing motions. At oral argument, Plaintiffs advised they were abandoning Claim Five, the alleged violation of Plaintiffs' Fourth Amendment rights regarding unreasonable searches and seizures. The City's briefing in opposition to Plaintiffs' Motion for Summary Judgment reserved the right to challenge the general standing of Plaintiffs Idaho Second Amendment Alliance, Inc. and Second Amendment Foundation, Inc. depending on the outcome of these motions for summary judgment.

II. STANDARD

A motion for summary judgment is proper when the party bringing the motion proves that there is no genuine issue as to any material fact and it is entitled to judgment as a matter of law. Idaho Rule of Civil Procedure 56(a). After the moving party has met this burden, the nonmoving party then bears the burden to show the existence of a genuine issue of material fact. *Asbury Park, LLC v. Greenbriar Estate Homeowners' Assn., Inc.*, 152 Idaho 338, 343–44, 271 P.3d 1194, 1199–1200 (2012). This means the nonmoving party is required to set forth specific facts showing there

is a genuine issue for trial. *Doe v. Durtschi*, 110 Idaho 466, 469, 716 P.2d 1238, 1241 (1986). The defendant will be entitled to judgment when the plaintiff fails to make a showing sufficient to establish the existence of an essential element of its claim and on which it bears the burden of proof. See *Thompson v. City of Lewiston*, 137 Idaho 473, 476, 50 P.3d 488, 491 (2002).

All disputed facts will be liberally construed by the Court in the light most favorable to the nonmoving party and any reasonable inferences supported by the record are drawn in favor of the nonmoving party. *Anderson v. City of Pocatello*, 112 Idaho 176, 179, 731 P.2d 171, 174 (1986).

III. ANALYSIS

Plaintiffs have generally alleged that Defendants are so intricately involved in a joint venture, with regard to the lease agreement with the Festival, that the actions of the Festival are really the actions of the City. They then argue that Idaho law precludes the City, and also the Festival, from carrying out the policy of restricting firearms possession by patrons at Festival events.

The Defendants have each argued that because of the lease of WAR to the Festival, the Festival has all of the rights of a leaseholder to control the attendees at its events, including the banning of firearms possession.

It should be noted that Plaintiffs' response to Defendants' position is an attack on the nature of the lease for the purpose of arguing against Defendants' leaseholder argument. This Court finds that Plaintiffs are judicially estopped from attacking the validity of the lease.

Plaintiffs have sought entry to the courts for their requested judicial declarations and injunctive relief via the Idaho Declaratory Judgment Act. I.C. § 10-1202:

Any person . . . whose rights . . . are affected by a . . . contract . . . may have determined any question of . . . validity arising under the . . . contract . . . and obtain a declaration of rights, status . . . thereunder.

Plaintiffs' initial factual assertion, at page 1 of the Complaint, states that the City leases WAR to the Festival and Plaintiffs' Memorandum in support of Motion for Summary Judgment, at page 3, states that for more than 20 years (including 2019) the City and Festival have entered into "agreements to rent" WAR. Thus, Plaintiffs have engaged in impermissible contradictory positions by invoking the existence of the lease and also attacking the existence of the lease. The attack consisted of argument that the City had not properly followed the Idaho Municipal Corporations Code, § 50-1409, to have validly leased public property to a private entity.

The doctrine of judicial estoppel is an act of equity by the court that can be invoked at the court's discretion. *Sword v. Sweet*, 140 Idaho 242, 252 (2004). It precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position. *McKay v. Owens*, 130 Idaho 148 (1997). The doctrine is designed to safeguard the orderly administration of justice, and for the dignity of judicial proceedings. It is intended to prevent a litigant from playing fast and loose with the courts.

The instant Plaintiffs gained the advantage of entry into this lawsuit, at least for declaratory judgment purposes, by invoking the existence of a contract (a lease or "agreement to rent"), and then seek a second advantage by taking the contradictory position that there is no valid lease. This Court thus determines that Plaintiffs' are judicially estopped from attacking the validity of the lease in question.

And now to the analysis of Plaintiffs' claims.

A. Plaintiffs' U.S. Constitution Claims – 42 U.S.C. § 1983 and § 1985 – Plaintiffs' Claims Three – Six

1. 42 U.S.C. §1983

- a. Plaintiffs' Claim Five – Violation of Fourteenth Amendment right to be free from unreasonable searches and seizures was abandoned by Plaintiffs.**
- b. Plaintiffs' Claim Four - Violation of Second Amendment rights per 42 U.S.C. 1983**

Plaintiffs' have not alleged that the city has passed an ordinance or engaged in conduct that directly violated Plaintiffs' Second Amendment rights. The essence of Plaintiffs' argument has been that the Defendants have engaged in joint conduct, through the lease of WAR to the Festival and Festival's ban of patrons possessing firearms, and that each have intentionally violated Plaintiffs' constitutional rights under the Second Amendment. 42 U.S.C. § 1983 provides for a cause of action for deprivation of constitutional rights that occur under color of state action. Under the state action doctrine a governmental entity is not considered liable for the conduct of a private party for which the governmental entity cannot be fairly blamed. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982). The rationale for this statement is that most rights secured by the Constitution are protected against infringement by governmental action. With regard to the state action, "at bottom, the inquiry is always whether the defendant has exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Rawson v. Recovery Innovations, Inc.* 975 F. 3d 742, 747–48 (9th Cir. 2020).

One of the tests applied by the U.S. Supreme Court in identifying state action, and one invoked by the instant Plaintiffs, is the public function test.

When private . . . groups are endowed by the State with powers or functions governmental in nature, they become agencies . . . of the State and subject to its constitutional limitations. *Lee v. Katz*, 276 F. 3d 550, 554–55 (9th Cir. 2002). The public function test is satisfied only on a showing that the function at issue is "both traditionally and exclusively governmental." *Id* at 555.

The record before the Court in the instant case is that the City endowed the Festival with the rights of an ordinary leaseholder to conduct a music festival on public property. The fact that the leaseholder chooses to screen its attendees for firearms is a leaseholder prerogative and not the result of the City conveying the traditional governmental policing powers to the Festival. Other examples of traditional and exclusively governmental functions are the ability to levy taxes or the construction of necessary streets or bridges, none of which were conveyed to the Festival. The conduct of a music festival is in no way a traditional governmental function, and no evidence exists in this record that satisfies the public function test that would establish state action for Defendants.

Plaintiffs also asserted the U.S. Supreme Court recognized government nexus test for state action. This test determines whether there is such a close nexus between the state and the private party's behavior that the behavior can be said to be that of the state itself. *Brentwood Academy v. Tennessee Secondary Sch. Athletics Ass'n.*, 531 U.S. 288, 295 (2001)

The case of *Villegas v. Gilroy Garlic Fest. Ass'n.*, 541 F. 3d 950,952 (9th Cir. 2008) is instructive in this analysis. This case was a claimed 42 U.S.C. § 1983 violation of plaintiffs' First Amendment rights of free expression that arose when they were escorted off the festival grounds by uniformed and armed City of Gilroy police for violation of the festival's "no gang colors or motorcycle club insignia" policy.

The garlic festival was held in a public park under a facility reservation contract between the City of Gilroy and the festival. That agreement required that security for the event be provided by volunteers, usually off-duty city police officers, paid for the by the festival. The trial court granted summary judgment for the defendant finding no existence of genuine issues of material fact establishing state action. The 9th Circuit Court of Appeals affirmed summary judgment for

defendant, finding that the garlic festival was not a state actor, and that conducting such a festival is not a traditionally municipal function.

The contract in *Villegas* differs from that in the instant case in one important factor: the government contract with the garlic festival required the city to control security for the event, usually with off-duty city officers paid for by the festival. The lease between Defendants in Sandpoint allowed the Festival to provide its own security with officers only standing by in case Festival security made a citizen's arrest.

This Courts finds even less evidence of State action than existed in *Villegas*, and likewise finds the existence of no genuine issue of fact as to state action even with the record being viewed in the light most favorable to Plaintiffs due to the competing motion for summary judgment. Summary Judgment is granted for Defendants as to Claim Four.

c. Plaintiffs' Claim Six – Violation of Plaintiffs' rights to Equal Protection per 42 U.S.C. § 1983

Plaintiffs generally alleged that Defendants' joint action generally discriminated against Plaintiffs' access to a public event based on their exercise of a fundamental right to bear arms under the U.S. and Idaho Constitutions. This claim fails as a matter of law. The 9th Circuit, in *Teixeira v. City of Alameda*, 822 F. 3d 1047, 1052 (9th Cir. 2016), and *reh'g en banc*, 873 F 3d 670 (9th Cir. 2017), held that an alleged infringement of a Second Amendment right is more appropriately analyzed under the Second Amendment and not the Equal Protection Clause. Such a Second Amendment infringement is not a cognizable claim under the Equal Protection Clause. *Id.* Summary Judgment is granted for Defendants as to Claim Six.

2. 42 U.S.C. § 1985 – Plaintiffs’ Claim Three – Conspiracy to deprive Plaintiffs’ constitutional rights to bear arms.

Plaintiffs generally alleged that the agreement between Defendants, and their actions in barring Herndon and Avery from possessing firearms at a Festival event, constituted a conspiracy to deprive Plaintiffs of equal protection of the laws based on an exercise of their constitutional rights to bear arms.

This claim likewise fails as a matter of law. For Plaintiffs to prevail on this claim they must show: 1) some racial or other class-based invidiously discriminatory animus, and 2) that a conspiracy existed aimed at interfering with rights that are protected against private as well as official encroachment. *Butler v. Elle*, 281 F. 3d 1014, 1028 (9th Cir. 2002). The class in question must be a suspect, or quasi-suspect, class requiring more exacting scrutiny or special protection. *Sever v. Alaska Pulp Corp.*, 978 F 2d 1529, 1536 (9th Cir. 1992); *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 267–68 (1993).

Plaintiffs have presented no factual basis nor legal authority to support that they are members of a suspect or quasi-suspect class to be afforded special scrutiny or protection. Moreover, there is no evidence in this record to support Plaintiffs’ claim that the Defendants had, as a motivation for their actions, the intent to deprive Plaintiffs of any constitutional right. Summary Judgment is granted for Defendants as to Claim Three.

B. Plaintiffs’ Legislative preemption Claims – Plaintiffs’ Claims One and Two

1. Declaratory Judgment – State Preemptions of firearms regulation

Plaintiffs argued that the Idaho legislature preempts the entire field of firearm regulation per I.C. § 18-3302J; thus, the City lacks authority to ban firearms specifically at WAR, and cannot convey such authority as part of a lease or contract. Plaintiffs’ position is that the City cannot convey authority to the Festival that the City does not possess.

Plaintiffs misconstrue the nature of the City's lease of WAR to the Festival. The City's lease does not delegate firearms banning authority to the Festival; rather, the City simply leases WAR to the Festival for the purpose of conducting a music festival. The city's conveyance of a leasehold interest entitles the Festival to exclusive possession of the property. *Devereaux Mortgage Co. v. Walker*, 46 Idaho 431, 436 (1928). A possessory interest includes the right to control the property and the right to exclude others *McKay v. Walker*, 160 Idaho 148, 152 (2016). It must also be noted that the Idaho legislature, in enacting its exclusive authority in the field of firearms regulation, specifically considered its citizens' constitutional rights to bear arms vis-à-vis the rights of property owners and tenants:

Nothing (in the previous subsections of I.C. § 18-3302) shall be construed to limit the existing rights of a private property owner, private tenant, private employer or private business entity.

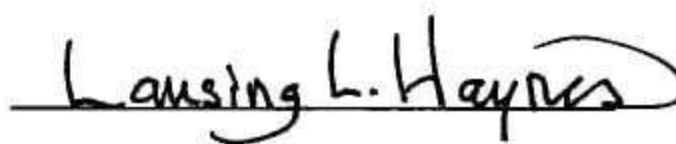
I.C. § 18-3302(25). The State of Idaho largely prohibits any city or county from regulating firearms possession, but nothing in § 18-3302 prohibits a private leaseholder, like the Festival, from exercising its leaseholder rights to control its leased property during the term of the lease. There is nothing in the lease to the Festival that is in any way an exercise in governmental regulatory authority. There are no genuine issues of material fact as to whether the City has promulgated any rule or ordinance in conflict with I.C. § 18-3302J; likewise, no genuine issues of fact exist as to whether the Festival has violated state law or any constitutional rights of Plaintiffs. Summary Judgment is granted for both Defendants on Plaintiffs' Claim One. With that grant of summary judgment, Plaintiffs' requested injunctive relief in Claim Two is not appropriate.

IV. CONCLUSION

Summary Judgment for Plaintiffs is DENIED. Summary Judgment for City of Sandpoint is GRANTED. Summary Judgment for the Festival is GRANTED.

Defendants are directed to present judgments to this Court consistent with this decision.

DATED this 1 day of June, 2021.

A handwritten signature in black ink, reading "Lansing L. Haynes", written over a horizontal line.

Lansing L. Haynes, District Judge