



IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

LISA SUMMERS, Personal Representative of)
the Estate of KESHALL ANDERSON, KISHA)
BAILEY, Individually and as the Legal)
Guardian of JORDAN DOMINIQUE)
ROBINSON, JR., a minor, MICHAEL)
BAILEY, Individually,)
)
Plaintiffs,)
)
v.) C.A. No. N18C-07-234 VLM
)
CABELA’S WHOLESALE, LLC., a Nebraska)
Corporation registered in Delaware,)
CABELA’S WHOLESALE, INC.,)
a Nebraska Limited Liability Company)
registered in Delaware,)
)
Defendants.)

**DEFENDANTS’ MOTION TO DISMISS
PLAINTIFFS’ FIRST AMENDED COMPLAINT**

Defendants, Cabela’s Wholesale, LLC, formerly Cabela’s Wholesale, Inc. (“Defendants”), move to dismiss Plaintiffs’ First Amended Complaint under Superior Court Civil Rule 12(b)(6) for failure to state a claim upon which relief can be granted, based on a Delaware statute that provides Defendants a complete defense to Plaintiffs’ claims. In support of their motion, Defendants states as follows:

Plaintiffs’ Allegations

1. Plaintiffs seek wrongful death and personal injury damages from the

Defendants, who Plaintiffs allege to be a federally licensed retail seller of a firearm that criminals later acquired and used to murder Keshall Anderson. Defendants allegedly sold the firearm in July 2016 to Brilena Hardwick, who purchased the firearm for a convicted felon, John Kuligowski. (First Am. Compl. ¶¶ 37 – 41, attached as Ex. 1). Kuligowski then allegedly “supplied the firearm to the criminal market,” where it was acquired and used to shoot and kill Anderson. (*Id.* at ¶¶ 58 – 62).

2. Hardwick and Defendants completed a firearms transaction record at the time of the alleged sale. (*Id.* at ¶¶ 43 – 44). Commonly referred to as a “Form 4473,” Plaintiffs refer to the completed transaction record repeatedly in their Complaint and rely on its contents to support their claims. (*Id.* ¶¶ 16, 17, 18, 19, 25, 26, 27, 31, 43, 44, 52, and 55). Plaintiffs have thus incorporated the Form 4473 by reference, and the Court may consider its factual content in deciding Defendants’ Motion to Dismiss. *See DecisivEdge, LLC v. VNU Group, LLC.*, 2018 Del. Super. LEXIS 132, at *11 (March 19, 2018) (copy attached as Ex. 2).

3. Before transferring the firearm to Hardwick, Defendants conducted a criminal history background check on her pursuant to the National Instant Criminal Background Check System (“NICS”). (Ex.1 at ¶ 54. *See also* Certification of Erin Roosevelt with Form 4473, at Questions 21a and 21b, attached as Ex. 3). The Federal Bureau of Investigation (“FBI”) completes NICS checks in Delaware and determines

whether the transfer of a firearm “would be in violation of the law.” 11 *Del. C.* § 1448A(a) and (b).

4. The FBI informed Defendants that Hardwick passed the background check, and the sale and transfer of the firearm to her could “proceed.” (Ex. 3, Form 4473, at Question 21c).

5. Plaintiffs allege Defendants are legally responsible for Anderson’s injuries, death and related damages under a variety of state law theories, including negligence *per se*, negligence, negligent entrustment, negligent training and supervision, and public nuisance. Plaintiffs’ claims for damages allegedly arise from Hardwick’s unlawful purchase of the firearm and her actions in delivering the firearm to a convicted felon and the criminal market.

Law and Argument

6. A complaint will be dismissed under Superior Court Civil Rule 12(b)(6) if Plaintiffs fail to show any reasonably conceivable set of circumstances susceptible to proof under the complaint. *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978). Although “the Court must accept all well-pleaded allegations in the complaint as true and draw all reasonable factual inference in favor of the non-moving party” (*id.*), it is not required “to accept conclusory allegations unsupported by specific facts or to draw unreasonable inferences in favor of the non-moving party.” *Price v. E.I. DuPont de Nemours & Co.*, 26 A.3d 162, 166 (Del. 2011).

7. Plaintiffs' claims should be dismissed because, under Delaware law, a licensed retail firearm dealer has "a complete defense" to any cause of action for damages under Delaware law relating to a transfer of a firearm when the dealer conducts a criminal history background check using the NICS system, and transfers the firearm only after being informed that it may proceed with the sale. 11 *Del. C.* § 1448A(d).

8. Section 1448A(d) of Title 11 of the Delaware Code provides, in pertinent part:

[C]ompliance with the provisions of this section [NICS criminal history records check] or § 1448B of this title, as the case may be, shall be a *complete defense* to any claim or cause of action under the laws of this State for liability for damages allegedly arising from the actions of the transferee subsequent to the date of said compliance wherein the claim for damages is factually connected to said compliant transfer.

11 *Del. C.* § 1448A(d) (emphasis added). Effective July 1, 2013, the Delaware Legislature intended to "expand the legal protections available to gun sellers and dealers who perform background checks in accordance with Delaware law." (Synopsis, House Amendment No. 7 to House Bill No. 35, attached as Exhibit 4). The Legislature sought to "encourage[] compliance" with background check requirements "by ensuring that persons who follow the law cannot be held liable for damages for actions that take place after a lawful transfer." (*Id.*)

9. As applied to this case, Section 1448A(d) is a complete defense to Plaintiffs' Amended Complaint because Plaintiffs' claims all "arise from the actions

of the transferee subsequent to the date of the said [NICS] compliance wherein the claim for damages is factually connected to said compliance transfer.” *Id.*

10. Defendants’ alleged firearm transfer to Hardwick was a “compliant transfer,” because Defendants requested a NICS background check and received NICS approval for the sale. (*See* Exhibit 3, Form 4473, at Question 21c). Therefore, the statute protects Defendants from being sued under state law for damages allegedly caused by the transfer. The plain language of the statute permits no other conclusion. *See CML V, LLC v. Bax*, 28 A.3d 1037, 1041 (Del. 2011) (Plain language controls judicial interpretation of statutory language.)

11. The Delaware Legislature did not provide exceptions to the “complete defense” that firearm dealers have for “compliant transfers.” *See* 11 *Del. C.* § 1448A(d). The transfer of the firearm to Hardwick was “compliant” based on Plaintiffs’ own allegations and, under this circumstance, Delaware law does not permit Plaintiffs to argue that Defendants had reason to suspect Hardwick purchased the firearm for another—or that Defendants should be liable based on such allegations.

CONCLUSION

12. There are “no reasonably conceivable set of circumstances” under which Plaintiffs can prevail on their claims in light of the facts they have pleaded, demonstrating that Cabela’s made “compliant transfer” of the firearm. Thus, their

claims should be dismissed under Section 1448A(d) of Title 11 of the Delaware Code.

WHEREFORE, Defendants respectfully request that this Honorable Court enter an order dismissing Plaintiffs' First Amended Complaint.

ECKERT SEAMANS CHERIN & MELLOTT, LLC

/s/ Francis G.X. Pileggi

Francis G.X. Pileggi (Bar ID No. 2624)

Jessica L. Reno (Bar ID No. 5950)

222 Delaware Avenue, 7th Floor

Wilmington, DE 19801

(302) 655-3667

fpileggi@eckertseamans.com

jreno@eckertseamans.com

Attorneys for Defendants

Of Counsel:

James B. Vogts, Esquire

Swanson, Martin & Bell LLP

330 N. Wabash Suite 3300

Chicago, IL 60611

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