

STATE OF MICHIGAN
COURT OF APPEALS

LINCOLN PARK HOUSING COMMISSION,

Plaintiff-Appellee,

v

DIANE ANDREW,

Defendant-Appellant.

UNPUBLISHED

March 23, 2004

No. 244259

Wayne Circuit Court

LC No. 02-201492-AV

Before: Cavanagh, P.J., and Gage and Zahra, JJ.

PER CURIAM.

Defendant appeals by leave granted an order issued by the circuit court, on appeal from a district court jury verdict, affirming a judgment for possession in favor of plaintiff in this landlord-tenant action. Defendant contests the constitutionality of a lease provision. We affirm.

Plaintiff owns and manages a government subsidized high-rise apartment complex in the city of Lincoln Park. In addition to senior citizens, a limited number of low-income individuals with disabilities also qualify to live in the complex. Defendant suffers from numerous physical and emotional problems and is a tenant in plaintiff's complex. At the time of trial, she had resided in the complex for almost three years. Defendant's lease, as did all other residents' leases, prohibited the possession of firearms anywhere on the premises. In August 2001, plaintiff's staff contacted the Lincoln Park police because of concerns about defendant's emotional status. Apparently, defendant had contacted the staff and her behavior was interpreted by the staff as suicidal in nature. Around this same time, a resident contacted the clinical social worker at plaintiff's complex and indicated that she had observed a gun in defendant's apartment. As a result, the Lincoln Park Police Department obtained a search warrant for defendant's apartment. When they arrived, defendant acknowledged that she possessed a handgun and directed the officers to the trunk of her car where the gun was located.

Following the incident, plaintiff served defendant with a notice to quit for breach of her lease agreement. Defendant requested and received an administrative hearing to challenge her eviction, and following a hearing, the panel concluded that defendant was in breach of her lease agreement with plaintiff. Plaintiff thereafter filed an action in the 25th District Court. Following a jury trial, the district court entered an order of eviction and money judgment award on January 4, 2002. Defendant appealed to the circuit court, arguing that plaintiff's prohibition on gun possession, as a condition of residency in its government subsidized building, is unconstitutional and cannot serve as the basis for defendant's loss of her tenancy and associated benefits.

Plaintiff, in response, argued that the prohibition of firearm possession as a condition of residency in certain types of government-subsidized housing is based on a compelling state interest and is constitutional. On April 15, 2002, the circuit court issued a written opinion upholding the district court's order of eviction and a written order was entered on May 3, 2002. This Court initially denied defendant's application for leave to appeal, *Lincoln Park Housing Comm v Andrew*, unpublished order of the Court of Appeals, entered August 27, 2002 (Docket No. 241787); however, by order dated October 8, 2002, the Michigan Supreme Court, in lieu of granting leave to appeal, remanded the matter to this Court for consideration as on leave granted. *Lincoln Park Housing Comm v Andrew*, 467 Mich 884; 653 NW2d 404 (2002).

Defendant asserts the Second Amendment, US Const Am II, provides an individual the right to "keep and bear arms." Defendant further asserts that the broad prohibition against the possession of any weapon in plaintiff's senior citizen complex is not sufficiently narrowly tailored to serve a compelling state interest and discriminates against the elderly and disabled. This Court reviews de novo the resolution of constitutional issues raised. *Van Buren Charter Twp v Garter Belt, Inc*, 258 Mich App 594, 602; 673 NW2d 111 (2003).

The Supreme Court precedent regarding interpretation of Second Amendment issues was established in *United States v Miller*, 307 US 174; 59 S Ct 816; 83 L Ed 1206 (1939). The Court in *Miller* upheld provisions that regulated certain types of shotguns as not violative of the Second Amendment and determined the Amendment applied only to the "preservation or efficiency of a well regulated militia." *Id.* at 178. Subsequently, lower federal courts "have uniformly interpreted the decision as holding that the Amendment affords 'a collective, rather than individual, right' associated with the maintenance of a regulated militia." *United States v Cole*, 276 F Supp 2d 146, 149 (D DC, 2003), citing *Love v Pepersack*, 47 F3d 120, 124 (CA 4, 1995). *Miller* is consistently read and interpreted as "demonstrating that the Supreme Court does not view the Second Amendment as safeguarding a fundamental individual right." *Bach v Pataki*, 289 F Supp 2d 217 (ND NY, 2003).

While recently the Fifth Circuit has determined the Second Amendment "does protect individual rights" of persons not engaged in military service or members of a militia, restrictions on those rights is not precluded. *United States v Emerson*, 270 F3d 203, 260 (CA 5, 2001). It is well recognized that laws prohibiting felons, infants and those of unsound mind from possessing weapons are not violative of the Second Amendment. *Emerson, supra* at 261; *United States v Waller*, 218 F3d 856, 857 (CA 8, 2000).

The Due Process Clause of the Fourteenth Amendment, however, does not incorporate the Second Amendment. *Miller v Texas*, 153 US 535, 538; 14 S Ct 874; 38 L Ed 812 (1894); *People v Swint*, 225 Mich App 353, 359-360; 572 NW2d 666 (1997). Thus, the Second Amendment is not applicable to the states. *Swint, supra*. With regard to defendant's due process rights, clear warnings exist against use of the Constitution, and substantive due process, to supplant laws already in place and administered by the states. *Galdikas v Fagan*, 342 F3d 684, 691 (CA 7, 2003). Substantive due process has been determined to safeguard against only the most arbitrary and conscience shocking intrusions by the government into personal matters. *ATC Partnership v Town of Windham*, 251 Conn 597, 606; 741 A2d 305 (1999). As such, even if applicable, plaintiff's prohibition against weapons fails to "shock the conscience" or exceed the "decencies of civilized conduct." *Co of Sacramento v Lewis*, 523 US 833, 846; 118 S Ct 1708; 140 L Ed 2d 1043 (1998).

Plaintiff asserts the prohibition against weapons is tied to a legitimate state interest to protect and assure the safety and welfare of its residents. By analogy, tenant evictions by public housing authorities have been upheld as not violative of the right of free association when such action by the housing association was part of their efforts to control crime¹ based upon the recognized and legitimate interest of public housing authorities to maintain safe, decent housing for its residents. *McKenna v Peekskill Housing Authority*, 647 F2d 332, 335 (CA 2, 1981). The weapons prohibition has a real and substantial relationship to plaintiff's stated goal. *Coleman v Dept of Personnel Admin*, 52 Cal 3d 1102, 1125; 278 Cal Rptr 346; 805 P2d 300 (1991). As such, defendant has failed to demonstrate the restriction on weapons violates the substantive due process rights afforded by the Fourteenth Amendment.

Finally, defendant asserts that even if the weapons prohibition by plaintiff is constitutional under the federal constitution, it is violative of Const 1963, art 1, § 6. While the right to possess arms is acknowledged within the Michigan Constitution, this right is subject to limitation. Jurisprudence in this state has consistently maintained the right to keep and bear arms is not absolute. *People v Brown*, 253 Mich 537, 538, 541; 235 NW 245 (1931); *Swint, supra* at 375; *Bay Co Concealed Weapons Licensing Board v Gasta*, 96 Mich App 784, 788; 293 NW2d 707 (1980); *People v McFadden*, 31 Mich App 512, 516; 188 NW2d 141 (1971); *Kampf v Kampf*, 237 Mich App 377, 383; 603 NW2d 295 (1999). This Court has determined that "the constitutionally guaranteed right to bear arms is subject to a reasonable exercise of the police power." *Swint, supra* at 363, citing *Gasta, supra* at 788. The state has a legitimate interest in limiting access to weapons. *McFadden, supra* at 540-543.

It is recognized that public housing authorities have a legitimate interest in maintaining a safe environment for their tenants. *Turner v Chicago Housing Auth*, 969 F2d 461, 463 (CA 7, 1992); *McKenna, supra* at 335. Infringements on legitimate rights of tenants can be justified by regulations imposed to serve compelling state interests which cannot be achieved through less restrictive means. *Roberts v United States Jaycees*, 468 US 609, 623; 104 S Ct 3244; 82 L Ed 2d 462 (1984). Restrictions on the right to possess weapons in the environment and circumstances described by plaintiff are both in furtherance of a legitimate interest to protect its residents and a reasonable exercise of police power. This is particularly true given defendant's failure to make any allegation she feels physically threatened or in danger as a resident of plaintiff's complex necessitating her possession of a weapon to defend herself.

Defendant further asserts the prohibition on weapons by plaintiff violates substantive due process under Const 1963, art 1, § 2, 17. The "essence of a substantive due process claim is the arbitrary deprivation of property or liberty interests." *Landon Holdings, Inc v Grattan Twp*, 257 Mich App 154, 176; 667 NW2d 93 (2003). If a fundamental right is not involved, a regulation must "only be rationally related to a legitimate governmental interest." *Landon Holdings, Inc, supra* at 173, citing *Electronic Data Sys Corp v Flint Twp*, 253 Mich App 538, 549; 656 NW2d 215 (2002).

¹ *Chavez v Housing Auth of El Paso*, 973 F2d 1245, 1248 (CA 5, 1992); *Turner v Chicago Housing Authority*, 969 F2d 461, 463 (CA 7, 1992).

A legitimate governmental interest is based in the police power and is defined as encompassing “protection of the safety, health, morals, prosperity, comfort, convenience and welfare of the public, or any substantial part of the public.” *Hecht v Nile Twp*, 173 Mich App 453, 460; 434 NW2d 156 (1988). Restrictions imposed by ordinances or statutes are deemed violative of due process if they comprise an unreasonable means of advancing a legitimate governmental interest. *Id.* at 461. Defendant has failed to demonstrate plaintiff’s lease restriction lacks a real or substantial relation to the health, safety and general welfare of its tenants. It is not unreasonable to restrict access to weapons within this specific environment. Further, plaintiff’s imposition of the lease provision is not arbitrary or capricious. Plaintiff has evaluated the physical setting, the concerns of its tenants, the potential dangers evident and determined a means to reduce the risk to tenants with minimal infringement of their rights.

Defendant also asserts, for the first time on appeal to this Court, that plaintiff’s lease prohibition against weapons violates the Fair Housing Amendments Act, 42 USCA 3601 *et seq.* As this issue was not properly preserved, and is not necessary to an adjudication of this matter, it need not be addressed by this Court.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Hilda R. Gage
/s/ Brian K. Zahra