

The U.S. Supreme Court's Seminal Decision

Has It Changed the People's Second Amendment Right to Own a Gun?

By Gary M. Fellner, Principal, Porzio, Bromberg & Newman P.C., Morristown, New Jersey



Decision in *District of Columbia v. Heller*:

A headline in September 2012 read, “Gun Range to Let Shooters Take Shots, and Knock Them Back, Too.” The article pertains to a couple’s decision in Georgia to open a new gun range where they also serve alcohol.¹ Though the catchy headline helps sell newspapers, the body of the article makes it clear that anyone drinking alcohol at this range cannot drink and then shoot. The business will have safeguards to separate the two. Obviously, this is why gun laws exist: to protect the public.

Gun sales are on the rise. Federal Bureau of Investigation records show that background checks for buyers of firearms and explosives across the United States rose 96 percent between 2002 and 2011, and 14 percent between 2010 and 2011 alone.²

The ability to regulate guns is well within the province of state and local governments, and officials seem to be addressing the issue of gun registration and ownership responsibility. How wise or unwise the proliferation of guns and their regulations may be are separate topics not addressed here. Rather, the discussion below addresses the right to own a firearm in this country in the aftermath of the U.S. Supreme Court’s landmark decision in June 2008 in *District of Columbia v. Heller*.³ The court fully examined the language of the Second Amendment: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”⁴

The U.S. Supreme Court held in *Heller*, for the first time, that the people have a constitutional right under the Second Amendment to bear arms without regard to any formal militia.⁵ This right is especially clear when a person chooses to keep a handgun for protection in his or her own home. It has been almost five years since *Heller* was decided, and a few questions come to mind: Is the right of the people to own a gun under the Second Amendment alive and well? How far does the right actually extend? What types of gun cases are being heard in the courts? Does the right extend to all kinds of weapons?

The Case

In *Heller*, the court addressed a broad law in the District of Columbia that prohibited handguns. The law went so far as to say that people who owned rifles must keep them unloaded or bound by a trigger lock in their homes. Dick Heller, a police officer, wanted to keep a handgun in his home but was denied a permit. He challenged the law in court on the ground that the law infringed

upon his constitutional right to bear arms under the Second Amendment. Before the case reached the U.S. Supreme Court, that court had never squarely held what the Second Amendment means or how far it applies to peoples’ individual right to own guns. *Heller* changed that.

The U.S. Supreme Court, in a majority opinion written by Justice Antonin Scalia, explained that the Second Amendment guarantees “the individual right to possess and carry weapons in case of confrontation.”⁶ The court observed that the right to own a gun actually predates the Constitution, as the Second Amendment’s language stating that the right “shall not be infringed” necessarily references such a pre-existing right. The court traced the long-standing history of the peoples’ right to bear arms for self-defense and found that the law at issue was unconstitutional because a complete ban on a person’s right to keep a loaded gun in his or her home interfered with that established right.

The court explained, however, that the right to bear arms is not unlimited, “just as we do not read the First Amendment to protect the right of citizens to speak for any purpose.” The court said, for example, that “[a]lthough we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on long-standing prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”⁷ The court also wrote that “[w]e think that limitation is fairly supported by the historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons.’”⁸

The ruling was handed down in June 2008. Since then, courts across the United States have been confronted with a variety of claims raised by individuals who rely

AUTHOR’S NOTE

In *Heller*, the Supreme Court ruled that the right of self defense is “most acute” in the home.¹ Thus, one question that federal courts have recently addressed, with different outcomes, is whether the constitutional right to bear arms exists *only* in the home or if there is a constitutional right to carry a gun beyond the front door.

On December 11, 2012, the U.S. Court of Appeals for the Seventh Circuit in Chicago, Illinois, ruled that Illinois’s ban on carrying loaded guns outside the home is unconstitutional.ⁱⁱ The court wrote that the U.S. Supreme Court made it clear that the Second Amendment “confers a right to bear arms for self defense, which is as important outside the home as inside.”ⁱⁱⁱ The law’s problem, said the court, is that it amounts to an outright ban on the right to carry. Reasonable regulations on carrying a gun in public are one thing; banning it completely violates the Constitution.

Another case to watch comes out of Maryland, which prohibits carrying guns outside of the home unless the applicant shows a “good and substantial reason” to carry. In *Woollard v. Sheridan*, decided in March 2012, a federal court in Maryland ruled that “the signposts left by [the] Supreme Court . . . all point to the conclusion that [Mr.] Woollard’s claim to self-defense [outside the home]—asserted by him as a law-abiding citizen . . . —does implicate[s] the Second Amendment, albeit subject to lawful limitations.”^{iv} The court struck down the state statute because it found that requiring the applicant to show a “good and substantial reason” to carry a gun interfered with the Second Amendment’s guarantees. The *Woollard* decision is currently on appeal before the U.S. Court of Appeals for the Fourth Circuit in Richmond, Virginia.

Meanwhile, the U.S. Court of Appeals for the Second Circuit in New York recently decided a case the other way, issuing a ruling on November 27, 2012, in which the court said that while the Second Amendment covers the right to carry a weapon in public, New York State’s licensing scheme, which bars people from getting a license to carry outside of the home unless they show “proper cause,” is constitutionally valid.^v

Notes:

ⁱ*Heller*, 554 U.S. 570, 628.

ⁱⁱ*Shepard v. Madigan*, 12-1788 (December 11, 2012), <http://www.isra.org/lawsuits/coa.pdf> (accessed February 8, 2013).

ⁱⁱⁱ*Id.* at 20.

^{iv}See *Woollard v. Sheridan*, 763 F. Supp.2d 462 (2012), www.mdd.uscourts.gov/Opinions/Opinions/WoollardMemo.pdf (accessed February 8, 2013).

^v*Kachalsky v. County of Westchester*, 701 F.3d 81 (2012).

upon *Heller* to support their Second Amendment right to bear arms in many contexts.

The Aftermath

The *New York Times* reported in March 2009, nine months after *Heller* was decided, that after the Supreme Court “breathed new life into the Second Amendment,” lower federal courts have decided “more than 80 cases interpreting the decision.... So far, *Heller* is firing blanks.” That is, “the lower courts [routinely have] upheld federal laws banning gun ownership by people convicted of felonies and some misdemeanors, and by illegal immigrants and by drug addicts. They have upheld laws banning machine guns and sawed-off shotguns, upheld laws making it illegal to carry guns near schools or in post offices, and upheld laws concerning concealed and unregistered weapons.” The *New York Times* further quoted a UCLA law professor to say that “the *Heller* case is a landmark decision that has not changed very much at all. To date, the federal courts have not invalidated a single gun control law on the basis of the Second Amendment since *Heller*.”⁹

A well-noted exception to the statement that *Heller* had not impacted many aspects of the right to bear arms was the government’s power to prevent a person charged with a crime, though not convicted, of possessing a firearm. In *United States vs. Arzberger*, a

criminal defendant was charged with possessing child pornography. The government imposed conditions on the defendant’s bail to include that he not possess a firearm. The trial court held that the government could not do that based on *Heller*, ruling that “[a] year ago, I might well have taken for granted the authority of Congress to require that a person charged with a crime be prohibited from possessing a firearm as a condition of pretrial release.... This all changed with *Heller*... [T]here is no basis for categorically depriving persons who are merely accused of certain crimes of the right to legal possession of a firearm.”¹⁰

Two other cases decided shortly after *Heller* show that changes were afoot in Second Amendment law. On Long Island, New York, a police commissioner revoked a man’s pistol license after his wife died from suicide because the handgun had neither been properly locked nor rendered inoperable in his home. The New York Supreme Court held after *Heller* was decided that “the State of New York and its agencies are no longer in a position to require that a handgun be stored in an inoperable condition or otherwise locked up if it is otherwise legally present in the owner’s dwelling.”¹¹ And in Cleveland, Ohio, an individual was charged with and acquitted of various disorderly conduct offenses. After his acquittal, he demanded to have his handgun, which

the government had seized, returned to him even though the gun was not properly registered to him. Nonetheless, the Court of Appeals in Ohio, citing *Heller*, wrote that the handgun “was not a legally banned handgun, nor was he prohibited from owning or possessing it. . . . This court certainly understands and shares the trial court’s concerns about dangerous guns in our society and the damage and violence they can cause. That does not entitle the city, however, to deprive a person of his private property without due process of law.”¹²

Recent Court Cases

As shown by the above cases, the comment that *Heller* “has not changed much at all” was questionable when written and is gradually proving to be inaccurate, as shown by some recent cases discussed below.

For instance, the Illinois Supreme Court reversed a lower court that had upheld an all-out ban on assault weapons, holding in June 2012 that the definition of assault weapons is unclear. That court ruled that, although some guns may be proscribed by the law, the law is too broad and, as such, infringes upon the peoples’ rights to bear lawful arms.¹³ The court sent the matter back for further proceedings in light of *Heller*, concluding that “[w]ithout a national uniform definition of assault weapons from which to judge these



OTTO[®]
Expect Excellence.

RADIO ACCESSORIES
Superior Quality For Demanding Applications

info@ottoexcellence.com
Toll Free: 888-234-OTTO
www.ottoexcellence.com

Designed, Manufactured and Engineered in the U.S.A. For Over 50 Years

MADE IN U.S.A.

© Copyright 2013 OTTO Engineering, Inc. © OTTO and the OTTO Expect Excellence logo are registered trademarks of OTTO Engineering, Inc. All rights reserved. 2013-06

weapons, it cannot be ascertained at this stage of the proceedings whether these arms with these particular attributes as defined in this Ordinance are well suited for self-defense or sport or would be outweighed completely by the collateral damage resulting from their use, making them 'dangerous and unusual' as articulated in *Heller*.¹⁴

The New Jersey Appellate Division ruled in 2012 for the individual in a case in which the state had argued that the individual failed to safely store his weapons in his studio apartment.¹⁵ A superintendent entered Mr. Blasko's apartment to repair some air-conditioning vents and noticed many weapons strewn across the apartment. The superintendent called the police, who later received a search warrant, following which they seized handguns and a shotgun. The state claimed that it did not have to return the weapons to Blasko after roughly a dozen guns were seized and he was arrested. After the charges were dismissed, Blasko petitioned for the guns' return. The Appellate Court observed that he did not have a mental illness, had no prior criminal record, and was never involved in domestic violence. The state nonetheless claimed that he was not fit to keep the weapons, primarily because he had not properly or safely stored them in his apartment. Blasko countered that the state cannot, under *Heller*, dictate how a person stores his weapons inside his own home. Referring to other cases where the courts have lawfully denied the return of weapons, as, for example, in cases involving habitual drunkenness, domestic violence, or narcotics possession, the appeals court said there was no evidence that Blasko posed a danger. Just owning a significant number of weapons and having them strewn haphazardly in a small studio apartment did not justify the state in refusing to return his weapons.

After the U.S. Supreme Court decided *Heller*, legislatures across the United States revisited their gun laws and, when needed, changed them to address the concerns raised by the court. The all-out ban that was held unconstitutional in *Heller*, for example, was changed within the District of Columbia. However, that prompted another lawsuit from Mr. Heller.¹⁶ This time, he challenged several aspects of the new law, including the gun registration process and assault weapons ban. This time, however, he was only partially successful.

The registration process requires, among other things, fingerprints and photographs for identification; that the registrant show knowledge of the laws of the District of Columbia pertaining to firearms; and that the registrant specify any business he has engaged in within five years, the use of the firearm, where the firearm will be kept, and "any other information that the police department deems necessary to carry out the registration provisions."¹⁷ The district court upheld all of the regulations because the regulations promoted the goals of public safety. The court also held that the ban on assault weapons was reasonable, as it put law enforcement officials at grave risk given their high firepower. The case was dismissed.

Heller appealed to the Court of Appeals, which affirmed the decision in October 2011, but disagreed with a portion of the lower court's ruling as to the law's registration provisions. The Court of Appeals decided that registration of handguns is lawful, but sent the matter back to the District Court for further proceedings on the issue of registration of rifles, saying that "[t]he record supports the view that basic registration of handguns is deeply enough rooted in our history to support the presumption that a registration requirement is constitutional." However, the Court of Appeals said that the record in the case was insufficient to confirm whether the law's registration requirements of rifles were constitutional, in that there must be a "close fit" between the requirements and the government's interests involved. Thus, the Court of Appeals sent the matter back to the lower court for further proceedings to address the constitutionality of the rifle registration process. The assault weapons ban, however, was upheld, because the court held the evidence showed that a ban on assault weapons is likely to promote the government's interest in crime control.¹⁸

**The IACP's
Drug Recognition Expert Section
Presents the**

**19th Annual Training
Conference on Drugs,
Alcohol and Impaired
Driving**

**August 5-7, 2013
Oklahoma City, OK**

In addition to general sessions featuring the latest research and initiatives, daily workshops will address a variety of topics relevant to law enforcement, toxicology, prosecutors, and other traffic safety advocates.

On-line Registration is Open!

***Discount for early
registration ends May 22.***

**Register now at
www.theiacp.org/dreconference**

***For more information and to book
rooms at the hotel group rate, visit
www.decp.org.***

**Those who wish to exhibit products
or services at the conference may
obtain information on corporate
sponsorships by contacting
Carolyn Cockroft at
cockroftc@theiacp.org or
1-800-THE-IACP.**



In Chicago, meanwhile, individuals brought a post-*Heller* challenge of a city ordinance that required one hour of range training as a condition to owning a gun, but also prohibited all firing ranges within the city. The ordinance also prohibited handgun possession outside of the home, at the owner's place of business, or having more than one assembled and operable firearm in the home. The ordinance further had an elaborate registration scheme, including requiring that the gun registrant complete a certified safety course, but at the same time, prohibited all shooting galleries, firearm ranges, or "any other place where firearms are discharged."¹⁹

The lower court denied plaintiffs any relief, finding that they had not shown to have suffered any harm. But the 7th Circuit U.S. Court of Appeals, in a 59-page decision issued in July 2011, found the law unconstitutional. The court said that the right to possess firearms for protection "implies a corresponding right to acquire and maintain proficiency in their use. That right would not mean much without the training and practice that makes it effective."²⁰

In March 2012, a federal court in Massachusetts addressed the question whether "the people" who are bestowed with the constitutional right to bear arms includes a lawful permanent resident in this country. The court said that it does.²¹ And because it does, the court found that the law in Massachusetts was unconstitutional because the law makes an assumption that lawful permanent residents are dangerous and thus not entitled to a gun permit, while American citizens, by contrast, are inherently trustworthy. The court found the assumption lacked a rational basis.

Heller Did Not Affect Certain Basic Principles

As noted above, the court in *Heller* made clear that certain principles established over the years are not impacted by its opinion. Thus, gun registration laws are often still upheld. In addition, in June 2012, the U.S. Court of Appeals for the Second Circuit addressed an issue implicating long-standing sovereignty of the states to enforce their own gun laws. According to that court, *Heller* did not change that aspect of the law. That case concerned Angel Decastro, who argued that he was denied his Second Amendment right to own a gun in New York, even though he purchased it in Florida and knew that taking it into New York was unlawful. Decastro moved from Florida to New York to help run a family business. He requested a handgun application from the New York Police Department but was told by a police officer that, due to a prior arrest in New York, he would not be approved. Decastro then went to Florida and bought two handguns: a Glock 9mm and Taurus PT92. He was licensed to own a gun in Florida. He left the Glock behind in Florida but took the Taurus pistol back to New York where he kept it at the family business for protection. Decastro was later convicted for transporting a weapon from out of state into New York in violation of a federal law that makes it a crime to transport into one's state of

residence a firearm purchased or obtained in another state, other than through a licensed importer, collector, or dealer. In upholding the conviction despite Decastro's Second Amendment argument, the Court of Appeals wrote that "[t]he law prohibits the transportation into one's state of residence of firearms acquired outside the state; but it does nothing to keep someone from purchasing a firearm in her home state, which is presumptively the most convenient place to buy anything. The evident purpose of the statute is to stop circumvention of state laws regulating gun possession; it does so by requiring state residents to comply with conditions of sale and similar requirements in their home state. [The law] does not bar purchases from an out-of-state supplier if the gun is first transferred to a licensed gun dealer in the purchaser's home state. In light of the ample alternative means of acquiring firearms for self-defense purposes, [the law] does not impose a substantial burden on the exercise of Decastro's Second Amendment rights."²²

In the District of Columbia Court of Appeals, the court rejected the defendant's argument that a law prohibiting the carrying of a pistol without a license violated the Second Amendment. The court wrote, in a 2011 decision, that carrying a loaded, concealed weapon without a license can be banned by the government. The defendant's conviction stood, as a conviction for "carrying a concealed pistol without a license . . . did not violate his constitutional right to keep and bear arms."²³ The court observed that *Heller* does not stand for the proposition that concealed weapons laws are unconstitutional.²⁴

The Court of Appeals for the Fourth District in California recently affirmed a conviction of a defendant for violating a law that prohibited the carrying of a concealed dirk or dagger.²⁵ The court there held that the law proscribing the carrying of a concealed dirk or dagger does not run afoul of the Second Amendment because it is narrowly tailored to serve the important governmental interest of preventing exposure to the risk of surprise attacks and does not burden the right to bear arms in self-defense.

States also still have the ability and power post-*Heller* to screen people to ensure that they are fit to own a gun. If a person is found to be unfit to possess a firearm, the government can lawfully deny that person a gun permit. In New Jersey, for example, a man recently challenged a decision made by the local police when it denied him any gun permit or firearm identification.²⁶ He argued that *Heller* compels the state to issue a gun permit under the Second Amendment. The court held an evidentiary hearing, as required under state law, at which time individuals testified regarding the petitioner's fitness to own a gun. The evidence showed that the applicant had compulsive and paranoid behavior. The court came to the same conclusion the police chief did and denied the permit in the interest of public safety. On appeal from that denial, the Appellate Division decided that *Heller* did not impact upon petitioner's constitutional rights because the law in question was not an all-out ban on guns, as was the case in *Heller*. Instead, the Appellate Division ruled that a fair hearing had been held as required by New Jersey law to address petitioner's fitness to own a gun, and the trial court is afforded deference to make factual findings in reaching its conclusion as to a person's individual fitness based upon the specific evidence produced at the hearing.

That deference to a lower court or gun licensing authority, however, is not unlimited. For instance, in New York, James Caputo applied for a home-premises handgun. He was denied the permit from the licensing division because, according to the division, he did not have the required "character and fitness" to own a gun based upon his prior arrests, including a felony conviction a decade earlier. On appeal to the New York State Supreme Court, Caputo argued that, based upon *Heller*, the matter should be remanded to the licensing division for full consideration of all of the evidence bearing upon his individual fitness and character.²⁷ The New York Supreme Court agreed and sent the matter back for further proceedings, stating that the division's decision was "arbitrary," and had been made with "blinders on" without proper consideration of all of the evidence,

including Caputo's honorable service in the Marines and almost five years of service as a New York City police officer.

Conclusion

The U.S. Supreme Court deliberately did not address all of the contours of the Second Amendment in its landmark decision in *Heller*. It observed that, like all constitutional rights, there are limits. There is no constitutional right, for example, to own a machine gun or other dangerous weapon, nor a right to carry a concealed handgun in the streets. However, in cases that are not so readily apparent, courts across the country, state and federal, continue to refine the Second Amendment's boundaries as new cases emerge in different contexts. As a result of *Heller*, individual rights under the Second Amendment continue to develop and are taking shape in the courts at a pace never before seen. The cases show that public safety must now be balanced with the rights of the individual, and, in certain contexts, the scales have tipped in favor of the individual. ♦

Gary M. Fellner is a principal in the law firm of Porzio, Bromberg & Newman P.C. He works principally in the firm's New York City and New Jersey offices. He concentrates his practice in the areas of commercial litigation with an emphasis on employment, leasehold, merger, and agency-related disputes. Mr. Fellner earned his J.D. at New York Law School, cum laude, and is admitted to practice in New Jersey, New York, United States District Courts for the Eastern and Southern Districts of New York and the District of New Jersey, the United States Tax Court, the United States Court of Appeals for the Second Circuit, and the United States Supreme Court.

Notes:

¹"Gun Range to Let Shooters Take Shots, and Knock Them Back, Too," MSN.com, September 21, 2012, <http://now.msn.com/gun-range-to-sell-alcohol> (accessed January 29, 2013).

²"National Instant Criminal Background Check System," FBI, <http://www.fbi.gov/about-us/cjis/nics> (accessed January 29, 2013). In 2011, 16,454,951 background checks were submitted to the National Instant Criminal Background Check Systems Operation. Of these, 6,875,625 transactions were processed by the NICS Section and the remaining 9,579,326 transactions were processed by state users. FBI, *National Instant Criminal Background Check System (NICS) Operations, 2011*, annual report, ii, <http://www.fbi.gov/about-us/cjis/nics/reports/2011-operations-report/operations-report-2011> (accessed January 30, 2013).

³*District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783 (2008).

⁴U.S. Const. amend. II; see "Second Amendment," Legal Information Institute, Cornell University Law School, http://www.law.cornell.edu/constitution/second_amendment (accessed January 29, 2013).

⁵Two years later, the U.S. Supreme Court held that the Second Amendment's right to bear arms is applicable to the states under the 14th Amendment. *McDonald v. City of Chicago*, 561 U.S. ____ ,130 S. Ct. 3020 (2010).

⁶*Heller*, 554 U.S. at 592, 128 S. Ct. at 2797.

⁷*Id.* at 2816-17.

⁸*Id.* at 2817, quoting William Blackstone, *Commentaries on the Laws of England*, 4 vols. (1765-1769).

⁹Adam Liptak, "Few Ripples from Supreme Court Ruling on Guns," *New York Times*, March 16, 2009, <http://www.nytimes.com/2009/03/17/us/17bar.html> (accessed January 29, 2013).

¹⁰*United States v. Arzberger*, 08 CR. 894 (AKH) (S.D.N.Y. 2008), Document 15 on ECF.

¹¹*Colaiacovo v. Dormer*, Index No. 08-020230 (New York Sup. Ct., Suffolk Co. 2008), https://www.nysrpa.org/files/colaiacovo_v_dormer.pdf (accessed January 29, 2013). See also *Matter of Tessler*, 2012 N.Y. Misc. LEXIS 4841 (New York Sup. Ct. 2012). New York City Administrative Code that makes it a crime to store or leave a weapon in such a manner that it is "out of the owner's immediate possession or control without having rendered such weapon inoperable by employing a safety locking device"

is unconstitutional to the extent that the law requires a firearm be kept inoperable in the home at all times (*Id.* at *29).

¹²*Cleveland v. Fulton*, 898 N.E.2d 983, 989 (Ct. of App. 2008).

¹³*Wilson v. County of Cook*, 360 Ill. Dec. 148 (2012).

¹⁴*Id.*

¹⁵*In Re Application of Blasko*, 2012 N.J. Super. Unpub. LEXIS 1466 (App. Div. 2012).

¹⁶See *Heller v. District of Columbia*, 698 F. Supp. 2d 179 (D. Col. 2010).

¹⁷The entire registration process is contained in §§ 7-2501.01 *et seq.* of the D.C. Code.

¹⁸670 F.3d at 1263.

¹⁹*Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011).

²⁰*Id.* at 704.

²¹*Fletcher v. Haas*, 851 F. Supp. 2d 287 (D. Mass. 2012).

²²*United States v. Decastro*, 682 F.3d 160, 168 (2d Cir. 2012). The United States Court of Appeals, Second Circuit, also recently held in *United States v. Zaleski*, 2012 U.S. App. LEXIS 14341 (2d Cir. 2012), that the defendant's conviction of possessing various machine guns, resulting in a jail sentence of 101 months, was valid. Even though the defendant was a member of a militia in Connecticut, the Second Amendment does not protect an individual in possession of machine guns. It only extends to weapons typically possessed "by law abiding citizens for lawful purposes."

²³*Gamble v. United States*, 30 A.3d 161, 164 (D.C. Ct. of App. 2011).

²⁴*Id.*

²⁵*People v. Mitchell*, 2012 Calif. App. LEXIS 1064 (Ct. of App. Fourth Dist. 2012).

²⁶*Matter of Dubov*, 2012 N.J. Super. Unpub. LEXIS 1957 (App. Div. 2012).

²⁷*Matter of Caputo*, 2011 N.Y. Misc. LEXIS 251 (New York Co. Sup. Ct. 2011).