

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

MICHAEL ELBERY,	)	
Plaintiff	)	
	)	
v.	)	CIVIL ACTION NO.
	)	98-CV-10163-MLW
ROBERT SHEKETOFF,	)	
KIMBERLY HOMAN and	)	
SHEKETOFF & HOMAN,	)	
Defendants	)	

and

MICHAEL ELBERY,	)	
Plaintiff	)	
	)	
v.	)	CIVIL ACTION NO.
	)	97-CV-11743-MLW
DANIEL SKLUT, JAMES CARLIN,	)	
STEPHEN FAUCHER, CARL HANSON,	)	
CHESTER JOHNSON, JAMES HURLEY,	)	
WAYNE SAMPSON, ROBERT MCGINLEY,	)	
and THE TOWN OF SHREWSBURY	)	
Defendants	)	

**SHEKETOFF DEFENDANTS' STATEMENT OF  
UNDISPUTED MATERIAL FACTS IN SUPPORT  
OF THEIR MOTION FOR SUMMARY JUDGMENT**

Pursuant to L.R. 56.1, defendants Robert Sheketoff, Kimberly Homan and Sheketoff & Homan (collectively, the "Sheketoff Defendants"), hereby submit the following statement of undisputed material facts in support of their motion for summary judgment.

### **UNDISPUTED MATERIAL FACTS<sup>1</sup>**

#### **Elbery's Firearms Licenses and 1993 Intent To Maim Conviction**

1. In or around 1982 or 1983, Michael Elbery ("Elbery") applied for and received a firearms identification card ("FID card")<sup>2</sup> from the Shrewsbury Police Department. Elbery Dep. 10-14, Exhibit A.<sup>3</sup>
2. In or about 1984, Elbery applied to the Town of Shrewsbury for a license to carry firearms.<sup>4</sup> Elbery's request was denied. Around the same time, Elbery applied to the City of Worcester for a license to carry firearms. Elbery Dep. 14-16. This request was allowed and the City of Worcester issued Elbery a license to carry.
3. During the time period from 1985 through 1992, Elbery was arrested on over a dozen criminal charges by the Shrewsbury and Worcester police. See Complaint-Amended, Exhibit B ¶ 12.

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<sup>1</sup> The facts set forth in this statement are undisputed for the purposes of this motion only. The Sheketoff Defendants dispute several of the facts in this statement; however, for the purposes of this motion, the Court may assume that Elbery's account of the facts is correct. The Sheketoff Defendants do not intend to waive their right to contest Elbery's assertions, and they expressly reserve the right to contest any or all of the facts set forth in this statement at a trial of this matter.

<sup>2</sup> As will be discussed in greater detail, an FID card is a license issued by the Commonwealth of Massachusetts which, generally speaking, entitles an individual to possess firearms. G.L. c. 140, §§129B and 129C, Exhibit C.

<sup>3</sup> Unless otherwise specified, all Exhibits are attached to the Doniger Affidavit.

<sup>4</sup> A license to carry firearms, generally speaking, is a separate license which entitles an individual to transport firearms or to possess them away from his or her residence or place of business. G.L. c. 140, § 131, Exhibit D.

Re: Michael Elbery v. Sheketoff, et al.  
Michael Elbery v. Daniel Sklut  
Statement of Undisputed Facts

3

4. On February 28, 1990, Elbery was arrested by the Shrewsbury Police Department on an outstanding warrant for assault and battery with a dangerous weapon. The Shrewsbury Police Department sent a letter to the Worcester Police Department, advising that Elbery had been arrested and that he was carrying a loaded 9mm pistol at the time of the arrest. Elbery Dep. 18; Letter from McGinley to Coakley of 2/28/90, Exhibit E.

5. Subsequently, on March 20, 1990, the Worcester Police Department sent a letter to Elbery revoking his license to carry firearms. Letter from Coakley to Elbery of 3/20/90, Exhibit F. The Worcester Police Department also sent a letter to Elbery in 1990 ordering him to surrender his firearms. Elbery Dep. 24-26.

6. Despite receiving the correspondence from the Worcester Police Department, Elbery did not turn in his firearms. He did not do so because he still had a valid FID card issued by the Shrewsbury Police Department. Apparently, the Worcester Police did not pursue the matter further. Elbery Dep. 26, 36-37.

7. Elbery continued to possess several handguns, including a Glock pistol and a Smith & Wesson .38 Special. He also continued to possess several rifles, including an AK-47, an Uzi, a Remington AR-15, and a shotgun. Elbery Dep. 36-40.

8. On September 29, 1992, Elbery was involved in a fight outside a bar called "The Winners' Circle" on Shrewsbury Street in Worcester. Elbery was subsequently prosecuted for attempting to put out the eye of Thomas King, an off-duty Westborough police officer. Elbery Dep. 170-173.

Re: Michael Elbery v. Sheketoff, et al.  
Michael Elbery v. Daniel Sklut  
Statement of Undisputed Facts

4

9. On July 2, 1993, a Worcester County jury found Elbery guilty of assault, disorderly conduct, and assault with intent to maim. Elbery was sentenced to probation for the disorderly person and assault convictions. He was sentenced to 10 years in MCI Concord for the assault with intent to maim conviction. Docket No. WOCR1993-00135, Exhibit G, p. 3-4.

10. On or about July 15, 1993, Elbery's defense attorney filed a motion to stay the 10-year sentence pending appeal of his intent to maim conviction. The motion to stay was granted, and Elbery was released from custody on \$7,500 bail. *Id.* p. 4; Elbery Dep. 173-175, 187-188.

11. In or about March 1994, Elbery retained Attorney Robert Sheketoff to pursue the appeal of his 1993 disorderly person, assault, and assault with intent to maim convictions. Sheketoff Aff. ¶ 4.

12. Attorney Sheketoff was admitted to the Massachusetts bar in 1976. He has represented criminal defendants for over 24 years. During that time, he has represented hundreds of defendants in connection with criminal charges in state and federal court. Sheketoff Aff. ¶ 2.

13. Attorney Sheketoff has represented numerous defendants who were charged with firearms violations under G.L. c. 269, the Massachusetts statute governing firearms. Attorney Sheketoff is familiar with the standard of care generally applicable to criminal defense attorneys in Massachusetts. He is also familiar with the standard of care applicable to criminal defense attorneys when they represent defendants in connection with firearms charges under G.L. c. 269. Sheketoff Aff. ¶ 3.

**The 1994 Firearms Charges Against Elbery**

14. At some point prior to August 1994, Elbery leased a storage unit at E-Z Mini Storage, located on Route 9 in Shrewsbury. Elbery Dep. 55-56.

15. Elbery stored in the unit "... a vintage 1990 ZR Corvette Stingray made by the Chevrolet Company." Elbery Dep. 58. He also stored there various firearms and ammunition, which he owned, including a Remington 870 12-gauge shotgun, an AK-47, an Uzi 9-mm pistol, and a .22 caliber Beretta semi-automatic pistol. Elbery Dep. 58-64. Some of the guns were in the Corvette. Elbery Dep. 65, 67.

16. On August 4, 1994, there was a large fire at the E-Z Mini Storage facility. Elbery Dep. 47.

17. In the early morning hours of August 5, 1994, Elbery received a telephone call from the Shrewsbury Police Department to come down to E-Z Mini Storage and claim his belongings. Elbery Dep. 104.

18. Elbery first arrived at the E-Z Mini Storage office, where he spoke to Officer James Hurley. Officer Hurley and Elbery discussed the fact that there were guns in the storage bin and that Elbery had a prior felony conviction. Elbery Dep. 104-108; Hurley Dep. 34-35. Elbery also spoke with Officer Chester Johnson, who was conducting the arson investigation. Officer Johnson allowed Elbery access to the storage unit to check his belongings. Elbery Dep. 130-136.

Re: Michael Elbery v. Sheketoff, et al.  
Michael Elbery v. Daniel Sklut  
Statement of Undisputed Facts

6

19. Later in the day, the police showed Elbery a search warrant. At some point thereafter, the police arrested Elbery and took him into custody on firearms charges. Elbery Dep. 136-39.

20. In or about the time that he was arrested, Elbery retained Attorney Sheketoff to represent him. The terms of the agreement were that Elbery would pay Attorney Sheketoff \$5,000.00 and, in return, Attorney Sheketoff would defend Elbery against the firearms charges. Elbery Dep. 238; Sheketoff Aff. ¶ 5.

21. On August 8, 1994, a formal complaint was filed against Elbery in Westborough District Court charging him with one count of illegally "carrying" a firearm <sup>5</sup> and five counts of illegally possessing firearms:

[Count 1]: [Elbery] did knowingly have in his or her possession, or under his or her control in a vehicle, a loaded or unloaded firearm, as defined in G.L. c. 140, § 121, said defendant not then being present in or on his residence or place of business, and not having in effect a license to carry firearms or being authorized to do so, in violation of G.L. c. 269, § 10(a);

[Counts 2-6]: [Elbery] did own, possess or transfer possession of a firearm, rifle, shotgun or ammunition [sic] without complying with the requirements relating to

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<sup>5</sup> A violation of G.L. c. 269, § 10(a) is known colloquially as criminally "carrying" a firearm, while a violation of G.L. c. 269, § 10(h) is known colloquially as criminally "possessing" as firearm. This distinction is based upon the prior language of Section 10(a), which contained an express prohibition against "carrying" firearms without a license to do so. As discussed in greater detail in paragraphs 36 through 38 of this statement, Section 10(a) was amended in 1990. The express reference to "carrying" was removed and replaced with new language prohibiting possessing or controlling a firearm under certain circumstances. Although a violation of Section 10(a) continues to be referred to as a "carrying" violation, the statute no longer expressly requires "carrying" on the part of the defendant.

Re: Michael Elbery v. Sheketoff, et al.  
Michael Elbery v. Daniel Sklut  
Statement of Undisputed Facts

7

the firearms identification card, as provided for in G.L. c. 140, §129C, in violation of G.L. c. 269, §10(h).

Complaint, Exhibit H.

22. Elbery was arraigned in Westborough District Court that day on the firearms charges. Bail was set at \$5,000. Elbery did not make bail, and he remained in custody.

Sheketoff Aff. ¶ 6; Docket No. 9467 CR 1900, Exhibit I.

**The Stay Is Vacated On Elbery's Intent To Maim Conviction**

23. On August 8, 1995, Judge Toomey revoked Elbery's prior bail on the assault with intent to maim conviction and set the matter for a hearing regarding the stay of execution he had previously granted. Docket No. WOCR1993-00135, Exhibit G, p. 4.

24. On August 10, 1994, a hearing was held in Worcester Superior Court on a motion by the Commonwealth to vacate the stay of the 10-year sentence on the intent to maim conviction. Assistant District Attorney Michael Ball represented the Commonwealth at the hearing. Hearing Transcript dated August 10, 1995, Exhibit J.

25. Prior to the hearing, Attorney Sheketoff met with Elbery's wife outside of the Courthouse. Elbery's wife showed Attorney Sheketoff Elbery's FID card. However, she refused to give it to him. Sheketoff Aff. ¶ 8.

26. During the hearing, Attorney Sheketoff verbally informed Judge Toomey that Elbery had a valid FID card. Attorney Sheketoff requested that the Court deny the Commonwealth's motion to vacate and instead reinstate bail at a very high amount. Hearing Transcript dated August 10, 1995, Exhibit J, p. 12.

Re: Michael Elbery v. Sheketoff, et al.  
Michael Elbery v. Daniel Sklut  
Statement of Undisputed Facts

8

27. Despite Attorney Sheketoff's efforts, Judge Toomey granted the Commonwealth's motion to vacate the stay. Elbery was remanded to MCI Concord. Id. p. 12-13.

**Sheketoff's Representation Of Elbery In Connection With The Firearms Charges**

28. On September 9, 1994, Attorney Sheketoff attended a pre-trial conference on the firearms charges at Westborough District Court. Assistant District Attorney John Revelli represented the Commonwealth at the pre-trial conference. Sheketoff Aff. ¶ 9.

29. During the conference, Attorney Sheketoff advised that Elbery intended to defend the charges, in part, based upon a license. He also requested that the Commonwealth provide its file on Elbery's firearms licenses and their alleged revocation. The Commonwealth agreed to produce these documents. Sheketoff Aff. ¶ 10; Pre-Trial Conference Report, Exhibit K.

30. On or about September 19, 1994, Sheketoff filed a motion to suppress evidence of the firearms on the grounds that the searches of Elbery's storage container by the Shrewsbury Police Department were without a warrant, probable cause, or other justification in violation of the Fourth and Fourteenth Amendments to the United States Constitution and Article Fourteen of the Massachusetts Constitution. See Motion to Suppress, Exhibit L.

31. On October 21, 1994, Attorney Sheketoff attended an evidentiary hearing on the motion to suppress at Westborough District Court. Assistant District Attorney Revelli again appeared for the Commonwealth. At the end of the hearing, the Court requested that the parties submit post-hearing briefs. Transcript of hearing dated October 21, 1994, Exhibit M.

32. On October 26, 1994, Attorney Sheketoff filed a post-hearing memorandum on behalf of Elbery. He also filed an amended motion to suppress. As part of his amended motion,



Re: Michael Elbery v. Sheketoff, et al.  
Michael Elbery v. Daniel Sklut  
Statement of Undisputed Facts

9

Attorney Sheketoff submitted an affidavit stating that he had seen Elbery's FID card and that the Commonwealth had failed to produce any evidence that it had been revoked. Amended motion to suppress, Exhibit N; Post-hearing memorandum, Exhibit O. X

33. On November 21, 1994, Westborough District Court (McCann, J., presiding) denied Elbery's motion to suppress. On December 7, 1994, Judge McCann issued his findings. Order dated November 21, 1994, Exhibit P; Findings, Exhibit Q.

### **The Motion To Dismiss The Firearms Charges**

34. At various times during Sheketoff's representation of Elbery in connection with the firearms charges, Elbery requested that Sheketoff pursue a motion to dismiss the firearms charges against him on the grounds that Elbery had a valid FID card at the time of his arrest. Sheketoff Aff. ¶ 14.

35. Attorney Sheketoff considered Elbery's request and whether it would enable Elbery to obtain a dismissal of the firearms charges under G.L. c. 269, § 10(h) and G.L. c. 269, § 10(a) in light of a recent change in the "carrying" statute, G.L. c. 269, § 10(a). Sheketoff Aff. ¶ 14.

36. Previously, G.L. c. 269, § 10(a) stated:

Whoever, except as provided by law, carries on his person, or carries on his person or under his control in a vehicle, a firearm, loaded or unloaded, as defined in section one hundred and twenty-one of chapter one hundred and forty without either:

(1) having in effect a license to carry firearms issues under section one hundred and thirty-one of chapter one hundred and forty; or

(2) having in effect a license to carry firearms issues under section one hundred and thirty-one F of chapter one hundred and forty;

\* \* \*

shall be punished by imprisonment in the state prison for not less than two and one-half nor more than five years, or for not less than one year nor more than two and one-half years in a jail or house of correction. . . .

G.L. c. 269, § 10(a) (West 1990) (emphasis added), Exhibit R.

37. Attorney Sheketoff was aware that decisions interpreting this version of the statute, which expressly referenced “carrying,” had held that the term “carrying” implied movement on the part of the defendant. Sheketoff Aff. ¶ 16.

38. In 1990, the Massachusetts Legislature amended G.L. c. 269, § 10 so that Paragraph (a) stated:

(a) Whoever, except as provided or exempted by statute, knowingly has in his possession; or knowingly has under his control in a vehicle; a firearm, loaded or unloaded, as defined in section one hundred and twenty-one of chapter one hundred and forty without either:

(1) being present in or on his residence or place of business; or

(2) having in effect a license to carry firearms issues under section one hundred and thirty-one of chapter one hundred and forty; or

(3) having in effect a license to carry firearms issues under section one hundred and thirty-one F of chapter one hundred and forty;

\* \* \*

shall be punished by imprisonment in the state prison for not less than two and one-half nor more than five years, or for not less than one year nor more than two and one-half years in a jail or house of correction. . . .

G.L. c. 269, § 10(a) (West 1990 as amended), Exhibit S.

Re: Michael Elbery v. Sheketoff, et al.  
Michael Elbery v. Daniel Sklut  
Statement of Undisputed Facts

11

39. In 1994, there were very few cases interpreting the amended statute, and no cases applying it in circumstances similar to the charges against Elbery. Sheketoff Aff. ¶ 18.

40. Attorney Sheketoff advised Elbery that a valid FID card was a defense to the charges under G.L. c. 269, § 10(h). He also advised Elbery that because the amended statute expressly required a license to carry, his FID card would not be a defense to the charge under G.L. c. 269, § 10(a). Sheketoff Aff. ¶ 19.

41. Elbery insisted that he could not be guilty of a violation of G.L. c. 269, § 10(a) because he did not have a handgun on him or in a car he was driving. Sheketoff Aff. ¶ 20.

42. Sheketoff acknowledged the prior decisions equating “carrying” with movement; however, he told Elbery that the 1990 amendments to the statute had removed all reference to the term “carrying” in defining the prohibited conduct. Sheketoff Aff. ¶ 21.

43. Attorney Sheketoff advised Elbery that the plain language of the amended statute did not require a defendant to be “carrying,” or that the defendant have the firearm on his person. Under the plain language of the amended statute, the Commonwealth had only to prove that Elbery had a firearm in his possession away from his residence or business, or a firearm under his control in an automobile away from his residence or business. Possession in Massachusetts includes constructive possession. Sheketoff Aff. ¶ 22.

44. Sheketoff advised Elbery that the Commonwealth could argue that Elbery had violated the statute because he had a firearm in or under his control in an automobile at the storage facility, which was not his business or home. Attorney Sheketoff advised Elbery that

Re: Michael Elbery v. Sheketoff, et al.  
Michael Elbery v. Daniel Sklut  
Statement of Undisputed Facts

12

because all reference to a defendant "carrying" a firearm on his person had been removed from the statute, the Commonwealth would have a real argument and that his conduct violated G.L. c. 269, § 10(a). Sheketoff Aff. ¶ 23.

45. Attorney Sheketoff was aware that even if a motion to dismiss the firearms charges were successful, Judge Toomey could still refuse to reinstate the stay on Elbery's 10-year sentence for the intent to maim conviction. A stay is entirely within the discretion of the judge. Because Elbery had been arrested with numerous firearms, it was unlikely that Judge Toomey would have reinstated the stay, even if the firearms charges were dismissed. Sheketoff Aff. ¶ 38.

46. Attorney Sheketoff was also particularly concerned that if he filed a formal motion to dismiss, it might prompt the Worcester County District Attorney's office to refer Elbery for federal prosecution. Under 18 U.S.C., § 922, it would be a violation for a convicted felon such as Elbery to possess a firearm or to receive a firearm that was in or affected interstate commerce. Sheketoff Aff. ¶ 24.

47. Attorney Sheketoff had a prior experience where the Worcester County District Attorney's office worked with the Bureau of Alcohol, Tobacco & Firearms. In that case, the Worcester County District Attorney's office offered a what appeared to be an attractive plea bargain on state firearms charges, which the defendant accepted. Attorney Sheketoff did not represent the defendant in that case. Sheketoff Aff. ¶ 25.

48. Subsequently, Attorney Sheketoff represented the defendant on federal firearms charges which were instituted by the ATF after the state prosecution. The federal prosecution

Re: Michael Elbery v. Sheketoff, et al.  
Michael Elbery v. Daniel Sklut  
Statement of Undisputed Facts

13

was based, in part, upon the defendant's plea in the state prosecution. While defending the federal prosecution, Attorney Sheketoff learned that the Assistant District Attorney who offered the plea bargain had knowledge of the ATF's involvement at the time that he made the offer.

Sheketoff Aff. ¶ 26.

49. It has been Attorney Sheketoff's experience that the Assistant District Attorneys who represent the Commonwealth in jury of six trials in the District Court are generally less experienced and legally sophisticated than other Assistant District Attorneys, such as those who represent the Commonwealth in the Superior Court or on appeals. Sheketoff Aff. ¶ 27.

50. Attorney Sheketoff was concerned that if he filed a formal motion to dismiss based upon the FID card, it would highlight the legal issues with respect to a license to carry and an FID card for the Assistant District Attorney who was handling the case against Elbery in the District Court. Attorney Sheketoff was concerned that the Assistant District Attorney might seek advice from an Assistant District Attorney from the Superior Court or from the Appeals Division, and that he would be better prepared for trial. He might also receive a suggestion to refer Elbery for federal prosecution. Sheketoff Aff. ¶ 28.

51. Attorney Sheketoff concluded that it would not be in Elbery's best interest to file a motion to dismiss. Attorney Sheketoff decided that it would be better to proceed to trial before a jury of six in the District Court. He planned to defend the charges under G.L. c. 269, § 10(h) on the grounds that Elbery had a valid FID card. He planned to defend the charge under G.L. c. 269, § 10(a) on the theory that the storage unit, which was used to store personal property

solely because Elbery did not have enough space in his apartment, was the functional equivalent of a residence and, therefore, the statute was inapplicable. Sheketoff Aff. ¶ 29.

52. It was Attorney Sheketoff's hope that he could raise these issues in a motion for a required finding of not guilty once the Commonwealth had presented its case, or that he would be able to convince the Assistant District Attorney or a busy trial judge that the Commonwealth could not prove its case. Sheketoff Aff. ¶ 30.

53. Attorney Sheketoff told Elbery that he would not file a motion to dismiss. He also informed Elbery that if Elbery disagreed with him, he could seek new counsel. Sheketoff Aff. ¶ 31.

54. Elbery fought with Attorney Sheketoff over the motion to dismiss, but he did not seek new counsel at that time. Elbery knew that he could fire Attorney Sheketoff at any time and he had the funds to hire a new lawyer. Sheketoff Aff. ¶ 32; Elbery Dep. 279, 321.

#### **Sheketoff's Good Faith in Defending Elbery**

55. During the course of Attorney Sheketoff's representation of Elbery, the Worcester County District Attorney's office offered Elbery a plea agreement of one year for each of the firearms charges with sentences to run concurrently. Attorney Sheketoff communicated this offer to Elbery, who immediately refused it. Sheketoff Aff. ¶ 33.

56. At no time during Attorney Sheketoff's representation of Elbery did the Worcester County District Attorney's office offer to dismiss the charges against Elbery. Sheketoff Aff. ¶ 34.

Re: Michael Elbery v. Sheketoff, et al.  
Michael Elbery v. Daniel Sklut  
Statement of Undisputed Facts

15

57. At all times, Attorney Sheketoff attempted, in good faith, to defend Elbery on the firearms charges against him. Sheketoff Aff. ¶ 35.

58. Attorney Sheketoff complied with the standard of care applicable to criminal defense attorneys defending a client under the circumstances surrounding the firearms charges against Elbery. Sheketoff Aff. ¶ 36.

59. It was unlikely that a motion to dismiss the firearms charges would have succeeded, because an FID card is not a defense to a charge under G.L. c. 269, § 10(a). Sheketoff Aff. ¶ 37.

60. Even if a motion to dismiss had succeeded, Judge Toomey probably would have refused to reinstate the stay of execution on Elbery's 10-year sentence for the intent to maim conviction. The stay was discretionary, and Elbery had been arrested for a large number of firearms. Sheketoff Aff. ¶ 38.

61. At no time did Attorney Sheketoff communicate with or form an agreement with any member of the Worcester County District Attorney's Office to keep Elbery in jail, to deprive him of his constitutional rights, to cover up an allegedly illegal search and seizure, or to deprive him of access to the courts in connection with the firearms charges. Sheketoff Aff. ¶ 39.

62. At no point did Attorney Sheketoff communicate with or form an agreement with any member of the Shrewsbury Police Department to put or keep Elbery in jail, to deprive him of his constitutional rights, to cover up an allegedly illegal search and seizure, or to deprive him of access to the courts. Attorney Sheketoff does not know any members of the Shrewsbury Police Department, nor do they know him. Sheketoff Aff. ¶ 40; Sklut Dep. 22; Carlin Dep. 10; Faucher

Re: Michael Elbery v. Sheketoff, et al.  
Michael Elbery v. Daniel Sklut  
Statement of Undisputed Facts

16

Dep. 14; Hanson Dep. 12; Johnson Dep. 21; Sampson Dep. 12; Coates Dep. 38 (collectively Exhibit T).

**Elbery's Termination of Sheketoff's Services In Connection  
With The Firearms Charges And The Commonwealth's New Offer**

63. On December 14, 1994, Judge McCann scheduled a trial on the firearms charges for January 18, 1995 in Worcester District Court. Pre-trial Conference Report, Exhibit K.

64. At the request of the Worcester County District Attorney's office, the trial on the firearms charges was subsequently continued until April 3, 1995. Sheketoff Aff. ¶ 41.

65. In or about March of 1995, Elbery discharged Attorney Sheketoff from representing him on the firearms possession and carrying charges. Elbery Dep. 151-152.

66. However, Elbery continued to allow Attorney Sheketoff to represent him on the appeal of the assault, disorderly conduct, and intent to maim convictions. Sheketoff continued to represent Elbery into 1996 on that matter. Elbery Dep. 152-154.

67. Elbery retained Attorney Kenneth Brekka to represent him on the firearms charges. Sheketoff Aff. ¶ 43.

68. Subsequently, Attorney Ludwig from the Worcester County District Attorney's Office offered to dismiss the charges against Elbery. Elbery refused to agree to a dismissal of the charges. Elbery knew that he would not be able to sue the Shrewsbury police if he agreed to dismiss the charges. Therefore, he remained incarcerated so that he could proceed to trial. Elbery Dep. 157-158.



Re: Michael Elbery v. Sheketoff, et al.  
Michael Elbery v. Daniel Sklut  
Statement of Undisputed Facts

17

69. On or about April 3, 1995, a trial was held in Worcester District Court on the possession and carrying charges. No one appeared on behalf of the Commonwealth and, accordingly, Elbery was found not guilty on the gun charges. Elbery Dep. 177-178.

**Elbery Sues Attorney Sheketoff And  
The Shrewsbury Police Department**

70. On or about January 18, 1998, Elbery filed the instant lawsuit against Attorney Sheketoff and various members of the Shrewsbury Police Department. Complaint-Amended, Exhibit B.

71. In Counts I, II, III, IV and VII of his complaint, Elbery seeks recovery against the Sheketoff Defendants under 42 U.S.C., §1983 on the theory that Attorney Sheketoff conspired with the Shrewsbury Police and Worcester County District Attorney's Office to imprison and convict him. See generally Complaint-Amended.

72. In Count V of his complaint, Elbery seeks recovery against the Sheketoff Defendants on the theory that Attorney Sheketoff committed legal malpractice in defending Elbery in connection with the firearms charges. Complaint-Amended, Count V.

73. In Count VI of his complaint, Elbery seeks recovery against the Sheketoff Defendants on the theory that Attorney Sheketoff intentionally inflicted emotional distress upon him. Complaint-Amended, Count VI.

74. In Count VIII of his complaint, Elbery seeks recovery against the Sheketoff Defendants on the theory that Attorney Sheketoff made fraudulent misrepresentations to him. Complaint-Amended, Count VIII.

Re: Michael Elbery v. Sheketoff, et al.  
Michael Elbery v. Daniel Sklut  
Statement of Undisputed Facts

18

75. In Count IX of his complaint, Elbery seeks recovery against the Sheketoff Defendants on the theories of breach of contract, fiduciary breach, and constructive fraud. Complaint-Amended, Count IX.

76. During his deposition, Elbery either refused or was unable to articulate a factual basis to support his conspiracy claims. Elbery Dep. 193-199, 205-212.

77. Elbery testified that Attorney Sheketoff fraudulently misrepresented that: (1) Elbery was guilty of the carrying charge (i.e., violation of M.G.L. c. 269, §10(a)), and (2) that Elbery should plead guilty. Elbery Dep. 234-235.

78. However, Elbery never agreed with Attorney Sheketoff's interpretation of G.L. c. 269, § 10(a). Elbery Dep. 279-281. Elbery is not an attorney, nevertheless he understood the gun laws. Elbery Dep. 28, 35. Indeed, Elbery claims that he is "one of the greatest legal minds in the United States of America." Elbery Dep. 211.

79. Elbery never pleaded guilty as a result of Attorney Sheketoff's alleged misrepresentations. Instead, he hired a different lawyer and decided to face trial on the charges. Elbery Dep. 235, 237.

80. On August 3, 1999, the Sheketoff Defendants served a second set of interrogatories upon Elbery. Interrogatory No. 5 required Elbery to disclose the identity of any expert witnesses he expects to call at trial, the subject matter upon which any such expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, and the grounds for each such opinion. Defendant's Second Set of Interrogatories, Exhibit U.

81. As of September 13, 1999, Elbery had failed to answer the second set of interrogatories. The Sheketoff defendants filed a motion to compel Elbery to provide answers to the second set of interrogatories. On September 29, 1999, the Court (Bowler, U.S.M.J.) granted the Sheketoff Defendants' motion to compel and ordered Elbery to provide answers to the second set of interrogatories by October 13, 1999. Order, Exhibit V.

82. On October 4, 1999, Elbery served his answers to the second set of interrogatories. Answer No. 5 identified Attorney Karen MacNutt as Elbery's expert witness. It further stated that:

The substance of the expert opinion will be that [Attorney Sheketoff] was bad. That [Attorney Sheketoff] should have alerted the presiding judges on the 8/5/94 [Shrewsbury Police Department] gun charges against me that I had an FID on 8/5/94. That [Attorney Sheketoff] should have investigated the FID card and presented the court proof of my FID card. That FID card evidence is readily available.

Plaintiff's Response to Defendant's Second Set of Interrogatories, Exhibit W.

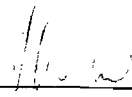
83. However, Elbery has never retained Attorney MacNutt to serve as his expert. Attorney MacNutt did not assist Elbery in preparing Plaintiff's Response to Defendant's Second Set of Interrogatories, including Answer No. 5. MacNutt Aff. ¶ 4-5.

Re: Michael Elbery v. Sheketoff, et al.  
Michael Elbery v. Daniel Sklut  
Statement of Undisputed Facts

20

Respectfully submitted,  
ROBERT SHEKETOFF, KIMBERLY HOMAN, and  
SHEKETOFF & HOMAN  
By their Attorneys,  
SUGARMAN, ROGERS, BARSHAK & COHEN, P.C.

By:

  
\_\_\_\_\_  
Anthony M. Doniger, BBO #129420  
John G. O'Neill, BBO #630272  
101 Merrimac Street, 9th Floor  
Boston, MA 02114  
(617) 227-3030

Dated: October 27, 2000

CERTIFICATE OF SERVICE

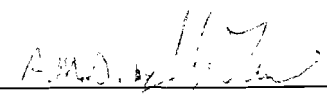
I, Anthony M. Doniger, attorney for the defendants, Robert Sheketoff, Kimberly Homan and Sheketoff & Homan, hereby certify that on this 27 day of October 2000, I served the within Sheketoff Defendants' Statement of Undisputed Material Facts Pursuant to L.R. 56.1 upon the other parties to this litigation by causing copies thereof to be sent by first-class mail, postage pre-paid to:

Michael Elbery  
P.O. Box 9106  
M.C.I. Concord  
Concord, MA 01742

Gerald Fabiano, Esquire  
Pierce, Davis & Perritano, LLP  
Ten Winthrop Square  
Boston, MA 02110

Michael Elbery  
168 Fairfield Street  
Needham, MA 02192

and to all counsel of record in the consolidated cases.

  
\_\_\_\_\_  
Anthony M. Doniger