

**Matter of Spahitz v Zambelli**

2006 NY Slip Op 30181(U)

March 8, 2006

Supreme Court, Westchester County

Docket Number: 0022516/2005

Judge: Jonathan Lippman

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right (CPLR 5513(a)), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

**FILED**  
AND  
**ENTERED**  
ON March 8<sup>th</sup> 2006  
**WESTCHESTER**  
**COUNTY CLERK**

-----X  
In the Matter of the Denial of the Amendment Pistol  
Application of STEVEN SPAHITZ,

DECISION/ORDER

Petitioner,

Index No. 22516/05

- against -

BARBARA GUNTHER ZAMBELLI, as Judge of the County  
Court, Westchester County,

Respondent.

**RECEIVED**

MAR 8 2006

TIMOTHY C. IDONI  
COUNTY CLERK  
COUNTY OF WESTCHESTER

-----X  
LIPPMAN, J.,

The following papers number 1 to 10 were read on this motion by respondent to dismiss this CPLR Article 78 proceeding for lack of subject matter jurisdiction:

PAPERS

NUMBERED

Order to Show Cause, Petition, Exhibits A-E	1-7
Notice of Motion to Dismiss	8
Affirmation of Wanda Perez-Maldonado, Esq.	9
Affirmation of John S. Chambers, Esq. In Opposition <sup>1</sup>	10

Upon the foregoing papers, it is ordered that the petition is dismissed.

<sup>1</sup>Petitioner's opposition to the instant motion is arguably late. Thus, the Order to Show Cause required petitioner to file his reply to respondent's answering papers no later than January 26, 2006. While respondent moved to dismiss, rather than answer the petition, the schedule set forth in the Order to Show Cause should control and petitioner's opposition to respondent's motion - which was faxed to chambers on February 1, 2006 and stamped by the Westchester County Clerk's office as having been filed February 7, 2006 - was untimely. However, because respondent has not objected to the Court's consideration of petitioner's opposition, and because no prejudice will result to respondent, the Court has nevertheless considered petitioner's untimely opposition in deciding the instant motion (*see Vento v City of New York*, 247 AD2d 535 [1998]).

## FACTUAL BACKGROUND

This CPLR Article 78 proceeding was instituted by petitioner, Steven Spahitz (“petitioner”), after respondent, the Honorable Barbara G. Zambelli, Judge of the County Court, Westchester County, pursuant to a decision dated September 1, 2005, denied petitioner’s application to amend his pistol license to change the restriction found therein from its current restriction of recreational (*i.e.*, target and hunting)/home possession handgun license to a “full carry” license. In her decision, Judge Zambelli explained that petitioner was seeking the full carry permit based on his concern that he and his family were potentially in danger based on the fact that the envelope transmitting his renewed pistol licenses had been tampered with.<sup>2</sup> Judge Zambelli viewed petitioner’s reason for the amendment insufficient since the petitioner’s personal information found on those licenses was a matter of public record as petitioner’s licenses were on file and publicly accessible in the County Clerk’s office. Thus, Judge Zambelli found that petitioner had failed to demonstrate “a special need for self-protection distinguishable from that of any other Westchester County citizen with a license to possess or carry a gun” (Decision & Order dated September 1, 2005 at 2, Petition, Exhibit B). Petitioner thereafter “appealed” the decision to Judge Zambelli and requested that she reconsider the decision on the grounds that she had “misunderstood” the basis for his amendment request. Petitioner argued that his amendment request had not been made for the reason cited by Judge Zambelli, but rather, that the amendment was sought because of the danger posed by his hobby of collecting rare, customized, vintage and other firearms which requires that he transport tens of thousands of

---

<sup>2</sup>The basis for petitioner’s fear was his concern that his personal information had been obtained when he received an empty envelope in the mail which had contained his pistol licenses (*i.e.*, someone had slit open the envelope containing his pistol licenses and removed them from the envelope). The licenses were subsequently returned to him by a postal worker who had found them in Monsey, New York.

dollars of handguns within New York State (exclusive of New York City). By letter dated November 7, 2005, Judge Zambelli responded to petitioner's "appeal" by advising him that her decision could only be challenged by a proceeding commenced pursuant to CPLR Article 78. The instant Article 78 proceeding ensued.

Respondent moves to dismiss this proceeding on the grounds that this Court lacks subject matter jurisdiction since CPLR § 506(b)(1) places exclusive jurisdiction of a proceeding against a Judge of the County Court within the jurisdiction of the Appellate Division in the judicial department in which the action is triable. Thus, it is respondent's position that this proceeding was improperly brought in this Court and must be dismissed.

By contrast, petitioner argues that because Judge Zambelli was acting in her capacity as the statutorily-designated pistol licensing officer (Penal Law § 265.00 (10) and § 400.00) and not as a jurist in rendering her decision which denied petitioner's pistol license amendment application, the provisions of CPLR § 506(b)(1) do not control and subject matter jurisdiction lies in this court. Petitioner analogizes Judge Zambelli's licensing decision to the pistol licensing decisions made by police commissioners in jurisdictions in which the police commissioner is statutorily designated as the pistol licensing officer. Thus, petitioner reasons that because the review of those determinations is always made in the context of a special proceeding (CPLR Article 78) in the Supreme Court located in the county in which the police commissioner made the determination, there should be no distinction made when a County Court Judge, rather than a police commissioner, is making the pistol licensing determination. Petitioner contends that in either case, because the special proceeding is being brought against a body or officer, it is CPLR § 506(b) – not CPLR § 506(b)(1) – that controls the issue and places subject matter jurisdiction in this Court.

Respondent counters this argument by pointing out that when Judge Zambelli denied petitioner's application, she was acting as a Judge of Westchester County Court action in her administrative capacity as a firearms licensing officer under Penal Law § 265.00(10). Because Penal Law § 265.00(10) specifically defines a licensing officer in Westchester County as "a judge or justice of a court of record having his office in the county of issuance," respondent argues that "[t]he distinction petitioner is attempting to make, that Judge Barbara Gunther Zambelli was acting as a 'licensing officer' and not as a Judge, is nonexistent" (Affirmation of Wanda Perez-Maldonado, Esq. at ¶ 8).

### LEGAL DISCUSSION

In addressing the issues concerning the proper proceeding and forum for the review of a pistol licensing determination by a County Court Judge, the Appellate Division, Second Department has held that "[t]he appropriate procedure for seeking review of a determination of a County Court Judge acting in her administrative capacity as the firearms licensing officer for Westchester County under Penal Law §§ 400.00(11) and 265.00(1), is not by direct appeal but by commencement of a proceeding pursuant to CPLR article 78 in the Appellate Division" (*Matter of Panaro*, 250 AD2d 616, 616 [1998], citing CPLR § 7801; CPLR § 506[b][1]; *Matter of County of Westchester v D'Ambrosio*, 244 AD2d 334 [1997]; *Matter of Schnell v Spano*, 120 AD2d 669 [1986]).

This issue was again addressed by the Appellate Division, Third Department in *Matter of Hassig v Nicandri* (2 AD3d 1118 [2003], *lv denied* 2 NY3d 701 [2004]). In that case, petitioner brought an Article 78 proceeding in the Supreme Court, Lawrence County, to review the revocation of petitioner's pistol licenses by a County Court Judge. The Supreme Court Justice

dismissed the proceeding for lack of subject matter jurisdiction. In affirming the Supreme Court's dismissal, the Appellate Division, Third Department held that because

“respondent’s authority to revoke the pistol permits derived from his position as County Judge (*see* Penal Law § 400.00[11]), the instant proceeding should have been commenced in this Court pursuant to CPLR 506(b)(1) ... This defect, implicating *Supreme Court’s* subject matter jurisdiction, cannot be waived ... Nevertheless, as requested by petitioner, we will treat the proceeding as though it was an original application in this Court and consider the merits” (*Matter of Hassig v Nicandri*, 2 AD3d 1118, 1119 [2003], *ly denied* 2 NY3d 701 [2004]; *see also Matter of Finley v Nicandri*, 272 AD2d 831, 831-832 [2000]).

Similarly, in *Ferrick v State of New York* (198 AD2d 822 [1993]), the Appellate Division, Fourth Department affirmed the Supreme Court’s dismissal of a proceeding based on lack of subject matter jurisdiction since “[p]laintiffs’ challenges to County Court’s refusal to issue unrestricted pistol licences to them must be initiated in the Appellate Division” (*Ferrick*, 198 AD2d at 823).

The reason for the Legislature’s placement of original jurisdiction in the Appellate Division pursuant to CPLR § 506(b)(2) (one of only a few instances where the Appellate Division exercises original jurisdiction) is its recognition of the “incongruity of allowing one supreme court justice to review another’s activity” (Siegel, NY Prac § 565, at 973 [4<sup>th</sup> ed]). The fact that the decision being appealed was rendered by a County Court Judge, rather than a Supreme Court Justice, is of no moment since the Legislature has decided that because County Court Judges exercise plenary jurisdiction over felonies, they are “deemed to be on an equal plane with supreme court ....” (*id.*) for the purposes of CPLR § 506(b)(2).

Accordingly, the motion is granted and the proceeding is dismissed for lack of subject matter jurisdiction (*see* CPLR § 506[b][1]). The rationale behind the Legislature’s selection of the Appellate Division (rather than a court of coordinate jurisdiction) for the appeals of such determinations is a sound one that should not be disturbed. While petitioner has alternatively requested that this Court, rather than dismiss the proceeding, transfer it to the Appellate

Division, Second Department, the Court finds that because it is without subject matter jurisdiction, it is also without the authority to transfer the proceeding pursuant to CPLR § 7804(g) (*Matter of Finley*, 272 AD2d at 831-832). The Court's dismissal is without prejudice to petitioner's filing a new Article 78 proceeding in the Appellate Division, Second Department.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York  
March 8, 2006

  
Honorable Jonathan Lippman, J.S.C.

To:

Law Office of John Skylar Chambers and Associates  
Attorneys for Petitioner  
89 Fifth Avenue, Suite 801  
New York, New York 10003

Eliot Spitzer  
Attorney General of the State of New York  
Attorney for Respondent  
101 East Post Road  
White Plains, New York 10601