

**Matter of Weisbroat v Kelly**

2008 NY Slip Op 32907(U)

October 22, 2008

Supreme Court, New York County

Docket Number: 108554/2008

Judge: Paul G. Feinman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
PRESENT: HON. PAUL G. FEINMAN PART 12  
J.S.C.

1/1/0 Paul J. Weisbrock, etc.

INDEX NO. 108554/08

MOTION DATE 8/22/08

MOT. SEQ. NO. 001

Raymond Kelly, etc.

MOT. CAL. NO. 125

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits  
Answering Affidavits — Exhibits  
Replying Affidavits

PAPERS NUMBERED

1  
2,3

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1000).

Cross-Motion:  Yes  No

Upon the foregoing papers, it is

~~ORDERED that the motion bearing sequence no. \_\_\_\_\_ is decided in accordance with the annexed decision and order.~~

ADJUDGED and ORDERED that the petition bearing sequence no. 001 is decided in accordance with the annexed decision, order and judgment.

~~ORDERED that the cross motion bearing sequence no. \_\_\_\_\_ is decided in accordance with the annexed decision and order.~~

~~ADJUDGED and ORDERED that the cross petition bearing sequence no. \_\_\_\_\_ is decided in accordance with the annexed decision, order and judgment.~~

~~ORDERED that the motion bearing sequence no. \_\_\_\_\_ is resolved pursuant to the terms of the parties' stipulation dated \_\_\_\_\_ and annexed hereto.~~

~~ADJUDGED and ORDERED that the petition bearing sequence no. \_\_\_\_\_ is resolved pursuant to the terms of the parties' stipulation dated \_\_\_\_\_ and annexed hereto.~~

Dated: 10/22/08

*SAF*

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X  
In the Matter of the Denial of the Business Related  
Carry License Application of  
PAUL J. WEISBROAT,  
Petitioner,

Index Number 108554/2008  
Submission Date Aug. 22, 2008  
Mot. Seq. No. 001  
Mot. Cal. No. 125

For a Judgment Pursuant to Article 78 of the  
CPLR Granting Petitioner A Business Related  
Carry License

- against -

RAYMOND KELLY, as the Statutorily Designated  
Handgun Licensing Officer, and as the New York City  
Police Commissioner, and His Successors in Office,  
Respondent.

**DECISION, ORDER AND  
JUDGMENT**

-----X

**For the Petitioner:**  
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**For the Respondent:**  
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Corporation Counsel of the City of New York  
By: Scott Glotzer, Esq.  
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788-1370

Papers considered in review of this petition pursuant to Article 78

**Papers**  
Notice of Petition and Affidavits Annexed  
Verified Answer & Memo of Law  
Reply Affirmation

**UNFILED JUDGMENT**  
The judgment has not been entered by the County Clerk  
and notice of entry cannot be served based hereon. To  
obtain entry, counsel or authorized representative must  
appear in person at the Judgment Clerk's Desk (Room  
Number 788-1370)  
2, 3  
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**PAUL G. FEINMAN, J.:**

In this Article 78 proceeding, petitioner seeks to reverse the determination by the License  
Division of the New York City Police Department that denied his application for a license to  
carry a concealed hand gun in connection with his work, or what is referred to as a "carry  
business pistol license." For the reasons which follow, the petition is denied.

Petitioner is a co-owner of a business located in New York City's "Diamond District"

which was “established for the purpose of engaging in the business of selling, at wholesale, gems and jewelry” (Ver. Pet. ¶ 1). According to the petition, petitioner buys and sells gems wholesale, and also sells high end jewelry, and creates and sells custom ordered jewelry (Ver. Pet. ¶ 4).

Unlike larger jewelry businesses where clients and customers visit the business, petitioner operates by making business calls on vendors, supplier, and clients and potential clients, using the subway, taxi cabs, or traveling on foot, and carries samples and completed items on his person and in a sample case (Ver. Pet. ¶¶ 5, 41). Petitioner estimates that on any given business day, he spends about 50 percent of his time traveling to and from his office making business calls and carrying items worth generally between \$150,000 and \$200,000 at current market rates (Ver. Pet. ¶¶ 27-28). Because he has been employed in the jewelry industry for his entire business career and now owns a jewelry business, he believes he is highly recognizable within the industry and to the criminal element interested in and conversant with the ways of the Diamond District (Ver. Pet. ¶ 37). He contends that because of the nature of his business he is exposed to extraordinary danger, and has a special need for the protection of a handgun, distinguishable from the need of the general community or other business persons (Ver. Pet. ¶¶ 6-8).

In 2007, petitioner applied for a carry business pistol license, pursuant to Penal Law § 400.00 and pertinent sections of the Rules of the City of New York.<sup>1</sup> His application was disapproved on February 11, 2008 (Ver. Pet. Ex. A-1). Petitioner was informed that he was denied the licence because “it was revealed you do not conduct your business with cash transactions. You failed to submit to this office bank deposit slips. You stated your need to carry a pistol is based on the fact you transport valuable/precious metals. Documents you submitted

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<sup>1</sup>Petitioner has a license for a premises residence pistol license (Ver. Ans. ¶ 59; Ex. A).

\* 4 ]  
reflect such metals/goods as being shipped.”

Petitioner appealed. His appeal included an attorney affirmation and legal analysis, and four affidavits from various dealers attesting that petitioner visits their stores to retrieve precious items either “four to five times a week,” or “2-3 times a week,” and in the case of one company, that he visits on “a routine basis” to show his sample line or with finished products (Ver. Pet. Ex. B [Admin. Appeal, ex. A-D]). All four affidavits also included attached invoices or memoranda detailing particular transactions of fine jewelry and gems, none of them showing shipping charges. In addition, his attorney argued that bank statements which were provided to the investigator, and deposit slips would not be helpful in substantiating his need for the license, because the issue is that he transports precious jewels rather than cash (Ver. Pet. Ex. B [Admin. Appeal, pp. 8-9]).

Petitioner’s appeal was disapproved by the License Division by notice dated March 28, 2008 (Ver. Pet. Ex. A-2). The disapproval was based on the reasons “previously stated in the letter of disapproval dated February 11, 2008,” and on an analysis of the information he submitted on appeal “which documented a total of 13 transactions during the period from September, 2007 to January, 2008, and total merchandise in the amount of \$125,000 which fails to establish proper cause or demonstrate a need to carry a firearm concealed on your person.”

Petitioner timely commenced this petition pursuant to CPLR Article 78 for review of the administrative decision. The petition argues that the appeals section of the License Division did not fully examine or give proper weight either to the submitted affidavits which describe his practice of picking up, carrying, and delivering the precious gems and jewelry, or to the memoranda and invoices which show, contrary to the conclusion by the License Division, that

his goods are commonly shipped (Ver. Pet. ¶¶ 54-55). The petition explains that the vendors' affidavits submitted as part of the appeal, were evidence that petitioner personally appears at their offices frequently during the week to retrieve gems and jewelry (Ver. Pet. ¶ 62). It also explains that although the standardized invoice forms do not clearly indicate that gems or jewelry were picked up rather than shipped, the existence of the original signatures of store owners acknowledging receipt of gems from petitioner, or invoices showing delivery and pick-up dates that would be physically impossible if the items were actually shipped, are evidence that in fact petitioner hand-delivered or picked up the jewelry (Ver. Pet. ¶¶ 56-61). Finally, the petition contends that the License Division's appeals section misunderstood the purpose of petitioner's presenting the affidavits as part of his appeal; they were not submitted to document all the transactions he made between September 2007 to January 2008, but to provide proof from some of his vendors that he does his business in person by visiting vendors, suppliers, and customers and either delivering or picking up the jewelry (Ver. Pet. ¶¶ 63-65). Petitioner argues that the decision to deny his application was based on a misunderstanding of his business and the contents of his application, and was arbitrary and capricious and contrary to law (CPLR 7803 [3]).

Respondent's verified answer opposes the petition and argues that the initial determination and the determination on appeal by the License Division were based on the rational finding that petitioner has not established his need for a business carry license. Respondent argues that petitioner did not establish that he is subject to danger greater than that faced by similarly situated jewelers operating out of the Diamond District and therefore did not make the necessary showing of proper cause that would permit him to have a carry business

license. The respondent notes that petitioner provided evidence to show that his office has security cameras, alarms, and a security officer, and petitioner had not shown evidence of recurrent threats to his life or safety, or that he had been the victim of an actual attack (Ver. Ans. ¶¶ 60-61, 63, 74-76). Respondent notes that petitioner conceded in his appeal that he ships some items (Ver. Ans. ¶ 78), and argues that petitioner did not sufficiently prove that most of his goods are hand delivered or picked up. Respondent notes that although many invoices show no shipping charge, it is unclear whether this reflects a professional courtesy extended to those petitioner deals with, and points to several invoices for businesses located outside of New York City that also show no shipping charges (Ver. Ans. ¶ 78, citing Ex. C).

It is a well-settled rule that judicial review of administrative determinations pursuant to CPLR Article 78 is limited to the grounds invoked by the agency (*Matter of Aronsky v Board of Educ.*, 75 NY2d 997 [1990]). The court may not substitute its judgment for that of the agency's determination but shall decide if the determination can be supported on any reasonable basis (*Matter of Clancy-Cullen Storage Co. v Board of Elections of the City of New York*, 98 AD2d 635, 636 [1<sup>st</sup> Dept. 1983]). The decision of an administrative agency is entitled to deference by the courts (*see, Samiento v World Yacht Inc.*, 10 NY3d 70, 79 [2008] "[construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld]" [internal quotation and citation omitted]). The test of whether a decision is arbitrary or capricious is "determined largely by whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact." (*Matter of Pell v Board of Educ.*, 34 NY2d 222, 232 [1974], quoting 1 N.Y. Jur., Admin. Law, § 184, p. 609).

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The issuance of a license to carry gun is a privilege, not a right (*Matter of Williams v Bratton*, 238 AD2d 269, 270 [1st Dept. 1997]). Penal Law § 400.00 (1) sets forth the eligibility requirements for licenses to carry a firearm, and the New York City Police Department has promulgated regulations to govern the issuance of licenses for handguns in the City, codified in Title 38, Chapter 5 of the Rules of the City of New York. Petitioner applied for a carry business pistol license, which allows a person to carry a concealed weapon but is restricted to the business activity (see 38 RCNY § 5-02; § 5-03) Under the rules, he is required to establish his qualifications for such a license, including showing that there is “proper cause” for its issuance, established through a review of all the relevant information bearing on his claimed need for the license (38 RCNY § 5-03). Factors that will be favorably considered include exposure to “extraordinary” personal danger, seen for example in the very nature of certain types of employment including those involving routine transactions of substantial amounts of cash or jewelry, and documented proof of recurrent threats to life or safety (38 RCNY § 5-03). It is not sufficient in and of itself for an applicant to have been the victim of a crime or that the applicant resides in or is employed in a high crime area.(38 RCNY § 5-03).

The petitioner maintains that he has satisfied the requirements in 38 RCNY § 5-03 by showing that his business is based on the routine transporting jewelry and gemstones worth many thousands of dollars to vendors and sellers, and that he is exposed to extraordinary personal danger because of the value of the objects that he carries and because he is a known business person in the Diamond District community, and thus likely known to the criminals who frequent the Diamond District.

Respondent initially denied petitioner’s application because the investigator concluded he

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had not effectively substantiated his claim that his business is largely conducted in person, rather than by shipping the valuables, and because he had not provided bank deposit slips.

Respondent's disapproval of the appeal was based in addition on petitioner's failure to establish that his business regularly involved items of the value that he claimed. In its answer, respondent notes that petitioner stated, but did not establish, that his particular business in the Diamond District operates in a manner different from other businesses in the Diamond District, and did not allege any particular threats or actual attacks. Respondent concluded that petitioner had not showed that he was placed in a danger greater than what others in the Diamond District were exposed to (38 RCNY § 5-03; *see, Martinek v Kerik*, 294 AD2d 221, 222 [1<sup>st</sup> Dept.], *lv denied* 98 NY2d 613 [2002] ).

Petitioner attempts to rebut respondent's arguments, and buttress his own, by proffering in his reply affirmation photographs and prices of the items contained in his sample case, copies of pages of his business diary showing his travels, and copies of all his invoices for 2007 to show that when an item was shipped, the invoice reflected a shipping charge. However, these documents, some of which at least are newly proffered, simply cannot be assessed by this court, because the rule is that only what was before the agency at the time of the determination can be reviewed in an Article 78 proceeding (*Featherstone v Franco*, 95 NY2d 550, 554 [2000]).

Petitioner's argument that his documents were misunderstood or misinterpreted by the agency is not persuasive, given that it was his burden to establish his claim before the License Division (Penal Law § 400.00[2] [f]; 38 RCNY § 5-03). In an Article 78 proceeding, the court's role is limited to determining whether there is any reasonable basis to support respondent's determination. It is not for the court to re-weigh the competing inferences from the evidence or

[\* 9 ]  
merely substitute its judgment for that of the agency. In this case, there is a reasonable basis for respondent's determination that petitioner failed to establish his need for a business carry pistol license and the denial cannot be found to be irrational, arbitrary or capricious. It is

ADJUDGED and ORDERED that the petition is denied and the proceeding is dismissed.

The foregoing shall constitute the decision, order and judgment of this court.

ENTER:

Dated: October 22, 2008  
New York, New York

  
\_\_\_\_\_  
J.S.C.

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 7307)