

Matter of Steinfeld v Kelly

2009 NY Slip Op 31382(U)

June 23, 2009

Supreme Court, New York County

Docket Number: 101715/09

Judge: Walter B. Tolub

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: WALTER B. TOLUB
Justice

PART 15

BRIAN SOEMBELDON

Raymond Kelly

INDEX NO. 101705709

MOTION DATE _____

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is denied in
accordance with the accompanying memorandum opinion.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served. Parties should appear in person at the Judgment Clerk's Office (Room 1419).

Dated: 6/23/09

WALTER B. TOLUB S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 15

----- X

In the Matter of the Revocation of the Premise Pistol
License and the Rifle/Shotgun Permit of

Bruce J. Steinfeld

Petitioner,

INDEX NO.
101715/09

For a Judgment under Article 78 of the Civil Practice Law
and Rules Restoring Petitioner's Firearms Licenses,

-against-

Raymond Kelly, as the Statutorily Designated Handgun
Licensing Officer, and As the Police Commissioner of the
City of New York, and His Successors in Office ,

Respondents.

----- X

WALTER B. TOLUB, J.:

This is an Article 78 proceeding wherein petitioner seeks a judgment (I) annulling respondents' October 7, 2008 determination which adopted the recommendation of respondents' hearing officer that petitioner's premises residence pistol license remain revoked, and (ii) "directing that the respondent tender reasonable legal fees to the petitioner in connection with the pursuit of his rights under the U.S. Constitution, Amendment II."

Petitioner was apparently a gun collector. In 1971 he was issued a rifle/shotgun permit under which he registered 15 rifles and/or shotguns. In 1975 he was issued a premises residence pistol license under which he registered 44 handguns. In 2001 he was notified that his rifle/shotgun permit had been cancelled for failure to renew and directed to surrender the rifles

and shotguns. Petitioner ignored the notice. In early January 2004 the New York Police Department learned that the Mayor's Office had received numerous complaints that petitioner's son, who was on probation, was engaged in illegal narcotics activity at petitioner's residence. A computer check revealed that petitioner had ignored respondents' 2001 notice that his rifle/shotgun permit had been cancelled. On or about January 22, 2004, members of the NYPD went to petitioner's residence and observed a substance that they thought was marijuana, a pipe, some plastic black boxes commonly used to store firearms, and a grenade. When the police returned with a search warrant they found 44 licensed handguns, seven unlicensed handguns, three unlicensed shotguns, seven unlicensed rifles, eight assault weapons, what appeared to be marijuana, numerous rounds of live ammunition, a bayonet, a bipod, folding stocks, pistol grips, magazines containing more than ten rounds, flash suppressors, a fixed magazine on shotguns capable of holding more than five rounds, and three plastic bags containing numerous knives that included gravity knives, switchblades, and knuckle knives. Petitioner was arrested and charged with two counts of criminal possession of a weapon in the second degree, one count of criminal possession of a weapon in the third degree and two counts of criminal possession of a weapon in the fourth degree. He pled guilty to a class A misdemeanor (criminal possession of a weapon in the fourth degree), was fined \$1,000, and placed on probation for three years.

Petitioner was notified by letter dated March 31, 2004 that his premises pistol license and his (previously revoked) rifle/shotgun permit had been revoked as a result of his arrest. He requested a hearing, which he received in September 2008 after his probation ended. Thereafter, respondents' hearing officer recommend that petitioner's pistol license remain revoked. Her recommendation was adopted in October 2008, and this Article 78 proceeding ensued.

The above factual background was culled from respondents' submissions. Although petitioner had the opportunity to challenge respondents' version of the facts in reply papers (see CPLR 7804[c] and [d]), he has remained silent.

Petitioner's application, in which he seeks restoration of both the rifle/shotgun permit and the premises residence pistol license, is based entirely on his attorney's interpretation of *District of Columbia v Heller*, 554 U.S. ___, 128 S. Ct. 2783 (2008), which counsel construes as standing for the proposition that owning a handgun is a right under the Second Amendment of the United States Constitution rather than a privilege to be bestowed or withheld by each state. While counsel concedes that the *Heller* court affirmed long-standing prohibitions on the possession of firearms by felons and the mentally ill, he proudly notes that petitioner's conviction was for a misdemeanor and that petitioner has never been institutionalized or treated for any mental illness. Counsel then requests attorney's fees stating that "respondent's apparent unwillingness to recognize the dramatic change in the law following the Heller decision, *supra*, mandates that respondent tender reasonable legal fees in connection with petitioner's quest to have his Second Amendment right fully recognized" (see petition, ¶ 25).

The Second Amendment provides: "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" (U.S. Const. amend. II). In writing for the majority in *Heller, supra*, Justice Scalia noted that the "Second Amendment applies only to the Federal Government" (128 S. Ct. 2783, 2813, fn 23) and did not address the licensing requirement (*id.* at 2819). In *Maloney v Cuomo*, 554 F3d 56 (2d Cir 2009), which was decided after *Heller*, the Second Circuit unequivocally stated that the Second Amendment applies only to limitations the federal government seeks to impose on the individual

right of citizens to keep and bear arms (see 554 F3d 56, 58; see also *Matter of Bastiani*, ___ Misc3d ___, 2008 WL 5455690, *2 [NY Co Ct 2008] [“a regulatory scheme would not run afoul of the *Heller* Court’s holding”]). Clearly, petitioner’s attempt to use *Heller* to overturn respondents’ determination to strip petitioner of his gun licenses has no basis in law or fact. The court therefore finds that, given the facts herein, and the fact that in this State, the burden of establishing proper cause for the issuance of a full carry permit is borne by the applicant who must demonstrate a “special need for self protection distinguishable from that of the general community” (*Matter of Bastiani*, at 1), respondents’ determination is eminently rational and, as such, it cannot and should not be disturbed (see *Pell v Board of Education*, 34 NY2d 222, 231 [1974]).

Petitioner’s request for attorney’s fees is denied (see *Apollon v Giuliani*, 246 AD2d 130, 135-136 [1st Dept 1998]; lv den 92 NY2d 1046 [1999]).

Accordingly, it is hereby

ORDERED and ADJUDGED that petitioner’s application is denied and the petition is dismissed.

This constitutes the decision and judgment of the court.

DATED: June 23rd, 2009



J.S.C.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served on the person. To obtain entry, counsel or pro se litigant must appear in person at the Judgment Clerk’s Desk (Room 141B).