

Matter of James v City of New York

2014 NY Slip Op 30594(U)

March 3, 2014

Supreme Court, New York County

Docket Number: 101273/2013

Judge: Peter H. Moulton

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: Hon. Peter H. Moulton PART 57
Justice

MELVA JAMES

INDEX NO. 101273/2013

MOTION DATE _____

v.

MOTION SEQ. NO. 001

THE CITY OF NEW YORK

MOTION CAL. NO. _____

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

Papers Numbered

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

This case has been disposed pursuant to the attached written decision dates
March 3, 2014.

Dated: 3/3/14 _____

New York, New York

J.S.C.

PETER H. MOULTON

- 1. Check one: Case Disposed Non-Final Disposition
- 2. Check as Appropriate: Motion is: Granted Denied Granted in Part Other
- 3. Check if Appropriate:: Settle Order Submit Order
- Do Not Post Fiduciary Appointment Reference

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 141B).

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 57

-----X
In the Matter of the Petition of MELVA JAMES,

Petitioner,

-against-

Index No.101273/2013

THE CITY OF NEW YORK,

Respondent,

For a Judgment Pursuant to Article 78 of the CPLR.
-----X

PETER H. MOULTON, J.:

Petitioner Melva James (“Petitioner”) moves, pursuant to CPLR Article 78, for an order annulling and reversing Respondent City of New York’s (“Respondent”) denial of a Pistol License Inquiry Form, informally known as a “good guy letter,” claiming that the refusal was arbitrary, capricious, and an abuse of discretion. Petitioner seeks the letter so that she may obtain a Retired Police Officer pistol license.

Respondent cross-moves, pursuant to CPLR §§ 3211(a)(5), 3211(a)(7), 7804(f), for an order dismissing the petition on the grounds that the petitioner is time-barred from commencing this proceeding and fails to state a cause of action for mandamus relief.

BACKGROUND

Petitioner is a retired New York City Department of Correction (“DOC”) Officer who ended her service in January 2011. For several years, starting in 2002, petitioner was positioned at a post in the George R. Vierno Center located in East Elmhurst, New York. While holding that position, petitioner was arrested in 2002 on charges of theft and assault stemming from an incident that took

place at a Lord and Taylor department store located in Paramus, New Jersey. Following that arrest, petitioner's ability to carry a firearm as a DOC member was revoked. Several years later, petitioner was approaching retirement, and on or about October 7, 2010, requested permission to purchase a handgun for personal protection. Petitioner did so by submitting an application for a Pistol License Inquiry Form, or "good guy letter," requesting permission to carry a firearm following her retirement.

Good guy letters are issued in accordance with a variety of internal New York City Police Department ("NYPD") statutes and regulations. Section 10-131 of the New York City Administrative Code allows the Police Commissioner of New York City to grant licenses for carrying pistols within New York City pursuant to § 400 of the Penal Law. Penal Law § 400 states in pertinent part: "No license shall be issued or renewed except by the licensing officer, and...except for an applicant..(e) who has not had a license revoked." The decision to issue a "good guy letter" is in the sole discretion of the Chief of the NYPD or his designee. An individual whose ability to carry a firearm has previously been revoked must follow a variety of internal DOC re-authorization procedures and guidelines to restore the right to carry a firearm prior to submitting a request for a "good guy letter." *See generally* Directive #4511R-A Firearms Policy and Procedures ("Firearms Policy"). One of those procedures involves going before a Firearms Review Board. *See* Firearms Policy, §§ III(D)(G), III(D)(H). The Firearms Review Board's function, in part, is to determine whether an individual whose firearm carrying privileges have previously been revoked as the result of an arrest should have those privileges restored.

On November 8, 2010, petitioner received a notice from the George R. Vierno Center, where she had previously worked, granting her permission to carry a firearm, pending full re-authorization. Petitioner received that letter of endorsement from her Commanding Officer as well as from a

Warden at the DOC, but not from the Firearms Review Board. Moreover, after receiving the letter petitioner did not subsequently go before the Firearms Review Board of the DOC to receive full re-authorization to carry a firearm. Nonetheless, based on petitioner's belief that she had already acquired permission to purchase a firearm, petitioner purchased a handgun in January 2011. Petitioner retired from the DOC that same month. On January 7, 2011, petitioner went to a firing range in the Bronx with her newly obtained handgun, and surrendered that handgun to the DOC for safekeeping. On February 12, 2011, petitioner received a letter from the DOC, dated January 20, 2011, informing her that her request for an endorsement for a pistol license upon retirement had been denied based on her prior arrest and failure to go before the Firearms Review Board. In light of that denial, the DOC refused to give petitioner back the handgun that she had previously surrendered. More than two years later, petitioner brought this Article 78 action seeking a reversal of the agency's determination.

ARGUMENTS

Petitioner argues that this Article 78 proceeding was timely commenced because (i) petitioner never received an indication in the February 2011 letter that the decision denying her request for an endorsement for a pistol license was final; and (ii) because petitioner's counsel sent letters and placed calls at various points in 2011 and 2012 regarding petitioner's firearm status and requesting an opportunity to be heard regarding this matter.

Respondent, in turn, contends that this Article 78 proceeding is time-barred due to the strict four month statute of limitations period. Additionally, respondent argues that petitioner is not entitled to mandamus relief because petitioner has no clear and absolute right to the relief sought.

DISCUSSION

Proceedings brought pursuant to Article 78 are governed by the statute of limitations set forth in Section 217 of the CPLR. Under Section 217 of the CPLR, a petitioner seeking relief under Article 78 must commence a proceeding against a body or officer “within four months after the determination to be reviewed becomes final and binding upon the petitioner.” N.Y. CPLR § 217(1). An agency determination becomes “final and binding” when ‘the petitioner has received notice of the determination and is aggrieved by it.’” *Baloy v. Kelly*, No. 110568/09, 2010 N.Y. Misc. LEXIS 4137, at ***5, 2010 NY Slip Op 51529(U) (Sup. Ct., N.Y. County June 28, 2010), *aff’d*, 92 AD3d 342, 346 (2000) (citing *Mattter of Cauldwest Realty Corp. v. City of New York*, 160 AD2d 489, 490 (1st Dept. 1990)).

Petitioner’s proceeding is time-barred because it was commenced more than two years after the applicable statute of limitations had run. Indeed, petitioner acknowledges that she was aware of the DOC’s decision to deny her request for a pistol license no later than February 12, 2011. *See* Verified Petition ¶ 37. Nevertheless, petitioner did not commence the instant proceeding until September 13, 2013, well beyond four months after she was made aware of the DOC’s determination.

Petitioner’s additional argument that subsequent correspondence between herself, her attorney, and the DOC following receipt of the DOC’s denial letter tolled the statute of limitations by rendering the DOC’s determination unsettled is also without merit. Once a petitioner obtains notice of an agency determination “and is aggrieved by it,” the determination becomes final and binding. *Cauldwest*, 160 AD2d at 490. Additionally, courts have consistently ruled that inquiries

for reconsideration of an agency decision do not toll an applicable statute of limitations. See *Raykowski v. New York City Dept. of Transp.*, 259 AD2d 367, 367 (1st Dept. 1999); *Baloy*, No. 110568/09, 2010 N.Y. Misc. LEXIS 4137, at ***5.

Petitioner's remaining claim that relief can be sought in the form of mandamus to compel is also unpersuasive. Indeed, petitioner cannot avoid the bar of the statute of limitations by seeking mandamus relief, which also carries a four month statute of limitations. See *Austin v. Board of Higher Educ. of City of N.Y.*, 5 NY2d 430, 441 (1959); see also *Matter of Zupa v. Zoning Bd. of Appeals of Town of Southold*, 64 AD3d 723, 725 (2d Dept. 2009). Moreover, an unreasonable delay in making a demand for such relief may constitute laches. See *Matter of Sheerin v. New York Fire Dept. Arts. 1 & 1B Pension Funds*, 46 NY2d 488, 495-496 (1979). Since petitioner did not make a specific demand for mandamus relief within four months, and is further barred by laches for waiting for more than two years to commence this suit, petitioner's request for mandamus relief is time-barred.

Even if mandamus relief were not time-barred, petitioner still would not prevail on this claim because petitioner has failed to demonstrate a clear legal right to it. Mandamus is available as a remedy in very few circumstances. See *Klostermann v. Cuomo*, 61 NY2d 525, 537 (1984). Indeed, one can only seek such relief "to compel the performance of a purely ministerial act where there is a clear right to the relief sought." See *Matter of Legal Aid Socy. of Sullivan County v Scheinman*, 53 NY2d 12, 13 (1981). Here, respondent correctly points out that the DOC's decision to restore one's firearm privileges prior to retirement is a discretionary matter. See *Firearms Policy*, at §§ III(D)(1), III(D)(2)(d), III(D)(4), III(D)(G), III(D)(H). Moreover, an arrest, however remote in time it may be, is one of the valid grounds for revoking and refusing to restore an individual's firearm privileges.

Id. Consequently, once one's privileges are revoked, the DOC may elect not to release a surrendered weapon to a retired officer if that officer does not have a firearm license. *See* Firearms Policy IV(I)(6). Petitioner admits that she does not have a firearm license. Moreover, petitioner has failed to demonstrate that she went through the proper steps to obtain one. Finally, petitioner has not sufficiently shown that the DOC's decision to deny her a firearm license is an inappropriate exercise of its authority. Petitioner was supposed to go before the Firearms Review Board in order to have her privileges to carry a firearm restored and by petitioner's own admission failed to do so. Consequently, the DOC cannot be compelled to contravene its own policies and practices by turning over a firearm to an individual in petitioner's shoes. As such, the relief petitioner seeks to compel cannot be granted.

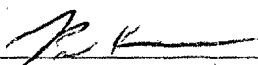
In light of the determinations above, it is hereby ORDERED that Respondent's cross-motion to dismiss is granted; and it is further

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

This Constitutes the Decision, Order and Judgment of the Court.

Dated: March 3, 2014

ENTER:



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 141B).