

<b>Matter of Leo v City of New York</b>
2020 NY Slip Op 31828(U)
June 12, 2020
Supreme Court, New York County
Docket Number: 162287/2019
Judge: Eileen A. Rakower
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**SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY**

**PRESENT: Hon. EILEEN A. RAKOWER**

**PART 6**

*Justice*

**In the Matter of the Petition of  
*Mario Leo,***

**Petitioner,**

INDEX NO. 162287/2019  
MOTION DATE  
MOTION SEQ. NO. **1**  
MOTION CAL. NO.

**For an Order or Judgment Pursuant to CPLR Article 78,**

- v -

***THE CITY OF NEW YORK, DERMOT SHEA,*  
as Police Commissioner of the City of New York, and  
the Police Department of New York City,**

**Respondents.**

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

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

Answer — Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits

**PAPERS NUMBERED**

█  
█  
█  
█  
█

**Cross-Motion:    Yes    X No**

Petitioner Mario Leo (“Petitioner”) brings this action, pursuant to Article 78 of the New York Civil Practice Laws and Rules (“Article 78”), to nullify and vacate the denial by the License Division of the New York City Police Department (“NYPD”) of Petitioner’s August 22, 2019 “Notice of Disapproval after Appeal” of Petitioner’s renewal of his previously issued Carry Business handgun license application. Respondents the City of New York, Dermot Shea, as Police Commissioner of the City of New York and NYPD (collectively, “Respondents”) oppose.

**Background/Factual Allegations**

Petitioner contends that he is the principal of Sal and Son Auto Body, Inc., located in Ozone Park, Queens. Petitioner further contends that he is the President and sole shareholder of seven other businesses: (1) Sal and Son Auto Body, Inc.;(2) Sal and Son Enterprises, Inc.; (3) 111-08 Jamaica Avenue, L.L.C.; (4) 97-26 99th

Street, L.L.C.; (5) 101-14 99th Street, L.L.C.; (6) 101<sup>st</sup> Street, L.L.C.; and (7) 97-12 101<sup>st</sup> Street, L.L.C. Petitioner contends that he “routinely engage in (a) towing and releasing towed motor vehicles, and (b) management of real estate and rental properties.”

On or about December 16, 2014, Petitioner submitted an application for a Limited Concealed Carry Business Handgun License to the NYPD License Division (“License Division”). On or about January 16, 2015 Petitioner’s application was upgraded to an Unrestricted Concealed Carry Business Handgun License and Petitioner was issued an Unrestricted Concealed Carry Business Handgun License (“Carry Business License”) retroactive to the date of his original application and expiring on August 21, 2018. Petitioner’s Carry Business License was issued to petitioner as “Owner” of “Sal And Sons Aut[o].”

On or about August 13, 2018, Petitioner submitted a renewal application. On or about November 27, 2018, the License Division conducted Petitioner’s background check and an Order of Protection Inquiry and a New York State Driver Group Search, and revealed no issues.

On or about February 1, 2019, the License Division forwarded a proposed form to Petitioner to sign, agreeing to withdraw his Carry Business License renewal application and request consideration for a Limited Carry Business License.

On or about February 11, 2019, the License Division was reconsidering whether or not Petitioner had established proper cause for a Limited Carry Business License and forwarded another form to petitioner to sign, agreeing to withdraw his Carry Business License renewal application and request consideration for a Premise Business License.

In or about mid-February 2019, Petitioner signed and returned the February 1, 2019 form agreeing to withdraw his Carry Business License renewal application and requesting consideration for a Limited Carry Business License.

On February 14, 2019, the License Division issued a Notice of Disapproval, denying Petitioner’s renewal application for a Carry Business handgun license. The Notice of Disapproval states, in relevant part:

The renewal application instructed you to provide supporting documentation; however, the documentation

that you provided is insufficient because it does not establish “proper cause” for a Carry Business license, which is required in order to renew your license. Your letter of necessity indicated that as owner you handle substantial amounts of cash and negotiable items annually totaling \$2.6 million dollars. However, your banking activity show deposits made by checks and does not reflect cash. As such, you were subsequently contacted by a License Division investigator requesting additional documents to support your claim of carrying substantial cash. You stated that you do not deposit cash at the bank, cash received is kept at the business or you take it home. You state you are exposed to extraordinary personal danger since you interact with strangers handling fees for towing and/or releasing vehicles. Also, please note that Title 38 Rules of the City of New York (RCNY), Section 5-03(b), states that the mere-fact that an applicant has been the victim of a crime or reside in or is employed in a “high crime area” does not establish “proper cause” for issuance of a carry or special handgun license. Additionally, the invoices you submitted is not enough to verify substantial cash received and does not distinguish you from the countless others who work in the same profession in New York City without a firearm. You further state that you manage real estate and it requires you to travel with substantial amounts of cash. Mr. Leo, your real estate business is not applicable as the license is issued to your auto body business and not for your real estate business. (Verified Answer, Exhibit O.)

On or about May 24, 2019, Petitioner’s counsel submitted an administrative appeal to the License Division.

On or about August 22, 2019, the License Division issued a Notice of Disapproval After Appeal (“Final Determination”), denying Petitioner’s administrative appeal and upheld its determination disapproving Petitioner’s application for a Carry Business handgun license. The Final Determination states, in relevant part:

In order to be eligible for a Carry Business license, “proper cause” must be shown. Critical to Mr. Leo’s “proper cause” argument is his claim that he transports million of dollars in cash between his several businesses and his home. However, no documentation was supported in support of this claim. Although he provided bank statements, they were insufficient because they did not indicate whether any deposits were made in cash. Also, he provided no cash deposit slips. This lack of documentation is fatal to Mr. Leo’s “proper cause” argument. See 38 RCNY 5-03. (Verified Answer, Exhibit Q.)

On December 19, 2019, Petitioner commenced this Article 78 proceeding. Respondents submitted opposition on May 4, 2020.

#### Parties’ Contentions

Petitioner contends that he “was fully (and demonstrably) compliant” with NYPD rules and regulations while he was a duly licensed holder of NYPD issued Business Carry pistol permit. Petitioner argues that the License Division “unilaterally and materially altered its licensing policies and arbitrarily and capriciously decided not to renew Petitioner’s previously issued pistol license.” (Petitioner’s Affirmation at 1). Petitioner asserts that there are two distinct classes of licensees (1) retired NYPD officers “receive ‘Gold Card’ treatment and privileges;” and (2) “legitimate businessmen like Petitioner get second rate shabby treatment at the hands of the License Division.” (Petitioner’s Affirmation at 2). Petitioner argues that Lieutenant Michael Barreto (“Lieutenant Barreto”) arbitrarily states in the Notice of Disapproval that Petitioner handles in excess of over \$2.5 million, but Lieutenant Barreto determined that cash may be involved but it was not sufficiently substantial, and working in a high crime area is insufficient to constitute proper cause.

Additionally, Petitioner asserts that there is no clear bright line test to evaluate and determine a job-related need for a carry pistol permit. Petitioner argues that “the Licensing Department is [ ], absent both (a) clear, and (b) articulated standards, the License Division acts on nothing more than highly subjective bureaucratic whim, not enforcing an (a) objective and (b) articulated standard of licensure need which respects Second Amendment guaranteed rights.” (Petitioner’s Affirmation at 4).

In opposition, Respondents argue that Petitioner’s renewal application was “reasonably and rationally denied” based on Petitioner’s failure to establish “proper cause” pursuant to Penal Law §400.00(2)(f). Respondents contend that Petitioner did not demonstrated “that by reason of employment or business, he is exposed to extraordinary personal danger and/or proof of recurrent threats to life or safety” pursuant to 38 RCNY § 5-03. (Respondents’ Memorandum in Law at 8). Respondents contend that Petitioner did not submit documentation that would “establish recurrent threats (or any threats) to his life or safety while conducting his auto body business” and that would establish that Petitioner “handled large amounts of cash.” (*Id.*). Respondents argue that the bank documents Petitioner submitted do not verify Petitioner’s contention that he handles \$2.6 million dollars in cash and negotiable items annually. Respondents further argue that the license at issue was only applied for in connection with Petitioner’s autobody business and not his alleged real estate businesses and are therefore not applicable to the license. Respondents assert that the License Division is not required to automatically renew Petitioner’s license because he was granted a Carry Business License in the past, Petitioner must establish “proper cause” pursuant to 38 RCNY § 5-03.

Moreover, Respondents argue that “Petitioner’s claim that the License Division has violated his Second Amendment right to bear arms is without merit.” (Respondents’ Memorandum in Law at 9). Respondents assert that “controlling cases mandate that restrictions on handgun possession, such as eligibility requirements, must survive a constitutional intermediate scrutiny analysis – that is, the restriction must bear a substantial relationship to the achievement of an important governmental objective.” (*Id.*). Respondents argue that “[t]he denial of petitioner’s handgun license application due to his inability to meet certain requirements cannot be understood in isolation; it must be viewed with respect to New York’s substantial interest in regulating public safety.” (*Id.*). Respondents contend that applicants in New York are granted a concealed carry license if they satisfy the requirements, here, Petitioner failed to establish “that by reason of employment or business, he is exposed to extraordinary personal danger and/or proof of recurrent threats to life or safety” pursuant to 38 RCNY § 5-03 and that he handled large amounts of cash.

Respondents assert that Petitioner’s claim that he was denied due process is also without merit. Respondents contend that “[i]n determining whether an individual has suffered a deprivation of procedural due process, the threshold question is whether that person has been deprived of a liberty or property interest, which is subject to due process protection, without having notice and an opportunity to be heard. *See Board of Regents v. Roth*, 408 U.S. 564, 569-70 (1972). *See also People v. Keindl*, 68 N.Y.2d 410, 416 (1986); *People v. Morris*, 61 N.Y.2d 290, 293

(1984).” (Respondents’ Memorandum in Law at 11). Respondents argue that “petitioner does not have a unilateral right to a Carry Business License, and thus did not have a property interest in his application; indeed, the denial of a renewal application cannot be equated with the suspension or revocation of a handgun license.” (*Id.*). Respondents contend that “even if petitioner had a property interest, Petitioner was afforded notice and opportunity to be heard prior to the issuance of NYPD’s final determination in accordance with the applicable law.” (*Id.*). Respondents assert that the License Division provided a specific reason and stated in writing why Petitioner’s renewal application was denied pursuant to Penal Law § 400.00 [4-a]2 and Petitioner was afforded the opportunity to appeal the denial. Respondents argue that “Petitioner cites to no authority supporting his proposition that a denial of a renewal application requires the License Division to do more than what NY Penal Law § 400.00 requires-- provide specific reasons for the denial and an opportunity to respond.” (Respondents’ Memorandum in Law at 13).

Lastly, Respondents argue that mandamus to compel is not available because “mandamus to compel is not an available remedy for a discretionary act, only for a ministerial one.” (*Id.*). Respondents assert that decision by the License Division to deny the renewal of a Carry Business License is discretionary. Respondents argue that “the License Division has broad discretion pursuant to the Administrative Code in determining whether the requirements have been met for an individual to possess a handgun license in the City of New York.” (Respondents’ Memorandum in Law at 14). Respondents argue that “[i]t is clearly a matter of the License Division’s discretion to determine whether there is proper cause pursuant to Penal Code §400.00(2)(f) for a the issuance of a particular handgun license.” (*Id.*).

In Reply, Petitioner argues that Respondents have “unlawfully amended” 38 R.C.N.Y. Section 5-03, “which they interpret require a demonstration of ‘extraordinary personal danger’ as a valid license renewal requirement... “by adding a ‘proof of necessity’ requirement that the State Legislature never (a) authorized by state legislation, nor (b) enacted by the City Council.” (Petitioner’s Reply Affirmation at 1). Petitioner argues that “the legal linchpin of Respondents’ legal defense is a bureaucratic regulation drafted by Respondent License Division, which clearly added a license satisfying requirement – not merely a demonstrable lawful need, but rather an unarticulated higher standard of perceived need: extraordinary.” (Petitioner’s Reply Affirmation at 1-2). Petitioner asserts that the Second Amendment is not limited to protection of one’s home but also protects the use of firearms when the individual leaves the home.

Furthermore, Petitioner argues that he was stripped of his license without a due process hearing. Petitioner asserts that “[a]ny procedure which deprives a license holder, and, make no mistake, Petitioner was a valid license holder charged with no act of misconduct or neglect, is not ‘due process,’ but rather ‘no process.’” (Petitioner’s Reply Affirmation at 3). Petitioner argues that that Respondents do not define the term “extraordinary need.” Petitioner contends that retired NYPD officers are not required to satisfy “extraordinary need” if they submit a “good guy letter.

### Legal Standard

“Article 78 proceedings exist for the relief of parties personally aggrieved by governmental action.” *Dunne v. Harnett*, 399 NYS 2d 562, 563 [Sup Ct, NY County 1977]. Judicial review is limited to questions expressly identified by CPLR 7803. *Featherstone v. Franco*, 95 NY2d 550, 554 [2000]. One such question is “whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed.” *See* CPLR 7803[3]. “[I]t is settled that in a proceeding seeking judicial review of administrative action, the court may not substitute its judgment for that of the agency responsible for making the determination, but must ascertain only whether there is a rational basis for the decision or whether it is arbitrary and capricious.” *Flacke v. Onondaga Landfill Systems, Inc.*, 69 NY2d 355, 363 [1987]. “An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts.” *Testwell, Inc. v. New York City Dept. of Bldgs.*, 80 AD3d 266, 276 [1st Dept 2010].

“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.” *Weisbroat v Kelly*, 2008 N.Y. Slip Op. 32907[U] [Sup Ct, New York County 2008]. The carry business pistol license “allows a person to carry a concealed weapon but is restricted to the business activity (see 38 RCNY § 5-02; § 5-03).” *Id.* “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).” *Id.* “Although ‘proper cause’ is not defined in Penal Law § 400.00(2)(f), case law has interpreted ‘proper cause’ to mean a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession.” *Matter of Knight v Bratton*, 48 Misc 3d at 541 (citation omitted). “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).” *Weisbroat*, 2008 N.Y. Slip Op. 32907[U] [Sup Ct, New York County 2008]. “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).” *Id.*

“New York courts have upheld the constitutionality of the City’s licensing scheme under the Second Amendment.” *Matter of Knight v Bratton*, 48 Misc 3d 536, 540 [Sup Ct 2015]. The First Department has held that “[t]he licensing scheme at issue satisfies the requisite constitutional standard, intermediate scrutiny, as it serves a governmental interest in maintaining public safety.” *Delgado v Kelly*, 127 AD3d 644, 644 [1st Dept 2015]. “Because the issuance of a license is an exercise of discretion, there is no property interest in the renewal of an expired license and no constitutional due process right to a hearing.” *Testwell, Inc.*, 80 AD3d at 274.

### Discussion

Petitioner has failed to demonstrate that the License Division’s Decision was arbitrary and capricious. *Flacke*, 69 NY2d at 363. The License Division’s denial of Petitioner’s renewal of his previously issued Carry Business handgun license application was rationally based on Petitioner’s failure to establish “proper cause” pursuant to Penal Law §400.00(2)(f). The License Division determined, in relevant part, that:

[Petitioner has] not established “proper cause.” [Petitioner] failed to provide any cash documentation and/or documentation of recurrent threats (or any threats) to your life or safety while conducting your business. Title 38 of the Rules of the City of New York, §5-03(a), requires documentary proof of your need to carry a concealed weapon. Based on the documentation that [Petitioner] provided, your business does not place you in extraordinary personal danger and you failed to demonstrate that you have a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession. Therefore, your application for renewal of your Carry

Business License is disapproved. (Verified Answer, Exhibit O.)

Petitioner was instructed to provide supporting documentation, however, the License Division determined that the documentation Petitioner provided was insufficient establish “proper cause.” Petitioner did not submit any documentation to establish recurrent threats to his life or safety while managing his auto body shop. “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).” *Weisbroat*, 2008 N.Y. Slip Op. 32907[U] [Sup Ct, New York County 2008].

Furthermore, the documentation Petitioner submitted to show that he handles substantial amounts of cash and negotiable items annually totaling \$2.6 million dollars, shows that Petitioner’s banking activity reveals deposits made by checks and does not reflect cash. A License Division investigator contacted Petitioner requesting for additional documents. Petitioner stated that he does not deposit cash at the bank but keeps the cash he receives at the business or in his home.

Moreover, Petitioner’s claims that his Second Amendment right was violated and he was denied due process are without merit. “New York courts have upheld the constitutionality of the City’s licensing scheme under the Second Amendment.” *Matter of Knight v Bratton*, 48 Misc 3d 536, 540 [Sup Ct 2015]. The First Department has held that “[t]he licensing scheme at issue satisfies the requisite constitutional standard, intermediate scrutiny, as it serves a governmental interest in maintaining public safety.” *Delgado v Kelly*, 127 AD3d 644, 644 [1st Dept 2015]. “Because the issuance of a license is an exercise of discretion, there is no property interest in the renewal of an expired license and no constitutional due process right to a hearing.” *Testwell, Inc.*, 80 AD3d at 274. Petitioner received sufficient due process when the License Division provided specific reasons and concisely stated, in writing, the reasons for denying his renewal application pursuant to Penal Law § 400.00 [4-a]2, and Petitioner was afforded the opportunity to administratively appeal the License Division determination, and thereafter challenge the final determination in this Article 78 proceeding.

Accordingly, Petitioner fails to meet his burden of demonstrating that the License Division’s determination should be disturbed by the Court.

Wherefore it is hereby

ORDERED that the Petition is denied; and it is further

ORDERED that the Petition is dismissed and the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

**Dated: June 12, 2020**

ENTER:   
J.S.C.  
**HON. EILEEN A. RAKOWER**

Check one:     **FINAL DISPOSITION**         **NON-FINAL DISPOSITION**