

Yukanov v City of New York

2020 NY Slip Op 33470(U)

October 23, 2020

Supreme Court, New York County

Docket Number: 152097/2020

Judge: Carol R. Edmead

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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. CAROL R. EDMEAD **PART** **IAS MOTION 35EFM**

Justice

-----X

ARTEM YUKANOV,

Plaintiff,

- v -

THE CITY OF NEW YORK, MICHAEL BARETTO,
JONATHAN DAVID

Defendant.

-----X

INDEX NO. 152097/2020

MOTION DATE 07/05/2020,
12/21/2020

MOTION SEQ. NO. 002 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 11, 12, 13, 14, 15, 16, 21, 23, 24

were read on this motion to/for RELEASE RECORDS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 17, 18, 19, 20, 22, 25, 26

were read on this motion to/for DISCOVERY.

Upon the foregoing documents, it is

ORDERED that application of Respondents to unseal, access and review (Motion Seq. 002) the criminal records of Petitioner Artem Yukanov ("Petitioner"), which were previously sealed pursuant to Criminal Procedure Law 160.50 and 160.55, is granted; and it is further

ORDERED that the application of Petitioner for production of documents (Motion Seq. 003) is denied; and it is further

ORDERED that Respondents shall, within 30 days from the date of this Decision and Order, answer or otherwise move in response to the Petition (Motion Seq. 001); and it is further

ORDERED that Respondents' response to the Petition shall be sealed; and it is further

ORDERED that counsel for Respondents shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on Petitioner's counsel.

MEMORANDUM DECISION

In this Article 78 proceeding, Petitioner seeks an order: (i) annulling and vacating the decision of the New York City Police Department (NYPD) License Division denying Petitioner's application for a gun license (the "Application"); (ii) granting Petitioner a gun license; and (iii) awarding Petitioner costs, fees and disbursements in connection with this proceeding.

In Motion Sequence 002, Respondents New York City, NYPD License Division Commanding Officer Michael Baretto and NYPD License Division Director Jonathan David (collectively, Respondents) seek, by Order to Show Cause, an order: (i) unsealing Petitioner's criminal records that are part of NYPD's administrative file relating to the Application (the "Administrative File") and that are germane to Respondents' defenses; (ii) staying the time for Respondents to respond until the resolution of the motion; and (iii) sealing Respondents' response to the Petition.

In Motion Sequence 003, Petitioner seeks an order directing Respondents to provide a complete copy of the Administrative File.

Motion Seqs. 002 and 003 are consolidated for disposition.

BACKGROUND FACTS

On January 14, 2019, Petitioner applied for a Premise Business Handgun License with the Division. In an undated "Notice of Disapproval" (the "Notice of Disapproval"), the Division denied the Application based on Petitioner's arrest history, criminal court summonses, domestic incident reports, driving history and failure to disclose some of these incidents (*see* NYSCEF doc No. 3). Petitioner appealed the Notice of Disapproval but the same was denied by NYPD License Division Director Jonathan David in a "Notice of Disapproval After Appeal" dated November 14, 2019 (the "NYPD Decision").

On February 21, 2020, Petitioner commenced this Article 78 proceeding challenging the NYPD Decision¹ as arbitrary and capricious. Petitioner argues that the Application should not have been denied since Petitioner's arrest history, as set forth in the Notice of Disapproval, is inaccurate (NYSCEF doc No. 1, ¶ 4)²; that his arrests, which are so remote in time, did not result in any criminal conviction and these arrests are so remote in time (*Id.*, ¶¶ 2-4, 27); that his driving history, as set forth in the Notice of Disapproval, is inaccurate (*Id.*, ¶ 9); that he has no knowledge of, and was not provided with further information about, some of the summonses and domestic incidents relied upon by Respondents to deny the Application (*Id.*, ¶¶ 8, 9, 19); and that he was not afforded a hearing of any kind (*Id.*, ¶¶ 11, 20).

Respondents' counsel alleges that on April 14, 2020, she requested Petitioner, through his counsel, to execute a "Designation of Agent for Access to Sealed Record Form" ("Agent Form") so that she could access and review the Administrative File (NYSCEF doc No. 12, ¶ 17). Petitioner allegedly refused (*Id.*, ¶ 18).

Motion Seq. 002

Respondents move to unseal Petitioner's criminal records forming part of the Administrative File, claiming that the records are needed to answer or otherwise move in response to the Petition. Respondents assert that while the NYPD has authority to access sealed criminal records of a gun license applicant, such authority does not extend to Respondents' counsel (NYSCEF doc No. 12, footnote 2). As Petitioner refused to execute the Agent Form, Respondent's counsel argues that she would not be able to meet her obligation under CPLR 7804(e) -- which

¹ Petitioner maintains that the record of arrest for "Aggravated Unlicensed Operation of a Motor Vehicle" in 2012 is "untrue."

requires “[t]he body or officer [to] file with the answer a certified transcript of the record of the proceedings under consideration” – without an unsealing order from this Court (*Id.*, ¶ 21).

Petitioner opposes the motion. He contends that the application to unseal merely shows that NYPD did not exercise its statutory authority to access Petitioner’s criminal records before denying the Application (NYSCEF doc No. 23, ¶¶ 3-6). According to Petitioner, the motion is but “an application after the fact to do what the [NYPD] had the statutory authority to do” (*Id.*, ¶ 3). Petitioner further avers that he refused to execute the Agent Form as it seeks the release of domestic incident reports and other similar records which are beyond the scope of Criminal Procedure Law (“CPL”) 160.50 (*Id.*, ¶ 7).

In Reply, Respondents deny that NYPD failed to access and review Petitioner’s sealed records and assert that this motion is only for the purpose of enabling Respondents’ counsel to review and file the sealed records in Court (NYSCEF doc No. 24, ¶ 6).

Motion Seq. 003

Petitioner separately moves for an order directing Respondents to provide a “complete copy of the file [Respondents] have created and maintained on the Petitioner, together with such other, further and different relief as may seem just and proper in the premises” (NYSCEF doc No. 18, ¶ 7). Respondents oppose, arguing that Petitioner cites no authority for his requested relief and that the “file” he demands will be attached to Respondents’ answer once said file is unsealed and released (NYSCEF doc No. 22, ¶¶ 3, 5). In reply, Petitioner invokes his right to due process to support his motion (NYSCEF doc No. 25, ¶ 6).

DISCUSSION

Unsealing of Petitioner’s Sealed Criminal Records

Pursuant to CPL 160.50 (1)(c), records of criminal action or proceeding that terminate in favor of the accused are sealed, thus:

“1. Upon the termination of a criminal action or proceeding against a person in favor of such person...the record of such action or proceeding shall be sealed...Upon receipt of notification of such termination and sealing:

xxx

(c) all official records and papers, including judgments and orders of a court but not including published court decisions or opinions or records and briefs on appeal, relating to the arrest or prosecution, including all duplicates and copies thereof, on file with the division of criminal justice services, any court, police agency, or prosecutor’s office shall be sealed and not made available to any person or public or private agency...”

Similarly, records regarding termination of a criminal action against a person by conviction of a traffic violation are sealed pursuant to CPL 160.55 (1)(c), to wit:

“1...upon the termination of a criminal action or proceeding against a person by the conviction of such person of a traffic infraction or a violation, other than a violation of loitering...

(c) all official records and papers relating to the arrest or prosecution, including all duplicates and copies thereof, on file with the division of criminal justice services, police agency, or prosecutor’s office shall be sealed and not made available to any person or public or private agency...”

Under both CPL 160.50 and 160.55, sealed records can be accessed by, inter alia, the person accused or “by the state or local officer or agency with the responsibility for the issuance of licenses to possess guns, when the accused has made application for such a license.”

Thus, by statute, the NYPD License Division had the authority to access Petitioner’s sealed criminal records when Petitioner filed his Application. Respondents, however, argues that such authority does not extend to Respondents’ counsel. Further, as Petitioner refused to execute the Agent Form, Respondent’s counsel avers that without the unsealing order from this Court, she cannot fully defend the NYPD Decision being challenged in this proceeding.

For the following reasons, the Court finds for Respondents.

First, while none of the circumstances allowing access to sealed records under CPL 160.50³ and 160.55⁴ apply here, courts have recognized that “there may be other sources of authority permitting access to sealed records;” in particular, where there are “extraordinary circumstances,” a specific grant of authority or a legal mandate that would otherwise be impossible to accomplish.” (*People v Anonymous*, 34 NY3d 631 [Ct App 2020]). Here, without allowing Respondent’s counsel to access Petitioner’s sealed criminal records and file them accordingly, this Court may not be able to make a sound resolution of the Petition as these records could very well determine

³ CPL 160.50 (1) (d) provides the exceptions to the sealing mandate:

“(d) such records shall be made available to the person accused or to such person's designated agent, and shall be made available to (i) a prosecutor in any proceeding in which the accused has moved for an order pursuant to section 170.56 or 210.46 of this chapter, or (ii) a law enforcement agency upon ex parte motion in any superior court, or in any district court, city court or the criminal court of the city of New York provided that such court sealed the record, if such agency demonstrates to the satisfaction of the court that justice requires that such records be made available to it, or (iii) any state or local officer or agency with responsibility for the issuance of licenses to possess guns, when the accused has made application for such a license, or (iv) the New York state department of corrections and community supervision when the accused is on parole supervision as a result of conditional release or a parole release granted by the New York state board of parole, and the arrest which is the subject of the inquiry is one which occurred while the accused was under such supervision, or (v) any prospective employer of a police officer or peace officer as those terms are defined in subdivisions thirty-three and thirty-four of section 1.20 of this chapter, in relation to an application for employment as a police officer or peace officer; provided, however, that every person who is an applicant for the position of police officer or peace officer shall be furnished with a copy of all records obtained under this paragraph and afforded an opportunity to make an explanation thereto, or (vi) the probation department responsible for supervision of the accused when the arrest which is the subject of the inquiry is one which occurred while the accused was under such supervision.” (CPL 160.50 [1].)

⁴ CPL 160.55 (1) (d) provides the exceptions to the sealing mandate:

“(d) the records referred to in paragraph (c) of this subdivision shall be made available to the person accused or to such person’s designated agent, and shall be made available to (i) a prosecutor in any proceeding in which the accused has moved for an order pursuant to section 170.56 or 210.46 of this chapter, or (ii) a law enforcement agency upon ex parte motion in any superior court, or in any district court, city court or the criminal court of the city of New York provided that such court sealed the record, if such agency demonstrates to the satisfaction of the court that justice requires that such records be made available to it, or (iii) any state or local officer or agency with responsibility for the issuance of licenses to possess guns, when the accused has made application for such a license, or (iv) the New York state department of corrections and community supervision when the accused is under parole supervision as a result of conditional release or parole release granted by the New York state board of parole and the arrest which is the subject of the inquiry is one which occurred while the accused was under such supervision, or (v) the probation department responsible for supervision of the accused when the arrest which is the subject of the inquiry is one which occurred while the accused was under such supervision, or (vi) a police agency, probation department, sheriff’s office, district attorney’s office, department of correction of any municipality and parole department, for law enforcement purposes, upon arrest in instances in which the individual stands convicted of harassment in the second degree, as defined in section 240.26 of the penal law, committed against a member of the same family or household as the defendant, as defined in subdivision one of section 530.11 of this chapter, and determined pursuant to subdivision eight-a of section 170.10 of this title...”

whether the challenged NYPD Decision has a rational basis. The Court highlights that Petitioner brought this Article 78 proceeding precisely to challenge, inter alia, the alleged inaccurate arrest and driving history set forth in the NYPD Decision (*see* NYSCEF doc No. 1, ¶ 5 [“What is more important is the fact that neither arrest was listed on my client’s annexed NYSID sheet and the Petitioner denies knowledge of these matters.”]; *Id.*, ¶ 9 [“The Respondents have also been untruthful concerning the driving history of the Petitioner. With no documentation whatsoever – and your affirmant has requested same on several occasions- the Respondents claim that the Petitioner has received 15 moving violations from 2006 to 2018. A review of the Petitioner’s Driving Abstract shows no more than seven, the oldest from 2006, the newest from 2014.”]) Thus, the Court must assess the existence and accuracy of any records supporting the NYPD Decision. Moreover, as highlighted by Respondents, CPLR 7804(e) requires Respondents to file with their answer the record of the proceedings under consideration. Without an unsealing order, Respondents would not be able to meet their obligations under this provision. Therefore, the Court finds that access to Petitioner’s records sealed under CPL 160.50 and 160.55 is proper on the ground that a legal mandate would be impossible to accomplish if this Court rules otherwise.

Second, Petitioner does not argue that the unsealing of his records would be contrary to law. His opposition is solely based on an assumption that the unsealing application is “dishonest” as “[i]t is an application after the fact to do what the Respondent had the statutory authority to do BUT NEVER BOTHERED TO DO” (NYSCEF doc No. 16, ¶ 3). The Court rejects Petitioner’s argument. The unsealing order will precisely show what the NYPD Administrative File contains, and whether it includes Petitioner’s arrest and driving history that the NYPD claims it reviewed prior to rendering the Decision. The Court refuses to adopt Petitioner’s assumption which, in

essence, suggests that the NYPD will somehow recreate an administrative file to support their Decision.

Third, Petitioner himself seeks a copy of the NYPD Administrative File (Mot. Sequence 003). In support, Petitioner maintains having “no knowledge” of “several criminal matters” set forth in the NYPD Notice (NYSCEF doc No. 18, ¶ 3). Thus, Petitioner and Respondents are both essentially seeking to obtain the same sealed criminal records.

On the basis of the foregoing, the Court grants the application by Respondents to unseal, review and file to this Court Petitioner’s sealed criminal records forming part of the NYPD Administrative File.

Petitioner’s Request for Production

In view of the Court’s ruling above, Petitioner’s motion, to the extent that it seeks production of his sealed criminal records forming part of the NYPD Administrative File, is now moot. Petitioner’s request for production of the rest of the NYPD Administrative file is thus denied.

In his motion, Petitioner alleges that he previously requested a copy of his application file with the NYPD Division and Respondents’ counsel pursuant to Title 38 of the Rules of the City of New York (RCNY) § 15-25 (a)(b) (NYSCEF doc No. 18, ¶ 5). This subsection, however, deals with requesting of records in relation to hearings for suspension and revocation of handgun licenses. This does not apply to Petitioner who was an applicant for a license. Other than invoking Title 38 of the RCNY, Petitioner relies on “fundamental fairness” to support his motion for production. The Court, however, does not see how the doctrine of fairness plays out given that, as discussed above, Respondents are already required to provide to this Court a copy of the administrative records under consideration, which would include the “file” demanded by Petitioner, as part of their response pursuant to CPLR 7804(e).

CONCLUSION

Based on the foregoing, it is hereby

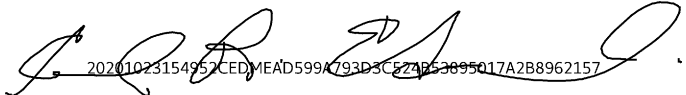
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10/23/2020
DATE

CAROL R. EDMED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE