

Gerstman v New York City
2022 NY Slip Op 31566(U)
May 11, 2022
Supreme Court, New York County
Docket Number: Index No. 157484/2021
Judge: Laurence Love
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LAURENCE LOVE **PART** **63M**

Justice

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BRADLEY GERSTMAN,

Petitioner,

- v -

NEW YORK CITY, NEW YORK POLICE DEPARTMENT
COMMISSIONER DERMOT SHEA, JONATHAN DAVID AS
DIRECTOR NYPD LICENSE DIVISION, COMMANDING
OFFICER MICHAEL BARRETO

Respondents.

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INDEX NO. 157484/2021

MOTION DATE 02/04/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 18, 19, 30, 31, 32, 33

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, it is

The following read on Petitioner’s denial of a pistol license by the Respondents and petitions this court for “i) [d]eclaratory relief stating that the ‘proper cause’ requirement of N.Y. Penal Law 400.00(2)(f) is facially unconstitutional, null and void, insofar as it interpreted to mean that a citizen must demonstrate a need greater than that of the average citizen, and in combination with the state’s blanket ban on open carry; ii) [a]n order, whether styled as a mandatory injunction, writ of mandamus, Article 78 relief, or similar, requiring the NYPD to issue to Mr. Gerstman the license which he applied for; iii) [c]ost for the actions; and iv) reasonable attorney’s fees.” Petitioner continues that “the [New York Police Department] has no rational standard ... are not rationally – related to the government interest ... fails the ‘arbitrary and capricious’ test” (see NYSCEF Doc. No. 1 Par. 49).

Petitioner provides the Notice of Disapproval (see NYSCEF Doc. No. 26), Petitioner's Appeal (see NYSCEF Doc. No. 27), and the Appeal Determination (see NYSCEF Doc. No. 28).

Respondents' answer states, "[t]he license division's final determination denying Petitioner's Application was not arbitrary, capricious, an abuse of discretion, an error of law, or in violation of lawful procedure; [t]he remedy of mandamus is only available to compel an act by an administrative body or officer that is ministerial and non-discretionary, premised upon specific statutory authority mandating performance in a specified manner. However, the determination to issue a Special Carry Business License, is not a ministerial act by the License Division, but rather, a discretionary act; Petitioner is not entitled to [declaratory judgment stating that the 'proper cause' requirement set forth in Penal Law 400.00] is unconstitutional; costs and attorney's fees are not available to Petitioner pursuant to CPLR 810; [and] Petitioner's request for 'a jury trial of all issues so triable' should not be considered. CPLR 7804(h) provides for a trial ... if a triable issue of fact exists" (see NYSCEF Doc. No. 20 Pars. 68 – 72).

Section 10 – 131 of the New York City Administrative Code authorizes the Police Commissioner of the City of New York to grant licenses for the keeping or carrying of firearms within the City of New York.

New York State Penal Law 400.00 sets forth the process and requirements that must be met in order for an applicant to be issued a license to keep or carry a firearm.

Pursuant to above Code and Law, the New York Police Department has promulgated regulations governing the issuance, revocation, and suspension of handgun licenses, in Chapter 5 of Title 38 of the Rules of the City of New York ("RCNY").

Title 38 RCNY 5-01 provides for six types of handgun license, including "special license," which provides in 38 RCNY 5-01(e):

“an applicant seeking a carry or special handgun license shall be required to show ‘proper cause’ pursuant to 400.00(2)(f) of the New York State Penal Law. ‘Proper cause’ is determined by a review of all relevant information bearing on the claimed need of the applicant for the license.”

CPLR 7803(4) states, “[t]he only questions that may be raised in a proceeding under this article are ... whether a determination was ... arbitrary and capricious.”

What is reviewed under the arbitrary and capricious standard is the rationality or the reasonableness of the agency’s determination. A court may overturn an administrative action only if the record reveals no rational or reasonable basis for it. The reviewing court does not examine the facts *de novo* to reach an independent determination (see *Marsh v. Hanley*, 50 A.D.2d 687 [3d Dept. 1975]). The reviewing court “may not substitute its own judgment of the evidence for that of the administrative agency, but should review the whole record to determine whether there exists a rational basis to support the findings upon which the agency’s determination is predicated” (see *Purdy v. Kreisberg*, 47 N.Y.2d 354, 358 [1979]). A rational or reasonable basis for an administrative agency determination exists if there is evidence in the record to support its conclusion (see *Sewell v. City of New York*, 182 A.D.2d 469 [1st Dept. 1992]).

Respondents’ Memorandum of Law states,

“Petitioner alleged in his Letter of Necessity, and reiterated in the two ‘threat assessment’ letters he submitted, that he is the subject of recurrent physical threats and death threats because of his appearance on the Fox News Network, his advocacy against anti-semitism, and his firm’s representation of Michael Cohen. Petitioner failed to provide documentation that detailed recurrent incidents or provide documents such as police reports to corroborate those claims. Petitioner failed to provide any documentary proof that he actually engages in large cash transactions and instances that he was in extraordinary danger because he was engaging in th[ese] transactions, such as police reports. Further, the fact that Petitioner previously had a Special Carry Business License that was continued,

after a suspension following an investigation of an arrest, is of no consequence here” (see NYSCEF Doc. No. 29 P. 12, 13).

The Petition also seeks mandamus. “Mandamus is an extraordinary remedy used to compel performance by an administrative body or officer of a duty positively required by law” (see *Hamptons Hosp. & Med. Ctr. Inc. v. Moore*, 52 N.Y.2d 88 [1981]).

Petitioner cites the United States Constitution and Case Law, “[a]s the Court is aware, the Supreme Court of the United States has declared that the right to keep and bear arms is guaranteed to the citizens by the United States Constitution, and that right has been incorporated to the states, such as New York, in *McDonald v. Chicago*, 51 U.S. 742 [2010]” (see NYSCEF Doc. No. 1 Par. 1).

New York Executive Law 71(1) states that when the constitutionality of a statute, rule, or regulation is brought into question in a civil proceeding, the party commencing the proceeding is required to file proof of notice of such constitutional challenge on the New York State Attorney General. As Petitioner has not submitted proof of notice to the New York State Attorney General, Petitioner cannot submit a constitutional challenge. If a litigant fails to file such proof of notice upon the New York State Attorney General, the Court is precluded from considering the constitutional challenge (see *McGee v. Korman*, 70 N.Y.2d 225, 231 [1987]).

Petitioner further challenges Respondents that the ‘proper cause’ requirement of N.Y. Penal Law 400.00(2)(f) is facially unconstitutional, null and void, insofar as it interpreted to mean that a citizen must demonstrate a need greater than that of the average citizen, and in combination with the state’s blanket ban on open carry.

In *District of Columbia v. Heller*, the U.S. Supreme Court recognized that the right to bear arms secured by the Second Amendment to the U.S. Constitution is not absolute, and it may be restricted by reasonable government regulation. The right to keep and bear arms “was not a

right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose” (see *District of Columbia v. Heller*, 544 U.S. 570, 626 [2008]).

Petitioner cites *McDonald v. City of Chicago*, but a further reading reiterates the limitations on the right to bear arms in *Heller*.

“We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as ‘prohibitions on the possession of firearms by felons and the mentally ill,’ laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing qualifications on the commercial sale of arms.’ We repeat those assurances here. (see *McDonald v City of Chicago*, 561 U.S. 742 [2010]).

The State of New York takes a two – step analysis when determining whether a law violates the Second Amendment. First, the Court must “determine whether the challenged legislation impinges upon conduct protected by the Second Amendment, and, if so, [the Court must] then determine the appropriate level of security to apply and evaluate the constitutionality of the law using that level of scrutiny” (see *People v. Tucker*, 181 A.D.3d 103 [4th Dept. 2020]).


The “proper cause” element of New York’s handgun licensing scheme (see Penal Law 400.00[2][f]) passes intermediate constitutional scrutiny, as it is substantially related to the state’s important interest in protecting public safety (see *Matter of Corbett v. City of New York*, 160 A.D.3d (1st Dept. 2018); *Kachalsky v. County of Westchester*, 701 F.3d 81 [2d Cir. 2012]). Moreover, viewed as a whole, New York’s handgun licensing scheme does not impose any blanket or near-total ban on gun ownership and possession (see *Kachalsky v. County of Westchester*, 701 F.3d 94-99 [2d Cir. 2012]).

Petitioner is not entitled to costs and fees incurred in connection with this proceeding, as such items are not available against the City in an Article 78 proceeding (see *Cosgrove v. Hanson*, 58 A.D.2d 911 [3d Dept. 1977]).

Through a review of all the information and documents submitted the Constitution allows the States to restrict the right to bear arms by reasonable government regulation. The Respondents properly reviewed all the information and made a rational decision to deny Petitioner’s license to carry a firearm.

ADJUDGED that the application is denied and the petition is dismissed, with costs and disbursements to respondent.

5/11/2022
DATE


LAURENCE LOVE, 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