

Matter of Elishayev v City of New York
2022 NY Slip Op 33892(U)
November 17, 2022
Supreme Court, New York County
Docket Number: Index No. 156587/2022
Judge: Nancy M. Bannon
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY M. BANNON PART 42

Justice

-----X

In the Matter of

ILAN ELISHAYEV,

Petitioner,

- v -

INDEX NO. 156587/2022

MOTION DATE 9/30/2022, 11/21/22

MOTION SEQ. NO. 001 002

THE CITY OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT, INSPECTOR HUGH BOGLE, Individually and as Commanding Officer of the License Division of THE NEW YORK CITY POLICE DEPARTMENT, NICOLE BERKOVICH, Individually and as Director of the License Division of THE NEW YORK CITY POLICE DEPARTMENT, and KEECHANT SEWELL, Individually and as Commissioner of THE NEW YORK CITY POLICE DEPARTMENT

Respondents.

DECISION, ORDER and JUDGMENT

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 4, 5, 6 were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

The following e-filed documents, listed by NYSCEF document number (Motion 002) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 were read on this motion to/for DEFAULT JUDGMENT.

I. BACKGROUND

The petitioner, Ilan Elishayev, commenced this proceeding pursuant to CPLR article 78 seeking to annul a determination of respondent New York City Police Department's (NYPD) License Division which denied his application for an unrestricted license to carry a handgun in New York City. In a "Notice of Disapproval" dated October 4, 2021, the NYPD determined that the petitioner, a property manager of residential buildings in Manhattan, failed to show "proper cause" for a license to carry a concealed weapon as required by the former Penal Law § 400.00(2)(f). The Notice, signed by respondent Inspector Hugh Bogle, further states that the petitioner failed to provide documentation of his claim that his job responsibilities placed him in extraordinary personal danger as he often collects rents in cash and responds to building emergencies in "high crime areas." The Notice also included

instructions on how to appeal the denial, including the requirement of a properly sworn and notarized statement by the applicant. The notice expressly states that “appeals that are not notarized ... will not be accepted.” In response to the denial, the petitioner submitted to the NYPD only a letter of his attorney dated October 31, 2021, entitled “Appeal of My Client Ilan Elishayev”, with no statement, notarized or unnotarized, of his own. While the petitioner does not so state, it appears that his “appeal” was not accepted. No mention is made in the papers of a final determination or any pending appeal. The court notes that the petition submitted is similarly unverified, and there is no affidavit or sworn statement submitted in support. The petition (MOT SEQ 001) and a purported default motion (MOT SEQ 002) are denied, and the proceeding is dismissed in its entirety.

II. DISCUSSION

A. Timeliness

First, the petitioner has not shown that his petition, filed on July 18, 2022, was timely. CPLR 217(1) provides in part that an article 78 proceeding “must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner.” See Matter of Yarborough v Franco, 95 NY2d 342 (2012); Matter of Rocco v Kelly, 20 AD3d 364 (1st Dept. 2005). Assuming that the NYPD’s final determination was the Notice of Disapproval rendered on October 4, 2021, and overlooking the requirement to exhaust administrative remedies, as more fully discussed below, the petitioner was to commence any CPLR article 78 proceeding no more than four months from that date. The petition was filed nine months from that date and is thus time-barred. See CPLR 217(1); Matter of Randles v State of New York Unified Court System, 128 AD3d 478 (1st Dept. 2015); Matter of Cole v New York City Hous. Auth., 122 AD3d 527 (1st Dept. 2014); Matter of Henry v New York City Hous. Auth., 122 AD3d 448 (1st Dept. 2014). Nor does the petitioner provide any legal authority that would allow for an extension of the statute of limitations based on new case law. Indeed, the petition, which was obviously filed on the heels of and in reaction to the U.S. Supreme Court’s decision in New York State Rifle & pistol Assoc., Inc. v Bruen, 142 S.Ct. 2111 (2022), and well after expiration of the four-month statutory period, is noticeably silent on the issue of timeliness.

B. Proof of Service

Secondly, the petitioner has not submitted proof of effective service. He commenced the proceeding against the City of New York, the NYPD, its commissioner and the commanding officer and director of the Licensing Division, including in their individual capacity. No opposition was submitted. However, the lack of a response may be due to lack of notice. The petitioner has not established

effective service of the petition and supporting papers on all respondents. He submits only one affidavit of service, by his attorney, alleging that counsel served all respondents by sending the papers to an email address purportedly designated by Corporation Counsel for service, without explanation. The actual email sent is not provided. The failure to demonstrate that he properly effectuated service on the respondents (CPLR 403; 7804[c]), and thus that this court has personal jurisdiction over them, warrants dismissal of the petition. See e.g. Matter of Crichlow v New York State Off. of Mental Health, 136 AD3d 503 (1st Dept. 2016); Matter of Vargas v State of New York, 95 AD3d 588 (1st Dept. 2012); Matter of Ruine v Hines, 57 AD3d 369 (1st Dept. 2008).

C. Merits

Even assuming timeliness and effective service, the petition would nonetheless be denied. It is well settled that judicial review of an administrative determination pursuant to CPLR article 78 is limited to whether the determination was arbitrary and capricious or rationally based on the record. See Matter of Peckham v Calogero, 12 NY3d 424 (2009); Pell v Bd. of Educ., 34 NY2d 222 (1974); see also Hushes v Doherty, 5 NY3d 100 (2005). Disposition of the proceeding is limited to “the facts and record adduced before the agency” when the administrative determination was rendered. See Fanelli v New York City Conciliation & Appeals Bd., 90 AD2d 756, 757 (1st Dept. 1982).

The gravamen of the petition is that, on June 23, 2022, the “proper cause” requirement of former Penal Law § 400.00(2)(f), upon which the NYPD denied the petitioner’s application, had been found by the United States Supreme Court to be unconstitutional in New York State Rifle & pistol Assoc., Inc. v Bruen, 142 S.Ct. 2111 (2022). However, that change in the law came after the October 4, 2021, determination of the NYPD. Thus, it necessarily was not considered by the NYPD in rendering its determination. Therefore, this court cannot consider it.

In considering a similar CPLR article 78 proceeding challenging the denial of an application to renew a “business carry handgun license”, a determination made prior to Bruen, the Appellate Division, First Department, held that it was constrained by that decision to annul the determination and remand the matter for the NYPD to reevaluate the petitioner’s application. See Callahan v City of New York, 208 AD3d 422 (1st Dept. 2022). Unlike in Callahan, however, the petition here cannot be remanded. Rather, it must be dismissed as untimely and for lack of proof of effective service as discussed. Furthermore, were the court to consider the merits of the petition, it would be denied for failure of proof which, as stated, does not include any affidavit of the petitioner but only an unverified petition, with the three documents attached - the Notice of

Disapproval, the attorney’s letter of appeal, and the single affidavit of service by e-mail. While the petition discusses Bruen, it is quite thin in regard to the findings and determination of the NYPD in regard to the petitioner’s application. This falls far short of demonstrating that the determination was arbitrary and capricious or not rationally based on the record submitted to the NYPD. See Matter of Peckham v Calogero, supra; Pell v Bd. of Educ., supra.

D. Improper Motion Practice

Finally, on October 25, 2022, the petitioner filed a purported motion pursuant to CPLR 3215 for a default judgment against all respondents since they did not answer the petition. The motion (MOT SEQ 002) is denied as procedurally improper. Counsel for the petitioner is cautioned against frivolous motion practice. See 22 NYCRR 130-1.1(a).

III. CONCLUSION

Accordingly, and upon the foregoing papers, it is,

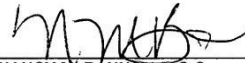
ORDERED and ADJUDGED that the petition (MOT SEQ 001) is denied and the proceeding is dismissed; and it is further,

ORDERED that the petitioner’s motion pursuant to CPLR 3215 (MOT SEQ 002) is denied as procedurally improper, and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision, Order and Judgment of the court.

11/17/2022
DATE


NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

CHECK ONE:

SEQ 001

SEQ 002

<input checked="" type="checkbox"/>	CASE DISPOSED
<input type="checkbox"/>	GRANTED
<input type="checkbox"/>	GRANTED

<input checked="" type="checkbox"/>	DENIED
<input checked="" type="checkbox"/>	DENIED

<input type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	GRANTED IN PART

<input type="checkbox"/>	OTHER
<input type="checkbox"/>	OTHER