

Matter of Felice v Waring

2024 NY Slip Op 34808(U)

September 19, 2024

Supreme Court, Suffolk County

Docket Number: Index No. 613381/2024

Judge: Maureen T. Liccione

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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.

Short Form Order

Index No. 613381/2024

SUPREME COURT – STATE OF NEW YORK
PART 78 – SUFFOLK COUNTY

P R E S E N T:

Hon. Maureen T. Liccione

Justice Supreme Court

-----x

In the Matter of the Application of
PAUL FELICE,

Petitioner,

For an Order of Mandamus Pursuant to Article 78 of
the Civil Practice Laws and Rules,

-against-

ROBERT E. WARING, in his official capacity as a
statutory licensing officer,

Respondent.

-----x

Mot. Seq. No. 002 – MD
Orig. Return Date: 07/31/2024
Mot. Submit Date: 07/31/2024

PETITIONER’S ATTORNEY

THE BELLANTONI LAW FIRM,
PC
2 Overhill Road, Suite 400
Scarsdale, NY 10583

RESPONDENT’S ATTORNEY

CHRISTOPHER J. CLAYTON
SUFFOLK COUNTY ATTORNEY
H. Lee Dennison Building
100 Veterans Memorial Highway
Hauppauge, NY 11788
By: Hope B. DeLauter, Assistant
County Attorney

Upon the e-filed documents numbered 1 through 19 and upon due deliberation, it is hereby
ORDERED that respondent’s motion to dismiss the Verified Petition is denied; and it is
further

ORDERED that the respondent shall file and serve its answer to the Verified Petition
within fifteen (15) days after service of this Order with Notice of Entry pursuant to CPLR 7804
(f).

In this Article 78 proceeding, petitioner Paul Felice (Felice), a resident of Suffolk County,
seeks an order of mandamus compelling respondent Robert Waring, in his official capacity as a
licensing officer, to accept his application for a semiautomatic rifle (SAR) license. The Suffolk
County Police Commissioner is the statutory licensing officer for pistols and semiautomatic rifles
for, inter alia, the Town of Brookhaven, Suffolk County, New York. On May 24, 2024, Felice
attempted to submit his application for a SAR license with the Suffolk County Police Department

Felice v Waring

Index No. 613381/2024

Licensing Bureau (PLB), but the PLB refused to accept his application. Petitioner's application packet contained the completed and notarized PPB-3 form, the statutorily required photographs, and the filing fee. Felice argues that he is entitled pursuant to Penal Law § 400.00 (4-b) to an order compelling respondent to accept, consider, and render a determination of his application for a SAR license. Felice does not seek a declaration from the Court requiring the issuance of a SAR license.

Respondent moves to dismiss the Verified Petition arguing that mandamus to compel does not lie to enforce the performance of respondent to accept, consider and render a determination of an incomplete application, that Felice lacks standing to bring this proceeding pursuant to CPLR 3211 (a) (3), that the petition must be dismissed as it fails to state a cause of action under CPLR 3211 (a) (7) and as respondent has established a defense based on documentary evidence under CPLR 3211 (a) (1).

In support of its motion, respondent included, inter alia, a Pistol License Notice of Disapproval, the affirmation of Lieutenant Michael Komorowski, the Appeal of Disapproval of Application, and a blank Pistol License Applicant Questionnaire. The Pistol License Notice of Disapproval shows that on January 10, 2024, the PLB denied Felice's earlier application for a pistol license (not for a SAR license) based on his failure to submit a doctor's note and barred Felice from re-applying until after January 10, 2026. Felice filed an opposition to the motion.

Applicable Law

New York State's firearm licensing law is codified in Penal Law § 400.00. On June 6, 2022, New York State enacted the Rifle Bill (Chapter 212 of the 2022 Session Laws), which requires a license for the purchase of a semiautomatic rifle after September 4, 2022 (Penal Law § 400.00 [1], [2]). Penal Law § 400.00 (3) (a) mandates that applications outside of New York City "be approved as to form by the superintendent of state police" and specifically includes the information that should be in an application. The August 2022 version of the State approved application, the PPB-3, is entitled:

"PISTOL/REVOLVER LICENSE APPLICATION
SEMI-AUTOMATIC RIFLE LICENSE APPLICATION"

The PPB-3 has separate sections which are specifically identified as "only appli[cable] to carry concealed" (NYSCEF Doc No. 3).

Pursuant to Penal Law § 400.00 (1) (o) (v), an applicant for a concealed carry license "shall, in addition to any other information or forms required by the license application submit to the

Felice v Waring

Index No. 613381/2024

licensing officer ... such other information required by the licensing officer that is reasonably necessary and related to the review of the licensing application.” Penal Law § 400.00 (1) (o) is applicable only to licenses issued under Penal Law § 400.00 (2) (f), which are licenses for a pistol or revolver that is to be carried concealed (Penal Law § 400.00 [2] [f] [“have and carry concealed”]; see *Gazzola v Hochul*, 88 F 4th 186, 203 [2d Cir 2023], cert. denied, 144 S Ct 2659 [2024]).

Lastly, pursuant to Penal Law § 400.00 (4-b), “[a]pplications for licenses shall be accepted for processing by the licensing officer at the time of presentment.”

Discussion

As a preliminary matter, the Court notes that all of respondent’s arguments in its motion to dismiss appear to be erroneously based on the assumed fact that Felice was trying to submit an application for a pistol license with the PLB. However, as the Verified Petition and the application attached to the Verified Petitioner (Felice’s filled out PPB-3) clearly evidence, Felice is seeking relief as to his attempt to submit his application for a *semiautomatic rifle* license, not a pistol license.

First, respondent argues that the Court should deny Felice’s request for an order compelling respondent to accept the application as Felice submitted an incomplete application at the time of the presentment without the Pistol License Applicant Questionnaire and Felice did not have the legal right to “submit an application for a pistol license based on his prior denial” (NYSCEF Doc No. 17). The Court finds these arguments unavailing.

Respondent identified no statute or regulation mandating an applicant for a SAR license to fill out Pistol License Applicant Questionnaire or permitting a licensing officer to require additional information outside of the PPB-3 requirements for a SAR license application. While respondent argues that pursuant to Penal Law § 400.00 (1) (o) (v) and *Kamensheik v Ryder*, 186 NYS3d 797 [Sup Ct, Nassau County 2023], the PLB has the authority to ask for additional information from the applicant in the form of the Pistol License Applicant Questionnaire, Penal Law § 400.00 (1) (o) (v) is only applicable to concealed carry license applications and not license applications for semiautomatic rifles.¹ Pursuant to the language of the statute, Penal Law § 400.00

¹ Penal Law § 400.00 (1) (o) (v) has been discussed in detail by the Second Circuit in *Antonyuk v Chiuimento*, 89 F 4th 271, 306 [2d Cir 2023], cert. granted, judgment vacated sub nom. *Antonyuk v James*, 144 S Ct 2709 [2024]). The *Antonyuk* decision, which was vacated by the United States Supreme Court and remanded for further consideration in light of *United States v Rahimi*, 144 S Ct 1889 [2024]), referred to this section as the “catch-all” provision, held that the catch-all provision was not facially unconstitutional although recognized that there would be situations in which the catch-all could be abused, and addressed the discretion afforded to a licensing officer under that provision

Felice v Waring

Index No. 613381/2024

(1) (o) (which includes subsection (v)) is applicable only to licenses issued under Penal Law § 400.00 (2) (f), which are licenses for a pistol or revolver that is to be carried concealed (Penal Law § 400.00 [2] [f] [“A license for a pistol or revolver, other than an assault weapon or a disguised gun, shall be issued to ... (f) have and carry concealed, without regard to employment or place of possession subject to the restrictions of state and federal law, by any person”]). The case cited by respondent, *Kamensheik v Ryder*, 186 NYS3d 797 [Sup Ct, Nassau County 2023], which was vacated and modified in part by *Kamensheik v Ryder*, 2024 WL 3078271 [Sup Ct, New York County, Feb. 20, 2024, No. 612719/22], is distinguishable from this case, as it involved an application for a carry concealed pistol/revolver license.

Additionally, the allegedly required Pistol License Applicant Questionnaire, is as its title clearly states, a questionnaire for a pistol license applicant; but Felice was applying for a SAR license. There is nothing in the Pistol License Applicant Questionnaire which states that the form is applicable to a SAR license application. Respondent provided no affidavit from an individual with personal knowledge within the County arguing that an applicant for a SAR license (not a pistol license) needs to complete the Pistol License Applicant Questionnaire.

Second, respondent’s argument that Felice lacks standing to bring this action pursuant to CPLR 3211 (a) (3) as he “cannot apply for a pistol license until January 10, 2026 based on the Pistol License Notice of Disapproval from his previous application dated August 30, 2022” is also without merit (NYSCEF Doc No. 17). Respondent, as a licensing officer, has no authority under Penal Law § 400.00 to bar petitioner from re-applying for a license (*Matter of Goldstein v Schwartz*, 185 AD3d 929, 930 [2d Dept 2020]; *Matter of Sibley v Watches*, 194 AD3d 1385, 1389 [4th Dept 2021]). The issuance of a two-year injunction was clearly “beyond the scope of [respondent’s] powers to either deny or grant the application” (*Matter of Goldstein*, 185 AD3d at 930; see Penal Law § 400.00 [4-a]; *Sherr v Everett*, 228 AD3d 872, 875 [2d Dept 2024]). As the two-year injunction in the Pistol License Notice of Disapproval was issued without legal authority, it is unenforceable. Additionally, while respondent states that “[i]t is undisputed that the Petitioner cannot apply for a pistol license until January 10, 2026,” petitioner is not applying for a pistol license, but, rather, is applying for a SAR license.

(*Antonyuk*, 89 F 4th at 328). The Nassau County Supreme Court in *Kamensheik v Ryder*, 2024 WL 3078271, at *2 [Sup Ct, New York County, Feb. 20, 2024, No. 612719/22] also discussed the discretion afforded to a licensing officer by the catch-all provision. As the provision is not applicable to semiautomatic rifle license applications, this Court declines to discuss the extent of the discretion afforded by Penal Law § 400.00 (1) (o) (v) to a licensing officer.

Felice v Waring

Index No. 613381/2024

Third, contrary to respondent’s argument, the petition does state a cause of action. “On a motion to dismiss a pleading pursuant to CPLR 3211(a)(7), all of the allegations in the petition are deemed true and the petitioner is afforded the benefit of every favorable inference” (*Matter of Kunik v New York City Dept. of Educ.*, 142 AD3d 616, 617 [2d Dept 2016]; *Matter of Grecco v Cimino*, 100 AD3d 892, 897 [2d Dept 2012]). In determining such a motion, the sole criterion is whether the petition sets forth allegations sufficient to make out a claim that “body or officer failed to perform a duty enjoined upon it by law” (*see* CPLR 7803 [1]). Applying this standard, the Verified Petition and the documents annexed to it establish a cognizable claim that in refusing to accept Felice’s application for a semiautomatic rifle license, respondent failed to perform a duty enjoyed upon it by Penal Law § 400.00 (4–a).

Lastly, respondent did not establish a defense based on documentary evidence so as to warrant dismissal of this proceeding pursuant CPLR 3211 (a) (3). On a motion to dismiss based upon documentary evidence under CPLR 3211(a)(1), dismissal is only warranted if the documentary evidence submitted conclusively establishes as a matter of law a defense to the asserted claims (*Matter of Oddone v Suffolk Cnty. Police Dept.*, 96 AD3d 758, 760 [2d Dept 2012]). The documentary evidence submitted by respondent – the Pistol License Notice of Disapproval, the Affirmation of Lieutenant Michael Komorowski, the Appeal of Disapproval of Application – are all related to Felice’s prior application for a pistol license, which was denied. As Felice correctly argues, such documentary evidence has no bearing on the Verified Petition, which evidently seeks relief relating to Felice’s application for a semiautomatic rifle license that is not subject to the same legal requirements under Penal Law § 400.00(1)(o) as a concealed carry license application. Additionally, as previously discussed, the two-year ban on reapplying was for a pistol license and was issued by the PLB without any legal authority.

Therefore, respondent’s motion to dismiss is denied.

The foregoing constitutes the decision and Order of the Court.

ENTER

DATE: September 19, 2024
Riverhead, NY



HON. MAUREEN T. LICCIONE, J.S.C.

___ FINAL DISPOSITION X NON-FINAL DISPOSITION