

SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack
Justice

_____ x

**TRIAL/IAS, PART 8
NASSAU COUNTY**

In the Matter of JOSEPH KAMENSHCHIK,

Petitioner(s),

Index No.: 612719/22

**For an Order of Mandamus to Compel Pursuant
to Penal Law sec 400.00 and for a Declaratory
Judgment Pursuant to CPLR §3001,**

**Motion Seqs. No.: 004
Motion Submitted: 1/12/24**

-against-

**PATRICK RYDER, in his Official Capacity as
Commissioner of the Nassau County Police
Department and as Licensing Officer under
Penal Law §400.00 for Nassau County, and all
successors therein,**

Respondent(s).

_____ x

The following papers read on this motion:

- Order to Show Cause/Supporting Exhibits.....X
- Affirmation in Opposition.....X
- Reply Affirmation.....X

Petitioner, Joseph Kamenshchik (Kamenshchik), moves this court for leave to renew and reargue the January 30, 2023 order of this court that mostly denied his petition to direct Respondent, Patrick Ryder (Commissioner Ryder), in his Official Capacity as

Commissioner of the Nassau County Police Department and as Licensing Officer under Penal Law §400.00 for Nassau County, to accept his application for a pistol permit based solely on the requirements of Penal Law §400.00. Kamenshchik further seeks a preliminary injunction and permanent injunction enjoining Commissioner Ryder from enforcing the requirement that Kamenshchik submit to urinalysis, and also finding that requirement unconstitutional.

Renewal

Both specifically and by implication, Kamenshchik challenges local requirements imposed by Commissioner Ryder that go beyond that required by Penal Law §400.00. The January 30, 2023 order was issued in the immediate aftermath of *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S.Ct. 2111 (2022), which found unconstitutional New York’s requirement that a person seeking a pistol permit must establish “proper cause” to carry a gun outside the home. It is relevant to note that, at the time the petition was submitted, Kamenshchik was not challenging any aspect of Penal Law §400.00. However, in the interim, Penal Law §400.00 was modified to include a requirement that an applicant provide “a list of former and current social media accounts of the applicant from the past three years to confirm the information regarding the applicants [sic] character and conduct as required in subparagraph (ii) of this paragraph.” Kamenshchik challenges that requirement, based upon the United States Court of Appeals, Second Circuit’s opinion in *Antonyuk v. Chiumento*, 89 F.4th 271 (2d Cir.

2023), which was issued in December, 2023. The *Antonyuk* decision, which is discussed at greater length, *infra*, considered a number of Federal Northern District of New York and Western District of New York cases wherein the those District Courts issued various temporary restraining orders and injunctions for parts of Penal Law §400.00. One such injunction was enjoining the requirement that social media accounts be provided as part of a Licensing Officers' inquiry into whether an applicant possessed "good moral character". The Second Circuit in *Antonyuk* upheld the injunction as to social media accounts.

Kamenshchik was and remains a resident of Nassau County who attempted to submit an application for a pistol permit in Nassau County. Since the time of the January 30, 2023 order, Kamenshchik has been denied a pistol permit, and the initial basis for the current application was the denial being based on, at least partially, Commissioner Ryder requiring Kamenshchik (and all other applicants) to submit to urinalysis to ensure they were not addicted to illegal drugs. Kamenshchik now asks this court to renew and reargue the January 30, 2023 order.

A motion for leave to renew or reargue is addressed to the sound discretion of the Supreme Court (see *Matter of Swingearn*, 59 AD3d 556 [2d Dept. 2009]). A motion for renewal "shall be based upon new facts not offered on the prior motion that would change the prior determination" (CPLR § 2221[e] [2]). A motion for reargument must be "based upon matters of fact or law allegedly overlooked or misapprehended by the court in

determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (CPLR § 2221[d][2]). It is not designed, however, to provide an unsuccessful party with successive opportunities to re-litigate the issues previously decided (*see Foley v. Roche*, 68 AD2d 558, 567 [1st Dept. 1979]), or to present arguments different from those originally tendered (*see Giovanniello v. Carolina Wholesale Off. Mach. Co., Inc.*, 29 AD3d 737, 738 [2d Dept. 2006]).

Pursuant to CPLR § 2221(d)(3) a motion for reargument "shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry". There is no statutory limit to the time within which a litigant can file a motion to renew based upon facts not offered on the prior motion that would change the prior determination pursuant to CPLR § 2221[e]. Regardless of when the motion is filed, the Supreme Court has jurisdiction to reconsider its prior order "regardless of statutory time limits concerning motions to reargue" (*Liss v Trans Auto Sys.*, 68 NY2d 15, 20 [1986]; *see Aridas v Caserta*, 41 NY2d 1059 [1977]; *cf. Matter of Huie [Furman]*, 20 NY2d 568 [1967]; *Johnson v Incorporated Vil. of Freeport*, 303 AD2d 640 [2d Dept. 2003]).

To prevail upon a motion to renew, a party must proffer both "new facts not offered on the prior motion that would change the prior determination . . . and . . . reasonable justification for the failure to present such facts on the prior motion" (CPLR § 2221 [e] [2], [3]; *see New York Cent. Mut. Fire Ins. Co. v Caddigan*, 15 AD3d 581 [2d

Dept. 2005], *JP Morgan Chase Bank, N.A. v Malarkey*, 65 AD3d 718, 719-720 [3d Dept. 2009]; *Johnson v Title N., Inc.*, 31 AD3d 1071, 1071-1072 [3d Dept. 2006]).

Granting renewal is proper for a number of reasons. First, the *Antonyuk* decision is the first appellate-level decision in this jurisdiction interpreting, applying and analyzing *Bruen* to this extent since its publication, and *Antonyuk* addresses issues this court considered in the January 30, 2023 order. Second, a significant part of this court's prior order focused on Penal Law §400.00(1)(o)(v) which, on top of the specific requirements an applicant must meet, allows a Licensing Officer to consider “.. such other information required by the licensing officer that is reasonably necessary and related to the review of the licensing application,” which the *Antonyuk* court referred to as the “catch-all” provision. *Antonyuk's* interpretation of the scope of the catch-all provision differs from that contained in this court's prior order. Third, on October 4, 2023, Kamenshchik received the denial of his pistol permit application. The denial listed the following factors:

Failure to submit a completed form PPB-3, State of New York Pistol/Revolver License Application/Semi-Automatic Rifle License Application for a "Carry Concealed" pistol/revolver license. Specifically, you failed to complete the sections entitled "Marital Status and Relationships" and "Social Media Accounts."

Failure to submit a certificate of completion endorsed and affirmed by a duly authorized instructor denoting your proficiency in a concealed carry firearms safety training course that complies with Penal Law § 400.00(19) and the Minimum Standards for New York Concealed Carry Firearms

Safety Training promulgated by the New York State Division of Criminal Justice Services and the Division of State Police

Failure to submit a notarized statement detailing whether or not any minors are residing, full-time or part-time, with you

Failure to provide the name and contact information of your current spouse or domestic partner and any other adults residing with you, including adult children

Failure to submit a list of former and current social media accounts from the past three (3) years.

Failure to submit urine drug testing results from a 12-panel test conduct by a United States Department of Health and Human Services (HHS) certified laboratory

Other than urinalysis and the Firearms Safety¹ course, *Antonyuk* addresses each of these issues.

Regarding the catch-all provision, this court, like *Antonyuk* determined that *Bruen* did not prevent a Licensing Officer from having a certain amount of discretion in interpreting the application or seeking follow-up information. However, *Antonyuk's* description of that discretion was much narrower than this court allowed. In addressing the catch-all provision, the *Antonyuk* court used words like “modicum”, “limited”, “minor” and “modest” in describing the degree of discretion the Licensing Officer could exercise in invoking the catch-all provision: (“Next, we disagree with the district court's conclusion that affording licensing officers a modicum of discretion to grant or deny a

¹Kamenshchik has indicated that he has now completed the course.

concealed carry permit is inconsistent with the nation's tradition of firearm regulation.”

Antonyuk at 312. “As we explain below, moreover, statutes that grant that kind of limited discretion in applying defined criteria are consistent with our tradition of firearms regulation.” *Antonyuk* at 317. “For the reasons above, we disagree with the district court's conclusion that licensing regimes that afford a modicum of discretion to issuing officers are not part of the nation's tradition of firearm regulation and that the character provision thus violates the Second Amendment.” *Antonyuk* at 324).

Though the *Antonyuk* court does not specifically define these terms, there is no need to under these circumstances. The *Antonyuk* court describes a small amount of discretion afforded the Licensing Officer, particularly in the area of good moral character or dangerousness, and in the nature of following-up on other information provided. It is therefore hard to reconcile Nassau County's requirement that an applicant submit to urinalysis. This was not an issue in *Antonyuk*, but it is not hard reach the conclusion that requiring drug testing is more than a Licensing Officer exercising a modicum of discretion. If urinalysis is beyond the Licensing Officer's discretion, then it can only be upheld if there is, in *Bruen's* parlance, a historical analogue. Not only is there no such historical analogue, but forcing an applicant to submit to urinalysis, in essence, requires them to give up their 4th Amendment rights against unlawful searches and seizures to exercise their 2nd Amendment rights. This court cannot imagine a scenario, under current 2nd Amendment jurisprudence, where that would be allowed. The court is therefore

constrained to find the urinalysis requirement is unconstitutional, as applied to Kamenshchik in this matter.

Further, Kamenshchik's application cannot be denied based upon his refusal to provide social media accounts. As the court determined in *Antonyuk*, such a requirement is an infringement on 1st Amendment Free Speech, particularly where a person wishes to communicate that speech anonymously. "Anyone familiar with most social media platforms knows that nearly all handles are pseudonymous, at least to the extent that the poster's identity is not immediately apparent. Requiring disclosure of handles is thus to demand that applicants effectively forfeit their right to pseudonymous speech on social media (where so much speech now takes place)." *Antonyuk* at 332. As such, Kamenshchik's application cannot be denied for his refusal to supply social media account information.

Preliminary Injunction

It is well established that to prevail on a motion for preliminary injunctive relief, the movant must clearly demonstrate a likelihood of success on the merits, the prospect of irreparable harm or injury if the relief is withheld and that a balance of the equities favors the movant's position (*see Wheaton/TMW Fourth Ave., LP v. New York City Dept. of Bldgs.*, 65 AD3d 1051 [2d Dept. 2009]; *Pearlgreen Corp. v. Yau Chi Chu*, 8 AD3d 460 [2d Dept. 2004]). The decision to grant a preliminary injunction is committed to the sound discretion of the court (*see Tatum v. Newell Funding, LLC.*, 63 AD3d 911 [2d

Dept. 2009]; *Bergen–Fine v. Oil Heat Inst., Inc.*, 280 AD2d 504 [2d Dept. 2001]), as the remedy is considered to be a drastic one (*see Doe v. Axelrod*, 73 NY2d 748 [1988]).

Consequently, a clear legal right to relief which is plain from undisputed facts must be established (*see Wheaton/TMW Fourth Ave., LP v. New York City Dept. of Bldgs.*, 65 AD3d 1051, *supra*; *Gagnon Bus Co., Inc. v. Vallo Transp., Ltd.*, 13 AD3d 334 [2d Dept 2004]; *Blueberries Gourmet v. Aris Realty*, 255 AD2d 348 [2d Dept 1998]).

Article 63 of the CPLR governs the issuance of preliminary injunctions and temporary restraining orders. Pursuant to CPLR § 6301, a preliminary injunction may be granted in an action for permanent injunctive relief to restrain the defendant, during the pendency of said action, from doing that which the plaintiff seeks to enjoin permanently, by the final judgment. In addition, a preliminary injunction may be granted in any action where it appears that a defendant threatens, or is about to do, or is doing, or procuring to be done, an act in violation of the plaintiff's rights, respecting the subject of the action, which is likely to render the judgment ineffective. To constitute the “subject of the action” within the contemplation of CPLR § 6301, the property or assets for which restraint is sought must be unique or sufficiently specific and the very object of the claim giving rise to the demand for preliminary injunctive relief (*see Credit Agricole Indosuez v. Rossiyskiy Kredit Bank*, 94 NY2d 541 [2000]; *Coby Group, LLC v. Hasenfeld*, 46 AD3d 593 [2d Dept 2007]).

The court finds Kamenshchik is entitled to a preliminary injunction enjoining

enforcement of the urinalysis requirement. Kamenshchik has established a likelihood of success on the merits that the urinalysis requirement is unenforceable based upon the requirements of *Bruen*, and the analysis contained in *Antonyuk*. Irreparable harm exists because Kamenshchik is being denied a constitutional right. For that same reason, the equities are balanced in Kamenshchik's favor.

Commissioner Ryder's remaining bases for denying the application are the failure to complete the sections of the application entitled "Marital Status and Relationships", the failure to submit a notarized statement detailing whether or not any minors are residing, full-time or part-time, with Kamenshchik, and the failure to provide the name and contact information of his current spouse or domestic partner and any other adults residing with him, including adult children. *Antonyuk* found these requirements proper:

In addition to providing an alternate means by which the licensing officer can learn of potential character references, the cohabitants themselves can inform the dangerousness inquiry. An assessment of an applicant's "good moral character" requires an evaluation of the whole individual. The identity and characteristics of an applicant's cohabitants are obviously relevant to the dangerousness of the applicant in situ. For instance, if an applicant living with multiple young children was unwilling or unable to secure firearms from meddling, surely a licensing officer could conclude that the applicant cannot "be entrusted with a weapon and to use it only in a manner that does not endanger [him]self or others," N.Y. Penal L. § 400.00(1)(b). *Antonyuk* at 330.

The denial of Kamenshchik's pistol permit application will be vacated, and Kamenshchik will be granted 30 days from being served with notice of entry of this order

to submit the cohabitation information, should he desire to do so. If he does so, Commissioner Ryder will be directed to consider the application in its entirety, without penalizing Kamenshchik for the failure to submit to urinalysis or provide social media information. A decision on the reconsideration of the application will be completed and provided to Kamenshchik within 30 days of receiving the updated application materials.

Kamenshchik's motion also seeks a finding that Commissioner Ryder's fingerprinting process is unconstitutional. This was addressed in prior orders and, specifically, by short form order dated August 24, 2023 which directed a hearing regarding this issue². That hearing has not yet taken place. The issue is that Commissioner Ryder requires fingerprinting for pistol permit purposes to take place at the Pistol Licensing Section only, and the wait time to get fingerprinted can be as long as eight months as it was for Kamenshchik. This court wanted, and continues to want, an explanation as to why it takes so long, and why fingerprinting cannot take place at any precinct (like it can and does for other reasons). Absent a valid reason, the court could be constrained to find the wait unreasonable and unconstitutional.

The hearing on this issue will be rescheduled for March 25, 2024 at 2:30pm. The court is aware that it is Commissioner Ryder's opinion that any such hearing is stayed because he has appealed the August 24, 2023 order directing the hearing. CPLR 5519(a) stays any effort to enforce a judgment or order where the state or a political

²The August 24, 2023 order also directed the hearing to address Commissioner Ryder's requirements that people providing references not be law enforcement and not be related to one another.

subdivision is party and files a notice of appeal. However, any such stay applies to an executory directive which commands a person to do an act. (*Shorten v City of White Plains*, 216 AD2d 344 [2d Dept 1995]). The August 24, 2023 directed Commissioner Ryder to issue a decision on Kamenshchik's application within 30 days of the order being served with notice of entry, and further directed the hearing take place regarding the fingerprint wait time. The directive to issue a decision on the application within 30 days was executory, and would have been stayed by any appeal. That has been rendered moot as the denial letter has been issued. The hearing seeks to clarify the process in which an application is considered, and is not an executory directive. As such, the court finds it is not stayed pursuant to CPLR 5519(a).

Accordingly, it is hereby

ORDERED, that Kamenshchik's motion is mostly GRANTED; and it is further

ORDERED, that the portion of the motion for leave to renew the January 30, 2023 order is GRANTED, and upon renewal, the January 30, 2023 order is modified to the extent that Kamenischik is not required to submit to urinalysis, and is not required to provide social medial information; and it is further

ORDERED, that, upon renewal, the denial of Kamenshchik's pistol permit application is vacated. Kamenshchik has 30 days from being served with notice of entry of this order to submit the "cohabitation" information, should he choose to do so. If he does, Commissioner Ryder is directed to reconsider Kamenshchik's application without

penalizing Kamenshchik for failing to provide social media information and for failing to submit to urinalysis; and it is further

ORDERED, that the portion of the motion that seeks a preliminary injunction of the urinalysis requirement is GRANTED; and it is further

ORDERED, that the portion of the motion that seeks a finding that the urinalysis requirement is unconstitutional is GRANTED as applied to Kamenshchik in this matter; and it is further

ORDERED, that the parties are directed to appear for a hearing on March 25, 2024 at 2:30p.m. to address Commissioner Ryder's requirement that only the Pistol Licensing Section can perform fingerprinting for a pistol license application, and whether that results in an unconstitutionally and unnecessarily long wait; and it is further

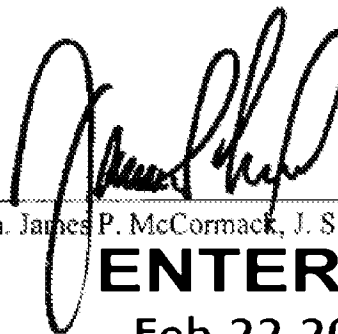
ORDERED, that the hearing will also address whether it is arbitrary and capricious to require that references not be law enforcement, and that they not be related to one another. Until such time as the hearing takes place, those requirements will remain in effect; and it is further

ORDERED, that those portions of this order that find the urinalysis requirement unconstitutional, and that finds Commissioner Ryder should be enjoined from enforcing the urinalysis requirement are stayed for 30 days, except as related to Kamenshchik. The vacatur of the denial of his permit, and the order to reconsider his application without penalizing him for failing to supply social media information and failing to submit to

urinalysis remain in effect.

This shall constitute the decision and order of this Court. The court has considered the remaining arguments of the parties and finds them to be moot or without merit. Any relief not specifically granted is denied.

Dated: February 20, 2024
Mineola, N.Y.



Hon. James P. McCormack, J. S. C.

ENTERED

Feb 22 2024

NASSAU COUNTY
COUNTY CLERK'S OFFICE