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January 13, 2017

Via U.S. Mail

The Honorable Frank P. Geraci, Jr.
Chief United States District Judge
Western District of New York
U.S. Courthouse
100 State Street
Rochester, New York 14614

RE: Libertarian Party of Erie County et al. v. Cuomo et al., 15-cv-00654 (FPG)

Your Honor:

I am an Assistant Attorney General in the Office of Eric T. Schneiderman, Attorney General of the State of New York. This Office represents defendants Andrew M. Cuomo, Governor of the State of New York; Eric T. Schneiderman, Attorney General of the State of New York; Joseph A. D'Amico, Superintendent of the New York State Police; the Honorable Matthew J. Murphy III, Niagara County Court Judge; the Honorable Dennis M. Kehoe, Wayne County Judge; and the Honorable M. William Boller, Judge of the New York State Court of Claims and Acting New York State Supreme Court Justice (collectively, the "Defendants") in the above-referenced action.[1]

Defendants submit this letter to advise the Court of a recent decision of the United States Court of Appeals for the Second Circuit, *Mishtaku v. Espada*, No. 15-2265, 2016 U.S. App. LEXIS 17734 (2d Cir. Sept. 28, 2016) (summary order), which was not handed down until after all briefing on Defendants' motion to dismiss was completed last June, and which is relevant to issues currently being considered by the Court on the pending motion.

In its decision, the Second Circuit affirmed the judgment of the district court and, applying intermediate scrutiny, held that the firearms licensing provisions of New York Penal Law § 400.00 "do not violate the Second Amendment." *Id.* at *1-2. That holding fully supports

[1] As of June 9, 2016, the Superintendent of the New York State Police is George P. Beach II. With respect to Plaintiffs' official-capacity claims only, he should be substituted for Joseph A. D'Amico as a defendant. Fed. R. Civ. P. 25(d).

Defendants' arguments for dismissal in this case. (*See* Memorandum of Law in Support of Defendants' Motion to Dismiss the Amended Complaint, dated Apr. 29, 2016 ("Defs.' Mem.") (ECF Docket No. 26) at 20-32; Reply Memorandum of Law in Further Support of Defendants' Motion to Dismiss the Amended Complaint, dated June 24, 2016 (ECF Docket No. 30) ("Defs.' Reply Mem.") at 4-9.)

The Second Circuit also affirmed the district court's decision not to exercise jurisdiction over plaintiff's state-law claim under Article 78 of the New York Civil Practice Law and Rules. *Mishtaku*, 2016 U.S. App. LEXIS 17734, at *3. That, too, supports Defendants' arguments for dismissal here, as to plaintiff John Murtari's purported Article 78 challenge to the denial of his application for a firearms license. (*See* Defs.' Mem. at 40-45; Defs.' Reply Mem. at 1-2 & n.2.)

A copy of the Second Circuit's decision in *Mishtaku* is attached as Exhibit A. I have also attached, as Exhibit B, a copy of the unpublished (and unavailable on Westlaw or LEXIS) district court decision in the case.

Respectfully submitted,

William J. Taylor, Jr.
Assistant Attorney General

Attachments

cc: James Ostrowski, Esq., *Attorney for Plaintiffs*

MARTIN MISHTAKU, Plaintiff-Appellant, v. OFFICER CINDY ESPADA, SERGEANT ANTHONY ESPOSITO, DEPUTY INSPECTOR ANDREW LUNETTA, DIRECTOR THOMAS M. PRASSO, POLICE DEPARTMENT LICENSE DIVISION, CITY OF NEW YORK, Defendants-Appellees.

No. 15-2265

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

2016 U.S. App. LEXIS 17734

September 28, 2016, Decided

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

PRIOR HISTORY: [*1] Appeal from a judgment of the United States District Court for the Southern District of New York (Vernon S. Broderick, Judge).

COUNSEL: PLAINTIFF-APPELLANT, Pro se, MARTIN MISHTAKU, Flushing, NY.

FOR DEFENDANTS-APPELLEES: ELIZABETH I. FREEDMAN, Assistant Corporation Counsel, for Zachary W. Carter, Corporation Counsel of the City of New York, New York, NY.

JUDGES: PRESENT: PIERRE N. LEVAL, RAYMOND J. LOHIER, JR., Circuit Judges, JOHN G. KOELTL, District Judge.*

* The Honorable John G. Koeltl, of the United States District Court for the Southern District of New York, sitting by designation.

OPINION

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is AFFIRMED.

Plaintiff-appellant Martin Mishtaku, proceeding pro se, appeals the District Court's judgment dismissing his complaint, which asserted violations of the Second Amendment and the Equal Protection Clause. We assume the parties' familiarity with the facts and record of the prior proceedings, to which we refer only as necessary to explain our decision to affirm.

We review the District Court's grant of a motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) de novo, accepting all of Mishtaku's allegations as true. Graziano v. Pataki, 689 F.3d 110, 114 (2d Cir. 2012).

We apply intermediate scrutiny [*2] to "laws implicating the Second Amendment." N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo, 804 F.3d 242, 260-61 (2d Cir. 2015), cert. denied sub nom. Shew v. Malloy, 136 S. Ct. 2486 (2016). Section 400.00 of the New York Penal Law requires that an applicant for a "license[] to carry, possess, repair and dispose of [a] firearm[]" be "of good moral character," and Title 38 § 5-10 of the Rules of the City of New York states that "an application for a handgun license may be denied" when "[t]he applicant has been arrested . . . or is reasonably believed to have a

disability or condition that may affect the ability to safely possess or use a handgun, including . . . mental illness." In District of Columbia v. Heller, the Supreme Court cautioned that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill," describing such regulations as "presumptively lawful regulatory measures." 554 U.S. 570, 626, 128 S. Ct. 2783, 171 L. Ed. 2d 637 & n.26 (2008). Here, the challenged regulations satisfy intermediate scrutiny because "New York has substantial, indeed compelling, governmental interests in public safety and crime prevention," Kachalsky v. County of Westchester, 701 F.3d 81, 97 (2d Cir. 2012), and the challenged regulations are substantially related to those important interests. We therefore agree with the District Court that the challenged regulations do not violate the Second Amendment.

"To prove a violation of the Equal Protection Clause . . . a plaintiff [*3] must demonstrate that he was treated differently than others similarly situated as a result of intentional or purposeful discrimination." Phillips v. Girdich, 408 F.3d 124, 129 (2d Cir. 2005). We agree with the District Court that Mishtaku failed to allege how defendants-appellees treated him differently than other similarly-situated individuals and therefore failed to state an equal protection claim. See id. at 129.

Finally, we conclude that the District Court did not err in declining to exercise supplemental jurisdiction over state-law claims brought under Article 78 of the New York Civil Practice Law and Rules. See Carlsbad Tech., Inc. v. HIF Bio, Inc., 556 U.S. 635, 639-40, 129 S. Ct. 1862, 173 L. Ed. 2d 843 (2009).

We have considered all of Mishtaku's remaining arguments and conclude that they are without merit. Accordingly, we AFFIRM the judgment of the District Court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARTIN MISHTAKU,

Plaintiff,

- against -

CITY OF NEW YORK, et al.,

Defendants.

14-CV-839 (VSB)

MEMORANDUM & ORDER

Appearances:

Martin Mishtaku
Flushing, New York
Plaintiff Pro Se

Jacqueline Hui
New York City Law Department
New York, New York
Counsel for Defendants

VERNON S. BRODERICK, United States District Judge:

Plaintiff Martin Mishtaku brings this action *pro se* alleging claims related to the New York City Police Department ("NYPD") License Division's ("License Division") denial of his application for a residential pistol permit. Because Plaintiff's Amended Complaint, (Doc. 5), does not contain sufficient allegations to state a claim upon which relief can be granted, Defendants' motion for judgment on the pleadings, (Doc. 29), is GRANTED and this case is DISMISSED.

I. Background[1]

On March 22, 2013, Plaintiff filed a residential pistol permit application with the License

[1] The following factual summary is drawn from the allegations of the Amended Complaint, unless otherwise

Division. (Am. Compl. 2, 9.)[2] On June 20, 2013, Plaintiff was interviewed by NYPD Officer Cindy Espada. (*Id.* at 2-3, 9.) From Plaintiff's perspective the interview went well, and Officer Espada told him that he would receive a notice in the mail by August 20, 2013. (*Id.* at 9-10.) On August 20, having not heard from the License Division, Plaintiff called Officer Espada. (*Id.* at 2, 10.) Officer Espada informed him that she was waiting on the papers from a 2010 psychological evaluation of Plaintiff made in connection with Plaintiff's unsuccessful application to become an NYPD officer. (*Id.* at 2-3, 10.) On October 15, 2013, Plaintiff again called Officer Espada to inquire about his application. (*Id.* at 3, 11.)

On October 18, 2013, Plaintiff visited the License Division in person, where he was informed that his application had been denied the previous month. (*Id.* at 3, 12.) Plaintiff was provided with a Notice of Disapproval, (*id.* at 3, 12, 22), which stated that Plaintiff's "arrest history, lack of responsibility, and poor stress tolerance cast grave doubt upon [Plaintiff's] ability to safely possess a firearm in New York City," (*id.* at 14, 22).[3] The License Division's determination to deny Plaintiff's application was based on, among other things, Plaintiff's August 2009 arrest, (*id.* at 22, 27; Doc. 31, at 7), and the NYPD's February 16, 2010 psychological evaluation of Plaintiff after which the NYPD determined that Plaintiff was

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indicated, which I assume to be true for purposes of this motion. My references to these allegations should not be construed as a finding as to their veracity, and I make no such findings.

[2] "Am. Compl." refers to the Amended Complaint and the documents attached to it. (Doc. 5.) All references to specific pages in the Amended Complaint or the documents attached thereto refer to the page numbers assigned by the Court's electronic filing system ("ECF").

[3] In relation to the instant motion I may consider the Amended Complaint as well as any attachments to the Amended Complaint. *See Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152-53 (2d Cir. 2002). In light of Plaintiff's *pro se* status, I also may consider factual allegations raised in Plaintiff's submissions on this motion. *See, e.g., Johnson v. Wright*, 234 F. Supp. 2d 352, 356 (S.D.N.Y. 2002) (considering a *pro se* plaintiff's factual allegations in briefs as supplementing his complaint); *Burgess v. Goord*, No. 98-CV-2077, 1999 WL 33458, at *1 n.1 (S.D.N.Y. Jan. 26, 1999) ("In general, a court may not look outside the pleadings when reviewing a Rule 12(b)(6) motion to dismiss. However, the mandate to read the papers of *pro se* litigants generously makes it appropriate to consider plaintiff's additional materials, such as his opposition memorandum." (internal quotation marks and citations omitted)).

"unsuitable for the position of Police Officer," (Am. Compl. 10, 22, 28).[4]

After receiving the Notice of Disapproval, Plaintiff asked to speak to a supervisor and was told he could file an appeal. (*Id.* at 12.) In late October, Plaintiff sought a psychological examination at Flushing Hospital in an effort to "prove [his] state of mind was sound," but was denied an evaluation. (*Id.* at 3, 15-16.) On November 12, 2013, Plaintiff appealed the License Division's decision. (*Id.* at 3, 14, 26-29.) On December 4, 2013, Plaintiff received the License Division's final determination denying his application. (*Id.* at 3, 16, 30.) The License Division's Notice of Disapproval After Appeal cited Plaintiff's 2009 arrest and related guilty plea and sentence; the NYPD's 2010 psychological evaluation of Plaintiff, including the finding that Plaintiff "demonstrated a consistent pattern of poor coping skills and poor judgment"; and the lack of evidence refuting the NYPD psychologist's conclusions. (*Id.* at 30.)

II. Procedural History

On February 6, 2014, Plaintiff initiated this lawsuit by filing a complaint. (Doc. 2.) On the same day, Plaintiff filed under civil action number 14-CV-838 a separate complaint making substantively similar allegations as his complaint in this action. On March 11, 2014, Judge Loretta A. Preska, to whom this case was originally assigned, issued an order closing 14-CV-838 and directing Plaintiff to submit a single amended complaint including all of his allegations and claims relating to the denial of his residential pistol permit application. (*See* Doc. 4.) On May 2, 2014, Plaintiff filed his Amended Complaint, which asserted claims against the License Division and various individual officers of the NYPD. (Doc. 5.) The case was reassigned to me on May

[4] While the precise circumstances of Plaintiff's arrest are not clear, Plaintiff's arrest appears to have resulted from his actions and conduct with respect to a female complainant. (Am Compl. 27; Doc. 31, at 7; Transcript of April 3, 2015 Hearing ("3/4 Tr.") 23-24.) According to the License Division, Plaintiff was charged with resisting arrest, third-degree criminal trespass and second-degree harassment; pled guilty to disorderly conduct; and was sentenced to a one-year conditional discharge and issued an order of protection. (Am. Compl. 30.) The arrest arose from a series of incidents that began in May 2009. (*Id.*)

7, 2014. (Docket Entry of May 7, 2014.) On May 9, 2014, I issued an order dismissing Plaintiff's claims against the License Division and substituting the City of New York as a Defendant. (Doc. 7.) On August 18, 2014, Defendants answered the Amended Complaint. (Doc. 21.)

On October 7, 2014, Defendants submitted a letter requesting permission to file a motion for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. (Doc. 23.) On October 17, 2014, I held a conference at which I granted Defendants leave to file their Rule 12(c) motion and set a briefing schedule on the motion. (*See* Docket Entries of Oct. 17, 2014.) On December 16, 2014, Defendants filed their motion for judgment on the pleadings and an accompanying memorandum of law. (Docs. 29, 30.) Plaintiff filed his opposition on February 17, 2015, (Doc. 31), and Defendants filed their reply on March 18, 2015, (Doc. 32). I held oral argument on April 3, 2015. (Docket Entry for Apr. 3, 2015.) On April 9, 2015, Plaintiff filed a supplemental brief. (Doc. 33.)[5]

III. Legal Standards

"After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings" under Federal Rule of Civil Procedure 12(c).[6] Fed. R. Civ. P. 12(c). The standard applicable to motions under Rule 12(c) is the same as the standard applied to motions to dismiss pursuant to Rule 12(b)(6). *Alcantara v. Bakery & Confectionery Union & Indus. Int'l Pension Fund Pension Plan*, 751 F.3d 71, 75 (2d Cir. 2014). To survive a motion to

[5] Although Plaintiff did not seek leave to file a supplemental brief, in light of his *pro se* status and the absence of any apparent prejudice to Defendants, I will consider Plaintiff's submission in connection with Defendants' motion. *Cf. Chambliss v. Rosini*, 808 F. Supp. 658, 662 (S.D.N.Y. 2011) (exercising discretion to consider *pro se* plaintiff's materials not filed in accordance with procedural rule); *John Wiley & Sons, Inc. v. Swancoat*, No. 08-CV-5672, 2011 WL 165420, at *1 (S.D.N.Y. Jan. 15, 2011) (exercising discretion to consider *pro se* defendant's untimely motion where there was no prejudice to plaintiff).

[6] Having filed an answer, Defendants were not permitted to file a Rule 12(b) motion. Fed. R. Civ. P. 12(b) ("A motion [under Rule 12(b)] must be made before pleading if a responsive pleading is allowed.").

dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim will have "facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* This standard demands "more than a sheer possibility that a defendant has acted unlawfully." *Id.* "Plausibility . . . depends on a host of considerations: the full factual picture presented by the complaint, the particular cause of action and its elements, and the existence of alternative explanations so obvious that they render plaintiff's inferences unreasonable." *L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 430 (2d Cir. 2011).

In considering a motion under Rule 12(b)(6) or Rule 12(c), a court must "accept all factual allegations in the complaint as true and draw all reasonable inferences in [the plaintiff's] favor." *Johnson v. Rowley*, 569 F.3d 40, 43 (2d Cir. 2009) (per curiam); *accord Kassner v. 2nd Ave. Delicatessen Inc.*, 496 F.3d 229, 237 (2d Cir. 2007). A complaint need not make "detailed factual allegations," but it must contain more than mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Iqbal*, 556 U.S. at 678 (internal quotation marks omitted). Finally, although all allegations contained in the complaint are assumed to be true, this tenet is "inapplicable to legal conclusions." *Id.*

Even after *Twombly* and *Iqbal*, a "document filed *pro se* is to be liberally construed and a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." *Boykin v. KeyCorp.*, 521 F.3d 202, 214 (2d Cir. 2008) (internal quotation marks omitted). Further, pleadings of a *pro se* party should be read "to raise the strongest arguments that they suggest." *Kevilly v. New York*, 410 F. App'x 371, 374 (2d Cir.

2010) (summary order) (internal quotation marks omitted). Nevertheless, dismissal of a *pro se* complaint is appropriate where a plaintiff fails to state a plausible claim supported by more than conclusory factual allegations. *See Walker v. Schult*, 717 F.3d 119, 124 (2d Cir. 2013). In other words, the "duty to liberally construe a plaintiff's complaint is not the equivalent of a duty to re-write it." *Geldzahler v. N.Y. Med. Coll.*, 663 F. Supp. 2d 379, 387 (S.D.N.Y. 2009) (alteration and internal quotation marks omitted).

IV. Discussion

Although the allegations in the Amended Complaint do not clearly state causes of action, Plaintiff appears to be making two general claims: (1) that he was denied a residential pistol permit in violation of his Second Amendment rights; and (2) that he was subject to prejudice and bias in violation of the Equal Protection Clause of the Fourteenth Amendment.

A. *Second Amendment*

Plaintiff fails to adequately allege a violation of his Second Amendment rights. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment protects an individual's right to use a firearm for traditionally lawful purposes. The Second Amendment's protection applies fully to the states. *McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010). The core of this protection is "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. at 635; *accord Osterweil v. Bartlett*, 706 F.3d 139, 141 (2d Cir. 2013) ("The Second Amendment protects an individual right to bear arms, and . . . the core of this right is the right to self-defense in the home.").

The Second Amendment, however, is "not unlimited." *Heller*, 554 U.S. at 626. While "Second Amendment guarantees are at their zenith within the home," *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012), the Court in *Heller* made clear that its holding

should not "cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill" or in sensitive places, or laws imposing conditions or qualifications on the sale of firearms, 554 U.S. at 626[7]; *accord McDonald*, 561 U.S. at 786 (incorporation of the Second Amendment against the states "does not imperil every law regulating firearms"); *see also Montalbano v. Port Auth. of N.Y. & N.J.*, 843 F. Supp. 2d 473, 481 (S.D.N.Y. 2012) ("Reasonable restrictions may be imposed on the right to keep and bear arms without the right being denied.").

Reading the Amended Complaint liberally, I construe Plaintiff's Second Amendment claim as encompassing two alternative arguments: First, Plaintiff claims that he has an absolute right to own a handgun wherever necessary to protect himself and his loved ones,[8] and second, Plaintiff claims that the permitting requirements pursuant to which the License Division denied Plaintiff's handgun application are unconstitutional facially and as applied to him.[9] As explained in more detail below, each of these claims fail. The Court made clear in *Heller* that Second Amendment rights are not absolute; therefore, the first claim must be summarily dismissed. 554

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[7] These "presumptively lawful regulatory measures [are] only . . . examples; [the] list does not purport to be exhaustive." *Heller*, 554 U.S. at 627 n.26.

[8] Although Plaintiff applied for a residential handgun permit, Plaintiff appears to be arguing that he has a right to carry a handgun wherever he feels it might be needed. (*See, e.g.*, Am. Compl. 12 ("[T]he 2nd amendment right . . . is necessary for me to protect my family and home, interior and exterior. By interior, I mean my family within my home and exterior, my home outside my home, in other words the people and my country if needed."); 4/3 Tr. 16 (requesting a document "recognizing my fundamental, unalienable right to keep and bear arms by enabling me to defend myself at all times and places").)

[9] Plaintiff also suggests that he is not subject to the jurisdiction of the United States. (*See* Doc. 31, at 3, 6-7. *See generally* Doc. 33.) Such arguments have no merit. Plaintiff's purported status as a "sovereign, free and independent being," (Doc. 31, at 6), does not exempt him from state or federal laws. *See United States v. Ulloa*, 511 F. App'x 105, 106 n.1 (2d Cir. 2013) ("The sovereign citizens are a loosely affiliated group who believe that the state and federal governments lack constitutional legitimacy and therefore have no authority to regulate their behavior."); *Paul v. New York*, No. 13-CV-5047, 2013 WL 5973138, at *3 (E.D.N.Y. Nov. 5, 2013) ("[S]overeign citizens, like all citizens of the United States, are subject to the laws of the jurisdiction in which they reside." (internal quotation marks omitted)); *see also, e.g., Coppedge v. Deutsche Bank Nat'l Trust*, 511 F. App'x 130, 133 (3d Cir. 2013) (per curiam) ("[S]overeign-citizen-based averments . . . are unlikely to bring [the plaintiff] relief in *any* court of law . . . .").

U.S. at 626. The second claim also fails, since Plaintiff makes no allegations suggesting that New York's licensing laws—or the application of those laws to Plaintiff by the License Division—result in an unconstitutional deprivation.

As an initial matter, in determining whether Plaintiff has stated a claim under the Second Amendment, I must determine the level of scrutiny to apply to the regulations Plaintiff appears to challenge. In the Second Circuit "heightened scrutiny is appropriate only as to those regulations that substantially burden the Second Amendment." *United States v. Decastro*, 682 F.3d 160, 164 (2d Cir. 2012). In other words, post-*Heller*, "heightened scrutiny is triggered only by those restrictions that (like the complete prohibition on handguns struck down in *Heller*) operate as a substantial burden on the ability of law-abiding citizens to possess and use a firearm for self-defense (or for other lawful purposes)." *Id.* at 166. Heightened scrutiny is not always strict scrutiny; the Second Circuit has "appl[ied] less than strict scrutiny when the regulation does not burden the 'core' protection" of the Second Amendment. *Kachalsky*, 701 F.3d at 93.

The Amended Complaint raises no basis to conclude that New York's licensing regime substantially burdens the core Second Amendment right of "law-abiding, responsible citizens" to self-defense in the home. *Heller*, 554 U.S. at 635. Article 400 of the New York Penal Law ("NYPL") is the "exclusive statutory mechanism for the licensing of firearms in New York State." *Kachalsky*, 701 F.3d at 85 (internal quotation marks omitted). It authorizes handgun permits for persons who, among other things, are at least twenty-one years old, are "of good moral character," do not have a history of mental illness or serious crime, and "concerning whom no good cause exists for the denial of the license." NYPL § 400.00(1). Before issuing a license, the local police undertake an investigation into the applicant's history and character. *Id.* § 400.00(4). The Rules of the City of New York ("RCNY") contain similar provisions. An

applicant may be denied a handgun license based upon consideration of a number of factors, including: (1) the applicant's history of arrest; (2) indictment or conviction for any crime except minor traffic violations; (3) the applicant's history of domestic violence; (4) the applicant's demonstrated failure to comply with rules, laws, and safety measures regarding firearms; (5) if the applicant "has or is reasonably believed to have" a condition or disability that "may affect the ability to safely possess or use a handgun"; and (6) "[o]ther information [that] demonstrates an unwillingness to abide by the law." 38 RCNY § 5-10; *see also id.* § 5-02 (requirements for premises licenses).

Because Article 400 and the relevant sections of the RCNY merely restrict access to handguns for the subset of individuals who lack the characteristics for safe possession of a handgun—and thus warrant something "less than strict scrutiny," *Kachalsky*, 701 F.3d at 93—application of intermediate scrutiny is appropriate here. Therefore, I must determine whether the pistol permitting regulations are substantially related to the government's goals in enacting those regulations and whether there is a reasonable fit between the regulations and the government's interests. *See Kwong v. Bloomberg*, 723 F.3d 160, 168 & n.16 (2d Cir. 2013) (applying intermediate scrutiny because the regulation at issue "does not ban the right to keep or bear arms but only imposes a burden on that right" and thus "strict scrutiny is not appropriate"); *N.Y. State Rifle & Pistol Ass'n v. City of New York*, No. 13-CV-2115, 2015 WL 500172, at *7 (S.D.N.Y. Feb. 5, 2015) (collecting cases and observing that "[a] majority of courts, including the Second Circuit and courts in this Circuit, apply intermediate scrutiny to general challenges under the Second Amendment, even when reviewing statutes or laws that may restrict the possession of handguns in the home"). New York's reasons for enacting these laws regulating handgun ownership are clear: "New York has substantial, indeed compelling, governmental interests in

public safety and crime prevention." *Kachalsky*, 701 F.3d at 97; *see also Kwong*, 723 F.3d at 168-69 (upholding handgun licensing fees as part of the New York City's "licensing scheme, which is designed to promote public safety and prevent gun violence"); *Bach v. Pataki*, 408 F.3d 75, 91 (2d Cir. 2005) (New York "has a substantial and legitimate interest . . . in insuring the safety of the general public from individuals who, by their conduct, have shown themselves to be lacking the essential temperament or character which should be present in one entrusted with a dangerous instrument"), *overruled on other grounds by McDonald*, 561 U.S. at 750. The licensing laws serve this interest by limiting the issuance of handgun permits to those individuals who are deemed able to safely possess a firearm.

Within this framework, I follow the logic adopted by courts in this and other Circuits and find that NYPL § 400.00(1) and 38 RCNY § 5-10, which require an inquiry into a pistol license applicant's ability to possess a handgun safely, substantially relate to New York's public safety goals, and that there is a reasonable fit between these laws and those goals. *See Aron v. Becker*, 48 F. Supp. 3d 347, 369-71 (N.D.N.Y. 2014) (holding that "the requirements of Article 400 constitute[] a reasonable fit between New York's objective and the law")[10]; *cf. United States v. Chovan*, 735 F.3d 1127, 1142 (9th Cir. 2013) (applying intermediate scrutiny in upholding federal ban on possession of firearms by persons convicted of misdemeanor domestic violence crimes); *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013) (applying intermediate scrutiny in upholding regime for permits to carry a handgun in public). Moreover, the Amended Complaint contains no facts suggesting that these regulations, as applied to Plaintiff by the License Division, resulted in a deprivation of Plaintiff's Second Amendment rights. Plaintiff

[10] In *Aron v. Becker* the United States District Court for the Northern District of New York addressed a claim similar to Plaintiff's and came to the same conclusion based on substantially the same reasoning as I apply here. The plaintiff in that case had been denied a pistol permit after the licensing officer determined that the plaintiff's conduct indicated that she did not have the judgment required to possess a handgun. *Aron*, 48 F. Supp. 3d at 355.

acknowledges in the Amended Complaint his prior arrest. (Am. Compl. 15.) Plaintiff also concedes in the Amended Complaint that following an NYPD psychological evaluation Plaintiff was deemed unfit to become a police officer, (*id.* at 10), and that the License Division denied Plaintiff's permit application because of Plaintiff's "arrest history, lack of responsibility, and poor stress tolerance," (*id.* at 14). In this context, NYPL § 400.00(1) and 38 RCNY § 5-10 are constitutional as applied; the License Division's determination that Plaintiff could not safely possess a handgun reasonably conforms to New York's interest in public safety and crime prevention.[11] Plaintiff may not agree with or like the decision of the License Division, but his personal views cannot support a valid claim under the Second Amendment.

Accordingly, I find that the Second Amendment claims raised in the Amended Complaint cannot survive Defendants' motion. These claims must be dismissed.

B. ***Equal Protection***

Reading the Amended Complaint to raise the strongest arguments it suggests, I construe Plaintiff's allegations as also raising a claim based on the Equal Protection Clause of the Fourteenth Amendment. (*See, e.g.*, Am. Compl. 8 (Plaintiff suffered "unequal treatment . . . in the form of prejudice, bias and negligence.").)[12] Plaintiff, however, has not identified any facts suggesting that he was treated differently compared with other similarly situated individuals, nor has he raised any facts suggesting that he was subject to bias or prejudice based on impermissible

[11] Plaintiff's claim that he is not subject to the jurisdiction of the United States, (*see* Doc. 31, at 3, 6-7; *see generally* Doc. 33), as a "sovereign, free and independent being," (Doc. 31, at 6), and therefore he is not and cannot be subject to state or federal laws and regulations governing gun ownership, suggests an "unwillingness to abide by the law," 38 RCNY § 5-10(n). Although Plaintiff may not have espoused these views at the time he submitted his application, such an unwillingness bolsters the License Division's determination.

[12] Plaintiff states that "[t]he 9th Amendment secures [his] unalienable right to equal treatment," (*e.g.*, Doc. 31, at 6), but Plaintiff's equal protection allegations are properly considered under the Fourteenth Amendment. Likewise, Plaintiff states that his unequal treatment is a "consequence of . . . negligence," (Am. Compl. 8), but he does not elaborate on that assertion. I therefore read his negligence allegations as part of his Fourteenth Amendment equal protection claim.

considerations such as "race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." *Lisa's Party City, Inc. v. Town of Henrietta*, 185 F.3d 12, 16 (2d Cir. 1999) (internal quotation marks omitted). Accordingly, to the extent the Amended Complaint can be read as raising an equal protection claim, that claim cannot survive Defendants' motion and is dismissed.

C. *State Law Claims*

While Plaintiff explicitly disavows any challenge to the License Division's administrative decision denying his application and instead argues that he is bringing a civil rights claim, (Doc. 31, at 8; Doc. 33, at 13; *see* Am. Compl. 8-9), construed liberally the Amended Complaint could raise a claim pursuant to Article 78 of the New York Civil Practice Law and Rules.[13] *See Kachalsky*, 701 F.3d at 87 (a handgun license applicant "may obtain judicial review of the denial of a license in whole or in part by filing a proceeding under Article 78"). An Article 78 proceeding is "the customary procedural vehicle for review of administrative determinations" in New York. *Mitchell v. Fishbein*, 377 F.3d 157, 170 (2d Cir. 2004) (emphasis omitted) (internal quotation marks omitted); *see also Carlos v. Santos*, 123 F.3d 61, 68 (2d Cir. 1997) (Article 78 provides for proceedings "in which administrative implementations of legislative acts are reviewed"). Even if Plaintiff intended to bring a challenge to the License Division's determination under Article 78 or some other state law, however, I decline to exercise jurisdiction over any potential state law claims raised by the Amended Complaint.[14] *See* 28

[13] Plaintiff acknowledges that he was advised of his "right to appeal [the License Division's] determination by commencing an Article 78 proceeding in State Supreme Court within four months of the date [of the Notice of Disapproval After Appeal]", and he consciously decided not to avail himself of that right. (Am. Compl. 8-9 ("Ultimately, these experiences led me to the final decision to resolve this case in court, acting pro se and without proceeding with an Article 78 appeal."); *see also id.* at 30.)

[14] It is not clear whether I even could exercise jurisdiction over claims brought pursuant to Article 78. *See Carver v. Nassau Cnty. Interim Fin. Auth.*, 730 F.3d 150, 155 (2d Cir. 2013) ("We need not decide . . . whether Article 78 can, on its own, deprive a federal court of jurisdiction over claims brought under that provision . . . ."). I need not determine whether Plaintiff's Article 78 claims may only be brought in state court because having dismissed

U.S.C. § 1367(c) (a district court "may decline to exercise supplemental jurisdiction over a claim" once it "has dismissed all claims over which it has original jurisdiction").

D. ***Leave to Amend***

Complaints brought *pro se* typically are dismissed without prejudice. *See Gomez v. USAA Fed. Sav. Bank*, 171 F.3d 794, 795-96 (2d Cir. 1999) (per curiam) (*pro se* complaints generally "not dismiss[ed] without granting leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated"); *Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000) (unless there is no indication that the *pro se* plaintiff will be able to assert a valid claim giving rise to subject matter jurisdiction, leave to amend should be given). Although Plaintiff has already amended his complaint once, I see no reason to deviate from the normal practice in this case. Accordingly, I dismiss Plaintiff's claims without prejudice.

V. Conclusion

For the foregoing reasons, Plaintiff's Complaint is DISMISSED WITHOUT PREJUDICE.

The Clerk's Office is respectfully directed to mail a copy of this Memorandum and Order to the *pro se* Plaintiff, terminate all pending motions, and close the case.

SO ORDERED.

Dated: May 4, 2015
New York, New York

Vernon S. Broderick
United States District Judge

Plaintiff's federal law claims I decline to exercise jurisdiction over any supplemental state law claims. *See* 28 U.S.C. § 1367(c). Moreover, insofar as Plaintiff alleges that any delay in processing his application violated his due process rights under the Fourteenth Amendment, such a claim would fail because Plaintiff had an adequate state law remedy under Article 78. *See Gudema v. Nassau Cnty.*, 163 F.3d 717, 724 (2d Cir. 1998).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

MARTIN MISHTAKU,

Plaintiff,

-against-

CITY OF NEW YORK, et al.,

Defendants.

----------X

14 **CIVIL** 839 (VSB)

JUDGMENT

Defendants having moved for judgment on the pleadings (Doc. #29), and the said motions having come before the Honorable Vernon S. Broderick, United States District Judge, and the Court thereafter, on May 4, 2015 having rendered its Memorandum & Order (Doc. #34) granting Defendants' motion for judgment on the pleadings and dismissing Plaintiff's Complaint without prejudice; and directing the Clerk's Office to mail a copy of the Memorandum and Order to the pro se Plaintiff, terminate all pending motions, and close the case, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons set forth in the Court's Memorandum & Order dated May 4, 2015, Defendants' motion for judgment on the pleadings is granted and Plaintiff's Complaint is dismissed without prejudice; accordingly, the case is closed.

Dated: New York, New York
May 6, 2015

RUBY J. KRAJICK

Clerk of Court

BY: K. Mango

Deputy Clerk