

1 **UNITED STATES COURT OF APPEALS**

2
3 **FOR THE SECOND CIRCUIT**

4
5 October Term, 2012

6
7
8 (Argued: October 26, 2012 Decided: December 23, 2013)

9
10 Docket No. 11-2420-cv

11
12 - - - - -x

13
14 ALFRED G. OSTERWEIL,
15
16 Appellant,

17
18 - v.-

19
20 GEORGE R. BARTLETT, III,
21
22 Appellee.

23
24 - - - - -x

25
26 Before: JACOBS, WALKER, Circuit Judges, AND O'CONNOR,
27 U.S. Supreme Court Justice (Ret.)*.

28 Counsel: PAUL D. CLEMENT, Bancroft PLLC,
29 Washington, D.C. (D. Zachary
30 Hudson, Bancroft PLLC,
31 Washington, D.C.; Daniel L.
32 Schmutter, Greenbaum, Rowe,
33 Smith & Davis LLP, Woodbridge,
34 New Jersey, on the brief), for
35 Plaintiff-Appellant.

* The Honorable Sandra Day O'Connor, Associate Justice (Ret.) of the United States Supreme Court, sitting by designation.

1
2 SIMON HELLER, Assistant
3 Solicitor General, New York
4 State Office of the Attorney
5 General, New York, New York, for
6 Defendant-Appellee.
7

8 PER CURIAM:

9 Appellant Alfred Osterweil applied for a handgun
10 license in May 2008. Following the directions of New York
11 Penal Law § 400.00(3)(a), he applied for a license "in the
12 city or county . . . where [he] resides."¹ His house in
13 Schoharie County, New York, was then his primary residence
14 and domicile, but while his application was pending,
15 Osterweil moved his primary residence to Louisiana, keeping
16 his home in Schoharie County as a part-time vacation
17 residence.
18

19 Osterweil's application was eventually forwarded to
20 appellee George Bartlett, a judge of the county court in
21 Schoharie County and licensing officer for the county. He
22 interpreted § 400.00(3)(a)'s apparent residence requirement
23 as a domicile requirement, relying on a 1993 decision from
24 New York's Appellate Division, Third Department, holding
25 that, "as used in this statute, the term residence is
26 equivalent to domicile." Mahoney v. Lewis, 199 A.D.2d 734,
27 605 N.Y.S.2d 168 (3d Dep't 1993). Because Osterweil "ha[d]
28 candidly advised the Court that New York State is not his
29 primary residence and, thus not his domicile," Judge
30 Bartlett denied the license. Judge Bartlett further
31 concluded that a domicile requirement was constitutional
32 under the Second Amendment, notwithstanding District of
33 Columbia v. Heller, 554 U.S. 570 (2008), because of the
34 State's interest in monitoring its handgun licensees to

¹ In relevant part, New York Penal Law § 400.00(3)(a) provides that "[a]pplications shall be made and renewed, in the case of a license to carry or possess a pistol or revolver, to the licensing officer in the city or county, as the case may be, where the applicant resides, is principally employed or has his principal place of business as merchant or storekeeper."

1 ensure their continuing fitness for the use of deadly
2 weapons.

3
4 Following the denial of his application, Osterweil
5 filed suit in the United States District Court for the
6 Northern District of New York, alleging that New York's
7 domicile requirement violated the Second and Fourteenth
8 Amendments and seeking, among other remedies, an injunction
9 ordering the State to give him a handgun license. The
10 district court granted summary judgment to the State,
11 holding in relevant part that the domicile requirement
12 satisfied intermediate scrutiny because "the law allows the
13 government to monitor its licensees more closely and better
14 ensure the public safety." Osterweil v. Bartlett, 819 F.
15 Supp. 2d 72, 85 (N.D.N.Y. 2011).

16
17 On appeal, the State maintained that section
18 400.00(3)(a) does not, in fact, impose a domicile
19 requirement. If no such requirement existed, there would,
20 we reasoned, be no need to reach the sensitive
21 constitutional question presented by this appeal. To allow
22 the New York Court of Appeals to resolve for itself the
23 existence of a domicile requirement, we certified the
24 following question to that Court:

25
26 Is an applicant who owns a part-time
27 residence in New York but makes his
28 permanent domicile elsewhere eligible for
29 a New York handgun license in the city or
30 county where his part-time residence is
31 located?

32
33 Osterweil v. Bartlett, 706 F.3d 139, 145 (2d Cir. 2013).

34
35 On October 15, 2013, the New York Court of Appeals
36 answered the certified question in the affirmative. In
37 Osterweil v. Bartlett, - NY3d -, 2013 NY Slip Op 6637 (Oct.
38 15 2013), the Court held that "Penal Law § 400.00(3)(a) does
39 not preclude an individual who owns a part-time residence in
40 New York but makes his permanent domicile in another state
41 from applying for a New York handgun license." Id. at *5.
42 The Court found this conclusion clear from the plain
43 statutory language, which refers only to an applicant's
44 residence and which expressly contemplates issuance of a

1 handgun to a nondomiciliary. See *id.* at *3, *5; Penal Law §
2 400.00(7). Moreover, the Court observed, “the law was
3 originally designed to ensure that licenses were obtained
4 where applicants resided, and to discourage
5 ‘forum-shopping,’ rather than to exclude certain applicants
6 from qualifying at all.” *Osterweil*, - NY3d -, 2013 NY Slip
7 Op 6637, at *5.

8
9 Accordingly, New York Penal Code § 400.00(3)(a) imposes
10 no requirement that Osterweil be domiciled in New York to
11 obtain a handgun license there; his status as a part-time
12 resident is sufficient. The State’s briefing represented
13 that, if the verb “resides” in § 400.00(3)(a) refers only to
14 residence and does not require domicile, then Osterweil
15 would satisfy this requirement and “this litigation would
16 thereby be resolved.” Appellee’s Br. 23. We agree.

17
18 Given this conclusion, we decline to reach the
19 constitutional question raised by Osterweil’s appeal, which
20 is based on a flawed reading of the licensing statute. We
21 hereby vacate the decision of the District Court and remand
22 for further proceedings consistent with this opinion.