

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D33698
W/prt

_____AD3d_____

Submitted - January 4, 2012

REINALDO E. RIVERA, J.P.
RANDALL T. ENG
CHERYL E. CHAMBERS
SANDRA L. SGROI
ROBERT J. MILLER, JJ.

2011-03666

DECISION & ORDER

In the Matter of Thomas Butler, appellant, v Board
of Trustees New York City Fire Department Pension
Fund, et al., respondents.

(Index No. 2338/09)

Pasternack Tilker Ziegler Walsh Stanton & Romano, LLP, Garden City, N.Y. (John A. Anselmo of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York, N.Y. (Paul Rephen, Inga Van Eysden, and Keith M. Snow of counsel), for respondents.

In a proceeding pursuant to CPLR article 78 to review a determination of the Board of Trustees of the City of New York Fire Department Pension Fund, the petitioner appeals, as limited by his brief, from so much of an order of the Supreme Court, Kings County (Vaughan, J.), dated February 9, 2011, as, upon reargument, adhered to the determination in an order of the same court dated July 7, 2010, denying his motion to restore the proceeding to active status, and denied that branch of his motion which was for leave to renew his motion to restore the proceeding to active status.

ORDERED that the order dated February 9, 2011, is modified, on the law, by deleting the provision thereof, upon reargument, adhering to the determination in the order dated July 7, 2010, denying the petitioner's motion to restore the proceeding to active status, and substituting therefor a provision, upon reargument, vacating the determination in the order dated July 7, 2010,

January 24, 2012

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denying the petitioner's motion, and thereupon granting the petitioner's motion to restore the proceeding to active status; as so modified, the order dated February 9, 2011, is affirmed insofar as appealed from, with costs to the petitioner.

It is undisputed that on July 29, 2009, this proceeding was "marked off" the calendar after the petitioner failed to appear at the Supreme Court's calendar call. Contrary to the respondents' contention, CPLR 3404 does not apply to this pre-note of issue proceeding (*see Varricchio v Sterling*, 86 AD3d 535, 536; *Mitskevitch v City of New York*, 78 AD3d 1137, 1138; *Lopez v Imperial Delivery Serv.*, 282 AD2d 190, 199). Furthermore, there was neither a 90-day notice pursuant to CPLR 3216, nor an order dismissing the petition pursuant to 22 NYCRR 202.27 (*see Varricchio v Sterling*, 86 AD3d at 536; *Mitskevitch v City of New York*, 78 AD3d at 1138; *Casavecchia v Mizrahi*, 62 AD3d 741, 742; *Burdick v Marcus*, 17 AD3d 388). Accordingly, upon reargument, the petitioner's motion to restore the proceeding to active status should have been granted.

RIVERA, J.P., ENG, CHAMBERS, SGROI and MILLER, JJ., concur.

ENTER:



Aprilanne Agostino
Clerk of the Court