

**Nager v Teachers' Retirement Sys. of City of N.Y.**

2004 NY Slip Op 30311(U)

January 20, 2004

Supreme Court, New York County

Docket Number: 119294/02

Judge: Faviola Soto

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. FAVIOLA SOTO  
Justice

PART 52

ARNOLD H. NAGER

INDEX NO. 119294/02

v -

MOTION DATE 10/19/04

TEACHERS' RETIREMENT

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. OOT

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED		
1, 2, 3		
4, 5		
6		

Cross-Motion:  Yes  No

*SEARCHED*  
JAN 22 2004

**FILED**

JAN 3 2004

CLERK'S OFFICE  
NEW YORK

Upon the foregoing papers, it is ordered that this motion \_\_\_\_\_

**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.**

**FILED**

JAN 23 2004

COUNTY CLERK'S OFFICE  
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: January 20, 2004

FAVIOLA SOTO  
J.S.C. J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 52

-----  
ARNOLD H. NAGER, individually and on behalf of  
all others similarly situated,

Index No. 119294/02

Plaintiff,

-against-

TEACHERS' RETIREMENT SYSTEM OF  
THE CITY OF NEW YORK, TEACHERS'  
RETIREMENT BOARD OF THE TEACHERS'  
RETIREMENT SYSTEM OF THE CITY OF  
NEW YORK, BOARD OF EDUCATION CITY  
SCHOOL DISTRICT OF THE CITY OF NEW  
YORK, WILLIAM C. THOMPSON, JR. as  
Comptroller of the City of New York, and the  
CITY OF NEW YORK,

DECISION & ORDER

Defendants.

FILED

JAN 23 2004

COURT CLERK'S OFFICE  
NEW YORK

-----  
HONORABLE FAVIOLA A. SOTO, J.:

Plaintiff Arnold H. Nager moves, pursuant to CPLR 902, for an order certifying this action as a class action. Plaintiff also moves, pursuant to CPLR 3212, for an order granting plaintiff partial summary judgment dismissing defendants' fifth defense, which asserts that the action fails to meet the statutory standards for maintenance as a class action. Defendants oppose.

In this action, plaintiff asserts a statutory claim that mirrors a claim raised in a prior action: pay for per-session work, i.e., work performed by teachers in the New York City school system during other than the traditional school hours, was improperly excluded in computing the teachers' pensions. Plaintiff seeks the relief retroactively; the prior action granted the relief prospectively. The claim was addressed by the Court of Appeals in Weingarten v Board of Trustees of the New York City Teachers' Retirement System, 98 NY2d 575 (2002)

There, the court affirmed the order of the Appellate Division, First Department (287 AD2d 14 [1st Dept 2001]), which affirmed Justice Gammerman's order and judgment granting

plaintiffs summary judgment, and ordering that the requested relief be given to all members of the Teachers' Retirement System of the City of New York (NYCTRS or the System) who were employed by the New York City Board of Education as of the commencement of that action, i.e., November 24, 1998, or subsequently, and not retired as of the date of the judgment. Justice Gammerman also allowed plaintiffs who did not wish to be credited with per session income (and debited for the concomitant contribution liability) to opt out for the period during which the case had been litigated before him.

Herc, plaintiff retired from his position with the New York City School System on August 31, 1996. He commenced the instant action on August 29, 2002, seeking to have the relief that was granted only prospectively in Weingarten granted retroactively. The class that plaintiff proposes consists of each person who:

(1) at any time has been deprived of pension benefits and/or pension credits due to the defendants' failure to credit per session pay in calculating his/her pension benefits; and (2) was previously or is currently receiving pension benefits from the defendant [the System] or will be entitled to receive them at some time in the future; and (3) has not been a member of the Teachers' Retirement Association of the System any time after November 23, 1998; or (4) is the surviving beneficiary or the estate of a person who meets the foregoing criteria,

#### Class Actions

CPLR 901 (a) provides that a class may be certified where:

1. the class is so numerous that joinder of all members... is impracticable;
2. there are questions **of** law or fact common to the class which predominate over any questions affecting only individual members;
3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;
4. the representative parties will fairly and adequately protect the interests of the class; and
5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

CPLR 902 provides that, in determining whether to certify a class, the court must consider:

1. The interest of members of the class in individually controlling the prosecution or defense of separate actions;
2. The impracticability or inefficiency of prosecuting or defending separate actions;
3. The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
4. The desirability or undesirability of concentrating the litigation of the claim in the particular forum;
5. The difficulties likely to be encountered in the management of a class action.

#### Defendants' Arguments

Defendants do not dispute that: the proposed class will include hundreds, if not thousands, of former teachers; questions of law in this case, other than the application of the appropriate statute of limitations, will be common to all of the proposed class members; or, that consideration of the factors set forth in CPLR 902 leads to the conclusion that the proposed class should be certified,

Nor do defendants dispute that plaintiff Nager will fairly and adequately protect the interests of the class. The court notes that plaintiff is the class representative in *Nager v Teachers' Retirement System of the City of New York*, Index No. 102377/97 (Sup Ct, NY County), a case which has involved substantial discovery and motion practice, and, thus far, one appeal (*Nager v Teachers' Retirement Sys. of the City of New York*, 261 AD2d 292 [1st Dept 1999] [affirming order denying defendants' motion for summary judgment])

Defendants oppose the motion solely on the basis of the "government operations rule", which provides that class treatment is unnecessary where a lawsuit challenges the propriety of a governmental operation, because it is presumed that the governmental defendant(s) will follow the

principle of stare decisis, and accordingly, grant such relief as the plaintiff may receive to all similarly situated persons. See Matter of Martin v Lavinc, 39 NY2d 72 (1976); Rosenthal v Saunders, 283 AD2d 156 (1st Dept 2001); Matter of Kelly v Bane, 192 AD2d 236 (1st Dept 1993).

The government operations rule, however, does not bar certification of a class where, as here, the relief sought includes monetary damages. Bryant Ave. Tenants' Assn. v Koch, 71 NY2d 856 (1988); Seittelman v Sabol, 217 AD2d 523 (1st Dept 1995), affd as modified 91 NY2d 618 (1998); Beekman v City of New York, 65 AD2d 317 (1st Dept 1979). Moreover, as in Nager v Teachers' Retirement System of the City of New York (supra), not all of the defendants here are governmental entities, and accordingly, the general rule does not apply.

Defendants also rely heavily on an affidavit sworn to by Stanley Kessock, the executive director of NYCTRS, who argues that in light of the procedural history of the Weingarten case and NYCTRS's actions in complying, class certification here is not necessary and NYCTRS will grant the same relief to all other similarly situated retirees.

Unlike in the Weingarten case, however, the parties here have been unable to agree to a stipulation as to who would be covered by any relief granted to plaintiff, either prior to or subsequent to the submission of the motion, or at or subsequent to the November 19" conference with the court. Moreover, while respecting NYCTRS's assurance, the court also queries whether such assurance can withstand challenge, as the concurrence of other persons appears necessary. (see New York City Administrative Code § 13-509).

Accordingly, it is hereby

ORDERED that plaintiff's motion for partial summary judgment dismissing defendants' fifth defense is granted, and defendants' fifth defense is dismissed; and it is further

ORDERED that plaintiff's motion to certify this action as a class action is granted; and it is further

ORDERED that, pursuant to CPLR 903, the class so certified is defined as follows:

the named plaintiff and every other person who: (1) at any time has been deprived of pension benefits and/or pension credits due to the defendants' failure to credit per session pay in calculating his or her pension benefits; and (2) was previously or is currently receiving pension benefits from defendant Teachers' Retirement System of the City of New York (the System), or will be entitled to receive them at some time in the future; and (3) has not been a member of the Teachers' Retirement Association of the System any time after November 23, 1998; or (4) is the surviving beneficiary or the estate of a person who meets the foregoing criteria

(the Class); and it is further


ORDERED that, pursuant to CPLR §§ 904 and 907, the parties are directed to consult in an effort to agree on (1) the content of a notice to the Class of the pendency of this action (the Notice), (2) the manner in which the Notice will be given to the Class, and (3) who shall bear the cost of providing the Notice, and the parties are directed to report to the court with respect to such efforts at a conference scheduled for February 4, 2004, 9:30 a.m., at 80 Centre Street, Courtroom 546; and it is further

ORDERED that plaintiff shall serve a copy of this decision and order with notice of entry upon the County Clerk and the Trial Support Office.

Dated: New York, New York  
January 20, 2004

Copies mailed

\_\_\_\_\_  
FAVIOLA A. SOTO, J.S.C.

  
JAN 23 2004  
NEW YORK