

Galtieri v Kelly

2005 NY Slip Op 30560(U)

September 26, 2005

Supreme Court, New York County

Docket Number: 108166/05

Judge: Herman Cahn

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49

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JOHN GALTIERI,

Petitioner,

-against-

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RAYMOND KELLY, as Police Commissioner of the City
of New York, as Chairman of the Board of Trustees of
the Police Pension Fund, Article II, THE BOARD OF
TRUSTEES of the POLICE PENSION FUND, ARTICLE
II and THE CITY OF NEW YORK,

Respondents.

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HERMAN CAHN, J.:

In this CPLR Article 78 proceeding, petitioner John Galtieri, a retired New York City Police Department sergeant, seeks a judgment annulling the actions of respondents, Police Commissioner and Pension Fund Board of Trustees, with respect to the disbursement of his accidental disability benefits to his ex-wife, Jeanne Kane. Petitioner claims that such disbursements constitute an illegal garnishment and unlawful taking.

Respondents cross-move for a dismissal of the petition.

Petitioner was appointed to the New York City Police Department (NYPD) on August 1, 1966, and thereby became an Article II member of the Police Pension Fund (PPF). As an Article II member, petitioner would have been entitled to a vested pension had he served in the NYPD for 15 years. However, due to injuries he sustained in the line of duty, petitioner retired after 14 years, 6 months and 26 days, just shy of the 15 years necessary for the vesting of his Article II pension. Galtieri was granted an accidental disability pension which is, and was, based solely on a determination that he sustained injuries in the line of duty, without regard to the number of

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years of service. The instant dispute involves the PPF's disbursement of a portion of Galtieri's pension to his former wife as an alternate payee.

At the time that Galtieri married Kane, on July 9, 1976, he had been with the NYPD almost 10 years. On September 1, 1978, Galtieri severely injured his back, and on February 24, 1980, he retired from the NYPD on accident disability. In or about 1983, Galtieri was also awarded a social security disability pension.

Galtieri filed for a divorce from Kane in Superior Court Chancery Division, Family Part, Monmouth County, New Jersey on or about December 20, 1999. Prior to filing, Galtieri and Kane had been residing in New Jersey for over a year, rendering New Jersey the proper venue for the couple's divorce proceeding. An examination of the Final Judgment of Divorce, which was entered on May 19, 2003, makes it clear that the divorce proceedings were not amicable. Although he was the party who commenced the proceedings, the Final Judgment of Divorce sets forth, among other things, Galtieri's failure to appear for two plenary hearings, his failure to make certain support payments; it notes that he was the subject of a Bench Warrant issued on September 18, 2002; and it details his failure to participate in the divorce trial, even via telephone, although he had been given the opportunity to do so.

With respect to the division and distribution of the marital assets, the Final Judgment of Divorce listed items that were subject to equitable distribution. As far as relevant here, the Final Judgment of Divorce directed that Galtieri

shall pay permanent alimony to [Kane] . . . based on the evidence presented regarding [Galtieri's] income and ability to pay, [Kane's] need and inability to work, the fault of [Galtieri] for the demise of the marriage Alimony shall be paid via wage garnishment, from the Plaintiff's [Galtieri's] social security disability income . . .

(Paragraph 4).

Petitioner's NYPD pension was neither included among the items deemed subject to equitable distribution, nor was it addressed anywhere else in the decree. However, a series of orders were issued relating to Kane's alimony, including orders issued on December 12, 2003 and June 30, 2004, which provide as follows.

An amended order dated December 12, 2003, issued by the Superior Court, ordered Kane's monthly alimony to be paid directly to her from Galtieri's NYPD pension and from his social security disability pension. A domestic relations order (DRO), dated June 30, 2004, granted an assignment to Kane, as the alternate payee, of benefits otherwise payable from the PPF to Galtieri, as the participant. The June 30, 2004 DRO specifically directed the PPF, upon service of a copy of the order, and if required by the PPF, upon proper application by Kane, to make direct payment to her of the benefit and to issue separate checks to the member (Galtieri) and to the alternate payee (Kane).

Galtieri objected to Kane's receipt of any part of NYPD pension, triggering repeated motions and cross motions to the Superior Court by both former spouses, for relief commensurate with their respective positions. These motions have yielded little more than, relatively, minor delays in the directed monthly disbursement from the PDF directly to Kane. The payments were recommenced, by court order, dated March 11, 2005, with the April 30, 2005 pension payment.

Galtieri commenced this Article 78 proceeding to halt PPF's distribution of the accident disability payments to Kane. He contends that it is both improper and illegal, in New York, for an accident disability pension to be treated as property subject to equitable distribution, and to be

attached and distributed, in whole or in part, to the former spouse.

The respondents oppose the petition on the grounds that New Jersey, not New York, had both personal jurisdiction over the parties, and subject matter jurisdiction over the Galtieri/ Kane divorce proceedings. Respondents maintain that New York and this court lack subject matter jurisdiction over the amended DRO, which was issued by a New Jersey court of competent jurisdiction, and that, pursuant to the Full Faith and Credit Clause of the U. S. Constitution, the respondents are required to implement the New Jersey divorce decree and subsequent orders.

The Legislature has determined that “any compensation a spouse receives for personal injuries is not considered marital property and is not subject to equitable distribution” (Dolan v Dolan, 78 NY2d 463, 467 [1991]; Domestic Relations Law § 236 [B] [1] [d] [2]), except “to the extent that the disability pension represents deferred compensation” (Mylett v Mylett, 163 AD2d 463, 465 [2nd Dept 1990]). The New Jersey courts, concerned with the difficulties often involved in determining “that portion of [one spouses’s] disability pension which represents a retirement component in which [the other spouse] would be entitled to share, and that portion which represents compensation for [the injured spouse’s] personal disability and personal economic loss” (Avallone v Avallone, 275 NJ Super 575, 584; 646 A2d 1121, 1126 [1994]), place the burden on the spouse claiming immunity to establish which assets, or portions, or percentage thereof, are immune from equitable distribution (id.).

To this end, Galtieri argues that, although his accident disability pension was not identified as a marital asset subject to equitable distribution, nor is it an ordinary Article II retirement pension, which he acknowledges would be subject to direct distribution towards his alimony obligation to his former wife, the New Jersey courts are in error in treating his accident

disability pension as marital property. He claims that the accident disability pension is being subjected to equitable distribution, which is not permitted under New York law, and that the PPF is arbitrarily, and illegally, attaching his accident disability pension and distributing a significant portion of it to Kane as alimony.

It has long been recognized in New York that disability pensions, such as those provided by Social Security, the Veterans Administration, and the PPF are considered as income substitutes, measured by lost earnings, and while not subject to equitable distribution, they are calculable as part of the recipient's gross income, and subject to attachment under appropriate circumstances (see Graby v Graby, 87 NY2d 605, 610 [1996]; Family Ct Act § 413 [1] [b] [5]; Rossi v Rossi, 163 AD2d 376, 377 [2nd Dept 1990]).

It is undisputed that the New Jersey courts had personal jurisdiction over Galtieri and Kane, and the power to adjudicate their divorce and to divide and distribute the marital assets. Although the New Jersey courts did not deem Galtieri's accident disability pension subject to equitable distribution, they repeatedly stated their intention that the accident disability pension be garnished to the extent necessary to meet petitioner's alimony obligations to his former spouse. The Full Faith and Credit Clause of the Constitution requires the New York courts to give the same effect to a properly obtained New Jersey divorce decree that New Jersey would give (O'Connell v Corcoran, 1 NY3d 179, 183 [2003]; Erhart v Erhart, 226 AD2d 26, 27 - 29 [4th Dept 1996]). Jurisdiction was properly laid in New Jersey, as the parties to the divorce action were New Jersey residents at the time that petitioner commenced the divorce action. The divorce was litigated in New Jersey, and jurisdiction over the terms of the Final Judgment of Divorce decree and all subsequent DRO's remains with New Jersey. To the extent that petitioner seeks to change

or to modify the orders he deems offensive, his remedy is to appeal the New Jersey orders to the appropriate New Jersey courts.

Accordingly, it is

ADJUDGED that the petition is denied and the proceeding is dismissed.

This constitutes the decision and judgment of the court.

Dated: September 26, 2005

ENTER:

[Handwritten Signature]

J.S.C.

Norman Goodman
Clerk

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NEW YORK**