

Matter of Ward v City of Long Beach

2009 NY Slip Op 30463(U)

February 19, 2009

Supreme Court, Nassau County

Docket Number: 022274/08

Judge: Daniel R. Palmieri

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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

**HON. DANIEL PALMIERI
Acting Justice Supreme Court**

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**In the Matter of the Application of
BRIAN WARD,**

Petitioner,

For a Judgment pursuant to Article 78 CPLR

-against-

THE CITY OF LONG BEACH,

REspondent.
-----x

TRIAL TERM PART: 47

INDEX NO.: 022274/08

**MOTION DATE: 1-15-09
SUBMIT DATE: 2-11-09
SEQ. NUMBER - 001 &
002**

The following papers have been read on this motion:

Notice of Petition, dated 12-15-08.....1
 Notice of Motion, dated 1-5-09.....2
 Memorandum of Law in Support of Motion,
 dated 1-5-09.....3
 Affirmation in Support of Petition, dated 1-22-09.....4
 Affidavit in Opposition to Motion and Support of
 Petition, dated 1-22-09.....5
 Memorandum of Law in Opposition to Motion to
 Dismiss, dated 1-27-09.....6
 Memorandum of Law in further Support of Motion to
 Dismiss, dated 2-9-09.....7
 Affidavit, dated 2-9-09.....8

In a proceeding pursuant to CPLR article 78, in effect, to compel respondent to provide him with supplementary disability benefits under General Municipal Law § 207-a(2),

the respondent's motion to dismiss the proceeding prior to answer pursuant to CPLR 7804(f) is granted to the extent that the second count of the petition is dismissed, and so much of the first count that asserts a right to a hearing before the municipal corporation or its departments, and is otherwise denied. The respondent's time to serve an answer with regard to the remaining claim is extended until 15 days after service upon its attorney of a copy of this order with notice of entry. Petitioner is granted leave to re-notice his petition.

On a motion pursuant to CPLR 7804(f) the petition alone is to be considered and all of its allegations are to be deemed true. *Matter of Bloodgood v Town of Huntington*, 17 AD3d 871 NYS2d 644 (2d Dept. 2009); *Matter of Long Is. Contractors' Assn. v Town of Riverhead*, 17 AD3d 590 (2d Dept. 2005); *Matter of Zaidins v Hashmall*, 288 AD2d 316 (2d Dept. 2001). So reviewed, it is apparent that the petitioner states a claim for relief, and respondent's motion should therefore be denied, except to the extent indicated.

The petitioner alleges that he is a Lieutenant in the respondent City of Long Beach's Fire Department. On or about October 17, 2003, he states that while on duty he slid down a fire pole which had an "accelerant" on its surface. The petitioner alleges that this increased the rate of his descent such that upon landing he was caused to sustain severe and permanent injuries to this left knee.

The petitioner further alleges that he was granted disability benefits pursuant to General Municipal Law § 207-a.¹ He subsequently applied to New York State for a disability

¹ This is likely a reference to section 207-a(1).

retirement. His application was granted by the State Comptroller on November 17, 2005.

By correspondence dated May 14, 2008 petitioner applied to the respondent for supplemental disability pension benefits pursuant to General Municipal Law § 207-a(2). This was denied by respondent's Fire Commissioner, Steven Fraser, by letter dated July 10, 2008, who also stated that petitioner could appeal that decision to the City Manager. Petitioner did so by letter dated August 13, 2008. On August 29, 2008 the City Manager responded by stating that all further proceedings were to be coordinated by and through the Corporation Counsel's office.

Petitioner alleges that on September 11, 2008 he delivered a letter to Corporation Counsel Corey Klein, asking for a meeting to obtain details as to why his application had been denied. The petitioner contends that Klein never responded to this contact, did not provide a written denial giving him reasons for the decision, nor gave him an opportunity to present evidence on his behalf. He contends that the respondent's actions were arbitrary and capricious. In two causes of action ("Counts"), he seeks a hearing and damages in the form of payment of benefits and attorney's fees under the General Municipal Law (Count I), and, for alleged violation of his constitutional right to due process of law, damages (including attorney's fees) pursuant to 83 USC § 1983 (Count II).

In view of the foregoing, the Court agrees with the respondent to the limited extent that there has been no viable claim stated for a violation of constitutional due process under the United States Constitution, and for that reason dismisses the second count of the petition. This proceeding is in the nature of mandamus to review an implicit denial of his application

for General Municipal Law § 207-a(2) benefits, in that the petition alleges a failure to act on his application. A right to constitutional due process, including a hearing, arises where a vested right in some property interest is threatened by a governmental action, and those property rights may be created by state law. *Matter of Medicon Diagnostic Labs v Perales*, 74 NY2d 539, 545 (1989).

As is made clear by the petition, the claim here is that such a right exists under state statute, the General Municipal Law. In making a determination as to whether this statute confers a right that can support constitutional due process protection, the focus is on the relevant provision. *Id.* In that regard, the Appellate Division, Fourth Department has held that denial of an initial application for General Municipal Law § 207-a(2) benefits, as opposed to stripping those benefits after they have been granted, does not involve vested rights such that due process requirements are triggered. *Matter of Heck v Keane*, 6 AD3d 95, 99 (4th Dept. 2004), *citing Matter of Dahn v Keane*, 1 AD3d 1038 (4th Dept. 2003). As neither the parties nor the Court's own research has revealed any other appellate authority on this point, the undersigned is bound to follow the holding of the Appellate Division, Fourth Department. *Mountain View Coach Lines v Storms*, 102 AD2d 663, 664 (2d Dept. 1984).

Accordingly, Count II, which is based on an alleged deprivation of constitutional due process, is dismissed, as is so much of Count I that is premised on a failure to provide a hearing to petitioner.

However, with respect to so much of the petition that seeks the benefits not conferred,

the Court holds that the petition states a claim for relief under General Municipal Law § 207-a(2), and CPLR 7803(3). It is based upon an alleged arbitrary and capricious handling of the request for supplementary benefits, to which the petitioner appears to be entitled under the facts pled, and which request was effectively denied by inaction. The respondent's resort to affidavit proof to explain the reason for denial cannot be used in support of a motion that is directed to the pleading. *Bloodgood v Town of Huntington, supra*.

To the extent that respondent has presented the written denial of the petitioner's claim by Corporation Counsel Klein (letter dated September 16, 2008), which was missing from the petition, the Court also finds no basis for dismissal based thereon. This is, in effect, a presentation of documentary evidence (*see*, CPLR 3211(a)(1)), but this can form a basis for dismissal prior to answer only if it disposes of all the claims made as a matter of law. *See, Tougher Indus. v Northern Westchester Joint Water Works*, 304 AD2d 822 (2d Dept. 2003). This letter merely states, in a single sentence, that "[u]pon review of all the records and facts, the City of Long Beach denies your request due to the causation and the permanence of your disability." As there is no further explanation or reference to the factors or proof upon which respondent relied in reaching its determination, this notice simply begs the question as to whether the denial was rational, or was arbitrary. Further, affidavits cannot be considered to supplement documentary evidence in support of dismissal prior to answer. *Berger v Temple Beth-El of Great Neck*, 303 AD2d 346 (2d Dept. 2003); Siegel, NY Prac. § 259 [3d Ed.].

As neither party has addressed the issue of attorney's fees, the Court makes no

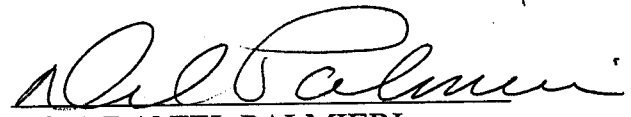
findings nor issues any determination on that issue.

Accordingly, the motion is denied except to the extent indicated, and the respondent must answer. The Court declines petitioner's request to rule on the underlying petition, as the respondent is entitled to answer and thus to supplement the record (*see*, CPLR 7804(d), (e)), should it choose to do so.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: February 19, 2009



HON. DANIEL PALMIERI
Acting Supreme Court Justice

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ENTERED

FEB 26 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE