

Ziegele v New York City Retirement Sys.

2009 NY Slip Op 32515(U)

October 29, 2009

Supreme Court, New York County

Docket Number: 113223/2009

Judge: Walter B. Tolub

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

PRESENT: TOLUB
Justice

PART 15

Edward Ziegele

INDEX NO. 113223/09

- v -

MOTION DATE: _____

NYC EMP.

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

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

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
OCT 29 2009

COUNTY CLERK'S OFFICE
NEW YORK COUNTY

Dated: 10/29/09

TOLUB
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----x
EDWARD ZIEGELE

Petitioner,

Index No. 113223/2009
Mtn. Seq. 001

For a judgment pursuant to Article 78
of the Civil Practice Law and Rules,

-against-

THE NEW YORK CITY RETIREMENT SYSTEM,

Respondent.
-----x

FILED
OCT 29 2009
COUNTY OF NEW YORK

WALTER B. TOLUB, J.:

By this Petition, Petitioner seeks an order waiving 7 years of interest added onto his pension loan.

Facts

Petitioner was appointed as a carpenter with what is now known as the New York City Administration for Children's Services (ACS) on March 10, 1986.

Effective July 8, 1986, Petitioner became a member of the New York City Retirement System (NYCRS) (Respondent Ex. 1).

On February 9, 1998, Petitioner applied for a loan against his pension contributions in the amount of \$17,000.00 (Pension Loan) (Respondent Ex. 3). The terms of the Pension Loan state in paragraph 11 that:

Consequences of Non-Payment

- a) A member's retirement allowance will be reduced by an outstanding loan balance on the date of retirement. Since interest continues to accrue up to the retirement date on an unpaid loan, the outstanding balance may

increase to such a large amount as to significantly decrease the retirement benefit otherwise payable.

b) It is important that you contact this system to make arrangements for direct payments if you are no longer, receiving a paycheck from which loan payments are being deducted.

c) A loan on which no payments have been made for over 90 days is termed a *Non-Performing Loan*.

d) If a member has a *Non-Performing Loan*, he or she forfeits all future entitlement to borrow from this system until the outstanding balance is fully repaid.

e) A *Non-Performing Loan* may have adverse tax consequences. See the section below entitled *Taxability*.

f) Insurance coverage is discontinued on a *Non-Performing Loan*. However, once a member starts making regular payments again, the loan will be considered to be insured, although otherwise remains a *Non-Performing Loan*.

(Respondent Ex. 3 ¶11).

Paragraph 13 of the Loan Application states that:

Taxability

With the exception of loans greater than \$50,000, current tax law does not consider a loan that is scheduled to be repaid within a five-year period to be a taxable distribution. If the loan is not repaid within five years, then the outstanding balance at the end of the five-year period may be considered a taxable distribution. In addition, if loan payments are not made for a 90 day period, the I.R.S. considers the loan to be a *Non-Performing Loan* and some part of the outstanding loan is deemed taxable. Subsequent loan payments will not negate the fact that a taxable distribution has been reported. Upon a member's obtaining a refund after resignation, the outstanding balance on a loan may be at least partially taxable. For retirees, the outstanding loan balance at retirement is taxable. Within three months

after your retirement date, you will receive a letter advising you of the taxable amount so that you may roll it over to an IRA, if you desire. In addition to being taxable at a member's normal tax rate, a member under the age of 59½ may incur an additional 10% penalty on such distribution.

(Respondent Ex. 3).

At that time, the scheduled payroll deductions to repay Petitioner's Pension Loan were estimated at \$191.00 per each two-week pay period for a for year period (Id.). This amount accounted for the statutory 7 3/4% interest rate that accrues pursuant to the New York Retirement and Social Security Law (RSSL) §613-b(d) (See also Administrative Codes §§ 13-101.12 and 13-638.2; NYCERS Rule 18 (11)(j) [Respondent's Ex. 2]).

On two occasions, NYCERS attempted to activate payroll deductions with Petitioner's employer to begin satisfaction of the Pension Loan. The last attempt made by NYCERS was on June 5, 1998. However, on June 26, 1998, Petitioner commenced a leave of absence and was removed from payroll. Consequently, Petitioner's payroll deductions were not commenced.

During Petitioner's leave, he made no Pension Loan payments and made no alternative arrangements for direct monthly payments (NYCERS Rule 18 (11)(h)(2)) (Respondent Ex. 2).

On December 28, 1998, after no payments were made for a period of 90 days, Petitioner's Pension Loan was deemed "non-performing" and in default, and was reported to the IRS (Respondent Ex. 9).

By letter dated January 29, 1999, Petitioner was notified that he was in default on the Pension Loan and that as a result of the default, the Pension Loan was deemed taxable income by the United States Internal Revenue Service (Respondent Ex. 4). Additionally, the letter stated that it had been determined that the taxable portion of Petitioner's pension loan balance was \$13,326.25.

Petitioner remained on leave through March 31, 2000 and returned to payroll on April 14, 2000. However, once Petitioner returned to work and payroll, payroll deductions did not commence.

NYCRS claims that it set up Petitioner's loan account for payment and monthly installments in April 1999, but that Petitioner had not made monthly payments. NYCRS only sets up monthly installments, as opposed to payroll deductions, upon the request of a member. With the exception of setting up monthly installment payments [without making any] and a disability retirement application filed on June 1, 1999, Petitioner made no contact with NYCRS regarding the repayment of his pension loan (Respondent Ex. 9 explanation of its records)¹.

Years later, in February of 2007, NYCRS realized that

¹On or about July 13, 2001, Petitioner filed for Chapter 7 bankruptcy in the United States Bankruptcy Court, Eastern District of New York. Bankruptcy proceedings do not release an individual from repayment of pension loans 11 USC §§101(4)(A) and 101(11)

Petitioner had not repaid any portion of his loan. Importantly, since the inception of Petitioner's loan, interest had continued to accrue at 7 3/4% (RSSL §§ 613-b and 613-b(d) and NYCERS Rule 18).

NYCERS recalculated the amount due on the loan with interest and on February 9, 2007, the amount owed was \$29,844.08 (Respondent Ex. 7).

On or about February 9, 2007, payroll deductions commenced.

By letter dated September 14, 2007, Petitioner disputed the details of his Pension Loan and payroll deductions. Petitioner claimed that his bankruptcy proceeding discharged the loan, arguing that approximately \$13,000 was left to pay on the loan and that any money garnished after his medical leave should be returned (Respondent Ex. 8).

NYCERS responded by letter dated September 24, 2007. The letter explained that the basis for Respondent's position was that Petitioner's loan was not a debt that could be discharged in Bankruptcy. Additionally, the letter explained the computation of the Loan and the interest that had accrued (Respondent Ex. 9).

Petitioner made several written inquiries regarding his payroll deductions (Respondent Ex. 10).

Respondent responded through several letters (Respondent Ex. 11). By letter dated August 11, 2008, NYCERS notified Petitioner that the loan checks state that;

[t]he repayment amount will be deducted from your paycheck. If payments on this loan have not begun within 4 weeks, please contact this agency. It is important that you contact this system to make arrangements for direct payment if you are no longer receiving a paycheck on which payments are being made on an outstanding loan. A loan, which no payments have been made for 90 days, is termed a non-performing loan. . . . In addition, since interest continues to accrue, your balance may increase to such amount that it may significantly affect your retirement allowance.

(Respondent Ex. 11 Letter August 11, 2008).

Petitioner commenced this action, not denying that he defaulted on the loan, but rather seeking an order waiving 7 years of interest added onto his defaulted pension loan.

Discussion

It is axiomatic that in an Article 78 proceeding that the function of the court is to determine whether the action of an administrative agency had a rational basis or was arbitrary and capricious (Pell v. Board of Edu., 34 NY2d 22, 231 [1974]). Arbitrary action is without sound basis in reason and is generally taken without regard to the facts (Id.). A rational basis exists where the determination is supported by proof sufficient to satisfy a reasonable person, of all the facts necessary to be proved in order to authorize the determination (Id.). A reviewing court will not substitute its judgment for that of the agency unless the agency's determination is arbitrary, capricious, or contrary to law (Id.).


NYCRS garnishment of Petitioner's payroll on the Pension Loan, with interest, is consistent with its rights and responsibilities under the law (RSSL §613-b; see also NYCRR Rule 18). Moreover, a review of Petitioner's file indicates that interest and the remaining payments of the Pension Loan have been properly calculated. And, although this Court understands that Petitioner had the mistaken belief that the Pension Loan was discharged in the Bankruptcy proceeding and although this Court is sympathetic to Petitioner's financial hardship, Petitioner has failed to show any legal basis for the relief sought.

Accordingly, it is
 ORDERED that the Petition is dismissed.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 10/29/09

FILED
 OCT 29 2009
 COUNTY CLERK'S OFFICE
 NEW YORK



 HON. WALTER B. TOLUB, J.S.C.