

Matter of Arciello v Nassau County

2009 NY Slip Op 33185(U)

December 22, 2009

Supreme Court, Nassau County

Docket Number: 015405/2004

Judge: Michele M. Woodard

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

-----X
In the Matter of the Application of
**ROBERT J. ARCIELLO, as President of the
DEPUTY SHERIFF'S UNIT, CIVIL SERVICE
EMPLOYEES ASSOCIATION, INC., LOCAL
1000, AFSCME, AFL-CIO, LOCAL 830, and all
similarly affected employees,**

Petitioners,

For a Judgment Pursuant to Article 78 of the
New York State Civil Practice Law and Rules

-against-

**NASSAU COUNTY, THOMAS R. SUOZZI, as
County Executive, HOWARD WEITZMAN, as
County Comptroller, NASSAU COUNTY
LEGISLATURE, HENRY M. DACHOWITZ, as
Treasurer, JUDITH JACOBS, as Presiding Officer,
EDWARD REILLY, NASSAU COUNTY
SHERIFF'S DEPARTMENT,**

Respondents,

-----X
Papers Read on this Motion:

Notice of Petition	01
Affirmation in Support of Petition	XX
Respondents' Cross Motion	02
Respondents' Memorandum of Law	XX
Petitioners' Memorandum of Law	XX
Respondents' Reply Memorandum of Law	XX
Petitioners' Supplemental Brief	XX
Respondents' Supplemental Brief	XX
Addendum to Respondents' Supplemental Brief	XX

The Petitioners seek an order compelling Respondents Nassau County to take all steps necessary to effectuate Resolution number 98-2001 which would allow Nassau County to opt into the enhanced pension benefit for sheriffs, under-sheriffs and deputy sheriffs offered by the New York State and Local Retirement System (hereafter "the Retirement System").

The Respondents oppose the motion and cross-move for an Order pursuant to CPLR

MICHELE M. WOODARD, JSC

**TRIAL/IAS Part 14
Index No.: 015405/2004**

MOTION SEQ. NOS.: 01 & 02

DECISION & ORDER

§§3211(a)(5) and (7) dismissing the Verified Petition.

This is a CPLR Article 78 proceeding in the nature of mandamus, seeking to compel the Nassau County Legislature to perform a duty which Petitioner's claim it is legally obligated to perform by completing all necessary steps to effectuate a resolution that it passed on April 23, 2001 which entitles the Nassau County sheriffs, deputy sheriffs and under sheriffs who have attained 20 years of total creditable service and who have prior service credit earned with a public employer to be credited with an additional one-sixtieth of the applicant's final average salary for each year of service in excess of twenty years.

The within applications were originally submitted to the Court on or about December 6, 2004. The parties attempted to settle this matter without the necessity of further litigation, motions, appeals and other proceedings and expending additional resources. Unfortunately, despite the parties good faith efforts they were unable to resolve the matter.

The Petitioners requested that the matter be restored to the active Court calendar. The Respondents have raised the issue of whether the Petitioners were in fact part of the retirement system.

Chapter 571 of the Laws of New York 1999 allowed counties to opt into a retirement enhancement whereby sheriffs, undersheriffs and deputy sheriffs engaged in law enforcement activities would be provided with an additional sixtieths benefit for all public service regardless of whether the service was as a sheriff.

Nassau County's Legislature voted to opt into the aforementioned enhanced benefit on April 23, 2001 by Resolution Number 98-2001. The measure was approved by the Assistant County Executive on April 27, 2001. Prior to the vote, the Respondents, at their request, had been provided an actuary report by the Retirement System on the cost of including the eligible employees in the enhanced. The County prepared a fiscal impact statement indicating, that the act would take effect immediately. The vote of the Legislature was unanimous to adopt the plan and it was presumed by the Petitioners that since the Respondents had sought to meet all the conditions of implementing the enhanced plan prior to the vote, the vote in of itself would effectuate the plan. In preparation for retirement, the Petitioner discovered that Resolution 98-2001 had not been filed as prescribed by the Retirement System and therefore the Petitioners will not receive the intended benefit.

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A representative from the Retirement System advised the named Petitioner Robert J. Arciello, president of the local chapter of the Petitioners' union, in July 2004 that all of the necessary steps had not been taken to effectuate Resolution 98-2001.

The Petitioners contend, and it is undisputed, that they filed this CPLR Article 78 petition within four months after receiving written notice, in the form of a letter, dated July 7, 2004 from the Retirement System. The letter indicated that Nassau County had failed to take all the necessary steps to effectuate the Resolution. The Petitioners contend that this petition was not filed earlier because they had no way of knowing previously that the Resolution was never filed. Before filing the within petition, the Petitioners made a written request to the Nassau County Sheriff and Nassau County Executive to comply with the Resolution at issue. After no response was had, this petition was filed.

The Respondents claim that the Petitioners failed to provide a legal basis for requiring the Nassau County Legislative Clerk to file the Resolution or for its Chief Fiscal Officer to prepare an affidavit. Additionally, the Respondents are claiming that the petition is untimely, fails to state a claim, and should be dismissed as a matter of law.

The Respondents raise CPLR § 217 which states that : "in commencing a proceeding in the nature of mandamus, it is necessary to make a demand and await a refusal, and the Statute of Limitations begins to run on the date of refusal and expires four months thereafter." The Respondents claim that the Petitioners had a duty to file their demand within the statute of limitations for an Article 78 proceeding. The Respondents cite several cases in which Article 78 proceedings were dismissed for failure to initiate an action within the statutory four- month period. However, in all of the cases cited by the Respondents, the Petitioners had received actual letters from the offending municipality indicating that they had been denied certain benefits. In the case at bar, quite the opposite occurred -- a resolution was passed providing that the Petitioner's would become entitled to receive certain benefits. The only document that the Petitioner's received indicating that the Resolution had not been filed and that the enhanced benefit had not been effectuated was the letter from the New York State and Local Retirement System, dated July 7, 2004, which the Petitioners argue makes the November 5, 2004 filing of the within petition timely. The aforementioned letter was sent in response to the Petitioner's request as to the status of the implementation of the benefits. The Respondents have offered no

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authority for their position that the four- month statute of limitations applicable to this Article 78 proceeding began to run at the time the Resolution in question was passed. The New York Court of Appeals stated : "If a reasonably diligent Petitioner is not aware of the facts that would prompt him to make the demand, his delay in making it is excusable and laches will not be applied." *O'Connell v Kern*, 287 NY 297 (1942).

Petitioner's argue that they had no way of knowing that the County did not preform the ministerial acts. The Petitioners also argue that the County did not publicize their efforts to file the resolution. The Statute of Limitations cannot be fairly said to have commenced running unless Petitioners know or should have known they were aggrieved by the Respondents. *O'Neil v Schechter*, 3 NY 2d 548 (1959).

The Respondents argue in their Supplemental Memorandum of Law that the Petitioner's reasoning as to why they should not have been aware that a demand was necessary is meritless. The Respondents claim that all actions are public and could have been ascertained by a request.

The Respondents contends that the Petitioners do not have a clear legal right to the remedy, as mandamus to compel is only available for the performance of a purely ministerial act where there is a clear legal right to the relief sought.

The Respondent further claims that the Petitioner's have failed to demonstrate that they have a clear legal right to the relief which they are requesting. The Legislature voted unanimously to afford the sheriffs, deputy sheriffs, and undersheriffs the enhanced benefits as provided by New York Law Chapter 571 of 1999. Further, the Respondents have not submitted any documentation that demonstrates that Nassau County intended to deny the benefits to the Petitioners by its failure to duly file the passed resolution.

The Petitioners argue, basically, that the filing of the resolution was a ministerial act created by the New York State Legislature under New York State Retirement Law, Titles 5 and 6 §§331-342 which provides the procedure a government entity must follow in order to opt into the enhanced retirement benefits. The ministerial nature of the filing appears to be established by the Respondents' vote and attempt to effectuate the enhanced benefits as demonstrated by the letters sent to the NYS Retirement System and annexed to the petition before the Court.

The Petitioners have submitted documentary evidence demonstrating that they have historically been members of the retirement system as law enforcement officers and that the

County has actively and continuously enrolled new recruits into the retirement system as law enforcement officers when they become employed by the Sheriff's office.

Any ambiguity created by an administrative body as to whether it has made a final and binding determination, from which the four-month period of limitations applicable to an article 78 proceeding is measured (CPLR §217), should be resolved against it in determining whether such a proceeding has been timely commenced. *Mundy v Nassau County Civ. Serv. Commn.* 44 NY2d 352 (1978). As stated in *Mundy*, having created the ambiguity and impression of nonfinality, it was up to the defendant commission to either "make it clear what was or what was not its [final] determination" (*Matter of Castaways Motel v Schuyler*, 24 NY2d 120 [1969]) or, failing that showing, to abide by reasonable delays which it alone had engendered (see *Matter of O'Neill v Schechter*, 5 NY2d 548 [1959]). As of matter of record, there still has not been an official determination that the County was not going to participate in the enhanced Sheriff benefits program or an act by the Legislature rescinding the previous resolution opting to participate in the enhanced Sheriff retirement benefit program.

Based on the foregoing, the Petitioners' application is timely and meritorious.

The Respondents' application is **denied** and the Petitioners' application is **granted**. It is hereby

ORDERED, Nassau County is directed to complete the filings and payments required by the New York State Retirement System in order to effectuate Resolution 98-2001 opting into the enhanced pension benefit for Sheriffs, Under Sheriffs and Deputy Sheriffs.

This constitutes the **Decision** and **Order** of the Court.

DATED: Mineola, New York
December 22, 2009

ENTER:



HON. MICHELE M. WOODARD
J.S.C.

ENTERED

DEC 31 2009

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**