

Matter of Ramery v Kelly
2010 NY Slip Op 31352(U)
May 26, 2010
Sup Ct, NY County
Docket Number: 115488/09
Judge: Joan B. Lobis
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: John B. Lobis

PART 6

Index Number : 115488/2009
RAMERY, ARLENE
vs.
KELLY, RAYMOND
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE 3/24/10
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

n this motion to/for _____

PAPERS NUMBERED

1-14
15-58

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 5/26/10

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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

-----X
In the Matter of the Application of
ARLENE RAMERY,

Petitioner,

Index No. 115488/09

For a Judgment under Article 78 of the
Civil Practice Law and Rules

**Decision, Order,
and Judgment**

-against-

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

Respondents.

-----X
JOAN B. LOBIS, J.S.C.:

Petitioner Arlene Ramery brings this proceeding under Article 78 of the C.P.L.R. to annul the decision of respondent The Board of Trustees of the Police Pension Fund (the "PPF"), which denied her a line of duty Accident Disability Retirement ("ADR") allowance and granted her Ordinary Disability Retirement ("ODR"). The other respondents are Raymond Kelly, as the police commissioner and as chairman of the PPF; the New York City Police Department (the "NYPD"); and the City of New York (the "City"). In addition, petitioner seeks an order compelling respondents' production of certain records; however, that branch of the petition is moot based on the documents annexed to respondents' papers. For the reasons stated below, the petition is denied.

Petitioner, a detective with the NYPD, joined the force on April 30, 1991, and served continuously until she retired on August 21, 2009. She injured her knee on February 27, 2006, when she

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Office on 11/14/09.

slipped on a patch of ice in a parking lot behind her precinct. Immediately after the fall, petitioner complained of pain and swelling in her left knee. Petitioner eventually underwent knee surgery on June 30, 2006. On January 17, 2007, petitioner applied for ADR and ODR, claiming that she “had surgery to repair medial and lateral meniscal tears of my left knee, but had no real improvement.” On July 19, 2007, the Medical Board reviewed petitioner’s application, conducted an examination of her knee, and recommended a denial of her application for ODR and ADR, setting forth “that there are no significant orthopedic findings precluding the detective from performing full duties[.]” On January 14, 2008, the Medical Board reviewed petitioner’s application for a second time. After an examination of petitioner’s knee, the Medical Board again recommended a denial of petitioner’s application.

On March 3, 2008, while petitioner was entering an NYPD office, her jacket became caught on a door handle, causing her to fall on her left side and injure her knee and hip. Because of these injuries, on December 15, 2008, the Medical Board reviewed petitioner’s ADR application for a third time. After reviewing her medical records and conducting an interview and physical examination, the Medical Board determined that “there are significant objective findings precluding the detective from performing the full duties of a New York City Police Officer. . . . The competent casual factor is the line of duty injury of March 3, 2008.” Petitioner’s application for ADR was recommended for approval. The PPF, however, by a six-to-six vote, did not approve petitioner’s application for ADR. The members of the PPF voting against the application believed that petitioner’s injury was caused by an “incident” on March 3, 2008 and not an “accident.” This petition followed the final determination of the PPF.

Petitioner argues that she is entitled to ADR as a result of her knee injury. Petitioner’s injury and its cause are undisputed. The primary dispute in this case concerns the PPF’s characterization

of the cause of the injury as a line of duty "incident" and not a line of duty "accident," which would entitle petitioner to ADR. Petitioner argues that she is entitled to ADR because the event causing her injury was an "accident." Petitioner also argues that the event on March 3, 2008, regardless of its characterization as an incident or accident, aggravated petitioner's previous knee injury and therefore entitles her to ADR. Respondents seek dismissal of the petition, on the grounds that petitioner has failed to meet her burden of showing that she is physically incapacitated from performing her duties as the natural and proximate result of an "accident" not caused by her own negligence and sustained in the performance of her duties. Respondents maintain that the PPF's determination that the event causing petitioner's injury was an "incident" and not an "accident" was neither arbitrary nor capricious. Respondents further contend that ADR is available for an aggravation of a pre-existing condition only when the exacerbation is caused by an "accident."

In an article 78 proceeding challenging a denial of disability payments, the PPF's determination will be sustained unless it is "arbitrary, capricious, an abuse of discretion or contrary to law." In re Jefferson v. Kelly, 51 A.D.3d 536, 537 (1st Dep't 2008). ADR benefits are available when an examination and investigation shows that the applicant is physically or mentally incapacitated from the performance of duty as a natural and proximate result of an "accidental injury" received in the line of duty, and that such disability was not the result of willful negligence on the part of the applicant. See Administrative Code of City of New York § 13-252. Injuries caused by a "sudden, fortuitous mischance, [which is] unexpected, [and] out of the ordinary" are considered accidental. In re Lichtenstein v. Board of Trustees of Police Pension Fund of Police Dept. of City of N.Y., 57 N.Y.2d 1010, 1012 (1982) (internal quotations and citations omitted). Accordingly, accidental injuries encompass injuries caused by "a

precipitating accidental event . . . which was not a risk of the work performed[.]” In re Starnella v. Bratton, 92 N.Y.2d 836, 839 (1998), quoting In re McCambridge v. McGuire, 62 N.Y.2d 563, 568 (1984). Furthermore, an “*accident* which . . . aggravates a preexisting condition is a cause of disability[.]” In re Tobin v. Steisel, 64 N.Y.2d 254, 257 (1985) (emphasis added). On the other hand, “a mere misstep in the ordinary course of employment is not the kind of ‘sudden and unexpected event’ which will support an award of accidental disability retirement benefits.” In re Danvi v. Board of Trustees of New York City Employees’ Ret. Sys., 176 A.D.2d 451, 452 (1st Dep’t 1991) (citation omitted); see also Starnella, 92 N.Y.2d at 839; In re Sciabarassi v. Safir, 298 A.D.2d 329 (1st Dep’t 2002).

It was not arbitrary and capricious for the PPF to refuse to characterize petitioner’s injury as accidental. Here, there was no “precipitating accidental event” that caused her injury. Her fall was caused by a non-hazardous door handle that was in its proper position. Petitioner’s injury was caused by her own failure to walk safely through an otherwise normal doorway. Moreover, it was not arbitrary and capricious for the PPF to refuse to consider whether the events of March 3, 2008 aggravated her previous knee injury, since the events were properly described as an incident.

The petition is denied and the proceeding is dismissed. This constitutes the decision, order, and judgment of the court.

Dated: May 26, 2010



JOAN B. LOBIS, J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk’s Desk (Room 141B).