

**Sweeney v New York City Dept. of Health & Mental
Hygiene**

2010 NY Slip Op 32661(U)

September 22, 2010

Supreme Court, New York County

Docket Number: 118314/09

Judge: Jane S. Solomon

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

PRESENT: JANE SOLOMON
Justice

PART 53

Index Number : 118314/2009
SWEENEY, JOSEPH
vs.
NYC DEPT. OF HEALTH
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____
MOTION DATE 9/20/10
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED
1-3
4-5

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____
Answering Affidavits — Exhibits _____
Replying Affidavits _____

FILED
SEP 27 2010
NEW YORK COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is

denied in answerd memorandum decision & order.

NB 11-15-10 PC at 11 Ady set at end of decision

Dated: ~~9/20/10~~ 9/22/10

JANE S. SOLOMON
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
COUNTY OF NEW YORK : IAS PART 55

----- X

JOSEPH SWEENEY,

Plaintiff,

INDEX NO. 118314/09

-against-

DECISION AND ORDER

NEW YORK CITY DEPARTMENT OF HEALTH and
MENTAL HYGIENE,

Defendant.

----- X

JANE S. SOLOMON, J.:

FILED
SEP 27 2010
NEW YORK
COUNTY CLERK'S OFFICE

Defendant, New York City Department of Health and Mental Hygiene, moves to dismiss the complaint pursuant to CPLR 3211(a)5 on the ground that plaintiff's claims are barred by the doctrines of collateral estoppel and *res judicata*.

According to the complaint (defendant's exhibit A), plaintiff passed a Civil Service examination and was hired in the competitive class position of Staff Analyst by defendant's predecessor in 1993 (*id.*, ¶ 10). He continued in civil service titles through at least 2003. At his September 1993 job interview he was told that he would be entitled to all benefits set forth in the New York Civil Service Law, including participation in the New York City Employees Retirement System ("NYCERS") (*id.*, ¶ 9). In December 2003, after his assignment was changed, he was advised by defendant's Executive Deputy Commissioner that his Civil Service status would be maintained (¶ 12). Almost four and a half years thereafter, at a May 20, 2008

meeting with defendant's Assistant Commissioners and other representatives, he learned that he never had Civil Service status, despite defendant's prior representations to the contrary, and that he would not be permitted to participate in NYCERS (§ 15). The reason for this was that the positions he held were funded with money from sources other than the City. The gravamen of the complaint is that for 15 years plaintiff relied on defendant's knowingly false representations that plaintiff held Civil Service positions and that he would be entitled to all the benefits attendant thereto (§ 18). Plaintiff seeks damages consisting of all benefits he would have received as a Civil Servant of the City of New York (§ 19).

The instant action, which was commenced in December 2009, is plaintiff's second attempt to obtain the benefits of membership in NYCERS through litigation. In June 2008, plaintiff and a co-worker, as petitioners, commenced an Article 78 proceeding against defendant (respondent therein) seeking a judgment declaring that defendant's denial of their membership in NYCERS was arbitrary, capricious and violative of petitioners' entitlement to those benefits pursuant to New York City Administrative Code § 13-104 (see notice of petition and petition, without exhibits, defendant's exhibit B). By a memorandum decision, order and judgment dated January 20, 2009 (Article 78 Decision, Edmead, J, defendant's exhibit E), the court denied their petition and dismissed the proceeding on the

ground that the record supported a finding that petitioners were employed by private entities and therefore were ineligible for NYCERS membership (*id.*, pp 19-20).

The Article 78 Decision gives a detailed factual recitation, including a description of documents submitted in connection with that proceeding. The court found that plaintiff had worked from 1993 to 2008 for an entity called the Center for Policy Research (CPR), which received funding from the State of New York to provide mental health services in conjunction with defendant. Plaintiff's salary and benefits, including health and retirement benefits, were provided by CPR, and his paychecks were issued by CPR. In May 2008, plaintiff was notified that CPR's contract was assumed by an entity called the Research Foundation for Mental Hygiene (Foundation). After this, the Foundation paid his salary and benefits. Documents showed that plaintiff either participated, or was eligible to participate, in a retirement plan provided by CPR and the Foundation, and administered by the Teachers Insurance and Annuity Association/College Retirement Equities Fund (TIAA-CREF). The Article 78 Decision refers to CPR's "Employee Benefits & Policies Summary Sheet", submitted in that proceeding but absent from the record here, which states that CPR contributed 12% of its employees' salary to a retirement plan administered by TIAA-CREF, and employees had the option of participating in a deferred annuity plan. When CPR's contract was assumed by the Foundation, plaintiff completed an application

for employment with the Foundation, listing CPR as his prior employer, and he requested retirement credit from the Foundation based upon his prior service with CPR. In short, the Article 78 Decision refers to documented proof that plaintiff was on notice that his salary and retirement benefits were being provided through CPR and the Foundation, and not by defendant.

The court's order, which concluded that defendant's determination to deny plaintiff and his co-worker the benefits of NYCERS membership was not arbitrary and capricious (*id.*, at 20), was affirmed on appeal (see *Ivan v New York City Department of Health and Mental Hygiene*, 63 AD3d 572 [1st Dept 2009]).

The present motion includes copies of the Article 78 petition, answer and decision, but it does not include the documentation submitted in that proceeding. It appears likely that, if the same documentation were submitted on this motion, defendants would have had a strong basis to seek dismissal under CPLR 3211(a)(1) ("a defense is founded upon documentary evidence"). The documentation described in the Article 78 Decision would almost certainly establish that plaintiff could not reasonably have relied upon oral representations that he was a civil servant employed by defendant and entitled to a NYCERS pension, rather than an employee of the entities that sent him paychecks for eighteen years, and that plaintiff knew he was entitled to participate in a retirement plan through that

employment.

Instead, defendant's motion is based on the argument that plaintiff's instant claims are barred by the doctrine of collateral estoppel because "[t]he issues in both cases are identical as plaintiff makes the same claims in this case as he did in his Article 78 Petition" (see defendant's supporting memorandum of law, p 5). Defendant then argues that plaintiff's claims are barred by the doctrine of *res judicata* because his claims in this case were previously litigated in his Article 78 proceeding and found to be without merit. Defendant adds that under New York's "transactional analysis approach" plaintiff's fraud claim, although made for the first time in this case, is nevertheless barred by the doctrine of *res judicata* because the claim arises out of the same series of transactions that brought about his Article 78 proceeding.

"The doctrine of collateral estoppel, a narrower species of *res judicata*, precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same" (*Ryan v New York Telephone Co.*, 62 NY2d 494, 500 [1984]). The party seeking to invoke the benefit of collateral estoppel (also known as issue preclusion) must prove (i) that the identical issue was "necessarily decided" in the prior action and is

decisive in the present action and (ii) that the party to be precluded from relitigating the issue had a full and fair opportunity to contest the prior determination (see *D'Arata v New York Central Mutual Fire Insurance Co.*, 76 NY2d 659, 664 [1990]).

Collateral estoppel is inapplicable here. The scope of an Article 78 proceeding is expressly limited to the four questions enumerated in CPLR 7803. The issue of fraud or fraudulent inducement presented herein was not and could not have been raised in the prior proceeding, let alone "necessarily decided."

The doctrine of *res judicata* is likewise inapplicable. The doctrine, often referred to as claim preclusion, provides that once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon a different theory or if a different remedy is sought (see *O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981], citing *Reilly v Reid*, 45 NY2d 24 [1978]). Although plaintiff's fraud claim arises out of his employment or lack thereof by defendant, it could not have been properly raised and adjudicated in the Article 78 proceeding (see CPLR 7803) and, in fact, was not. The broad transactional approach to *res judicata*, which has been adopted in this State (see *O'Brien v City of Syracuse*, *supra*, at 357), was never intended to deprive a litigant of his day in court (see *Reilly v Reid*, *supra*, at 28).

Plaintiff's complaint accepts the outcome of the Article 78

proceeding and seeks compensation for the alleged misconduct in his having been misled by defendant over the years prior to that outcome. Accordingly, it hereby is

ORDERED that defendant's motion to dismiss is denied, and defendant is directed to serve its answer to the complaint within 20 days from service of a copy of this order with notice of entry, and counsel shall appear in Part 55 for a preliminary conference on November 15, 2010 at 11 AM.

DATED: September 22 2010

ENTER:

J.S.
JANE S. SOLOMON
J.S.C.

FILED
SEP. 27 2010
NEW YORK
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