

<b>Matter of Diaz v Kelly</b>
2010 NY Slip Op 33506(U)
December 22, 2010
Sup Ct, NY County
Docket Number: 105924-10
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. JUDITH J. GISCHE

PRESENT: \_\_\_\_\_

PART 10

Justice

Index Number : 105924/2010

DIAZ, JOEL

vs.

KELLY, RAYMOND

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Answering Affidavits — Exhibits \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

**UNFILED JUDGMENT**

Upon the foregoing papers, it is ordered that this ~~no~~ 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).

*Petition*

**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.**

Dated: Dec 22, 2010

HON. JUDITH J. GISCHE *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):



disabling heart condition.

Respondents have answered the petition and seek the dismissal of this action. They contend their decision to deny Diaz's request to reopen and amend his application was neither arbitrary nor capricious.

Since an Article 78 proceeding is a special proceeding it may be summarily determined upon the pleadings, papers, and admissions to the extent that no triable issues of fact are raised (CPLR § 409 [b]; CPLR §§ 7801, 7804 [h]). Thus, much like a motion for summary judgment, the court should decide the issues raised on the papers presented and grant judgment for the prevailing party, unless there is an issue of fact requiring a trial (CPLR § 7804 [h]; York v. McGuire 1984, 99 A.D.2d 1023 *aff'd* 63 N.Y.2d 760 [1984]; Battaglia v. Schumer, 60 A.D.2d 759 [4<sup>th</sup> Dept 1977]).

#### **Underlying Facts**

Diaz, born in 1963, joined the police force in 1985 and suffered a number of injuries while on duty. Many of those injuries were to his legs and back. Although in May 2000 Diaz was taken to the hospital with chest pains, the treating physician reported a normal "Thallium stress test." Diaz was treated and released with instructions to obtain an "upper G-I series."

On April 22, 2009, Diaz filed an application for ADR. He stated the following on his application:

"As a result of a gunshot wound in the line of duty to my left leg and back [I] suffered DVT [deep vein thrombosis] PE [pulmonary emboll], numbness and swelling to leg and back, pain and swelling reoccurs. Cannot stand for long periods and cannot run. As a result, I am unable to perform full duty. I request accident disability."

On May 31, 2009, while his application was being processed and reviewed, Diaz retired from the force.

On June 12, 2009, the Police Commissioner filed its own application on Diaz's behalf for Ordinary Disability Pension ("ODR"), indicating the disability was "lower leg extremity derangement."

Following a physical examination of plaintiff and a review of his medical documents and file, the Medical Board of the Police Pension Fund, Article II ("Medical Board") issued its report dated September 2, 2009, recommending that both the ADR and ODR applications be denied. In making that recommendation, the Medical Board wrote the following:

"There is a letter dated August 19, 1993 from Dr. John Chang, a cardiothoracic and vascular surgeon, indicating the detective had a duplex scan of his venous thrombosis (DVT). Dr. Chang recommended the detective discontinue taking Coumadin and continue with compression stockings and leg elevation as part of his exercise program."

The Medical Board also observed that:

"On physical examination today, the detective removed ... compression stockings, one from each leg. No obvious swelling was appreciated in either extremity. No temperature change was noted ... no skin changes appreciated. Pedal pulse was 2+ bilateral..."

The Medical Board concluded that "the documentary and clinical evidence fails to substantiate that [Diaz] was disabled from performing the full duties of a New York City Police Officer at the time of his retirement."

When the matter appeared before the Board of Trustees on November 9, 2009,

the application was "tabled"<sup>1</sup> for reconsideration. The application was "tabled" again on December 9, 2009. The last time the application was considered (January 13, 2010), the Board of Trustees adopted the Medical Board's September 2, 2009 recommendation, that ADR and ODR on his DVT and PE claim be denied. Diaz was notified of the Board of Trustee's decision denying his application by letter dated January 15, 2010.

On November 2, 2009 – after the Medical Board recommended denial of Diaz's application, but before the matter was tabled the first time – Diaz suffered a heart attack. He required surgery and the implantation of five (5) stents. He did not have an attorney at the time and he did not file an application to amend his ADR until February 17, 2010, after it was denied. At that time he retained a lawyer who wrote a letter to the Board requesting that his client's application be reopened so that Diaz could be considered for ADR under General Municipal Law § 207-k (the "Heart Bill").

As part of his letter application, Diaz's attorney attached petitioner's medical documents, including: the results of a World Trade Center, Law Enforcement Cardiovascular Screening ("WTC") he underwent, the report of an ECG performed on May 21, 2009, a stress test performed May 11, 2009, a cardiac catheterization and cineangiographic report dated November 3, 2009, a CMRI report done November 5, 2009 and another CMRI done on December 2, 2009.

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<sup>1</sup>The tabling of Diaz's application was in accordance with New York City Administrative Code § 13-216 and the Pension Fund's resolution dated January 14, 2009 which provides a protocol for how the Board of Trustees carries out its responsibilities.

The April 3, 2009 WTC report shows some abnormalities in Diaz's EKG. An Echocardiogram also shows some abnormalities as does a Coronary CT Scan undertaken of Diaz. The report notes that Diaz shows signs of "coronary artery disease" and it contains a recommendation that "you see a heart specialist for further evaluation (stress test). We encourage you to bring the results of your abnormal tests to your primary medical doctor's attention as soon as possible." The May 11, 2009 test results were "negative," however, the November 3, 2009 report showed moderate heart disease. The cardiac MRIs each showed, among other things, a myocardial infarction.

Respondents' arguments for why the petition should be dismissed fall into two broad categories. The first category is that Diaz was already retired and his application was denied when he first notified the respondents of his heart condition and the heart attack. They deny that they prematurely closed Diaz's application and point out they tabled this matter twice before the Board of Trustees decided to adopt the Medical Board's recommendation to deny his ADR application. Respondents contend that the Heart Bill does not provide Diaz with any protection because he was already retired when he had his heart attack and the purpose of the Heart Bill is to protect a "paid member" of the force (*see, Uniformed Firefighter Assn. Local 94 v. Beekman, 52 NY2d 463 [1981]*).

The second category of arguments is that Diaz did not file for ADR based upon a heart condition, or disclose symptoms of a heart condition in his application. They argue further that his attempt to draw a nexus between his heart attack and a disabling heart condition before he retired is ineffective because Diaz had negative, if not good, reports on the cardiac tests, scans. CMRI's etc., he took.

Diaz claims that the Heart Bill is intended to address situations like his because under the bill, there is presumption that a disabling or fatal heart condition suffered by city police officer was accidentally sustained as result of his employment if not rebutted by contrary proof. He also claims that respondents should have amended his application on his behalf because the Detectives Endowment Association ("DEA") knew he had suffered a heart attack and the DEA is a sitting and voting member of the Board of Trustees. Diaz contends the resolution is merely a self-enacted rule of protocol and it is not unusual for applications to be tabled more than twice. According to Diaz, there is precedent for allowing a closed application for ADR to be reopened to include a heart condition discovered a year after the officer retired, although not the basis for the application in the first place.

#### **Discussion**

The issue framed by this petition is whether Diaz, who suffered a heart attack while his application for ADR was pending, should have been allowed to amend his application to assert a disability based upon a heart condition, even though he did not ask to amend his application until after it was denied.

The underpinnings of the Heart Bill are that a heart condition is not only an occupational hazard for police officers and firemen, but also a unique condition which generally is not the result of any particular incident but involves a gradual and progressive degeneration as a result of the continuous stress and strain of the job. The Heart Bill effectively dispenses with the need for heart disability applicants to point to particular accidents as the cause of the condition (Uniformed Firefighter Assn. Local 94 v. Beekman, 52 NY2d 463, 472 [1981]).

The Board of Trustees agrees that it has considerable discretion in deciding whether to allow an applicant an opportunity to amend a pending application by a retired member of the force for a disability pension to include a claim based upon coronary disease (Mulheren v. Board of Trustees of the Police Pension Fund, Article II, 307 AD2d 129 [1<sup>st</sup> Dept 2003] *lv den* 100 NY2d 515 [2003]). Furthermore, the language of the Heart Bill suggests that the amendment will be permitted, whether or not the condition was diagnosed before the applicant retired, so long as the condition was incurred while the applicant was still a paid member of the force (Mulheren v. Board of Trustees of the Police Pension Fund, Article II, supra). Although the resolution provides for an application to be routinely remanded a certain number of times, these protocols are not inflexible, but self-imposed (Mulheren v. Board of Trustees of the Police Pension Fund, Article II, supra - three remands; Detemple v. Kelly, 28 Misc3d 1218 (A) [N.Y. Sup 2010] - three remands).

Here, Diaz put in medical records that showed he had experienced chest pains in May 2000. The pains were serious enough that he was taken to the hospital and administered a stress test. The chest pain was identified as being of "unknown etiology." Later cardiac testing that he underwent in 2009, at or about the time he filed for the leg based disability, shows he had some abnormalities that could have been coronary disease related. Those tests were taken before the Board of Trustees approved the Medical Board's recommendation denying him ADR.

Admittedly, Diaz did not file an amended application as soon as he had his heart attack. He claims, and it is unrefuted, that he was recovering from major coronary surgery, including the implantation of five (5) stents. He did not have an attorney.

Although the respondents argue that they had no obligation to allow him to amend his application and remand the matter to the Medical Board for consideration of his claim that he incurred a heart-related disability incurred while he was still a paid member of the police department, there is some evidence that Diaz may have had an undiagnosed heart condition when he filed his orthopedic based application (see Mulheren v. Board of Trustees of the Police Pension Fund, Article II, supra). Clearly, his heart condition – requiring five (5) stents – did not happen suddenly.

Unlike the petitioner in Detemple v. Kelly, 28 Misc3d 1218 (A) [Sup Ct. N.Y. Co. 2010] who filed ADR based upon a spine related injury, Diaz filed his ADR application based upon DVT and PE – circulatory ailments which may be linked to an increased risk of a heart attack <http://www.webmd.com/dvt/news/20071126>.

Arguments by respondents, that Diaz has not showed a nexus between his heart attack and pre-retirement coronary disease, miss the point and overlook the pivotal role the Medical Board plays in the decision making process. By statute, the Heart Bill is simply a rebuttable presumption, under certain conditions, that an officer's disabling heart condition was incurred in the performance of his official duties, if not rebutted by contrary proof (Uniformed Firefighters Ass'n, Local 94, IAFF, AFL-CIO v. Beckman, supra). Thus, the presumption may be overcome by competent evidence to the contrary (Knorr v Kelly, 35 AD3d 326 [1<sup>st</sup> Dept 2006]).

Although the court must defer to the expertise of the Medical Board where medical evidence is subject to conflicting interpretations, and to the judgment of the Board of Trustees in adopting the Medical Board's findings, Diaz never had the opportunity to present his claim or prove that it was a line of duty related condition (see

In re Bornstein v. NYCERS, 88 NY2d 756 [1996]; see also: Petition of Lunt, 159 A.D.2d 404 [1<sup>st</sup> Dept 2009]).

The Board of Trustees' decision to not allow Diaz the opportunity to amend his application was arbitrary and capricious, particularly when viewed under the extenuating circumstances and the very short period of time between Diaz filing his application and his heart attack.

The court remands this matter with a direction that Diaz be allowed to amend his application for ADR based upon his claimed heart-related disability.

### Conclusion

In accordance with the foregoing,

*It is hereby*

**ORDERED, DECLARED AND ADJUDGED** that the petition is granted to the extent of annulling the findings of the Board of Trustees, denying petitioner the opportunity to amend his application for ADR; and it is further

**ORDERED** that the court remands this matter with a direction that Diaz be allowed to amend his application for ADR based upon his claimed heart-related disability; and it is further

**ORDERED** that this constitutes the Decision, Order and Judgment of the Court.

Dated:           New York, New York  
December 22, 2010

So Ordered:

\_\_\_\_\_  
Hon. Judith J. Gische, JSC

**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 1415).

**UNFILED JUDGMENT**

-Page 9 of 9- 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 1415).