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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER PART IA PART 16

Index Number : 105113/2011

MCPHERSON, RANDALL

VS

D'ALESSANDRO, DIANNE

Sequence Number : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

r _____

_____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is granted, the petition is denied, and the Article 78 proceeding is dismissed in accordance with the accompanying memorandum decision.

FILED

OCT 25 2011

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

FOR THE FOLLOWING REASON(S):

Dated: OCT 21 2011

_____, J.S.C.

ALICE SCHLESINGER

1. CHECK ONE: ..... [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: [ ] GRANTED [ ] DENIED [ ] GRANTED IN PART [X] OTHER

3. CHECK IF APPROPRIATE: ..... [ ] SETTLE ORDER [ ] SUBMIT ORDER

[ ] DO NOT POST [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

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

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In the Matter of the Application of

RANDALL MCPHERSON,

Petitioner,

For A Judgment Pursuant to CPLR Article 78

-against-

DIANNE D'ALESSANDRO, as Executive Director and BOARD OF TRUSTEES of NEW YORK CITY EMPLOYEES RETIREMENT SYSTEM,

Respondents.

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Index No. 105113/11
Motion Seq. No. 001

SCHLESINGER, J.:

Before this Court is an Article 78 petition brought by Randall McPherson. Mr. McPherson was employed by the City of New York as a deckhand aboard the Staten Island Ferry. He is a member of the New York City Employees Retirement System (NYCERS). On April 16, 2009, Mr. McPherson filed an application for Disability Retirement benefits under the provisions of §605 of the New York State Retirement and Social Security Law. In that application, he asserted that he was incapacitated from performing his duties as a deckhand due to injuries he had sustained in an accident while on the job on July 28, 2007. His application was denied by the NYCERS' Board of Trustees in a letter dated February 14, 2011. His Article 78 petition challenges that denial.

The opposition consists of a cross-motion by respondent NYCERS to dismiss the Verified Petition. That motion is supported by an affirmation from General Counsel Karen Mazza, with significant documents attached as well as a memorandum of law. The cross-motion to dismiss is based on §3211(a)(1) and (a)(7) of the CPLR.

I feel it is important to begin a discussion of the relevant facts and supporting law here with a statement of this Court's feelings after reading the Petition. They were based on confusion. Mr. McPherson was referring to and attaching three different medical reports, one dated February 5, 2010 from NYCERS' Medical Board, the second one cited, though not in chronological order, was one from Dr. Lester Lieberman dated October 26, 2010, titled "Review of Medical Records," and the third dated October 21, 2010 was based on an examination of October 18, 2010 by Dr. Richard I. Ulim. This last one was in the form of a letter addressed to a Dr. Gehl.

Mr. McPherson pointed out that Dr. Lieberman had recommended that his application for disability be approved, while Dr. Ulim had recommended that the application be denied. As stated earlier, the Board of Trustees did deny the application on February 14, 2011, adopting the recommendation of the Final Medical Review Committee. Mr. McPherson noted that Dr. Ulim had said in the final paragraph of his letter, after having examined petitioner and reviewed his chart, that:

> Given the complete lack of objective documentation of his problem in the chart, I can only find that there is no reason to declare him disabled from performing his usual work as a deckhand.

Based on this statement, McPherson argued that "Dr. Ulim has essentially conceded that his decision was arbitrary and capricious and is not based on the requisite evidence necessary to make a credible, legitimate determination" (¶17) because "on its face Ulim's decision acknowledges that it is not based on 'some credible evidence', inasmuch as the doctor was not in possession of any appropriate documentation to make the decision he made." (¶18).

I was left in a state of confusion because I did not understand from where or why these additional reports from Dr. Leiberman and Dr. Ulim had come. I understood that the Medical Board, on February 5, 2010, had recommended to the Board of Trustees that Mr. McPherson's application for Disability Retirement be denied. But I did not understand the origin or basis of the two later examinations and recommendations.

However, soon after I began reading the respondent's cross-motion, I realized that my confusion had come from the obvious and intentional failure by petitioner and his counsel to tell me about the relevant events that had happened between the Medical Board's February, 2010 recommendation and the Board's final adoption of it the following year, February 2011. However, those relevant events, which were put forth in the form of documents that appropriately formed the basis for respondents' cross-motion to dismiss, cleared up my confusion.

These are the things petitioner and his counsel failed to tell me. First, that the Board of Trustees had adopted the Medical Board's recommendation of denial of the disability retirement benefits before February 14, 2011. In fact, the Board had met and adopted that recommendation on July 8, 2010 and had informed Mr. McPherson of this decision in a letter dated July 9, 2010.[1]

That letter, in clear, understandable language, first told Mr. McPherson that the Board of Trustees had adopted the recommendation of the Medical Board. Then, in the same clear and understandable language, he was informed that should he wish to contest

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[1]Therefore, if the petitioner had chosen to contest this determination via an Article 78 proceeding, one of three options given to him in the July 9th letter, he would have had four months from that date to bring such a proceeding. But as will be discussed in the body of this decision, he made a different choice.

this recommendation, he could do it in one of three ways. First, he could institute an Article 78 proceeding no later than four months from receipt of this letter. Two, he could have his case reviewed by a Special Medical Review Committee, comprised of three independent doctors. Three, he could re-file for Disability Retirement.

The next three paragraphs further explain the second option, also in clear, understandable language. Further, the time limits and specific procedures used were put in bold print. Finally, and perhaps most significantly, the petitioner was advised that the recommendation of the Special Medical Committee shall supercede the recommendations of the NYCERS' Medical Board, and in bold, underlined print, indicated that it shall be final and conclusive. To further elaborate on this point, Mr. McPherson was then explicitly told that "no other disposition of the application by the Court or an Administrative body or otherwise may be had, including an Article 78 CPLR proceeding."

Second, I was not told by petitioner and his counsel that in a letter of August 12, 2010, Mr. McPherson's bargaining representative, Michael Brandon, Secretary Treasurer of United Marine Division, Local 333, had requested a Medical Review for him. In other words, within the 45 days he was given to make a choice of options if he wanted to have his application further considered, he chose option two.

Following this, the third item I was not informed of by petitioner or his counsel was that on August 2, Randall R. McPherson signed an individualized form entitled "Final Medical Review Waiver (to be completed by the Member)", Form #613, received by NYCERS on August 23, 2010, acknowledging in the waiver that via this agreement his "application for disability retirement shall be disposed of by action of Special Medical Review Committee... [and] that such an action of the Special Medical Review Committee shall be

final and conclusive, and that I waive any and all rights that I might otherwise have to seek or obtain any other disposition of such application for disability retirement by a Court, including but not limited to an Article 78 CPLR Proceeding, administrative proceedings or otherwise." Mr. McPherson's signature was notarized.

The fourth item I was not told of by Mr. McPherson or his counsel was a letter dated August 26, 2010, from Ometa Killiebrew, Manager of the Medical Unit Operation Division of NYCERS, informing Mr. McPherson that his request for Final Medical Review had been received. He was then informed how the process and review would work and that he would be notified of the Special Medical Review Committee's decision approximately 30 days after his last appointment. In the penultimate paragraph of this letter, he is reminded that "the findings and recommendation of the Special Medical Committee is final and conclusive." The last three words were in bold print.

The fifth and final item I was not told by Mr. McPherson and his counsel was a second letter of December 25, 2010, from Ms. Killiebrew that the Committee had agreed with the findings of the NYCERS' Medical Board. Therefore, the latter's recommendation of denial "remains unchanged".

Mr. McPherson was then informed formally by the Board of Trustees in the February 14, 2011 letter that the recommendation of the Final Medical Review Committee denying his application had been adopted. Unlike the earlier July 9, 2010 letter from the Board, he was not given any further information or further options because at this time there were none.

Perhaps there was one other item I was not informed of, that of another, or third, medical report from a doctor other than Doctors Lieberman and Ulim. I cannot be certain

of this because neither side refers to one or includes such a report. My speculation of a third report is based on the procedure that three independent physicians were to be chosen to make up the Special Medical Committee. Mr. McPherson and his counsel only tell me about two. This leads me to suspect that a third report, assuming there was one, was not favorable to petitioner. And it is clear, petitioner omitted informing the Court of many items unfavorable to him.

A final paper submitted in Reply consists of a brief affidavit from Mr. McPherson acknowledging that the signature on the waiver is his, though he did not have a "specific personal recollection as to the full circumstances of my execution of the document" (¶2). He elaborates on this point in the succeeding paragraphs. Finally, he states that he did not read the document carefully, but even if he had, he "still would not have understood the implications or ramifications of execution the form *(sic)*, inasmuch as I am not intimately familiar with either the Administrative Code of the City of New York, or the Retirement and Social Security Law" (¶ 6). Finally, he states that he did not know what an Article 78 Special Proceeding was until after his case had been denied (¶7), but that if he had understood, he would not have executed the waiver (¶8).

Notably, neither in the Petition nor in the Reply does McPherson ever say he was coerced or under duress when he signed the waiver. Nothing is heard from his counsel in Reply.[2]

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[2]Nor did I hear anything from counsel or have the opportunity to question him regarding these omissions and their significance at oral argument, since counsel informed the Court he was unavailable to come on the date that had been set for argument weeks earlier. Therefore, oral argument was waived.

Discussion

The cross-motion to dismiss not only cleared up the confusion in my mind as to the circumstances leading up to the February 14, 2011 decision by the Board of Trustees (though not the circumstances behind counsel's failure to inform the Court of relevant events, nor any justification for such failure), it also convinced me to grant the relief sought. CPLR §3211(a)(1), concerning documentary evidence as a basis for dismissal, is absolutely pertinent here. The July 9, 2010 denial letter clearly set out Mr. McPherson's three options on how to proceed in the event he wanted reconsideration. One of those included an Article 78 proceeding. By choosing the second option, the one asking for a Special Medical Review, he was informed in bold print which was underlined that the decision of such a review shall be final and conclusive and that he would not be able to bring another procedure, including an Article 78 CPLR proceeding. In the waiver letter (Form #613) that he signed on August 2, 2010, he was again informed that by choosing a Special Medical Review, that he was precluded him from any further appeal, including an Article 78 CPLR Proceeding.[3]

[3]The judicial history of such a waiver is interesting and deserving of comment. In 1975, in *Matter of Tropea v. New York City Empls. Retirement System*, 49 AD2d 819, the First Department, in a brief decision, upheld the dismissal of an Article 78 proceeding under conditions similar to ours where a waiver had been signed when the petitioner asked for and received a review by a special medical committee. In 1990, in *Matter of McEwan v. New York City Employees' Retirement System*, 159 AD2d 238, the First Department, citing *Tropea* again upheld a waiver under similar circumstances. But in 2001, District Court Judge Denise Cote in *Morris v. New York City Employees' Retirement System*, 129 F. Supp2d 599, set aside such a waiver, finding that it deprived Morris of due process because the waiver did not explicitly mention that the applicant was giving up his right to seek redress in court via an Article 78 proceeding. So beginning in September 2007 (See Exhibit 6 in Respondent's cross-motion) NYCERS utilized a waiver that explicitly did inform the applicant, Mr. McPherson here, that he was giving up any and all rights to seek further redress "including but not limited to an Article 78 CPLR Proceeding."

Mr. McPherson's Reply, where he unconvincingly explains that he did not really understand what giving up an Article 78 meant, is just that unconvincing. It certainly should not and does not here dissipate the significance and validity of the waiver that he admits to having signed. And as argued by counsel for respondent and noted by the Court, nowhere does Mr. McPherson state that he was coerced into signing that waiver.

CPLR §3211(a)(7) concerns dismissals for failure to state a valid cause of action. Here, respondent urges in its memorandum of law that this section is applicable because by executing a valid waiver of his right to seek judicial review given in exchange for review by the Special Medical Committee, petitioner has lost that right, one for judicial review, and is no longer entitled to the review he now seeks via this proceeding.

I believe that this assertion is correct. Petitioning a court to judicially review an unfavorable finding by an administrative board or committee is a right given by statute (in New York State via Article 78 of the CPLR) or as some believe, a right conferred, if it is a protected property right, by the United State Constitution itself (see fn 3). But it is a right that can be waived. "If it is freely and knowingly made and not the product of coercion or duress, an individual can waive his right to seek review of an administrative proceeding and such determination is binding." *Matter of McEwan , supra*, citing *Matter of Abramovich v. Board of Education*, 46 NY2d 450 (1979).

That is precisely what occurred here. It is absolutely clear, despite Mr. McPherson's somewhat anemic disclaimer in Reply, that petitioner was told repeatedly that he had choices but that the choices carried conditions. He made a choice, which had to involve consultation with his union representative because that was required and that is what was done here when Michael Brandon, an official of his union, requested a Medical Review on

Mr. McPherson's behalf. Mr. McPherson then signed a waiver freely (he has never alleged anything else), a waiver in which he explicitly gave up his right to seek judicial review. Thus, he has lost that right. That means here that this Court cannot and will not entertain the Petition in any way other than it has, or in other words, on its merits.

Accordingly, it is hereby

ORDERED that the cross-motion to dismiss is granted; and it is further

ADJUDGED that the petition is denied and this Article 78 proceeding is dismissed.

Dated: October 21, 2011

OCT 21 2011

J.S.C.

ALICE SCHLESINGER

FILED

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