

Matter of Strax v City of New York
2015 NY Slip Op 31998(U)
October 26, 2015
Supreme Court, Queens County
Docket Number: 17123/14
Judge: Allan B. Weiss
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS

IA PART_2_

In the Matter of the Application of
LISA STRAX,

Index No.: 17123/14

Petitioner,

Motion Date: 2/24/15

For a Judgment Pursuant to Article 78
of Civil Practice Law and Rules and a
declaratory judgment action

Motion Seq. No.: 1

-against-

THE CITY OF NEW YORK and THE NEW YORK
EMPLOYEES' RETIREMENT SYSTEM,

Respondents.

The following papers numbered read on this Article 78 proceeding by self represented petitioner Lisa Strax for a judgment reversing respondents' determination as to the effective date of her retirement, and directing respondents to declare the effective date of her to recalculate her pension benefits from October 5, 2011 forward and awarding her the same. Respondents cross move for an order dismissing the petition on the grounds of statute of limitations, pursuant to CPLR 3211(a)(5) and 7804(f).

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Upon the foregoing papers the petition and cross motion are determined as follows:

Plaintiff commenced the within Article 78 proceeding by filing on November 25, 2014, and served the respondents on December 3, 2014.

Respondents in response to the petition initially moved by way of an order to show cause for a stay and for a change of venue. Said motion was denied by this court in an order dated March 19, 2015, and respondents were directed by this court to serve and file and answer to the petition within 30 days of entry of said order. Respondents, rather than comply with this court's order, served and submitted a cross motion to dismiss the petition on the grounds of statute of limitations, within said 30 day period.

This court in an order dated July 8, 2015, stated that the submission of the cross motion was improper, and directed respondents to serve and file its answer together with the complete administrative record within 20 days of entry of said order. The petition and cross motion were held in abeyance pending the service of said papers. The court's records establish that the order of July 8, 2015 was filed on July 13, 2015. Respondents' verified answer was timely served on petitioner on July 28, 2015, and interposes two affirmative defenses, including the statute of limitations.

Petitioner Lisa Strax, was appointed as a per diem Administrative Law Judge (ALJ) for the New York City Taxi and Limousine Commission on March 3, 2000, and joined NYCERS on May 11, 2006 as a Tier 4 member of the 57/5 Retirement Plan. In 1997, Ms. Strax applied to NYCERS to purchase credit for City service prior to her effective date of enrollment in the retirement system. Although she was notified on November 19, 2007 that her application was approved, she did not remit the required lump sum payment of \$18,615.56. On August 8, 2011, Ms. Strax, using a request for information form, requested that NYCERS reinstate her application to purchase credit for City service prior to her effective date of enrollment in the retirement system. NYCERS, in a letter dated September 26, 2011 notified Ms. Strax that she could purchase the service credit and that she was required to make a lump sum payment of \$22,447.19 on or before October 28, 2011. Ms. Strax remitted said amount on October 27, 2011 by wire transfer, thereby purchasing 4.18 years of service credit.

Petitioner alleges that on September 26, 2011, she was involved in a motor vehicle accident and that she sustained physical injuries, including traumatic brain injury. She alleges that on October 4, 2011 she orally notified her immediate supervisor that she was no longer able to work as an ALJ due to her injuries. She further alleges that her last day of active city service was October 4, 2011.

Ms. Strax received a letter from NYCERS dated November 29, 2011, stating that its records indicated that she had not been in active City service for more than 35 days, and advised her that depending on the reason for leaving active service that there were certain important actions that she needed to consider taking with regard to her NYCERS membership. Ms. Strax sent a response to NYCERS dated December 12, 2011, in which she stated “please be advised I have been on disability since Oct 6, 2011 per doctor’s advice”.

Ms. Strax received a letter from NYCERS dated February 11, 2103, informing her that she has a right to a vested retirement benefit, and that she was required to file for this benefit by completing the enclosed Application for Payment of a Vested Retirement, and returning it to NYCERS “no earlier than 90 days before the effective payability date shown in the box checked below” which was “Upon separation from city service on July 3, 2011 which is after your 57th birthday”.

In February 2013, Ms. Strax telephoned NYCERS and was informed by customer service representative Brett Rothman that she could visit in-person and obtain further information regarding her retirement. In May 2013, Ms. Strax met with NYCERS’ customer service representative Dwayne Monroe to review temporary and permanent retirement options and complete an application for the payment of retirement benefits. Ms. Strax did not submit said application at any time in 2013.

Ms. Strax submitted an Application for Payment of a Vested Retirement to NYCERS on January 19, 2014, stating that she was applying for retirement from City service to take effect on October 4, 2011. Said application was received by NYCERS on January 24, 2014. NYCERS issued a receipt for the retirement application on January 24, 2014, stating that it had been received on January 24, 2014, and that the effective retirement date was October 4, 2011.

NYCERS, in a letter dated January 29, 2014, informed Ms. Strax that it had received her application for service retirement on January 24, 2014, in which she indicated that her effective retirement date was October 4, 2011; that “[u]pon reviewing your records, NYCERS changed the effective date of your retirement for the reason shown below”; and checked a box reading “As a Tier 4 member of this system, the earliest date you can retire is the date we receive your application; therefore, your effective date will be January 24, 2014.”

Ms. Strax, in a letter dated February 8, 2014, provided NYCERS with evidence of her date of birth as requested; enclosed copies of the NYCERS’ letters of January 24, 2014 and January 29, 2014 “which show the effective date of my retirement as 10/4/11 and

01/24/14, respectively; stated that “The payability date of my retirement should be retroactive to 10/4/14, which was my last payday. I was unable to return to work afterward due to disability. But by that date, I was over 57 years old and my pension had already vested. I would appreciate a correction”.

Ms. Strax sent a request for information to NYCERS’ “director of retirement eligibility” which was received on July 15, 2014, in which she stated she left City service due to a brain injury sustained in a car accident on September 26, 2011; that she requested that her retirement be retroactive to October 4, 2011, since it was her last day of work, and that she “always understood to be” her last day of “active city service”; that there was nothing in NYCERS’ literature advising a participant that leaving “active service” meant something other than no longer working for the city; that during an interview on May 22, 2013 with Dwayne Monroe at NYCERS she was told that her retirement date would be retroactive to her last day of work since then she would be “inactive”; and that only after she filed her application for retirement was she advised that the date would be when NYCERS received her application, effectively losing 30 months of benefits.

The Retirement and Eligibility unit of NYCERS, a letter dated July 29, 2014, informed Ms. Strax that her correspondence dated July 15, 2014 had been forwarded to said unit for review and response, and stated that: “When NYCERS received your service retirement application on January 24, 2014 we reviewed the citywide Payroll Management System (PMS) to determine your status at that time. The PMS records indicated that you were carried in a leave status by your agency until January 24, 2014. NYCERS cannot give you a retroactive date of retirement because you were not considered to be a separated member and therefore, we established your retirement date to be January 24, 2014, the date your application for service retirement was submitted to NYCERS. Your retirement date remains January 24, 2014, as that was the date you submitted your service retirement application”.

It is well settled that to commence a timely proceeding pursuant to CPLR article 78, “a petitioner must seek review of a determination within four months after the determination to be reviewed becomes final and binding” (*Matter of Barresi v County of Suffolk*, 72 AD3d 1076, 1076 [2d Dept 2010], *lv denied* 15 NY3d 705 [2010]; *see* CPLR 217 ; *DeMilio v Borghard*, 55 NY2d 216 [1982]; *Walton v New York State Dept. of Correctional Servs.*, 8 NY3d 186, 194-196 [2007]; *Matter of Best Payphones, Inc. v Department of Info. Tech. & Telecom. of City of N.Y.*, 5 NY3d 30, 34 [2005]; *Matter of Drake v Reuter*, 27 AD3d 736 [2d Dept 2006]). An administrative determination is considered final and binding for purposes of CPLR 217[1] when it has an impact on the petitioner and when the petitioner knows he is aggrieved by it (*Matter of Edmead v McGuire*, 67 NY2d 714 [1986]). A petitioner’s subsequent requests for reconsideration do not extend or toll the statute of

limitations (*Matter of Lubin v Board of Educ. Of City of New York*, 60 NY2d 974 [1983]; *Matter of Drake, supra*; see also *Matter of Edwards v New York City Employees' Retirement Sys.*, 190 AD2d 545, 545 [1st Dept 1993], citing *Matter of Cauldwest Realty Corp. v City of New York*, 160 AD2d 489 [1st Dept 1990]).

It is undisputed that Ms. Strax did not separate from City service on July 3, 2011. However, there is no evidence that petitioner tendered her resignation on October 4, 2011, or that she informed her employer or its payroll department that she was separating from City service on October 4, 2011. Thus, Ms. Strax remained on her employer's payroll in a "leave status" until she filed said her application for retirement benefits in January 2014. It is noted that as Ms. Strax was a per diem employee, she did not have to report to work on a daily basis, and could accept assignments as an ALJ depending on her schedule.

In addition, there is no evidence that Ms. Strax informed NYCERS that she had permanently left her employment, prior to filing said application in January 2014. At the most, in December 2011 Ms. Strax informed NYCERS that she was on disability since October 6, 2011, pursuant to the advice of her doctor. She did not inform NYCERS at that time that she was permanently disabled and unable to resume work as an ALJ at anytime in the future.

Petitioner filed for retirement benefits on January 24, 2014, and NYCERS informed her on January 29, 2014 that her effective date for retirement had been changed from the date she had indicated, October 4, 2011, to January 24, 2014. Ms. Strax's correspondence with NYCERS, in which she requested a "correction" of the effective date of retirement, and NYCERS' response on July 29, 2014, did not extend or toll the four month statute of limitations to commence an Article 78 proceeding. Petitioner's petition was served and filed over four months after the administrative determination by the NYCERS to change her effective date of retirement to January 24, 2014. Petitioner knew about this decision no later than February 8, 2014 and was aggrieved by it, as she sent her first letter to NYCERS requesting a "correction" on said date.

Accordingly, as the within Article 78 proceeding was not timely commenced, respondents' cross motion to dismiss the petition, is granted.

Dated: October 26 , 2015

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J.S.C.