

**Matter of Fernandez v Nigro**

2016 NY Slip Op 33063(U)

September 7, 2016

Supreme Court, Kings County

Docket Number: 15826/14

Judge: Richard Velasquez

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

*E* FILED  
KINGS COUNTY CLERK  
2016 SEP 20 AM 9:43

At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 7th day of September, 2016.

PRESENT:  
HON: RICHARD VELASQUEZ,  
Justice.

\_\_\_\_\_ X

In the Matter of the Application of

JACKIE KAHT FERNANDEZ,

Petitioner,

Index No. 15826/14

-against-

DANIEL NIGRO, as the Fire commissioner of the City of New York, and as Chairman of the Board of Trustees of the New York City Fire Department Article 1-B Pension Fund, THE BOARD OF TRUSTEES of the New York City Fire Department, Article 1-B Pension Fund, and THE CITY OF NEW YORK,

RESPONDENTS' Motion for  
LEAVE TO APPEAL

Respondents.

For a Judgment pursuant to Article 78, CPLR, to review and annul the determination made by respondents denying petitioner's application for World Trade Center death benefits, and to award said benefits.

\_\_\_\_\_ X

The following papers were read on this motion:

- (1) Respondents' Notice of Motion for Leave to Appeal and Affirmations and Affidavits
- (2) Petitioner's Affirmation in Opposition and Exhibit A
- (3) Respondents' Reply

After oral argument and a review of the submissions herein, the Court finds as

and with the Pension Board and Medical Board denials not following the WTC law, Petitioner's claim must be granted. This was the second decision finding for Petitioner in a matter of three years. After this court's first decision and affirmance of that decision by the Appellate Division, Second Department, the matter was remanded to the NYFD Pension Board and Medical Board for a decision not inconsistent with the Appellate Division's decision. This Court was shocked by the Pension Board and Medical Board's denial for possibly the 7<sup>th</sup> time.

Even more shocking was the Medical Board's refusal to follow the WTC law which mandates that the petitioner- first responder, or the petitioner for the first responder in case of first responder's death, who provides evidence of any injuries which are likely to have resulted from a 9/11 first response, that such evidence must be evaluated pursuant to the requirements of WTC law, and that the Medical Board has the burden of coming forward with affirmative credible evidence to disprove the condition resulted from "first response", including "new onset conditions". Instead, the Medical Board never afforded the WTC presumption to the Decedent's illnesses.

Furthermore, in Petitioner's case, the Medical Board also refused to follow the law by making decisions denying decedent's eligibility without ever producing one scintilla of any evidence, credible or not, which contradicted any part or all of the findings from treating doctors, experts in the field of 9/11 illnesses, and the results of the Medical Examiner's second report. That report, as previously discussed, changed the Medical Examiner's findings from drowning as the cause of death, to drowning due to coronary artery disease and mitral valve prolapse, resulting from abundant anthracosis which follows the lymphatic channels and is brochocentric throughout.

An Article 78 petition was then pursued by the Petitioner again to this Court, which resulted in the Court's March 24, 2016 decision, and included a finding of bad faith by the NYFD Board of Pensions and the Medical Board. That "bad faith" decision was based upon the continued denial of Petitioner's claim by the NYFD Board of Pensions and the Medical Board's and its intentional decision not to follow the WTC law by failing to presume that Decedent's injuries were the result of his being a 9/11 "first responder", and in failing to offer any evidence at all to contradict Petitioner's evidence. The Board acted arbitrarily, capriciously, unlawfully and irrationally. These "bad faith" actions resulted in Petitioner incurring much higher attorney fees, and going for years without the financial benefit of the her rightful award of WTC benefits.

#### *Law Governing Sanctions and the Award of Attorney's Fees*

This Court in its March 24, 2016, decision, found that Respondents had acted in "Bad Faith" by denying Petitioner widow's benefits from the death of her First Responder husband for over nine years, for all of the reasons mentioned above as well as others discussed in that decision. As support for that determination, CPLR §8303-a was cited. Although Respondent argued that:

"The Court awarded sanctions based on a finding of bad faith, but the record

does not support such a finding—to the contrary, respondents correctly determined that petitioner's husband died as a result of an accidental drowning, not as a result of a World Trade Center condition and, at a bare minimum, respondents' determination was a reasonable one, made in good faith and in furtherance of their public duties”.

This statement made by Devin Slack, Assistant Corporation Counsel in the Office of the Corporation Counsel of the City of New York is itself, arbitrary, capricious, and irrational, for the reasons set forth in this decision as well as this Court's March 24, 2016 decision. One wonders whether Mr. Slack has read the actual decision of this Court and, if so, how he could possibly reach his conclusion.

As for Respondents' contention that the “bad faith” determination sanctions were made *sua sponte*, the Court noted that Petitioner requested, *inter alia*, “costs” in its petition. Attorney's fees and sanctions were not specified, but this Court determined that because of Respondents failure to follow the law resulting in petitioner suffering the consequences for over nine years, sanctions pursuant to CPLR §8303-a were warranted grounded on legislative intent:

**§ 8303-a. Costs upon frivolous claims and counterclaims in actions to recover damages for personal injury, injury to property or wrongful death. (a) If in an action to recover damages for personal injury, injury to property or wrongful death, or an action brought by the individual who committed a crime against the victim of the crime, and such action or claim is commenced or continued by a plaintiff or a counterclaim, defense or cross claim is commenced or continued by a defendant and is found, at any time during the proceedings or upon judgment, to be frivolous by the court, the court shall award to the successful party costs and reasonable attorney's fees not exceeding ten thousand dollars. (b) The costs and fees awarded under subdivision (a) of this section shall be assessed either against the party bringing the action, claim, cross claim, defense or counterclaim or against the attorney for such party, or against both, as may be determined by the court, based upon the circumstances of the case. Such costs and fees shall be in addition to any other judgment awarded to the successful party.**

**© In order to find the action, claim, counterclaim, defense or cross claim to be frivolous under subdivision (a) of this section, the court must find one or more of the following: (I) the action, claim, counterclaim, defense or cross claim was commenced, used or continued in bad faith, solely to delay or prolong the resolution of the litigation or to harass or maliciously injure another; (ii) the action, claim, counterclaim, defense or cross claim was commenced or continued in bad faith without any reasonable basis in law or fact and could not be supported by a good faith argument for an extension, modification or reversal of existing law. If the action, claim, counterclaim, defense or cross claim was promptly discontinued when the party or the attorney learned or should have**

**learned that the action, claim, counterclaim, defense or cross claim lacked such a reasonable basis, the court may find that the party or the attorney did not act in bad faith.**

Respondents likewise contend that this is not a personal injury action and that in any case, CPLR 8303-a cannot be used for sanctions in an Article 78 petition, because same are not available except where authorized by statute. Respondent cites to *Shields v. Blum*, 80 A.D. 2d 668, 669 (3<sup>rd</sup> Dept 1982) as supporting his contention that attorney's fees are not available in an Article 78 proceeding except as authorized by statute. The Court finds that said case has little applicability to the instant matter, and involves a suit under federal statute for attorney's fees upon annulment of a Fair Hearing decision. Such is not the case here.

Moreover, Petitioner has suggested that NYCRR §130-1.1 might also be appropriate in this matter, as Respondents over and over again in bad faith refused to follow the WTC law which resulted in Petitioner expending funds for attorneys' fees, litigation and court costs, and delayed her receiving benefits to which she was lawfully entitled for nine years. Respondents did not appeal the decision of this Court finding Petitioner was entitled to WTC benefits on the death of her First Responder husband, and retroactive to the date in 2007 when all necessary evidence was before the Pension Board and Medical Board. Respondents only appealed the awarding of sanctions in the form of attorneys fees and costs, and interest on retroactive benefits. Thus, Respondents have acknowledged that for nine years, the Pension and Medical Boards arbitrarily, capriciously, and unlawfully denied Petitioner her rightful benefits.

130-1.1 provides in relevant part:

**Sanctions 130-1.1 Costs; sanctions.**

**(a) The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonably attorney's fees, resulting from frivolous conduct as defined in this part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.1 of this Part. ...**

**(c) For purposes of this Part, conduct is frivolous if:**

**(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;**

**(2) it is undertaken primarily to delay or prolong the resolution of the litigation or to harass or maliciously injure another; or it asserts material factual statements that are false.**

**(3) it asserts material factual statements that are false.**

...In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the (1) circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct; and (2) whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.

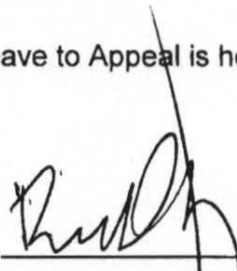
(d) An award of costs or imposition of sanctions may be made...upon the court's own initiative, after a reasonable opportunity to be heard. The form of the shall depend upon the nature of the conduct and the circumstances of the case.

*Conclusion*

As this Court stated in its March 24, 2016, decision and order, the amount of attorney's fees and interest on the debt to Petitioner (for frivolous and sanctionable behavior) shall be determined at a hearing. As Respondent has request leave to appeal, and, as the Court has been informed by Counsel that Petitioner has already begun to receive her WTC payments, this Court will now postpone said hearings until after the Appellate Division, Second Department has had an opportunity to review this matter.

Accordingly, Respondents' Motion for Leave to Appeal is hereby granted.

ENTER:



RICHARD VELASQUEZ, J.S.C.

So Ordered  
Hon. Richard Velasquez

SEP 07 2016

FILED  
KINGS COUNTY CLERK  
2016 SEP 20 AM 9:53