

Nespoli v Board of Trustees of the N.Y. City Employees' Retirement Sys.
2017 NY Slip Op 32231(U)
October 19, 2017
Supreme Court, New York County
Docket Number: 159601/16
Judge: William Franc Perry
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. W. FRANC PERRY, J.S.C.

PART 5

HARRY NESPOLI, as President of the UNIFORMED
SANITATIONMEN'S ASSOCIATION, Local 83 1,
International Brotherhood of Teamsters, et al.,

INDEX NO. 159601/16

MOT. DATE September 5, 2017

MOT. SEQ. NO. 001

Plaintiffs,

- v -

BOARD OF TRUSTEES OF THE NEW YORK CITY
EMPLOYEES' RETIREMENT SYSTEM, JOHN
ADLER, as Chairperson of the Board of Trustees of the New
York City Employees' Retirement System and DIANE
D'ALESSANDRO, as Executive Director of
the New York City Employees' Retirement System,
Defendants

The following papers were read on this motion to Convert to Article 78 Proceeding
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits A through B
Notice of Cross-Motion/Answering Affidavits — Exhibits A through D
Replying Affidavits and Memorandum of Law

ECFS DOC No(s). 1-2, 1-10ECFS DOC No(s). 1-4, 1-23ECFS DOC No(s). 1-10

Plaintiffs, Harry Nespoli, as President of the Uniformed Sanitationmen's Association, Local 831, International Brotherhood of Teamsters (the "Union"); the Union; and five individuals, Michael Bonanno, Lennie Owes, Jr., Joselyn Espinosa, Barkim Covington, and Adrian Smith, bring the instant action against the Board of Trustees of the New York City Employees' Retirement System ("NYCERS"); John Adler, its Chairperson; and Diane D'Alessandro, the now-former Executive Director of NYCERS. The individual plaintiffs are active members of NYCERS, a public employee retirement system, with effective dates of memberships before April 1, 2012. They each obtained membership within a public employee retirement system either through prior public employment with the City of New York, or through their employment with a non-City public service employer for which their non-NYCERS membership and service was transferred to NYCERS. After April 1, 2012, each individual plaintiff became employed, for the first time, as a Sanitation Worker with the New York City Department of Sanitation ("DSNY").

In Fall 2016, following review, NYCERS determined that, notwithstanding their prior Tier 4 membership, members in the title of Sanitation Worker who had entered that title on or after April 1, 2012, were not eligible for the Sanitation 20-Year Plan under Tier 4, but rather, pursuant to law, were instead mandated to participate in the Sanitation 22-Year Plan, which was created through the legislative revisions enacted pursuant to Chapter 18 of the Laws of 2012. In the instant action, the individual plaintiffs, together with Nespoli and their Union, challenge the grounds for this NYCERS determination, and seek a declaratory judgment, contending that each individual plaintiff, by virtue of his previously existing Tier 4 membership, must be deemed eligible for the Sanitation 20-Year Plan.

Plaintiffs challenge the NYCERS determination that the Member Plaintiffs and others similarly-situated, are not eligible for the Sanitation 20-Year Plan, but rather, and pursuant to the RSSL, should have been mandated into the Sanitation 22-Year Plan. Plaintiffs seek a judgment declaring that under the RSSL, "the Member Plaintiffs and those similarly situated are entitled to the benefit of the prior pension

membership date and should remain or be placed in Tier 4." Plaintiffs further assert a promissory estoppel claim, concerning prior representations allegedly made by NYCERS and DSNY about their Tier status, seek a permanent injunction enjoining NYCERS from moving Member Plaintiffs and others similarly situated into the Sanitation 22 Year Plan, and, lastly, contend that defendants have imposed "a significant and substantial impairment of the contractual rights granted to Member Plaintiffs and others similarly situated by the New York State Constitution." (Leighton Aff., Ex. A).

Defendants now move to convert this matter, pursuant to Section 103(c) of the Civil Practice Law and Rules ("CPLR"), from a declaratory judgment action to a special proceeding under CPLR Article 78. Defendants argue that the gravamen of plaintiffs' challenge is to determinations made by the NYCERS as to the affected individual plaintiffs and, by logical extension, any other Sanitation Worker similarly affected. Defendants contend that the parties' dispute centers on the legal interpretation of certain provisions within the New York State Retirement and Social Security Law ("RSSL"), and how these provisions impact certain Sanitation Workers, namely, those with effective dates of retirement system membership before, but first employment with DSNY after, April 1, 2012. Defendants' motion seeks only to convert this action to an Article 78 proceeding; defendants are not seeking to resolve the legal dispute as to the RSSL provisions.

Plaintiffs oppose defendants' motion to convert the proceeding to an Article 78 and cross move to compel production of documentation pertaining to other retirement plans, which defendants assert are the basis for its new Fall 2016 policy regarding Sanitation Workers. Plaintiffs argue that this controversy focuses on whether the applicable RSSL provisions permit defendants actions and as such, the court must interpret the statutory provisions pertaining to a class of individuals beyond the individual plaintiffs thereby making a declaratory judgment action the appropriate vehicle to resolve the instant dispute. Plaintiffs also contend that conversion to an Article 78 proceeding is unwarranted as defendants have not demonstrated a specific reason, such as statute of limitations and/or standard of review, to warrant conversion. Finally, plaintiffs seek to compel a limited production of documents from defendants identifying other NYCERS retirement plans that inspired NYCERS's new policy.

For the reasons that follow, defendants' motion is granted and plaintiffs' cross motion is denied.

STANDARD OF REVIEW and ANALYSIS

Article 78, as established by The New York State Legislature, is the vehicle through which administrative determinations may be judicially reviewed. It is the substance of a claim, rather than its ostensible form, which determines the applicable law. See, *Foster v. City of New York*, 157 AD2d 516, 518 (1st Dept. 1990). If the gravamen of a claim falls within the scope of Article 78, that claim must be brought as an Article 78 proceeding even if it was commenced under some other legal theory. *Id.* at 518. See also *Todras v. City of New York*, 11 AD3d 383 (1st Dept. 2003); *Delle v. Kampe*, 296 AD2d 498, 499 (2nd Dept. 2002); *Rodriguez v. City of Yonkers*, 279 AD2d 632 (2d Dept. 2001).

NYCERS is the expert agency vested by the legislature with the authority to manage the City's complex public employee retirement plans. *Matter of Kaslow v City of New York*, 23 NY3d 78, 87 (2014), citing, *Matter of New York State Superfund Coalition, Inc. v New York State Dept. of Envtl. Conservation*, 18 NY3d 289, 296 (2011). "Courts regularly defer to the governmental agency charged with the responsibility for administration of (a) statute in those cases where interpretation or application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom". *Matter of Kaslow*, 23 NY3d at 88.

Here, plaintiffs challenge the validity of NYCERS' determination to remove Member Plaintiffs and others similarly situated from the Sanitation 20-Year Plan into the Sanitation 22-Year Plan. (Leighton

Aff., Ex. A). Specifically, plaintiffs seek a declaration that “under the RSSL, [including, but not limited to RSSL §§43, 501(25), 600(a) and 645] the Member Plaintiffs and those similarly situated are entitled to the benefit of their prior pension membership date and should remain or be placed in Tier 4.” (Leighton Aff., Ex. A, paras. 49-50).

Based on a reading of the complaint, there can be no doubt that plaintiffs are challenging the NYCERS administrative determination, calling into question specifically, its new Fall 2016 policy regarding Sanitation Workers. As such, it is appropriate for the court to defer to the governmental agency charged with the responsibility for administration of the Sanitation Retirement Plan. It is precisely because plaintiffs are challenging a determination made by the NYCERS, that defendants are seeking to convert this action into a special proceeding. Accordingly, an Article 78 proceeding is the appropriate vehicle through which to evaluate NYCERS’ determination. *Matter of Kaslow v City of New York*, 23 NY3d at 87-88; see also, *Matter of Lighthouse Pointe Prop. Assoc. LLC v New York State Dep’t of Envtl. Conservation*, 14 NY3d.161, 176 (2010) (“Courts regularly defer to the governmental agency charged with the responsibility for administration of [a] statute in those cases where interpretation or application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom, and the agency’s interpretation is not irrational or unreasonable.”).

Plaintiffs reliance on *Conrad v Regan*, 155 AD2d 931 (4th Dept. 1989) to support the argument that an Article 78 proceeding is inappropriate because plaintiffs are suing defendants “on behalf of themselves and all others similarly situated”, is unavailing and patently ignores the practical considerations that include the interests of justice that would be achieved by converting this action. Likewise, plaintiffs’ contention that conversion is not appropriate because this matter involves a question of pure statutory interpretation, is not persuasive, as the Court of Appeals has stated that the mere existence of a statutory language dispute does not require wholesale *de novo* review. *Matter of Kaslow v City of New York*, 23 NY3d 78. (Article 78 proceeding appropriate to determine meaning of “Credited Service” under RSSL for Tier 3 CO-20 retirement plain for correction officers).

Plaintiffs also contend that defendants must make a showing that the matter will be disposed of, *vis-a-vis* the shortened four-month statute of limitations, in order to convert the action into an Article 78 proceeding. While the caselaw cited by defendants involved matters where the court, upon conversion, dismissed the proceeding as barred by the statute of limitations, plaintiffs have not offered any legal authority for the sweeping proposition that disposal of the matter is a prerequisite for granting the motion to convert.

As defendants have aptly demonstrated, a public retirement system such as the Sanitation Retirement Plan at issue here, should be afforded deference in its interpretation of the RSSL. See, *Lynch v City of New York*, 2017 NY Slip Op 27125 at 13 (Sup. Ct. NY Cty April 13, 2017) (where plaintiffs challenged the validity of defendants’ interpretation and implementation of the RSSL and Admin Code §13-218(h), pursuant to which defendants denied child care service credit to Tier 3 police officers. Court converted matter to a special proceeding recognizing that such a “claim is clearly encompassed within CPLR 7803(3) as grounds for mandamus to review, which includes challenges as to “whether a determination . . . was affected by an error of law or was arbitrary and capricious.”). Accordingly, this matter is converted to an Article 78 proceeding, pursuant to CPLR 103(3).

Plaintiffs cross motion seeking limited discovery is premature as the determination of what discovery is material and necessary to this proceeding should be made after defendants have interposed an answer to the converted pleading. Therefore, plaintiffs’ cross motion is denied.

CONCLUSION

Accordingly, it is hereby

ORDERED that defendants motion, Sequence No. 001, to convert this declaratory judgment action into an Article 78 proceeding is granted and the Complaint filed to commence the action is deemed the Petition in this special proceeding and shall be deemed served upon service of a copy of this Order with notice of entry thereof; and it is further

ORDERED that defendants shall serve an answer to the Article 78 proceeding within 20 days of said service; and it is further

ORDERED that plaintiffs' cross motion, Sequence No. 001, to compel production of document discovery is denied; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry pursuant to e-filing protocol, upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the conversion of this action to an Article 78 proceeding.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

SO ORDERED:

Dated: October 19, 2017


HON. W. FRANC PERRY, J.S.C.

1. Check one:

CASE DISPOSED NON-FINAL DISPOSITION

2. Check as appropriate: Motion is

GRANTED DENIED GRANTED IN PART OTHER

3. Check if appropriate:

SETTLE ORDER SUBMIT ORDER DO NOT POST

FIDUCIARY APPOINTMENT REFERENCE