

New York City Police Pension Fund v Plinneke
2021 NY Slip Op 31820(U)
May 28, 2021
Supreme Court, New York County
Docket Number: 450055/2019
Judge: Louis L. Nock
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY****PRESENT: HON. LOUIS L. NOCK****PART****IAS MOTION 38EFM***Justice*

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NEW YORK CITY POLICE PENSION FUND,

INDEX NO. 450055/2019**MOTION DATE** 02/05/2021

Plaintiff,

MOTION SEQ. NO. 003

- v -

MARK PLINNEKE,

**DECISION + ORDER ON
MOTION**

Defendant.

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LOUIS L. NOCK

The following e-filed documents, listed by NYSCEF document number (Motion 003) 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, and 57

were read on this motion for

SANCTIONS (ATTORNEYS' FEES).

Upon the foregoing documents, and after oral argument held this day, it is determined that defendant's motion for an award of sanctions and costs is denied as follows.

Plaintiff brought this action to recover \$50,002.52 in alleged overpayments of pension benefits made to Frank W. Kiefer, defendant Mark Plinneke's deceased stepfather. Defendant, a California resident, moved to dismiss (motion seq. no. 001) pursuant to CPLR 3211 (a) (8) for lack of personal jurisdiction or, in the alternative, pursuant CPLR 327 for *forum non conveniens*. By decision and order filed February 4, 2021, this court granted the motion to dismiss. Defendant now moves (motion seq. no. 003) for an award of sanctions and costs against the plaintiff, citing 22 NYCRR 130-1.1 (NYSCEF Doc. No. 49 at 4), enabling such a motion for claims that are "completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law."¹ The motion seeks an

¹ A similar motion was made by defendant (motion seq. no. 002) during the pendency of his motion to dismiss (motion seq. no. 001), which was denied without prejudice to renew after disposition of the motion to dismiss (see, NYSCEF Doc. No. 40).

award of \$15,982.50 or, alternatively, \$10,000, as a legal fee sanction against plaintiff and its counsel, jointly and severally.

On a motion for a sanctions award for legal fees under 22 NYCRR 130-1.1, the movant “has the burden of demonstrating that the conduct of the opposing party was frivolous within the meaning of the rule, or that the action was commenced or continued in bad faith” (*Miller v Miller*, 96 AD3d 943, 944 [2d Dept 2012]). The movant must show that the opposing party was engaged in “extreme behavior” (*Hunts Point Terminal Produce Cooperative Assn. v New York City Economic Dev. Corp.*, 54 AD3d 296, 296 [1st Dept 2008]).

While it is true that this court ultimately found no personal jurisdiction to exist in this case, a review of plaintiff’s submissions during the pendency of the action leads this court to conclude that plaintiff’s institution and continuation of this action was not tainted by bad faith; but my a mistaken belief that personal jurisdiction existed. Plaintiff’s proffered theory in support of that belief was premised on its understanding that the alleged tortious actions by the defendant in taking alleged pension overpayments could be viewed as having occurred in New York or having caused injury in New York, giving rise to personal jurisdiction under CPLR 302 (a) (2) or CPLR 302 (a) (3). The complaint had alleged that defendant wrongfully caused plaintiff to remit pension benefits to him through the subterfuge of concealing the fact of the death of the pensioner, who was defendant’s stepfather. Although defendant is a California domiciliary, plaintiff posited that the wire transfer of the benefits from New York accomplished two things relevant to jurisdictional analysis – the occurrence of a tortious conversion in New York and/or a resultant injury to the plaintiff which is situated in New York.

The court’s dismissal order concluded that the locus for jurisdictional analysis in these circumstances was California, where the defendant’s bank account was situated, because that

was the locus where defendant actually did an “affirmative act” of conversion for CPLR 302 (a) (2) purposes (*State of N.Y. v Seventh Regiment Fund, Inc.*, 98 NY2d 249, 260 [2002]). That order also concluded that jurisdiction under CPLR 302 (a) (3) did not obtain because “the situs of commercial injury is where the original critical events associated with the action or dispute took place, not where any financial loss or damages occurred” (*Deutsche Bank AG v Vik*, 163 AD3d 414, 415 [1st Dept 2018]). That order additionally held that jurisdiction under CPLR 302 (a) (1) did not obtain because the “single act” predicate for such jurisdiction (*D&R Global Selections, S.L. v Bodega Olegario Falcon Pineiro*, 90 AD3d 403, 404 [1st Dept 2011]) could not be satisfied without “[p]urposeful activities” in New York (*id.*). While this court adheres to those conclusions, it does not find that plaintiff’s efforts to argue that the underlying circumstances satisfy one or all of the foregoing bases for jurisdiction was or were imbued with a bad faith desire to ignore the law in order to harass the California-based defendant.

Another of plaintiff’s theories was that defendant had waived any jurisdictional defenses by allegedly failing to timely file his answer asserting the defense of lack of jurisdiction. Again – this court disagreed with that theory due to its finding that plaintiff’s position was predicated on an erroneous understanding of the timing scheme under CPLR 3012 (a). However, this court’s finding in that regard does not necessitate a finding that plaintiff was trying to manipulate the timing scheme in order to deliberately gain an unmerited advantage over the defendant in this action.

Plaintiff also addresses its counsel’s neglect to appear at a particular court appearance, casting that as “a lack of awareness of the scheduled oral argument date, not from any malice or lack of faith in its motion” (NYSCEF Doc. No. 55 at 9).

Consequently, this court does not find that a sanction is appropriate, notwithstanding plaintiff's lack of success in sustaining the allegation of personal jurisdiction in this now-dismissed action. However, that said, this court will not opine on the level of professional courtesy, or possible lack thereof, attaching to what appear to be non-responses to defendant's counsel's entreaties for further consideration of the jurisdiction question (see, NYSCEF Doc. No. 33). This court does presume, though, that plaintiff's counsel received and read those entreaties, yet continued to be confident in its position regarding jurisdiction, which this court ultimately disagreed with.

Accordingly, it is

ORDERED that defendant's motion for an attorneys' fee sanction is denied.

This will constitute the decision and order of the court.

ENTER:

Louis L. Nock

<u>5/28/2021</u>			
DATE		LOUIS L. NOCK, J.S.C.	
CHECK ONE:	☒ CASE DISPOSED	☐ NON-FINAL DISPOSITION	
	☐ GRANTED ☒ DENIED	☐ GRANTED IN PART	☐ OTHER
APPLICATION:	☐ SETTLE ORDER	☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN	☐ FIDUCIARY APPOINTMENT	☐ REFERENCE