

<b>Barkow v New York City Employees' Retirement Sys.</b>
2022 NY Slip Op 31342(U)
April 25, 2022
Supreme Court, New York County
Docket Number: Index No. 161545/2021
Judge: Arlene Bluth
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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.

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

**PRESENT: HON. ARLENE BLUTH PART 14**

*Justice*

-----X

EILEEN BARKOW,

Petitioner,

- v -

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

Respondents.

-----X

INDEX NO. 161545/2021

MOTION DATE 04/15/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16

were read on this motion to/for ARTICLE 78.

The cross-motion by respondents to dismiss based on lack of standing is granted.

**Background**

Petitioner contends that she is long-time employee of the City's Department of Information, Technology and Telecommunications. She insists she is planning on retiring and suspects that respondent New York City Employees' Retirement System ("NYCERS") is going to drastically underpay her monthly pension payments for some undetermined amount of time while they calculate what her exact payments should be. Petitioner maintains that she was told she would get only about 44 percent of her pension benefits for 8-10 months and then receive a lump sum for the difference. She alleges that she spoke with other retirees who explained that the wait time is usually more than 8-10 months and can often exceed a year.

Petitioner brings this special proceeding for a declaration that respondents' practice of delaying pension benefits is arbitrary and capricious and to direct respondents to timely process her application for retirement.

Respondents move to dismiss on the ground that petitioner lacks standing to bring this petition or, in the alternative, to change venue to Kings County where NYCERS is located. They question how petitioner can show she has suffered an injury in fact when she has not yet retired. Respondents also point out that petitioner has not even filed a retirement application, which must be filed 30-90 days prior to retirement. They argue petitioner only offers speculative harms that might occur once she retires.

In opposition to the motion to dismiss, petitioner argues that she has standing based on NYCERS' harmful actions. She insists she was told on November 21, 2021 that she would receive only 44 percent of her pension benefits for 8-10 months and this constitutes a prospective injury sufficient to confer standing. Petitioner claims that she has pled enough facts to show that NYCERS action will have a harmful effect on her and that her petition should survive the motion to dismiss.

In reply, respondents emphasize that petitioner admits she has not retired or even filed the paperwork necessary to start the retirement process. They argue petitioner cannot rest her allegations on speculative claims from other individuals' experiences.

### **Discussion**

“Standing is a threshold determination, resting in part on policy considerations, that a person should be allowed access to the courts to adjudicate the merits of a particular dispute that satisfies the other justiciability criteria. Petitioner has the burden of establishing both an injury-in-fact and that the asserted injury is within the zone of interests sought to be protected by the

statute alleged to have been violated” (*Matter of Assn. for a Better Long Is., Inc. v New York State Dept. of Envtl. Conservation*, 23 NY3d 1, 6, 988 NYS2d 115 [2014] [internal quotations and citations omitted]). Injury-in-fact means that a “plaintiff will actually be harmed by the challenged administrative action. As the term itself implies, the injury must be more than conjectural” (*New York State Ass'n of Nurse Anesthetists v Novello*, 2 NY3d 207, 211, 778 NYS2d 123 [2004]).

Here, the Court finds that petitioner failed to establish an injury-in-fact. As respondents point out, petitioner has neither retired nor has she even started the process to retire (she has not filed her application for retirement). Therefore, the alleged injuries she complains about are, at this point, speculative and theoretical. Her reliance on the experience of other retirees is not sufficient to defeat respondents’ cross-motion to dismiss. Moreover, the Court observes that petitioner did not provide enough specifics about what exactly was communicated to her concerning the alleged 44 percent of her pension she is supposed to receive when she ultimately retires. Who made this comment? Was it in the form of a letter? Why was this letter not attached as an exhibit? Also of note is a letter referenced by petitioner dated January 14, 2021 about a detailed estimate of her pension benefits although this letter is not attached as an exhibit either.

Unfortunately for petitioner, the fact is that she only alleges a harm that *might* result when she eventually decides to retire. That is too speculative for this Court to find that petitioner has standing to bring this proceeding. There are too many steps that must occur before petitioner will suffer any injury. In fact, respondents have not taken any action at all; they have not committed to paying petitioner less than what she is owed and petitioner has not even committed to retiring by a date certain.

However, the Court stresses that the allegations by petitioner are deeply concerning. There is no reason it should take respondents over a year (according to petitioner's allegations) to calculate how much a retiree is owed. While the Court makes no finding as to what amount of time would be reasonable, government workers who have paid into the pension system for years should not have to dip into other assets for months and months while respondents figure out how much a retiree is due. These workers earned their pensions and deserve to receive it in a timely fashion. Nothing prevents petitioner from bringing this case again once she retires and receives a clearly insufficient payment.

Accordingly, it is hereby

ORDERED that the cross-motion to dismiss by respondents is granted, this proceeding is dismissed and the Clerk is directed to enter judgment without costs or disbursements upon presentation of proper papers therefor.

4/25/2022  
DATE

  
ARLENE BLUTH, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	