

Seme v City of New York

2025 NY Slip Op 30323(U)

January 17, 2025

Supreme Court, Kings County

Docket Number: Index No. 514677/2024

Judge: Gina Abadi

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At an IAS Term, City Part 22 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York, on the 17th day of January, 2025.

PRESENT:

HON. GINA ABADI,
J.S.C.

WILSHA SEME, VENITH ROGERS, SHANEQUA WILSON, SIMONE SIMMONS, SANTANA CRUZ, MELISSA PAUL, REINALDO JILES, MANNY CALDERON, EBONY COTTMAN, KERLINE LEON, CLAUDE LULY, KELVIN MADISON, MARTIZA BURGOS, STARVITA THOMPSON, SHERENE SEWELL, CHRISTINA GREGORY, WILLENE BYNUM, JERMAINE MERCED, AND ERNEST FONG,

Plaintiffs,

-against-

CITY OF NEW YORK, NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM, AND NEW YORK CITY DEPARTMENT OF CORRECTION,

Defendants.

Index No.: 514677/2024
Motion Seq: 1

DECISION AND ORDER

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of this motion:

<u>Papers</u>	<u>NYSCEF Numbered</u>
Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed	<u>1 – 11, 14-15, 17</u>
Opposing Affidavits (Affirmations)	<u>19 – 20</u>
Reply Affidavits (Affirmations)	<u>21</u>
Other	

Upon the foregoing cited papers and after oral argument, the afore-captioned plaintiffs (plaintiffs) jointly move, by order to show cause, dated July 16, 2024 (Saitta, J.) (NYSCEF Doc No. 15), for an order: (1) enjoining defendants City of New York, New

York City Employees' Retirement System (NYCERS), and New York City Department of Correction (DOC and collectively with City and NYCERS, defendants) "from forcing . . . [p]laintiffs to participate in NYCERS' Tier 6 Pension Membership;" (2) directing NYCERS and City "to restore . . . [p]laintiffs previously removed from their previous Tier 3 [or 4 as applicable] Pension Membership back to such [membership], retroactively, with refunds for any and all overpayments to . . . [p]laintiffs, along with all rights and privileges of Tier 3 [or 4 as applicable] Pension Membership, including participation in the Correction Officer 20-Year Pension Plan set forth under Section 504 of the New York State Retirement and Social Security Law"; (3) directing NYCERS and City "to restore all rights and privileges of . . . [p]laintiffs not previously removed from their previous Tier 3 [or 4 as applicable] Pension Membership, including participation in the Correction Officer 20-Year Pension Plan set forth under Section 504 of . . . Retirement and Social Security Law"; and (4) directing "the computation of any and all city-service-time as a right of Tier 3 [or 4 as applicable] Pension Membership." Defendants object to the entirety of the relief sought by plaintiffs' order to show.

Background

Effective April 1, 2012, the Retirement and Social Security Law (RSSL) was amended to create a "Tier 6 membership system" for (among others) the DOC's uniformed members (Second Amended Complaint [SAC], ¶¶ 19-20). Starting approximately three weeks later on April 26, 2012 and continuing for 12 years thereafter until the

commencement of this action in 2024, plaintiffs were appointed as the DOC “uniformed members” (SAC, ¶¶ 1, 10, 18).

Prior to their respective appointment dates with the DOC, “all . . . [p]laintiffs . . . [had maintained] . . . municipal employment [outside the DOC] wherein they were all . . . [under NYCERS’] Tier 3 (predominately) and Tier 4 [membership plans]” (SAC, ¶ 15). From and after their respective appointment dates at the DOC on and after April 26, 2012, and until “in about May 2017,” plaintiffs remained in their respective NYCERS’ Tier 3 (or 4 as applicable) membership plans. In May 2017, however, “many . . . [p]laintiffs began receiving letters from . . . [d]efendants [informing plaintiffs] that they had been erroneously allowed to remain members of Tier 3 [or 4 as applicable], with [such] letters stating[,] in pertinent part, that membership in Tier 6 [under the amended RSSL] was mandatory” (SAC, ¶ 27). “[A]ccording to such [letters], [the applicable plaintiffs] were being removed from NYCERS’ Tier 3 or 4 Pension Membership and placed into NYCERS[’] Tier 6 Pension Membership” (SAC, ¶ 28).

In particular, lead plaintiff Wilsha Seme (lead plaintiff) was initially advised by NYCERS in April 2017 that she would be eligible for the Tier 3 membership (known at the DOC as “CF-20” or “Correction Force Member 20-Year Retirement Plan”) from and after the payroll effective date of April 21, 2017.¹ In May 2017, however, the lead plaintiff was advised by NYCERS that it “recently conducted a review of [her] membership and

¹ See Certification of Rate of Deduction, dated April 7, 2017, by NYCERS for the lead plaintiff (NYSCEF Doc No. 7). The Certificate of Rate Deduction reflects that the lead plaintiff first became a member of NYCERS on July 21, 2009. As stated, the lead plaintiff (like other plaintiffs) was appointed as a DOC uniformed member on or after April 26, 2012.

determined that [her] [then-]current [membership] plan, CF-20, [was] incorrect.”² In the same letter, NYCERS explained to the lead plaintiff that:

*“Participation in the CF-22 Year Plan [i.e., Tier 6 under the amended RSSL] is mandatory for members who become employed in the uniformed force of the New York City Department of Correction (Uniformed Correction Force) for the first time on or after April 1, 2012. NYCERS['] records indicate that your employment as a Correction Officer started on or after April 1, 2012. Therefore, pursuant to the law, you should have been mandated into the Uniformed Correction Force 22-Year Retirement Plan (CF-22). Participation is also mandatory for NYCERS members with a [NYCERS'] membership date prior to April 1, 2012 who become members of the Uniformed Correction Force on or after April 1, 2012.”*³

By summons, dated May 27, 2024 (as amended on July 8, 2024), plaintiffs commenced the instant plenary action challenging their reclassification (either already performed, or to be performed, by NYCERS) from NYCERS' Tier 3 (or 4 as applicable) membership to NYCERS' Tier 6 membership. Plaintiffs seek: (1) “restoration and/or protection of their rights to [the] Tier 3 [or 4 as applicable] New York City Pensions;” (2) “restoration and/or protection of their 20-year service retirement rights under Tier 3 [or 4 as applicable];” and (3) “lawful computation of their municipal service time for purposes of their Tier 3 [or 4 as applicable] rights” (SAC, ¶ 1). Plaintiffs assert that they are entitled to the foregoing relief because the amended RSSL “is unconstitutionally vague” and violated their “right to due process as applied to them” (SAC, First and Second Causes of Action, respectively). Further, plaintiffs preemptively assert that defendants are barred by the doctrines of “fraudulent concealment” and “continuing wrong” from pleading

² See NYCERS' letter, dated May 1, 2017 to the lead plaintiff (NYSCEF Doc No. 8).

³ See NYCERS' letter, dated May 1, 2017 to the lead plaintiff (emphasis added).

the statute of limitations as a defense to their claims (SAC, Third and Fourth Causes of Action, respectively). In connection with the commencement of this action, plaintiffs sought and obtained the aforementioned order to show cause seeking injunctive relief.

Discussion

“The purpose of a preliminary injunction is to preserve the status quo pending trial. . . . However, the remedy of granting a preliminary injunction is a drastic one which should be used sparingly.” *McLaughlin, Piven, Vogel, Inc. v W.J. Nolan & Co., Inc.*, 114 AD2d 165, 172 (2d Dept 1986) (internal citation omitted), *appeal denied* 67 NY2d 606 (1986). “As a general rule, the decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court.” *Trump on the Ocean, LLC v Ash*, 81 AD3d 713, 715 (2d Dept 2011), *lv dismissed* 17 NY3d 875 (2011). In exercising that discretion, the Court must determine if the movant has established (among other elements) “a likelihood of success on the merits” and “irreparable harm in the absence of an injunction.” *Id.* at 715.

Here, plaintiffs have failed to demonstrate a likelihood of success on the merits for at least two reasons. First, recent appellate caselaw squarely upheld the validity of the reclassification of the DOC uniformed officers to NYCERS’ Tier 6 membership plan in accordance with the amended RSSL upon their appointment with the DOC on or after April 1, 2012, notwithstanding the fact (as was the instance with plaintiffs here) that: (1) *before* their appointment to the DOC, such officers were members of NYCERS’ Tier 3 or 4 plans, and (2) *after* their appointment to the DOC, such officers initially (but

erroneously) remained on NYCERS' books and records as members of its Tier 3 or 4 plans. *See Matter of Ramirez v New York City Employees' Retirement Sys.*, 189 AD3d 1417, 1418-1421 (2d Dept 2020); *Matter of Ly v New York City Employees' Retirement Sys.*, 189 AD3d 1410, 1411-1414 (2d Dept 2020). *See also Matter of Nespoli v Board of Trustees of New York City Employees' Retirement Sys.*, 205 AD3d 453, 454-455 (1st Dept 2022) (analogous holding as to sanitation workers). Second, appellate caselaw holds that a challenge to a NYCERS' determination (such as a reclassification) must be advanced in the context of a CPLR article 78 proceeding to be commenced within four months after the challenged determination in accordance with CPLR 217. As the true nature of the Second Amended Complaint, stripped of all artifice, squarely fits the parameters of a CPLR article 78 proceeding, plaintiffs were required to commence it within four months of the challenged reclassification. *See Rock v New York City Employees' Retirement Sys.*, 231 AD3d 979, 983-984 (2d Dept 2024); *Town of Southampton v County of Suffolk*, 98 AD3d 1033, 1034 (2d Dept 2012). Contrary to plaintiffs' contention, the doctrine of estoppel (which they rephrased as "fraudulent concealment" and "continuing wrong") does not preclude NYCERS (or other defendants) from performing a statutory duty or from rectifying administrative errors. *See Matter of Lake v New York City Employees' Retirement Sys.*, 202 AD3d 682, 684-685 (2d Dept 2022); *Matter of Ly*, 189 AD3d at 1414.

Moreover, plaintiffs have failed to demonstrate irreparable injury absent an injunction because they can be adequately compensated by money damages. *See*

Brighton Leasing Corp. v Brighton Realty Corp., ___ AD3d ___, 2024 NY Slip Op 06325, *2 (2d Dept 2024); *Benaim v S2 Corona, LLC*, 214 AD3d 760, 761 (2d Dept 2023).

The Court has considered plaintiffs' remaining contentions and found them either unavailing or moot in light of its determination.

Conclusion

Accordingly, it is

ORDERED that in Seq. No. 1, plaintiffs' order to show cause, dated July 16, 2024 (Saitta, J.) (NYSCEF Doc No. 15), is *denied in its entirety*; and it is further

ORDERED that the Corporation Counsel is directed to electronically serve a copy of this Decision and Order on plaintiffs' counsel and to electronically file an affidavit of service thereof with the Kings County Clerk.

The foregoing constitutes the Decision and Order of this Court.

ENTER,



HON. GINA ABADI
J. S. C.

KINGS COUNTY CLERK
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