

**Matter of Brennan v Kelly**

2012 NY Slip Op 31709(U)

June 27, 2012

Supreme Court, New York County

Docket Number: 13427/11

Judge: Barbara Jaffe

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

**PRESENT:** BARBARA JAFFE *Jaffe*  
*J.S.C.* *Justice*

**PART** 5

Index Number : 113427/2011  
BRENNAN, KELLY  
vs.  
KELLY, RAYMOND  
SEQUENCE NUMBER : 001  
ARTICLE 78 *Cal. #. 27*

INDEX NO. \_\_\_\_\_  
MOTION DATE 4/10/12  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for vacate administrative determination

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	<b>No(s).</b> <u>1, 2</u>
Answering Affidavits — Exhibits _____	<b>No(s).</b> <u>3, 4</u>
Replying Affidavits _____	<b>No(s).</b> _____

Upon the foregoing papers, It is ordered that this motion is

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 6/27/12  
*JUN 27 2012*

*[Signature]*  
\_\_\_\_\_, J.S.C.  
**BARBARA JAFFE**  
*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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 5

-----X  
In the Matter of the Application of:  
KELLY BRENNAN,

Petitioner,

For a Judgment pursuant to Article 78 of the Civil  
Practice Law and Rules,

-against-

RAYMOND KELLY, as the Police Commissioner of the  
City of New York, and as Chairman of the Board of  
Trustees of the New York City Police Pension Fund,  
Article II, and THE BOARD OF TRUSTEES of the  
Police Pension Fund, Article II, NEW YORK  
CITY POLICE DEPARTMENT,

Respondents.

-----X  
BARBARA JAFFE, JSC:

**For petitioner:**  
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**For respondents:**  
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Index No. 113427/11  
Argued: 4/10/12  
Motion Seq. No.: 001  
Motion Cal. No.: 24

**DECISION & JUDGMENT**

**UNFILED JUDGMENT**

**This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).**

By notice of petition dated October 27, 2011, petitioner, a retired New York City Police Officer, moves pursuant to: (1) CPLR 7803 for an order annulling respondent Board of Trustees of the New York City Police Pension Fund's (Board of Trustees) denial of her application for accident disability retirement (ADR) benefits pursuant to the World Trade Center (WTC) presumption and directing the Board of Trustees to award her ADR benefits retroactive to the date of the denial, or in the alternative, remanding the matter to the Board of Trustees for further review; and (2) pursuant to CPLR 2307(a) for an order directing the Board of Trustees to serve and file certain documents it reviewed in considering petitioner's application. Respondents

oppose.

#### I. ARTICLE 78 PROCEEDING

The determination of an ADR application requires two considerations. (*Matter of Borenstein v New York City Empls. Ret. Sys.*, 88 NY2d 756, 760 [1996]). First, the New York City Police Pension Fund Medical Board (Medical Board) decides whether the applicant is disabled and if so, whether the disability resulted from a service-related accident, certifying its determination to the Board of Trustees. (*Id.*). Second, the Board of Trustees makes its own determination of causation. (*Id.*).

Generally, the Board of Trustees' determinations as to ADR benefits eligibility, like most administrative determinations, are reviewed according to the arbitrary and capricious or substantial evidence standards. (*Matter of Canfora v Bd. of Trustees of the Police Pension Fund of the Police Dept. of the City of New York, Art. II*, 60 NY2d 347, 351 [1983]; *Matter of Macri v Kelly*, 92 AD3d 53, 59 [1<sup>st</sup> Dept 2011]). However, where the Board of Trustees denies an application for ADR benefits on the basis of a tie vote, the standard of review "is necessarily different. In such circumstances, the reviewing court may not set aside [its] denial of [ADR benefits] . . . unless it can be determined as a matter of law on the record that the disability was the natural and proximate result of a service-related accident." (*Id.*). Therefore, "as long as there was any credible evidence of lack of causation before the Board of Trustees . . . , its determination must stand." (*Matter of Macri*, 92 AD3d at 59).

The WTC presumption provides, in pertinent part, that:

if any condition or impairment of health is caused by a qualifying [WTC] condition . . . , it shall be presumptive evidence that it was incurred in the performance and discharge of duty and the natural and proximate result of an accident not caused by such member's

own willful negligence, unless the contrary be proved by competent evidence.

(New York City Administrative Code § 13-252.1[1][a]).

As pertinent here, in order to have a qualifying WTC condition, one must have worked at the WTC site “for any period of time within the forty-eight hours after the first airplane hit the towers.” (Retirement and Social Security Law § 2[36][a], [e], [g]). The WTC site is defined as “anywhere below a line starting from the Hudson River and Canal Street; east on Canal Street to Pike Street; south on Pike Street to the East River; and extending to the lower tip of Manhattan.” (Retirement and Social Security Law § 2[36][f]).

Here, the Medical Board determined that petitioner is disabled and recommended to the Board of Trustees approval of her application for ADR benefits. (Ver. Ans., Exh. K). To demonstrate that she worked at the WTC site within the first 48 hours after the crash, petitioner submitted to the Board of Trustees the following materials: (1) her memo books from September 12 to September 16, 2001 reflecting that she completed tours of duty at various subway stations in Brooklyn; (2) three affidavits in which she attests that she volunteered at the WTC site before and after these tours of duty, two reflecting that she did so from September 12 to September 16, and one reflecting that she did so from September 13 to September 16; (3) three affidavits from two fellow police officers in which they attest that they witnessed petitioner assist in cleanup and recovery operations at the WTC site; (4) memo books from one of the officers; (5) an affidavit from the other officer in which he states that he resigned from the force in 2006 and disposed of his memo books in 2008; and (6) a personal statement in which petitioner recounts her career as a police officer. (*Id.*, Exhs. L, M, Q, S, W, X, Y). She also cited a portion of the Federal Register addressing proposed amendments to the James Zadroga 9/11 Health and Compensation Act of

2011 (Zadroga Act), one of which would define the WTC site to include the Brooklyn Bridge and “any other area[s] contiguous to the crash site [that were] . . . sufficiently close to the site that there was a demonstrable risk of physical harm . . . .,” arguing that her work at the Brooklyn subway stations should qualify as time spent at the WTC site because of their proximity to the East River. (*Id.*, Exh. CC).

The Board of Trustees also considered that New York City Police Department records pertaining to work at the WTC site contain no evidence of petitioner’s presence there before September 18, 2001. (*Id.*, Exhs. U, Z, AA). Moreover, an exposure report in which commanding officers were instructed to include the names of officers who were assigned to or volunteered at the WTC site does not reflect that petitioner was assigned to or volunteered at the site. (*Id.*, Exhs. U, BB). In a subsequent submission to the Board of Trustees, petitioner failed to address the absence of her name from the report. (*Id.*, Exh. CC). Thereafter, petitioner’s application for ADR benefits was denied by a tie vote, and she was awarded ordinary disability retirement. (*Id.*, Exh. FF).

In light of the absence of records demonstrating her presence at the statutorily-defined WTC site during the pertinent days and her failure to address the absence of her name from the exposure report, it cannot be determined as a matter of law that she volunteered at the WTC site during the first 48 hours after the crash. And, as the WTC site is unambiguously defined to include only certain areas of Manhattan, not Brooklyn, petitioner’s tours of duty in Brooklyn subway stations, notwithstanding their proximity to the East River, the valor of her service, and the unfortunate unavailability of the additional benefit, do not, as a matter of law, constitute work at the site. That federal regulations related to the Zadroga Act may be amended to expand the

WTC site is immaterial, as the Board of Trustees is bound by Retirement and Social Security Law § 2[36][f] in determining whether an individual worked at the WTC site, and in any event, petitioner worked neither on the Brooklyn Bridge nor in any area contiguous to the crash site. While I have no reason to doubt petitioner's assertions, given the limited scope of my review, the Board of Trustees' determination must stand.

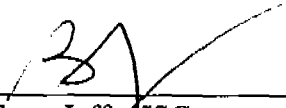
II. CPLR 2307(a) MOTION

As respondents annexed these documents to their answer (*id.*, Exhs. Z, AA), this portion of petitioner's application is moot.

Accordingly, it is hereby

ORDERED and ADJUDGED, that the petition is denied in its entirety and the proceeding is dismissed.

ENTER:

  
\_\_\_\_\_  
Barbara Jaffe, JSC

**BARBARA JAFFE**  
J.S.C.

DATED: June 27, 2012  
New York, New York  
**JUN 27 2012**

UNFILED JUDGMENT

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