

Lynch v City of New York

2012 NY Slip Op 33199(U)

January 20, 2012

Supreme Court, New York County

Docket Number: 650822/2010

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. CAROL EDMead**

PART 35

Justice

Index Number : 650822/2010
LYNCH, PATRICK
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 004
ARTICLE 78

INDEX NO. _____
MOTION DATE 10-18-2011
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ [No(s). _____]
Answering Affidavits — Exhibits _____ [No(s). _____]
Replying Affidavits _____ [No(s). _____]

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

Motion sequences 002, 003 and 004 are decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that defendants' motion to dismiss the action is granted to the extent that the second, third, fourth, and fifth causes of action are dismissed, and the complaint is severed and dismissed as to defendants the New York City Police Pension Fund and the New York City Fire Department Pension Fund; and it is further

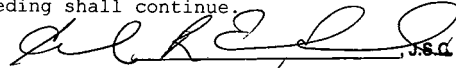
ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ADJUDGED and DECLARED that defendant City of New York has violated and continues to violate Retirement and Social Security Law § 480 (b) (i) and (ii) by failing to contribute to members of the New York City Police Pension Fund and the New York City Fire Department Pension Fund who are in Tier III of the City's pension system the amounts required by § 480 (b) (ii), to wit, amounts "equal to the rate of such contributions assumed by such employer for the payroll period preceding [January 1, 1976]"; and it is further

ORDERED that counsel for plaintiffs shall serve a copy of this order with notice of entry within twenty (20) days of entry on counsel for defendants; and it is further

ORDERED that the rest of this proceeding shall continue.

Dated: 1-20-2012


J.S.C.

HON. CAROL EDMead

- 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

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

-----X
PATRICK LYNCH as President of the
PATROLMEN'S BENEVOLENT ASSOCIATION OF
THE CITY OF NEW YORK, INC., on behalf
of the Aggrieved Police Members, and the
PATROLMEN'S BENEVOLENT ASSOCIATION OF
THE CITY OF NEW YORK, INC., ROY T.
RICHTER, as PRESIDENT of the CAPTAINS'
ENDOWMENT ASSOCIATION OF THE CITY OF
NEW YORK, INC., on behalf of the
Aggrieved Police Surgeon and its future
adversely affected members, and ALEXANDER
HAGEN, as President of the UNIFORMED
FIRE MEMBERS ASSOCIATION, on behalf of
the Aggrieved Medical Member, and its
future adversely affected Members,

Plaintiffs,

-against-

Index No. 650822/10

The CITY OF NEW YORK, the NEW YORK CITY
POLICE PENSION FUND, and THE NEW YORK
CITY FIRE DEPARTMENT PENSION FUND,

Defendants.

-----X
CAROL EDMEAD, J.S.C.

By order, dated April 1, 2011, Justice Kornreich, before whom
this action was pending, converted it to an Article 78 proceeding
and sent it for reassignment outside the Commercial Division.
Motion sequence nos. 002, 003, and 004 are now consolidated for
disposition. In motion sequence no. 002, petitioner Patrick Lynch
moves for summary judgment. In motion sequence no. 003, defendants
move to dismiss the action. In motion sequence no. 004, petitioner
Roy T. Richter moves for partial summary judgment as to liability.
By letter dated September 15, 2011, petitioner Alexander Hagan
joined in the motions for summary judgment.

Petitioners seek declaratory and monetary relief for

defendants' failure to contribute to the sums that New York City (City) police officers and fire fighters, who are in Tier III of the City's pension program, are statutorily required to pay toward their retirement benefits. The three complaints allege the following five causes of action: (1) the City's failure to make such contributions violates the Retirement and Social Security Law (RSSL) § 480 (b) (i) and (ii); (2) the failure to make contributions without authorization from the board of trustees of defendants New York City Police Pension Fund and New York City Fire Department Pension Fund violates the Administrative Code of City of New York §§ 13-216 (b) and 13 316 (b); (3) the failure to make contributions violates a June 6, 2000 agreement between the City and the Municipal Labor Committee (MLC), of which both the Patrolmen's Benevolent Association of the City of New York and the Uniformed Fire Officers Association are members; (4) the failure to make contributions violates Labor Law § 193; and (5) the City and defendant pension funds have converted the amounts that the City was required to contribute. Labor Law § 193 bars employers from making any deductions from the wages of employees, other than such deductions as are statutorily permitted.

The principal question that this action raises is whether a statute that provides for the City to make contributions to offset, in part, the sums that police officers and fire fighters are required to pay toward their retirement benefits, and that was enacted at a time when all City police officers and fire fighters were members of Tier I or Tier II of the City pension system, is

also applicable to those officers and fire fighters who are now members of Tier III.

RSSL § 480 (b), which was first enacted in 1974, provides:

(i) Any program under which an employer in a public retirement system funded by the state or one of its political subdivisions assumes all or part of the contribution which would otherwise be made by its employees toward retirement, which expires or terminates during nineteen hundred seventy-four, is hereby extended ..., except that commencing with the payroll period the first day of which is nearest to January first nineteen hundred seventy-six, the rate of such contribution assumed by an employer in any of the public retirement systems funded and maintained by a city, shall be one-half the rate of such contribution assumed by such employer for the immediately preceding payroll period ...

Commencing in 1963 and continuing until the enactment of RSSL § 480, the Mayor of the City of New York, by executive order, provided that the contributions that each member of the City police force and fire department was required to make toward his or her retirement benefits would be reduced by a certain percentage of the member's compensation, thus providing such employees with increased take-home-pay (ITHP). See Admin Code §§ 13-226, 13-326. Although Tier III of the City pension system was created in 1976 (see Admin Code § 13-500; L 1976 ch 890), and, in general, all City employees who were hired thereafter were placed in Tier III, newly hired police officers and fire fighters continued to be placed in Tier II until June 30, 2009, after which newly hired officers and fire fighters were placed in Tier III. Thus, when RSSL § 480 was first enacted, all New York City police officers and fire fighters were either in Tier I, or Tier II, of their respective pension systems. Defendants have not extended the benefits provided for in RSSL §

480 (b) to police officers and fire fighters who are in Tier III.

Defendants argue that RSSL § 480 (b) is inapplicable to employees in Tier III, because, by its terms, that subsection extended programs that expired or terminated in 1974, and those programs were applicable solely to police officers and fire fighters who were in Tiers I and II. However, the relevant sections of the Administrative Code, which provided for the programs that expired in 1974, do not refer to pension tiers. Rather, they make the benefits that they provide available to each "member." Admin Code §§ 13-226, 13-326. "Member" is defined as, respectively, a member of the police pension fund (Admin Code §§ 13-214, 13-215) and a member of the fire department pension fund (Admin Code §§ 13-313 (4), 13-314). Indisputably, the Administrative Code provisions were written to include future, as well as then-employed officers and fire fighters, and needless to say, police officers and fire fighters, who are in Tier III, are members of their respective pension funds. To be sure, the programs that expired in 1974 did not affect any Tier III police officers or fire fighters, because there were no such officers or fire fighters prior to July 1, 2009, and indeed, there was no reason to think, in 1974, that a new pension tier would be created. However, at the time that RSSL § 480 (b) was amended, in 2009, to make the provisions of that statute applicable to City employees joining the retirement system on or after January 1, 2010 (L 2009, ch. 504, approved Dec. 10, 2009), there had been police officers and fire fighters who had been in Tier III of their respective

pension funds for more than five months, because on June 3, 2009, Governor Paterson had vetoed a bill (S. 1409) that would have extended placement in Tier II for uniformed members of the police department who became members on or after July 1, 2009 but prior to July 1, 2011. "[T]he Legislature is presumed to be aware of the law in existence at the time of an enactment." *Matter of Amorosi v South Colonie Ind. Cent. School Dist.*, 9 NY3d 367, 373 (2007), quoting *B&F Bldg. Corp. v Liebig*, 76 NY2d 689, 693 (1990). That general principle is all the more applicable here, where the enactment of Chapter 504 followed Governor Paterson's veto by approximately six months, and where Chapter 504 retained the RSSL § 480 requirement that the City contribute a portion of the sums that police officers and fire fighters pay toward their retirement benefits, although the major thrust of the Chapter was to reduce the City's and the State's pension costs by, among other things, increasing the vesting period for pensions from five years to 10. See L 2009, ch. 504, Part A, § 1202.

Defendants also argue that the ITHP program is inconsistent with the statutory provisions governing Tier III, because members of Tier III are required to contribute 3% of their salary per year for 25 years toward their pension benefits, while the ITHP program would reduce their contributions to zero. The parties' joint statement of facts states that the sums that members of Tiers I and II are required to contribute toward their pensions are based upon age at entry and actuarial calculations and that, pursuant to the actuarial table that the City uses, the contribution rate for

police officers and fire fighters hired prior to July 1, 2009 varies from 8.65% for an individual hired at age 16 to 4.30% for an individual hired at age 43. Pursuant to RSSL § 480 (b) (ii), the City currently assumes 5% of each such member's contribution rate. Accordingly, an officer or fire fighter with a contribution rate above 5% contributes the percentage of his or her salary by which his or her contribution rate exceeds 5%, and a member with a contribution rate of 5%, or less, contributes nothing. While the actuarial table is not applicable to members in Tier III, because Tier III members are statutorily required to contribute a set 3% of salary toward their retirement, there is no inconsistency in those members paying nothing, just as Tier I and Tier II members whose contribution rates are 5% or less of their salaries also pay nothing, although they are required to pay at the rate set by the actuary of the City. See Admin Code §§ 13-221 (1) and (2). The provisions requiring the City to offset all, or a portion of the sums that officers and fire fighters are statutorily required to contribute to their pensions are independent of those statutory requirements.

The second cause of action alleges that, by failing to vote to require the City to fund the 3% contribution rate that Tier III members are required to pay toward their pension benefits, defendant pension funds have violated those sections of the Administrative Code that require their boards to vote on any act that they take. However, while the boards of defendant pension funds are statutorily required to "establish rules and regulations

for the administration and transaction of the business of [the funds] and for the control and disposition thereof" (Admin Code §§ 13-216 [a], 13-316 [a]), they have no authority to determine whether, or to what extent, their members or the City is responsible for contributing to them.

The MLC agreement, entered into by the City and MCL on June 6, 2000, provided that MLC would support the City actuary's recommendations for various actuarial assumptions and methods and that the savings expected to be realized thereby would be used to fund certain pension improvements through jointly supported legislation. Statement of Facts ¶¶ 24, 25. One of those improvements was the amendment of RSSL § 480 (b) to add subsection (b) (ii), which raised the ITHP rate from 2.5% to the pre-1976 rate of 5%. Plaintiffs' contention is that by failing to extend the ITHP benefit to officers and fire fighters in Tier III the City breached the agreement. While, indeed, as plaintiffs argue, the courts will not adopt an interpretation of a contract that would "render insubstantial or even illusory the benefits ... for which [one party] bargained," (*Federated Retail Holdings, Inc. v Weatherly 39th St., LLC*, 77 AD3d 573, 574 (1st Dept 2010) (citation omitted), it was hardly in the contemplation of either party to the MLC agreement that, nine years later, newly hired police officers and fire fighters would no longer be placed in Tier II of their respective pension systems. Accordingly, the court is dismissing the third cause of action.

The City's sole argument for dismissing the four and fifth

causes of action is that the City is not required to contribute ITHP funds to petitioners' Tier III members. The court has found to the contrary. However, neither the fourth nor the fifth cause of action has independent vitality. Both rest entirely upon the allegations of the first cause of action. Accordingly, the court is dismissing these claims.

Inasmuch as the court has determined that RSSL § 480 (b) is applicable to police officers and fire fighters who are in Tier III, the court will grant plaintiff movants partial summary judgment on their first cause of action.

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss the action is granted to the extent that the second, third, fourth, and fifth causes of action are dismissed, and the complaint is severed and dismissed as to defendants the New York City Police Pension Fund and the New York City Fire Department Pension Fund; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ADJUDGED and DECLARED that defendant City of New York has violated and continues to violate Retirement and Social Security Law § 480 (b) (i) and (ii) by failing to contribute to members of the New York City Police Pension Fund and the New York City Fire Department Pension Fund who are in Tier III of the City's pension system the amounts required by § 480 (b) (ii), to wit, amounts "equal to the rate of such contributions assumed by such employer

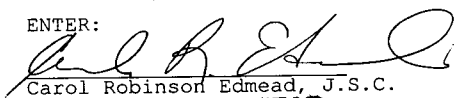
for the payroll period preceding [January 1, 1976]"; and it is further

ORDERED that counsel for plaintiffs shall serve a copy of this order with notice of entry within twenty (20) days of entry on counsel for defendants; and it is further

ORDERED that the rest of this proceeding shall continue.

Dated: January 20, 2012

ENTER:



Carol Robinson Edmead, J.S.C.

HON. CAROL EDMED