Matter of Flood v Kelly
2013 NY Slip Op 32388(U)
October 3, 2013
Sup Ct, New York County
Docket Number: 100487/13
Judge: Alice Schlesinger

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Index Number : 100487/2013
FLOOD, CHRISTOPHER

VS

KELLY, RAYMOND

Sequence Number : 001

ARTICLE 78

IA PART 16
PART _____

INDEX NO. _____

MOTION DATE _____

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~~ Article 78 petition is granted in accordance with the accompanying memorandum decision.

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: OCT 03 2013

Alice Schlesinger, J.S.C.
ALICE SCHLESINGER

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

----------X

In the Matter of the Application of

CHRISTOPHER FLOOD,

Petitioner,

-against-

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

Respondents.

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Index No. 100487/13
Motion Seq. No. 001

SCHLESINGER, J.:

Before the Court is an Article 78 petition wherein Lieutenant Christopher Flood, a police officer since October 15, 1990, is challenging the final decision by the Board of Trustees to deny him a Line of Duty pension. The predicate for this petition occurred on October 1, 2008. At that time the Lieutenant, who was assigned to the Facilities Management Division, was sent to a parking lot where he had never been before, adjacent to the Jacob Javits Convention Center. His assignment was to do a survey of this large parking lot and take pictures at the site. Part of the instructions were for him to do the survey quickly.

What happened next is the precise event around which this action centers. As Lieutenant Flood was walking quickly to the next spot he wanted to photograph, his right foot became lodged inside a crack on the ground. This caused his right knee to buckle inwards, leading him to lose his balance and fall backward with all his weight on

his right outstretched arm. While this was happening, he tried to brace himself from the fall. Therefore, upon impact with the ground, he immediately felt his right shoulder pop, causing intense pain. He also at that point had pain in his right knee and in his back. He was immediately taken to the hospital for diagnosis and treatment of his injuries. The above information came from a Line of Duty injury report written two days later (Petition, Exh A).

Despite the fact that there were no broken bones involved in the accident, due to various findings made by orthopedic surgeons relying on scans taken of his right shoulder, Lieutenant Flood underwent four shoulder surgeries. The first one was on December 12, 2008. The last surgery involved the replacement of his right shoulder with an artificial shoulder. Lieutenant Flood never returned to work after his fall.

Based on these facts, Lieutenant Flood applied for a Line of Duty injury retirement and went before the Medical Board. On July 22, 2011, the Medical Board denied the request for Accident Disability Retirement ("ADR"), finding based on various x-rays and scans that the Lieutenant actually had a chronic condition (Exh C). The Board went so far as to predict that the Lieutenant would have needed this surgery even if he had never fallen. The condition that the Board diagnosed him with was Glenohumeral Osteoarthritis.

The application then went to the Board of Trustees. During that time, Lieutenant Flood hired an attorney who wrote a long letter to the Trustees that included a very strong statement from the Lieutenant's orthopedic surgeon, Dr. Stephen Fealy (Exh D and). Dr. Fealy is an orthopedic surgeon associated with the Hospital for Special Surgery, where he performed all of Flood's surgeries. In that letter, Dr. Fealy said that

the Medical Board was completely wrong in suggesting that the Lieutenant would have had the same problems without an accident, pointing out that in all of Flood's 38 years of life, he had been completely asymptomatic.

Upon receipt of this material, the Trustees remanded the matter to the Medical Board and asked them to reconsider. In fact, the Medical Board did just that and changed its mind, acknowledging in its March 2, 2012 decision that, whether or not Flood had chronic problems, in light of the circumstances here, it was certainly the accident that caused these problems to manifest themselves (Exh F).

The matter then went to the Trustees, who heard the case on June 13, 2012, but the Trustees were not satisfied with the Medical Board's change in position (Exh G). One of the members had some question as to whether the Medical Board was using the proper standard under the Court of Appeals case *Tobin v Steisel*, 64 NY2d 254 (1985). Finally on this date, the same member, perhaps thinking out loud, suggested that this fall might really have been an incident, rather than an accident. The distinction is an important one, because a mere incident, as opposed to an accident, does not entitle the member to ADR benefits.

On July 13, 2012, the Medical Board clearly reaffirmed its prior finding of ADR and sent it forward to the Trustees (Exh H). Petitioner's attorney, anticipating that the accident versus incident issue might be a concern, wrote a second letter to the Trustees (Exh I). In that letter, counsel cited to a number of appellate cases and reminded the Trustees of the definition of "accident" spelled out by the Court of Appeals in *Matter of Lichtenstein*, 57 NY2d 1010, 1012 (1982); namely, "a sudden, fortuitous mischance, out of the ordinary, and injurious in impact."

The Trustees debated this issue and said: "But after reviewing all the documents in the file, we don't believe this case is an accident." (Exh J). At that point, the matter was tabled to be heard a final time. In other words, no vote was taken on October 12, 2012, when the Trustees last heard the case.

Then counsel wrote yet another letter to the Board (Exh K) dated November 9, 2012. There he cited additional cases and even submitted photographs that had been taken of the crack at the parking lot (Exh L). However, nothing seemed to make a difference to the Trustees, because the member who had raised this issue in the first instance said at the November 14, 2012 meeting that: "I don't believe ... that stepping in a crack in the pavement was a sudden and unforeseeable event." (Exh M). A vote was finally taken on December 20, 2012, and since the Trustees were divided equally with six votes to six, the application for ADR was denied. Following the denial, this Article 78 proceeding was timely commenced.

Both counsel have cited to the Court many, many cases. There are times when it is difficult to know precisely why a particular court decided as it did. In other words, distinguishing between an "accident" and an "incident" is sometimes an elusive thing. However, in this case here, I do not find that it is. If one compares the definition of accident in *Lichtenstein*, *supra,* with the event involving Lieutenant Flood in the parking lot, one would say that Flood's event was certainly sudden, that the lodging of his foot in the crack was a fortuitous mischance and certainly not an ordinary followup to encountering a crack on the pavement, and that the event was certainly injurious in its impact. The Court notes here that after four shoulder surgeries, Lieutenant Flood is still not able to use his shoulder in a proper way.

It would be useful here to discuss some of the cited cases, but in so doing it must be emphasized that each decision involves very specific facts and that seemingly small differences oftentimes influence the result. In *Lichtenstein*, earlier mentioned, our highest Court, after defining accident, found that one had not occurred in that case. In *Lichtenstein* the police officer had sustained a back injury while leaning over the hood of an automobile in order to place a summons on the vehicle. The Court found that this was not an unexpected event, as it resulted from activity undertaken in the performance of ordinary police duties.

In another widely cited case, *Matter of McCambridge v McGuire*, 62 NY2d 563 (1984), the Court of Appeals considered two applications for ADR. The lower courts had dismissed both of the petitions. In the first of these cases, petitioner McCambridge, while performing his duties, was sitting at the desk of Detective Frank. When Frank approached the desk to remove some papers from the drawer, petitioner stood up to move away. While doing this, he placed his hand on Frank's shoulder to steady himself. However, Frank unexpectedly moved away from the desk, causing petitioner to lose his balance and fall to the floor, twisting his knee as he did so. McCambridge required surgery as a result of this fall and was never again able to perform his duties as a police officer.

The second petitioner, Officer Knight, was a patrolman in the New York City Police Department. On April 15, 1979 while on duty, as Knight was about to enter his patrol car, he slipped on pavement wet from rain and fell backwards, injuring his left elbow. Surgery was required. Patrolmen Knight was permanently disabled from performing his duties.

Why is the *McCambridge* opinion important? Other than the Court's reversal of the dismissal of these petitions, the decision is important because it emphasized that petitioner's job assignment should not be the proper focus; rather, the focus should be on the precipitating cause of the injury. The Court said (at p 568): "In each of these claims the injuries were sustained in the line of duty and were accidents within the common sense definition adopted in *Lichtenstein*." The Court distinguished these kind of injuries from those sustained while performing routine duties but not resulting from unexpected events. Finally, the Court noted that it was critical to the determination of both cases that there was a precipitating accidental event. In *McCambridge*, the officer lost his balance, and in *Knight* the officer fell on wet pavement.

A third Court of Appeals case coming just two years later, *Matter of Pratt v Regan*, 68 NY2d 746 (1986), is significant because the facts there are relevant to the ones here. In *Pratt*, a Rochester fireman was injured when he exited a fire truck at normal speed, wearing approved safety shoes, and caught his right heel on the running board, lost his balance, and came down on his left leg in a pothole. He was denied ADR. But the high Court said (at pp 747-48):

> We conclude that petitioner sustained an accidental injury as a matter of law (*Matter of McCambridge v McGuire*, *supra*). Catching a heel on a running board and thus losing balance may be a risk of the work performed, but coming down hard upon the other foot in a pothole is not. Thus, it was a sudden, unexpected event. The Comptroller's determination should, therefore, be annulled.

Much the same could be said here, absent the pothole. Tripping on a crack in a a parking lot may be a risk of the work performed, but getting one's foot caught in the crack, losing balance because a right knee buckled, and falling backward while trying to break a fall, is not.

Respondent's very capable counsel cites to a number of cases. But a brief recitation of the facts in each case shows why they are not relevant or are distinguishable from the case here.

In *Matter of Hallihan v Ward*, 169 AD2d 542 (1st Dep't 1991), petitioner was injured when he stepped off a curb onto a cobblestone roadway. But there was no mention of any hazardous condition. Additionally, other evidence, including "self-serving statements by petitioner's companions, submitted fully a year and a half after the incident, were properly given minimal weight". Citing *Matter of Pratt* and *Knight v McGuire*, earlier discussed, and in contrast to those cases, the *Hallihan* court upheld the denial of ADR benefits.

Matter of Ortiz v New York City Employees' Retirement Sys., 173 AD2d 237 (1st Dep't 1991), concerned an elevator mechanic working on the top of an elevator car. When Ortiz attempted to step down from this height, he caught his left foot in the elevator door's gate-chain and fell two to three feet to the floor below. Again, citing to *Matter of Pratt*, the Court denied ADR, finding (at p 238) that: "The nature of the occurrence was reasonably within the risk of the work performed and, as such, it cannot be construed as a sudden and unexpected event, which is a prerequisite to a grant of accident disability pension benefits."

In *Matter of McCormack v Kelly* 206 AD2d 265 (1st Dep't 1994), petitioner police officer was denied ADR because of the minimal nature of the event itself — tripping over a sidewalk depression while carrying police records on foot — the divergent account of the occurrence he gave to the doctor, and his preexisting back condition.

In *Matter of Hess v Board of Trustees Police Pension Fund*, 255 AD2d 163 (1st Dep't 1998), a police officer assigned to the Harbor Unit sustained shoulder injuries "when he tripped on a raised portion of concrete while carrying his scuba equipment" in November 1991 and the following year "when he slipped and fell off a wet ladder while descending into a launch." In light of his normal work environment, the Court concluded that these occurrences could not be characterized as unexpected or out of the ordinary.

The opinion in *Wallen v Safir*, 261 AD2d 183 (1st Dep't 1999), contains few facts. We are only told that the injury to petitioner's ankle was sustained "when he tripped over a raised plank of plywood covering part of a precinct house stairway landing". The Court found that Wallen had "failed to show that his injury was the result of an accident, i.e., a sudden and unexpected event." In making this finding, *Matter of Starnella v Bratton*, 92 NY2d 836 (1998), was cited, a decision addressing separate appeals by Officer Gasparino and Officer Starnella.

Officer Gasparino, who was awarded ADR, had slipped on a pool of water in the bathroom. But Starnella, who was denied benefits, had fallen down a flight of stairs, presumably in the precinct as Wallen had. The high court stated that Starnella had not been injured "as the result of an unexpected, out of the ordinary event". Both *Starnella* and *Wallen* involved falls that occurred on familiar territory, presumably under conditions that the petitioners were, or ought to have been, familiar with.

Finally, in *Matter of Chilelli v DiNapoli*, 91 AD3d 1098 (3rd Dept. 2012), the petitioner, who was a school crossing guard, sustained an injury to her left shoulder after she tripped over a curb. Accident disability benefits were denied, as the circumstances of her injury involved the performance of her ordinary duties in helping children cross the street. The injury appeared to be the result of her own misstep or inattention, as opposed to a sudden and extraordinary event unrelated to the ordinary risks of her employment.

When one reviews the facts and rationale in the cases discussed above, it is clear that a pattern emerges. Either the condition was not hazardous because it was a known circumstance, or the condition may have been hazardous, but also it was the employee's normal work situation.

That cannot be said here. Lieutenant Flood in the first instance was not on familiar territory. As part of his job, he was sent to a parking lot that was a new location to him in order to conduct a survey. A crack in the pavement of the lot may not have been inherently hazardous, but what made it so under these circumstances was the fact that Flood's foot became lodged in the crack, forcing his knee to buckle and causing him to lose his balance and fall. It was an unexpected, sudden event, something out of the ordinary, and it most definitely had an injurious impact — four surgeries resulting in a permanent disabled arm and shoulder.

In *Canfora v Board of Trustees of Police Pension Fund*, 60 NY2d 347 (1983), the Court is instructed that in reviewing denials of ADR applications, it can only set a denial aside if it can be concluded that the retiree was entitled to greater benefits as a matter of law. In this case, I am making such a finding, that Lieutenant Flood did suffer an

accident while on duty on October 1, 2008. The resulting disability, therefore, entitles him to an award of ADR benefits, and the matter is remanded to the Board for that purpose.

Accordingly, it is hereby

ORDERED AND ADJUDGED that the petition is granted, the December 20, 2012 decision by the Board of Trustees is annulled, and the matter is remanded for an award to petitioner of Accident Disability Retirement benefits consistent with the terms of this decision.

This constitutes the decision, order and judgment of this Court.

Dated: October 3, 2013

OCT 03 2013

J.S.C.

ALICE SCHLESINGER

UNFILED JUDGMENT

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