Marenus v Teacher's Retirement Sys. of the City of N.Y.
2013 NY Slip Op 33309(U)
March 7, 2013
Sup Ct, New York County
Docket Number: 150919/12
Judge: Anil C. Singh
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANIL C. SINGH SUPREME COURT JUSTICE Justice

PART 61

Index Number : 150919/2012
MARENUS, HELENE S
vs.
TEACHERS' RETIREMENT SYSTEM
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to 3, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1

Answering Affidavits — Exhibits _____ | No(s). 2

Replying Affidavits _____ | No(s). 3

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum opinion.

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

U N F I L E D J U D G M E N T
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 EFile a "Request for Entry of Judgment", Proposed Judgment, and any supporting documents on the NYSCEF system.

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

12 150919

Dated: 3/7/13

HON. ANIL C. SINGH
SUPREME COURT JUSTICE, 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: IAS PART 61

----------x

HELENE S. MARENUS,

Plaintiff,

-against-

Index No.
150919/12

TEACHERS' RETIREMENT SYSTEM OF THE
CITY OF NEW YORK,

Defendant.

----------x

HON. ANIL C. SINGH, J.:

Defendant Teachers' Retirement System of the City of New York (TRS) moves for an order, pursuant to CPLR 3211 (a) (2) and (5), to dismiss the complaint on the grounds that it is time-barred under the applicable statute of limitations, and for lack of subject matter jurisdiction because plaintiff, Helene S. Marenus, failed to timely file a notice of claim as required by Administrative Code § 7-201 and General Municipal Law § 50-e. Plaintiff opposes the motion.

In this action, plaintiff, a retired New York City teacher, seeks damages from defendant TRS for breach of contract, breach of fiduciary duty, and fraud, for TRS's failure to comply with her notice of election to change her investment option for her contributions to her tax-deferred annuity account for the third quarter of 2008. She claims that she notified TRS by the deadline of May 30, 2008, of her election to change, that TRS was thereby obligated to change her contributions starting on July 1, 2008, but that, instead, TRS effected her election change on October 1, 2008. When she inquired about TRS's failure to effect the change by July 1, 2008, TRS informed her that it did not receive the election until after May 30, 2008.

In its motion, TRS urges that this should have been brought as an Article 78 proceeding, and, as such, it is untimely. Alternatively, it urges that even if this was a proper complaint for contract and tort claims, plaintiff failed to file a timely notice of claim, a condition precedent to commencing such a lawsuit.

BACKGROUND

Plaintiff is a retired teacher who worked in the New York City public school system, and is a member of defendant TRS (Complaint, ¶ 1). Defendant TRS is a public employee retirement system which provides pensions and various other benefits to its members (*id.*, ¶ 2).

Plaintiff participated in a tax-deferred annuity program (TDA Program) through TRS in which she made regular contributions from her paycheck on a tax-deferred basis. A participant in the TDA Program is required to select from various investment options on how contributions to the account are invested, such options included the diversified equity fund and the fixed return fund (*id.*, ¶¶ 4, 6). Plaintiff received documents regarding her TDA account, which she asserts set forth the obligations of both her and TRS, but she no longer possesses them (Affidavit of Helene S. Marenus, dated June 22, 2012, 4-5).

In the Spring of 2008, plaintiff decided to change her fund election from the diversified equity fund to the fixed return fund, and to make such change effective beginning in the third quarter of 2008 – that is, starting July 1, 2008 (*id.*, ¶ 6). TRS advised her that to effect such a change, plaintiff had to complete, sign, and submit the TD45 Form (election change form) to TRS no later than May 30, 2008, and that submitting it by facsimile on that date would qualify as a timely election for the third quarter (*id.*, ¶¶ 7-8). Plaintiff alleges that the TDA Program documents, and specifically, the retiree's companion document, entitled her to make fund

election changes effective the beginning of the third quarter if the changes were submitted by June 1st, and that if that date fell on a weekend, as it did in 2008, the actual deadline would be the preceding business day, which was on Friday May 30, 2008 (Complaint, ¶¶ 15-16).

On May 30, 2008, plaintiff faxed her election change form to TRS, directing that all current and future holdings in her TDA account be placed in the fixed return fund. She asserts that she has a transmission verification report from the facsimile machine she used, which indicates that a fax was transmitted on May 30, 2008, at 1:51 p.m. (*id.*, ¶¶ 9-10).

By letter dated June 3, 2008, TRS informed plaintiff that it received her election change form, and that future TDA contributions and/or loan payments would be invested 100% in the fixed return fund, and her past accumulations would be converted from the diversified equity fund to the fixed return fund over a three-month period (exhibit A to Affirmation of Karen B. Selvin in Support [Selvin Affirm.], June 3, 2008 Letter). The June 3, 2008 Letter stated that "[y]our new investment election(s) will take effect on October 01, 2008" which was the start of the fourth quarter (*id.*). It also provided that if there were any discrepancies between plaintiff's records and the information shown in the letter, or if she required any additional assistance, plaintiff was encouraged to contact TRS's "Member Services Center," and gave plaintiff the toll free number to contact it (*id.*). Plaintiff's assets were ultimately deposited into the fixed return fund commencing on October 1, 2008, not on July 1, 2008 (*see* exhibit F to Selvin Affirm.). Plaintiff thereafter received account statements for the third and fourth quarter of 2008 and then the first quarter of 2009 from TRS reflecting the distribution of assets in her TDA account. These statements reflected that TRS effected plaintiff's election change form beginning in the fourth quarter (*id.*, Plaintiff's quarterly account statements for 3rd quarter 2008, 4th quarter 2008,

and 1st quarter 2009, attached to TRS's June 8, 2010 letter).

On May 28, 2009, a TRS Inquiry Form was submitted by Mona Romain, a trustee of TRS and an officer of the United Federation of Teachers, on plaintiff's behalf, in which Romain states that plaintiff received the confirmation of her election change to begin the fourth quarter of 2008, but that she now believed it was a mistake and that the change should have started beginning in the third quarter of 2008 (July 1, 2008), since she faxed the form to TRS on the last day of May 2008. Ms. Romain requested that TRS investigate this matter (exhibit B to Selvin Affirm.). By letter dated May 29, 2009, TRS notified plaintiff that Mona Romain notified it of plaintiff's pension inquiry, and that TRS would make every effort to provide a favorable response as quickly as possible (exhibit C to Selvin Affirm.). By letter dated September 8, 2009, TRS replied to plaintiff's inquiry, stating that May 30, 2008 was the last business date for it to accept plaintiff's election change form, and that plaintiff's form was processed on June 2, 2008 (exhibit D to Selvin Affirm.). It stated to plaintiff to "provide proof that your form was submitted by Friday May 30, 2008 and we will revise your TDA investment election" (*id.*).

Plaintiff then submitted to TRS handwritten notes she made on the TRS September 8, 2009 letter, and a five-page fax transmission, which included a sheet entitled "Transmission Verification Report," indicating a date of May 30, 2008 and time of "13:52," and the four pages of her election change form, none of which contained any fax date or time stamp (exhibit E to Selvin Affirm.).

By letter dated June 8, 2010, TRS informed plaintiff that it had conducted "a thorough investigation and concluded that there is no records of [plaintiff's] TD45 form arriving by fax at TRS by the May 30, 2008 deadline. All faxes that were received on that date had the date and

time noted and [plaintiff's] did not" (exhibit F to Selvin Affirm.).

By letter dated September 10, 2010, an attorney representing plaintiff, Charles M. O'Rourke, demanded that TRS give him a copy of the fax that TRS received from plaintiff (exhibit G to Selvin Affirm.).

By letter dated October 4, 2010, sent to both plaintiff and O'Rourke, TRS indicated that it had reviewed the attorney's letter and all records relating to the TDA investment election, but stated that it would not change its decision (exhibit H to Selvin Affirm.). It stated that it did not receive the change form by fax at 1:51 p.m. on May 30, 2008, as plaintiff was contending; that it did not receive a fax from the fax number plaintiff provided; and that there was no fax cover sheet on the document it received. Further, it stated that it received and processed plaintiff's request on June 2, 2008; that it sent the confirmation letter to plaintiff June 3, 2008; and that it never received an inquiry about that investment change until May 29, 2009 (*id.*).

On March 16, 2012, plaintiff commenced this action asserting claims for breach of contract, bad faith, breach of fiduciary duty, and fraud.

Defendant TRS is moving to dismiss on several grounds. First, it argues that this should have been commenced as an Article 78 proceeding, and as such is governed by the four-month statute of limitations set forth in CPLR 217 (1). It contends that plaintiff is challenging an administrative determination by TRS, asserting that its determination was made in violation of lawful procedure with regard to plaintiff's investment election change form. It urges that plaintiff was informed on June 3, 2008, that her election conversion would not take place until October 1, 2008, and then she received at least three quarterly statements reflecting this without objecting. It asserts that she could have sought to annul TRS's June 3, 2008 determination, or

she could have requested mandamus seeking to compel TRS to immediately implement her investment change, but she did not. Instead, she waited almost four years after being informed by TRS to challenge its administrative determination. Even if the limitations period did not begin to run due to plaintiff's subsequent requests for reconsideration, TRS argues that, at the latest, the limitations period started to run by October 4, 2010, and plaintiff's March 16, 2012 complaint is still beyond the four-month time period. Further, TRS urges that even if plaintiff's complaint could be considered timely, plaintiff failed to file a notice of claim, and thus the complaint must be dismissed.

In opposition, plaintiff contends that it was not until June 8, 2010, that TRS expressly declined to recognize that it erred, and advised her that there was nothing further it could do regarding her election. By that point, plaintiff argues, the funds had been in the fixed return fund for almost two years. This is significant, according to plaintiff, because it demonstrates that mandamus to compel or to nullify agency action was not available; a plenary action was the only way she could proceed; and, therefore, the four-month statute of limitations for Article 78 proceedings does not apply. She also urges that her claims are for breach of contract and in tort, seeking money damages, which she urges are outside the ambit of Article 78 proceedings. She contends that the New York State Constitution, Article V, section 7 recognizes her membership in TRS's pension system as a contractual relationship; that the Administrative Code of the City of New York sets out the statutory rules for the administration of the teachers' retirement system; and that the documents she signed in creating her TDA account show that she has a contractual relationship. She contends that she could not have effectively brought an Article 78 because her claims involve TRS's failure to timely implement her requested fund transfer, and so her claim is

strictly for money damages, and not to obtain a benefit that was never given to her. Finally, she maintains that she was not required under any statute, law, or rule to file a notice of claim.

DISCUSSION

The motion to dismiss is granted, this action is converted to an Article 78 proceeding, the complaint is deemed a petition, and the petition is dismissed as beyond the four-month statute of limitations.

Plaintiff's claims against the TRS, involving a challenge to the agency's retirement fund determination, while not being brought in the form of an Article 78 proceeding, are actually governed by the four-month statute of limitations set forth in CPLR 217 (*see Solnick v Whalen*, 49 NY2d 224, 229-233 [1980]). "[W]hen the claim is one against a governmental body or officer, the form of action that immediately springs to mind is a proceeding brought under CPLR article 78, a traditional, and surely the most common, vehicle for challenging a governmental decision or action" (*New York City Health & Hosps. Corp. v McBarnette*, 84 NY2d 194, 201 [1994]). Courts have routinely considered challenges to teachers' retirement fund determinations as appropriately Article 78 proceedings (*see e.g. Matter of Wertheim v New York City Teachers' Retirement Sys.*, 91 AD2d 514 [1st Dept 1982], *affd* 58 NY2d 1043 [1983]; *Matter of Carboni v Teachers Retirement Sys. of the City of N.Y.*, 184 AD2d 448 [1st Dept 1992]; *Matter of Venet v Teachers' Retirement Sys. of the City of N.Y.*, 159 AD2d 273 [1st Dept], *app denied* 76 NY2d 703 [1990]; *Clissuras v City of N.Y.*, 131 AD2d 717 [2d Dept], *app dismissed* 70 NY2d 795 [1987], *cert denied* 484 US 1053 [1988]). A plaintiff's characterization of her claim is not controlling (*see California Suites, Inc. v Russo Demolition Inc.*, 98 AD3d 144, 153 [1st Dept 2012]). Rather, the court must examine the substance of the action to identify the relationship out of

which the claims arise and the relief sought (*New York City Health & Hosps. Corp. v McBarnette*, 84 NY2d at 201; *Solnick v Whalen*, 49 NY2d at 229-230). The inquiry is whether the essence of the challenge is to an administrative, quasi-administrative, or a quasi-judicial determination by an agency, and whether that determination was in violation of lawful procedure, was effected by an error of law, was arbitrary or capricious, or was an abuse of discretion (*see* CPLR 7803; *see also Press v County of Monroe*, 50 NY2d 695, 703-704 [1980]). If the challenge is premised on the manner in which an agency made or imposed an administrative determination, then Article 78 is the vehicle for making that challenge (*see e.g. Aymes v NYC Dept. of Hous., Preserv. & Dev.*, 37 AD3d 306, 307 [1st Dept], *lv denied* 8 NY3d 814 [2007]; *Todras v City of New York*, 11 AD3d 383, 384 [1st Dept 2004]; *Leon v New York City Employees' Retirement Sys.*, 240 AD2d 186, 186 [1st Dept], *lv denied* 90 NY2d 812 [1997]; *see DiMiero v Livingston-Steuben-Wyoming County Bd. of Coop. Educ. Servs.*, 199 AD2d 875, 877 [3d Dept 1993], *lv denied* 83 NY2d 756 [1994] [challenges to discrete ad hoc determinations regarding teachers' employment benefits must be pursued in Article 78 proceeding]; *Clissuras v City of N.Y.*, 131 AD2d at 718; *Goodman v Regan*, 151 AD2d 958, 959 [3d Dept 1989] [regardless of how characterized by plaintiff, challenge to comptroller's assessment of appropriate pension membership date is governed by Article 78]).

Here, while plaintiff has characterized her challenge as a breach of contract or breach of fiduciary duty action, the essence of her claims is a challenge to TRS's administrative or quasi-administrative determination that plaintiff submitted her Election Change Form after the May 30, 2008 deadline. She believes that TRS improperly effected her elected change starting in the fourth quarter, on October 1, 2008, rather than the third quarter, on July 1, 2008, based on TRS's

rules or regulations regarding the making of such elections. TRS had the statutory authority to administer the tax-deferred annuity program. The Teachers' Retirement Board is authorized to establish rules and regulations regarding the administration of all the funds provided for in chapter 4 of title 13 of the Administrative Code of the City of New York (the Teachers' Retirement System) (Administrative Code, §13-513), which includes the tax-deferred annuity program and election changes or revocations made by TRS members in that program (Administrative Code, §13-582 [1]). Plaintiff does not assert that TRS lacked the statutory authority to establish the deadlines or to render a determination regarding compliance with such deadlines. Instead, she claims that it refused to effectuate her election change on May 30, 2008, a challenge to its administrative determination, based on a violation of lawful procedure established in its rules and regulations, regarding a member's election to change his or her TDA contributions. This challenge had to be brought as an Article 78 proceeding.

The primary case on which plaintiff relies in arguing that her claims may proceed as a plenary action for fraud and breach of contract is *Abiele Contracting v New York City School Constr. Auth.* (91 NY2d 1 [1997]). That case, however, is clearly distinguishable on the facts and does not warrant the conclusion plaintiff seeks. In *Abiele*, the plaintiff was a general contractor that had entered into a contract with the New York City School Construction Authority to renovate certain buildings. There were conflicts between the general contractor and the City over the City's failure to give it notice and opportunity to cure based on a specific contract requirement, and over costs and payments. It was seeking the balance of the contract price, monies for extra work and additional work, and was claiming that the City interfered with its performance. The Court found that because the general contractor was seeking recovery for

the breach of specific express terms of the contract, and the contract terms clearly and explicitly contemplated the general contractor's right to seek money damages, its claims could be pursued in a plenary action (*Abiele Contr. v New York City School Constr. Auth.*, 91 NY2d at 8; *see also Matter of Cromwell Towers Redevelopment Co. v City of Yonkers*, 41 NY2d 1, 4-5 [1976] [plaintiff could bring breach of contract action for municipality's act in assessing a tax when they had actual and explicit contract provision granting plaintiff a tax exemption]). In addition, the Court found that the School Construction Authority did not have statutory or contractual authority to render a quasi-judicial determination that the contractor was in default and then terminate the contract (*Abiele Contr. v New York City School Constr. Auth.*, 91 NY2d at 9). In fact, its actions in doing so violated specific contract terms regarding termination (*id.*).

In contrast, here, plaintiff is not claiming, nor can she, that TRS did not have statutory authority to establish deadlines for investment election changes, and to render its administrative determination that her Election Change Form had to be received by it on Friday, May 30, 2008, and that it was not. The essence of plaintiff's claims is that TRS wrongfully failed and refused to effectuate her fund election change on May 30th, the deadline for the change to be effective for the third quarter. She is challenging whether TRS abided by its own rules, regulations and procedures with regard to such changes in her TDA account, and whether it acted in good faith or whether its action was arbitrary or irrational (*see Gertler v Goodgold*, 107 AD2d 481, 486 [1st Dept], *affd* 66 NY2d 946 [1985]; *see also Bango v Gouveneur Volunteer Rescue Squad, Inc.*, 101 AD3d 1556, 1557 [3d Dept 2012] [improper termination through improper procedures and failure to follow own rules]; *Dormer v Suffolk County Police Benevolent Assn., Inc.*, 95 AD3d 1166, 1168 [2d Dept 2012] [plaintiff's contract action alleging improper termination of

membership through improper procedures and failure to follow internal rules is Article 78 proceeding]). She also alleges that TRS lacked a reasonable basis for its decision (Complaint, ¶¶ 23, 28). The internal administrative determinations of TRS which plaintiff challenges are redressable, if at all, in the form of an Article 78 proceeding. Plaintiff also relies upon *Nager v TRS* (exhibit B to Affirmation of Owen J. Lipnick), which also is clearly distinguishable on the facts. That case was a class action brought against TRS by its members, alleging, among other things, that defendant breached their rights under the New York State Constitution, Article V, section 7, by adopting an investment policy which was contrary to the dictates of the Legislature. Their claims were based on constitutional and statutory violations. Plaintiff's claims, here, are challenging TRS's specific administrative determination regarding her election change request. Therefore, plaintiff's action is converted into an Article 78 proceeding, and her complaint is deemed a petition.

As set forth in CPLR 217 (1), the limitations period for an Article 78 proceeding is four months after the determination to be reviewed becomes final and binding, or after the respondent's refusal, upon the demand of the petitioner, to perform its duty, unless a shorter time is provided by law (CPLR 217 [1]; *Walton v New York State Dept. of Correctional Servs.*, 8 NY3d 186, 194-195 [2007]). A petitioner cannot delay in making a demand – he or she must make the demand within a reasonable time after the right to make it occurs, or after he or she knows of facts which give him or her the clear right to relief, or the claim will be barred by the doctrine of laches (*see Matter of Sheerin v New York Fire Dept. Arts. 1 & 1B Pension Funds*, 46 NY2d 488, 495-496 [1979]; *Matter of Barresi v County of Suffolk*, 72 AD3d 1076, 1076 [2d Dept], *lv denied* 15 NY3d 705 [2010]). A determination is final and binding when it has impact

on the petitioner (Matter of *Edmead v McGuire*, 67 NY2d 714, 716 [1986]; *Matter of Eldaghar v New York City Hous. Auth.*, 34 AD3d 326, 327 [1st Dept 2006], *lv denied* 8 NY3d 955 [2007]). A petitioner's request for reconsideration by the agency of its determination will not extend the limitations period (*Matter of DeMilio v Borghard*, 55 NY2d 216, 220 [1982]; *Matter of Eldaghar v New York City Hous. Auth.*, 34 AD3d at 327). Where the determination is clear and its effect certain, the statute begins to run as soon as the aggrieved person is notified (*Matter of Edmead v McGuire*, 67 NY2d at 716).

Here, TRS's determination was made – and plaintiff had the clear right to relief – on June 3, 2008, when TRS notified her that it was effecting her election change starting in the fourth quarter, on October 1, 2008 (exhibit A to Selvin Affirm.). It was upon receiving that letter that plaintiff was aware that her election change was not going to take effect on July 1, 2008, and TRS's determination had impact on her then. TRS's June 3, 2008 letter specifically encouraged plaintiff to contact it if she believed an error had occurred. Plaintiff does not dispute that she received that June 3, 2008 TRS letter. Contrary to plaintiff's contention, she was aware of and could have sought judicial intervention to compel TRS to make the change before July 1, 2008, and avoided suffering money damages. Even if she did not seek judicial intervention until the end of the four-month period, on October 3, 2008, she could have sought an order that compelled TRS to make the change immediately, and to pay any damages for any delay in the change. The court also notes that plaintiff thereafter received three account statements for the third and fourth quarter of 2008, and the first quarter of 2009, which clearly showed that her election fund change was not effected on July 1, 2008, and still did nothing. This subjects her to the defense of laches. The later requests by plaintiff for reconsideration of the TRS determination do not extend the

limitations period, and even if they did, the last TRS letter rejecting plaintiff's request was dated October 4, 2010, almost one and a half years before plaintiff brought this action, well beyond the four-month period. Therefore, the petition is dismissed as untimely. Accordingly, it is

ORDERED and ADJUDGED that the motion is granted, the action is converted into an Article 78 proceeding, and the petition is denied and the proceeding is dismissed as untimely.

Dated: MARCH 7, 2013

ENTER:

Anil C. Singh

HON. ANIL C. SINGH
SUPREME COURT JUSTICE

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 EFile a "Request for Entry of Judgment", Proposed Judgment, and any supporting documents on the NYSCEF system.

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