

**Paschall v New York City Empls. Retirement Sys.**

2013 NY Slip Op 32042(U)

August 29, 2013

Supreme Court, New York County

Docket Number: 104404/2012

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

DIANA PASCHALL,  
Plaintiff,

Index No.: 104404/2012

- v -

Motion Date: 08/27/2013

NEW YORK CITY EMPLOYEES RETIREMENT SYSTEM,  
JEWEL G. PASCHALL, CHANELL PASCAHLL,  
PATRICE PASCHALL, PARRISH PASCHALL,

Motion Seq. No.: 001

Defendants.

The following papers, numbered 1 to 4 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause - Affidavits - Exhibits  
Notices of Cross Motion - Answering Affidavits - Exhibits  
Replying Affidavits - Exhibits

**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).

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion of defendant Jewel G. Paschall for summary judgment dismissing the complaint is denied; this cross motion of plaintiff Diana Paschall for summary judgment on her claim for a declaratory judgment is granted; and this cross motion of defendant New York City Employment Retirement System for summary judgment dismissing the complaint is denied.

Plaintiff Diana Paschall filed a pro se complaint and amended complaint on December 7 and 12, 2012, respectively, seeking enforcement of the Settlement Agreement dated September

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

- 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

19, 2003, which survived, was not merged but was incorporated by reference into the divorce judgment. Such divorce judgment, and "Stipulations dated September 19, 2003, copies of which are on file with this Court", was entered on March 9, 2004 in Randy Paschall v Diana Paschall, New York County Supreme Court Index No. 403736/2002. Plaintiff Diana Pashall and decedent Randy Pascahll were married on August 8, 1980. The judgment of divorce dissolved the twenty year marriage between plaintiff and her husband Randy Paschall.

By her complaint, plaintiff seeks to enforce the provision of the Settlement Agreement that relates to her rights to receive her former spouse's death benefit under his New York City Employees' Retirement System pension plan.

Randy Paschall, plaintiff's former husband, (decedent) died on December 8, 2011. At the time of his death he was married to defendant Jewel G. Paschall. By Notice of Election, certified by the Clerk of the Surrogate's Court of the State of New York, County of Bronx, as filed on February 1, 2013, defendant Jewel Paschall was issued letters of administration on July 3, 2012. She exercised her personal right of election to take her elective share of her late husband's estate pursuant to New York Estates, Powers & Trust Law 5-1.1-A.

Defendant New York City Employees' Retirement System

answered the amended complaint on February 7, 2013. Defendant Jewel G. Paschall answered the amended complaint on February 8, 2013. None of other defendants, who are decedent and plaintiff's children, have appeared or answered.

Defendant Jewel G. Paschall moves to dismiss the complaint on the grounds that any rights that plaintiff has to the decedent's pension benefits under the Settlement Agreement do not confer rights to decedent's death benefits upon plaintiff, and that pursuant to the Estates, Powers & Trust Law, defendant Jewel G. Paschall, as surviving spouse, is entitled to the pension death benefits of the decedent.

Plaintiff cross moves in opposition to defendant Jewel Paschall's motion and for a summary judgment for a declaratory judgment in her favor.

Defendant New York City Employees' Retirement System (NYCERS) cross moves for summary judgment dismissing the complaint, arguing that NYCERS is unable to make any distribution of decedent's pension benefits to plaintiff because she never obtained and presented a Domestic Relations Order (DRO) to NYCERS. It asserts that it therefore must pay the benefit to decedent's designated beneficiary pursuant to New York City Administrative Code (Administrative Code) § 13-148, as payment to anyone other than a duly designated beneficiary or court ordered

beneficiary is prohibited by Administrative Code § 13-181, NYCERS' anti-assignment statute. NYCERS further contends that the decedent never designated plaintiff as a beneficiary of his pension benefits, and appends to its cross motion the decedent's February 9, 2009 designation of NYCERS' Retirement and Benefits that nominates his daughters Parrish Paschall and Chanel Paschal and his son Patrick Paschal as beneficiaries for a death benefit.

A copy of the Settlement Agreement, which is dated and acknowledged as signed by Diana Paschall and Randy Paschall on September 19, 2003, is attached to plaintiff's cross motion for summary judgment. Article 11 of the Settlement Agreement states, in pertinent part:

Husband has a pension account with KNACKWURST. \*\*\*In the event of Husband's death before the Wife, the Wife shall be entitled to the former spouses (sic) survivor annuity. Husband shall designate wife as his death benefit beneficiary under the pension plan.

As stated in Denary v Denary, 84 AD3d 1148 (2d Dept 2011), leave to appeal dismissed in 17 NY3d 921 (2011),

"[Motions to enforce the terms of a stipulation of settlement are not subject to statutes of limitation". "[Because a QDRO is derived from the bargain struck by the parties at the time of the judgment of divorce, there is no need to commence a separate 'action' in order for the court to formalize the agreement between the parties in the form of a QDRO". Indeed, our Court has expressly held that an application or motion for the issuance of a QDRO is not barred by the statute of limitations (citations omitted).

Based on the reasoning of the appellate court in Denary,

this court finds that contrary to NYCERS' position in this matter, plaintiff's failure to respond to its instruction to use the sample DRO<sup>1</sup>, also known as QDRO, to draft a DRO acceptable to NYCERS is not fatal to her entitlement to the decedent's pension death benefits.

Moreover, the Court of Appeals in Kaplan v Kaplan, 82 NY2d 300 (1993) made clear that under equitable distribution laws, in a divorce judgment a spouse may accept, or the court may order, a distribution of a pension death benefit in lieu of ongoing maintenance, without contravening the anti assignment statutes. Nor did the Kaplan court find it of any moment that the spouse was seeking to enforce the settlement agreement of divorce against the pension plan administrator, rather than against the employee spouse. Decedent's failure to nominate plaintiff, his former wife, as his beneficiary in accordance with the Settlement Agreement is of no consequence under the rationale set forth in Kaplan.

Accordingly, it is

ORDERED that defendant Jewel G. Paschall's motion for summary judgment for an order dismissing the complaint is denied;

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<sup>1</sup> The court notes that NYCERS failed to append such sample DRO to its cross motion papers, and plaintiff denies ever receiving a sample DRO.

and it is further

ORDERED that the cross motion of plaintiff Diana Paschall for summary judgment of a declaratory judgment that she is entitled to be paid death benefits earned by Randy Dewayne Paschall with the defendant New York City Employees' Retirement System, upon his death on December 8, 2011, is granted; and it is further

ORDERED that the cross motion of defendant New York City Retirement Employees' System for an order of summary judgment dismissing the complaint is denied; and it is further

ADJUDGED and DECLARED that plaintiff Diana Paschall is entitled to receive 100% of the death benefit payable by defendant New York City Employees' Retirement System from the account of her deceased former husband Randy Dewayne Paschall; and it is further

ORDERED that this Court shall retain jurisdiction to implement and supervise the payment of retirement death benefits as provided herein should either party or the Plan Administrator make such application, and the Court determines such is appropriate and necessary.

Dated: August 29, 2013

ENTER:

**UNFILED JUDGMENT**

Debra A. James J.S.C.

**DEBRA A. JAMES**

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