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# Municipal Corporations—Contribution Deficiencies to City Pension Fund Due to Extension of Benefits

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not be estopped from asserting the provision as a complete bar to plaintiff contractor's action.

The Statute of Limitations, however, does not apply when a shorter limitation is prescribed by the written contract of the parties,[5] and while that shorter limitation is still in effect. Thus in a similar situation, *Soviero Bros. Contracting Corp. v. City of New York*,[6] the city successfully took advantage of a contract provision limiting the time for bringing an action on the contract to one year. This type of contract provision can operate to the advantage of either party and, standing on no different ground than any other provision in the contract, may be waived by the action of a party to the contract either expressly or impliedly. Moreover, an estoppel may arise against a municipality the same as any other person.[7]

The decision in the instant case, *Planet Construction Corp. v. Board of Education of The City of New York*,[8] represents a refusal by the Court of Appeals to extend to privately and individually negotiated limitations the policy considerations which prompted the Legislature to prohibit a municipal corporation from waiving or being estopped from asserting the general provisions of the Statute of Limitations. In the present case the Statute will still limit the time within which the plaintiff can commence an action. Thus the pocket book of a municipality and ultimately its taxpayers is protected from the over-generosity or incompetence of its officials to the extent that they may not deprive a municipality of the benefit of the Statute of Limitations itself. However, in placing a municipality on the same footing as anyone else in so far as contract provisions for a shorter period of limitation are concerned, the municipality and the taxpayer are to that extent deprived of some protection. This is not necessarily a bad state of affairs, for, although the municipal officials are not allowed to challenge or evade the wisdom of the Legislature in setting up the extreme limit for bringing of an action, i.e., the Statute of Limitations, they may, albeit sometimes inadvertantly, waive those private and individual limitations set up by themselves and another party in the course of negotiating an individual contract. Since the source of the limitation is the will of the contracting parties, and not that of the Legislature, as in the case of Statute of Limitations, it seems far from inequitable that the parties to the contract may by mutual agreement, waiver, or estoppel alter this type of contract provision just as they might alter any other contract provision.

CONTRIBUTION DEFICIENCIES TO CITY PENSION FUND DUE TO EXTENSION OF BENEFITS

Plaintiffs in *Dunn v. City of New York*[9] are members of the fire depart-

5. N.Y. Civ. Prac. Act § 10(1).
6. 286 App. Div. 435, 142 N.Y.S.2d 508 (1st Dep't 1955).
7. Buffalo Library v. Wanamaker, 162 Misc. 26, 293 N.Y. Supp. 776 (Sup. Ct. 1937).
8. Supra note 1.
9. 7 N.Y.2d 232, 196 N.Y.S.2d 686 (1959).

ment of the City of New York. They are also members of the City Pension Fund which is maintained by contributions from the City and individual members. The City pays fifty-five per cent of the amount necessary to insure a member's retirement after twenty years service and the individual pays forty-five per cent of that amount.

Plaintiff, Dunn, became eligible for appointment to the fire department in September of 1942, but at that time he was in military service, so his name was placed on a special eligibles list in accordance with Section 243 (7) of the New York Military Law.[10] He was discharged in April of 1946 and appointed to the fire department that July. He became a member of the pension fund in January of 1947. The percentage of Dunn's salary necessary to make up his contribution to the pension fund was 9.31%. This percentage was computed on the assumption that Dunn would make contributions to the fund for twenty years and that he would retire in 1966, as the fund is based on years of service rather than a fixed retirement age.

In 1947, however, an amendment to the New York Military Law gave those persons who were in military service when their time for appointment came, credit for their military service.[11] As a result of this credit plaintiff, Dunn, was deemed to have joined the fire department and the pension fund as of September 1942 and therefore would be eligible for retirement in 1962, four years earlier than contemplated. This amendment granting the credit also provided that the city should pay one hundred per cent of the contribution to the pension fund for the time Dunn was in service.

The fact that Dunn would be retiring at an earlier date, 1962 instead of 1966, meant that his benefits would be greater. To keep the pension fund actuarially sound a recomputation was made based on the assumption that Dunn was appointed in 1942 and had received the salary increments so as to bring him up to full salary as of 1946. Actually Dunn did not reach full salary until 1950. Based on the above mentioned assumption it was determined that Dunn would have to contribute 9.57% of his salary, part of which he never actually received. Dunn has been paying the higher percentage on the full

10. Any person whose name is on any eligible list shall, while in military duty, retain his rights and status on such list. If the name of any such person is reached for certification during his military duty, it shall be placed on a special eligible list in the order of his original standing, provided he makes request therefore following termination of his military duty and during the period of his eligibility on such list . . . Such names shall remain on such special eligible list for a period of two years after the termination of such military duty. . . .

11. § 243(20):

(E.) Upon the death or retirement of a New York City member, but not otherwise, the city of New York . . . shall pay into the appropriate fund of the system in which such member held membership at the time of his death or retirement, the amount of all contributions which such member would have been required to make if, during the period of his military duty, he had been present and had continuously performed the duties of the position or positions with respect to which his rights and benefits during the corresponding period or portion thereof are determined. . . . Each such member shall be credited with such contributions paid in his behalf by such city . . . for all pension or retirement purposes.

salary from 1950 and since the city paid the whole one hundred percent from 1942 to 1946, the only years in dispute are from 1946 to 1950.

The computation using the higher percentage was completed in 1950, but Dunn's individual deficiency, $373.32, was not computed until 1956. Dunn here sues individually and on behalf of others similarly situated to have a directive of the Fire Commissioner, calling for payment of the deficiency, declared null and void. Plaintiffs were successful in the Supreme Court,[12] and the Appellate Division,[13] but the order was unanimously reversed by the Court of Appeals.[14]

Plaintiffs claim that to pay the higher percentage based on the hypothetical salary is an impairment of a pension contract in that an increase in contributions would reduce their benefits and thus be a direct violation of Article five of the New York Constitution.[15] Dunn also contests payments covering his six month probationary period since he was not allowed to join the pension fund until January of 1947.

The Court felt that the result in the instant case depended on the interpretation of Section 243 of the New York Military Law. Although the amendment provided for payment by the city for the war years, it did not provide for the deficiency which arose in the post war years due to the recomputation.

It was pointed out by the Court that those who were actually members of the pension fund before they went into military service had to make contributions equal to the amount they would contribute if they were not in the military service, if they wished to remain in the fund. Those persons however were entitled to be restored to their former position with salary increments upon their discharge. Assuming it was the Legislative intent to maintain some equality between this group and plaintiffs in the instant case, the Court limited the benefit conferred on plaintiffs to the credit and contributions for the war years only.

The Court rejected Dunn's claim that to pay the deficiency based on the higher percentage would be an impairment of contract by answering that the original contract was made without the knowledge of benefits subsequently conferred by Section 243 of New York Military Law. What the Court seems to be saying is that when one enters a contract for retirement he agrees to pay, not a specific amount of dollars, but an amount sufficient to insure guaranteed payments if retirement is to happen at a fixed time, according to actuarial tables as they exist when the contract is made. Looking at it from that point of view, plaintiff, although paying a higher percentage of his salary,

12. 9 Misc. 2d 1054, 171 N.Y.S.2d 399 (Sup. Ct. 1958).
13. 7 A.D.2d 711, 181 N.Y.S.2d 159 (1st Dep't 1959).
14. Supra note 9.
15. Article 5, § 7:
After July first, nineteen hundred forty, membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired.

will pay no more than the amount required to insure these fixed payments according to actuarial tables as they existed when the contract was entered into.

Plaintiff's other contention, that he should not have to pay for the probationary period, was rejected on the ground that in computing the deficiencies some mathematical inconsistancies must occur, but since plaintiff was given credit for that period when his appointment was back dated to September of 1942 he was not prejudiced.

The Court in the instant case reached a result which is not only logical and reasonable, but undoubtedly conforms with the legislative intent. Dunn was not forced to pay any more than he would have paid had he actually became a fireman in September of 1942, and contributed for twenty years. In fact, the city has paid his contribution for the four years while he was in service. Plaintiff received four years credit and was in no way prejudiced by being required to make up the deficiency necessary to keep the pension fund actuarially sound.

JUDGMENT OF JURY NOT TO BE SUBSTITUTED FOR DETERMINATION OF CITY'S BOARD OF SAFETY

In the consolidated cases, *Weiss v. Fote* and *Alexander v. Fote*,[16] actions to recover damages for personal injuries resulting from a collision between two automobiles at an intersection, the plaintiff Weiss, a pedestrian, sued the drivers of both cars, Alexander and Fote, and also the City of Buffalo. The driver, Alexander, sued Fote and the City of Buffalo. Both the Supreme Court of Erie County and the Appellate Division found for the plaintiffs,[17] but only against the defendant City of Buffalo and not against the allegedly negligent automobile operators.

The negligence liability of the defendant City was predicated on the theory that at the intersection where the accident occurred, the traffic signal designed by the Board of Safety of the City of Buffalo did not have a sufficient "clearance interval." Allegedly the four second interval of time between the end of the green signal for east-west traffic and the beginning of the green signal for north-south traffic was too short to allow the intersection to be safely cleared of cars from one direction before inviting cars to procede from the other direction and hence the *design* or *plan* of the traffic light was a proximate cause of the accident.

The Court of Appeals reversed the judgments against the City of Buffalo and dismissed the complaints,[18] holding that in the absence of some indication that due care was not exercised in the preparation of the design, or that no reasonable official could have accepted it, a jury verdict as to the reasonableness of the time interval involved may not be substituted for the previous determination of that question by the legally authorized Board of Safety.

16. 7 N.Y.2d 579, 200 N.Y.S.2d 409 (1960).
17. 8 A.D.2d 692, 186 N.Y.S.2d 233 (4th Dep't 1959).
18. Supra note 16.