STATE OF MICHIGAN

COURT OF APPEALS

PETER RHOADES,

Plaintiff-Appellant,

v

BOARD OF TRUSTEES OF THE GENERAL RETIREMENT SYSTEM OF THE CITY OF DETROIT,

Defendant-Appellee.

UNPUBLISHED
June 17, 2014

No. 312081
Wayne Circuit Court
LC No. 11-002962-CD

Before: JANSEN, P.J., and MURRAY and BOONSTRA, JJ.

PER CURIAM.

Plaintiff appeals as of right the opinion and order of the trial court granting defendant Board of Trustees of the General Retirement System of the City of Detroit's (GRS) motion for summary disposition and denying plaintiff's motion for summary disposition in this dispute over pension benefits. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

This case arises from the suspension of plaintiff's pension benefits by GRS pursuant to the City of Detroit General Retirement Ordinance Amendment 29-01, Section 47-2-2(d)(1) (the amendment), which prohibits the payment of pension benefits during any periods when a retiree of the City of Detroit (city) is reemployed by the city.

The facts in this case are undisputed. Plaintiff, an attorney, began his employment with the city in a union position in January 1981, when he also began accruing pension benefits. As a union member, any changes to plaintiff's pension benefits were subject to collective bargaining. Plaintiff became fully vested under the city's retirement plan in January 1991. Between June 30, 2001, when the collective bargaining agreement between plaintiff's union and the city ended, and May 23, 2007, when a new collective bargaining agreement was reached, the terms of the earlier agreement operated on a day-to-day basis pursuant to the Master Agreement between the union and the city. During this period, in November 2001, the Detroit City Council passed the amendment at issue to the city's General Retirement Ordinance to suspend the payment of

pension benefits during any period that a city retiree was reemployed by the city. This amendment was effective in January 2002.[1]

On July 18, 2006, plaintiff retired with 25 years, seven months of employment and began receiving pension benefits. On April 13, 2009, plaintiff returned to work for the city in a nonunion position as a hearing officer. In February 2010, GRS stopped its payment of plaintiff's pension benefits pursuant to the amendment. Plaintiff's objection to that action was denied by GRS. Plaintiff was subsequently terminated from his second position with the city on October 25, 2010. GRS immediately resumed paying plaintiff his pension benefits, which were increased, in accordance with the amendment, based upon plaintiff's additional 18 months of employment with the city.[2] However, plaintiff was ordered to repay $27,496.18 that he had received in pension checks from April 2009 through February 2010 (the period of time after plaintiff was reemployed by the city but before GRS stopped payment pursuant to the amendment). When plaintiff refused, GRS recovered certain amounts by offsets from plaintiff's plan assets, and began deducting $1,000 per month from plaintiff's pension checks to recover the remainder.

Plaintiff brought suit, arguing that GRS's action in suspending his pension benefits while he was reemployed by the city violated the state constitution, the Internal Revenue Code, the General Retirement Ordinance for the city, and his due process rights. The trial court heard oral arguments on plaintiff's and GRS's cross motions for summary disposition and entered its opinion and order granting GRS's motion and denying plaintiff's motion.

The trial court stated its reasoning as follows:

> Plaintiff's benefits were *suspended* during his re-employment with the City of Detroit, not taken away from him or diminished, and in fact, he benefitted . . . . Plaintiff's pension benefits were not unconstitutionally

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[1] The General Retirement Ordinance 29-01, Section 47-4-4, provides in pertinent part:

> The City reserves the right to amend this Chapter 47 and the plans created hereunder at any time; such amendment may include termination of the Plan; provided, however, that no such amendment or termination shall deprive any Participant, former Participant or Beneficiary of any *then vested* benefit under the Plan. [Emphasis added.]

The amendment states:

> Retirees who return to work will have their Defined Benefit Plan pension benefit amount suspended upon reemployment. . . . The pension improvement factor shall continue to be added to the vested amount of the original pension but will not be paid on the Defined Benefit amount until the employee again separates from service.

[2] The amendment provides that retirees who become reemployed with the city will continue to receive their "pension improvement factor" on their original pension, as well as become entitled to a second pension with payments based on the compensation received at the new position.

> diminished nor is there any other constitutional issue or IRS violation. Extending the rationale of *In Re Request for Advisory Opinion*,[3] if a tax against pensions is not an unconstitutional diminishment or impairment, the simple suspension of pension payments during a period of re-employment is not unconstitutional. Plaintiff is not entitled to receive pension benefits at the same time he receives a salary as an employee under 47-2-2(D) which is properly applied to him through the Retirement Ordinance, incorporated in the collective bargaining agreements that governed Plaintiff while he was a union employee before his retirement. Defendant Retirement Board was properly authorized to recover the improperly paid benefits. [Footnotes omitted.]

Plaintiff moved for reconsideration, which was denied. This appeal followed.

II. STANDARD OF REVIEW

We review a trial court's decision on a motion for summary disposition de novo. *Moser v Detroit*, 284 Mich App 536, 538; 772 NW2d 823 (2009). Summary disposition is proper under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). We consider the affidavits, pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party. *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 29; 772 NW2d 801 (2009). All reasonable inferences are to be drawn in favor of the nonmovant. *Dextrom v Wexford County*, 287 Mich App 406, 415; 789 NW2d 211 (2010). If it appears that the opposing party is entitled to judgment, the court may render judgment in favor of the opposing party. MCR 2.116(I)(2); *Bd of Trustees of Policemen & Firemen Retirement Sys v Detroit*, 270 Mich App 74, 77-78; 714 NW2d 658 (2006). A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue on which reasonable minds could differ. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

We review issues of statutory interpretation de novo. *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008).

III. CONSTITUTIONAL VIOLATION

Plaintiff first argues on appeal that GRS violated Const 1963, art 9, § 24 by applying the amendment to deprive him of $53,799.82[4] in pension benefits that plaintiff claims he had already accrued before the effective date of the amendment. We disagree.

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[3] *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295; 806 NW2d 683 (2011).

[4] This amount includes both the amounts that GRS paid and subsequently recovered for the period from April 2009 through February 2010, and additional unpaid amounts from that point forward until GRS resumed payments following plaintiff's termination in October 2010.

With regard to public pension plans and retirement systems, Const 1963, art 9, § 24 provides in pertinent part that "accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby." Plaintiff argues that his pension benefits were unconstitutionally diminished by what he describes as GRS's retroactive application of the amendment to benefits that had accrued before the effective date of the amendment.

Plaintiff's argument is unpersuasive. As the trial court properly found, plaintiff's pension benefits were not "diminished," but were merely suspended for the period of time that he was reemployed by the city. The state and its political subdivisions are allowed to add restrictions on pension benefits. See *Seitz v Probate Judges Retirement System*, 189 Mich App 445, 455-456; 474 NW2d 125 (1991) ("[W]hile the Legislature may change public pension plans from time to time, *including adding restrictions on benefits*, the state may not reduce the pension benefit of any state employee or official, or local employee or official, once a pension right has been granted."). (Emphasis added).

Further, plaintiff admits that the amendment is valid and enforceable, at least prospectively, but objects to what he characterizes as a retroactive application to his situation. Under the Public Employment Relations Act (PERA), MCL 423.201 *et seq*., retirement benefits are a mandatory subject of bargaining and, while the city has the right to implement the retirement ordinance, neither the trustees nor the City Council can unilaterally amend the ordinance without negotiating with the employees' collective bargaining representative. *Detroit v Mich Council 25, AFSCME*, 118 Mich App 211; 324 NW2d 578 (1982). Plaintiff claims that the collective bargaining obligations for the new collective bargaining agreement were not complete until the agreement was accepted by the City Council on May 23, 2007. Regardless of the date of enactment, plaintiff further argues that his pension vested in January 1991, his tenth anniversary of employment with the city, prior to the adoption of the amendment, and that applying the amendment against him is a retroactive application in violation of the General Retirement Ordinance, which protects him from the deprivation of vested rights, and a violation of Const 1963, art 9, § 24, which also prohibits the retroactive application of a payment reduction enactment.

In determining when the amendment became effective with regard to plaintiff, the trial court noted that all of the collective bargaining agreements between the city and plaintiff's union contained language that the previous agreement would remain in effect on a day-to-day basis if the parties failed to arrive at an agreement by a particular date. As the trial court stated, "[t]his language applies the Retirement Ordinance, including the change that prohibits double dipping in 47-2-2 as far back as 2002, which was well before plaintiff retired." Therefore, the trial court found that GRS was acting within the scope of the law and within its authority when it suspended plaintiff's pension benefits while he was reemployed by the city.

We find that the trial court was correct in its assessment, and that the amendment became effective with regard to plaintiff on its effective date in January 2002. In any event, there was no relevant time when the collective bargaining provision, common to all the agreements at issue, did not apply. Plaintiff concedes that the amendment was adopted by his union but claims that the city was not permitted to unilaterally amend the retirement ordinance without negotiating with the collective bargaining representative. However, plaintiff supplied no evidence to support his argument that the city did not negotiate with its unions, including before plaintiff retired.

The application of the amendment to plaintiff is not retroactive. Although plaintiff argues that the amendment only became effective when his union reached a collective bargaining agreement with the city on May 23, 2007, the amendment became generally effective in 2002 and was not applied to plaintiff until 2009 when he became reemployed by the city.[5]

IV. INTERNAL REVENUE CODE VIOLATION

Plaintiff next argues that GRS violated the Internal Revenue Code by applying the amendment retroactively to decrease pension benefits that plaintiff had already accrued before the effective date of the amendment. Plaintiff relies on 26 USC § 411(d)(6)(A) of the Internal Revenue Code, which states:

> **(6) Accrued benefit not to be decreased by amendment.--**
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> **(A) In general.--**A plan shall be treated as not satisfying the requirements of this section if the accrued benefit of a participant is decreased by an amendment of the plan, other than an amendment described in section 412(d)(2), or section 4281 of the Employee Retirement Income Security Act of 1974.

As stated earlier, plaintiff's argument that he was permitted to receive pension benefits during reemployment, despite a valid ordinance that states the contrary, fails. As GRS notes, plaintiff's argument concerning the Internal Revenue Code relies upon *Central Laborers' Pension Fund v Heinz*, 541 US 739, 744; 124 S Ct 2230, 2235; 159 L Ed 2d 46 (2004), an ERISA[6] case involving a private pension fund. *Id.* ERISA does not apply to public pensions like the plan at issue here. *Wayne Co Employees Retirement Sys v Wayne Co*, 301 Mich App 1,

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[5] Plaintiff also argues that the trial court's opinion runs contrary to this Court's unpublished opinion in *Trager v City of Detroit (On Remand)*, unpublished opinion per curiam of the Court of Appeals, August 18, 2000 (Docket Nos. 209668/214835), wherein this Court affirmed that the implementation of a suspension of benefit rule upon benefits already vested was not just a change in the payment schedule but caused a diminishment of a participant's accrued financial benefits in violation of Const 1963, art 9, § 24. Notwithstanding the lack of precedential value of that case, see MCR 7.215(C)(1), *Trager* does not support plaintiff's position. In *Trager*, this Court noted an ambiguity in the city's retirement ordinance, which at the time provided that one could not be a "Member" and a "Retiree" at the same time but did not provide what happened with retirees who returned to work after collecting pension benefits. This Court held that "absent an amendment to the charter providing for such a contingency, defendant could not suspend plaintiff's pension benefits." *Trager*, slip op at pp 2-3. The city subsequently eliminated the ambiguity by adding the amendment at issue in this appeal, which prohibits "double dipping" while employed by the city, effective January 2002, the year after this Court decided *Trager*, and four years before plaintiff retired. Thus, *Trager* does not support plaintiff's position because of a critical difference in the facts. The amendment at issue in this case did not exist when Trager retired and thus was not at issue in his case, while here, the amendment existed years *before* plaintiff retired.

[6] Employee Retiree Income Security Act of 1974, 29 USC § 1001 *et seq*.

45, n 26; 836 NW2d 279 (2013), citing *In re Pensions of 19 Dist Judges under Dearborn Employees Retirement Sys*, 213 Mich App 701, 707; 540 NW2d 784 (1995).

Further, it is worth noting that the Internal Revenue Code specifically allows benefit payments to be suspended during a retiree's period of reemployment by the same employer:

> A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that the payment of benefits is suspended for such period as the employee is employed, subsequent to the commencement of payment of such benefits--
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> (i) in the case of a plan other than a multiemployer plan, by the employer who maintains the plan under which such benefits were being paid[.] [26 USC § 411(a)(3)(B)(i).]

GRS's application of the amendment to plaintiff's pension benefits during his period of reemployment did not violate the provisions of 26 USC § 411(d)(6)(A).

V. VIOLATION OF GENERAL RETIREMENT ORDINANCE

Plaintiff next argues that GRS violated the General Retirement Ordinance, Section 47-4-4, by applying the amendment retroactively to deprive him of pension benefits in which he was already vested when the amendment became effective. We disagree. Plaintiff's argument is essentially identical to his argument in Section III, above, and is premised upon his assertion that the amendment was illegally applied retroactively to deprive him of pension benefits. However, General Retirement Ordinance 47-2-2 and the amendment are in accord.

General Retirement Ordinance 47-2-2 bars amendments that would deprive retirees of their vested benefits. Plaintiff contends he was vested in his benefits after ten years of service, in January 1991, and the amendment was not generally effective until January 2002. However, plaintiff did not have a vested right to receive post-employment pension benefits while he was reemployed by the city. Further, the amendment was not applied retroactively with regard to plaintiff because he was not reemployed by the city until 2009, when the amendment was applied against him.

VI. SUBSTANTIVE DUE PROCESS VIOLATION

Plaintiff's final argument is that GRS violated his right to substantive due process by arbitrarily and capriciously diminishing his vested pension benefits during his period of reemployment by the city, ignoring Const 1963, art 9, § 24, the Internal Revenue Code, the General Retirement Ordinance, and previous court decisions against GRS's policy of withholding accrued pension benefits.

Plaintiff cites 42 USC § 1983, which provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities

> secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]

To succeed on his claim of substantive due process violation under § 1983, plaintiff had to show that he had "a property interest/right" to pension benefits while he was reemployed by the city and GRS's act of depriving him of that interest was "arbitrary or capricious." *Harrington v Harris*, 118 F3d 359, 368 (CA 5, 1997), quoting *Moulton v City of Beaumont*, 991 F2d 227, 230 (CA 5, 1993).

We find that GRS's application of the amendment to plaintiff and suspension of his pension benefits while he was reemployed by the city did not violate the state constitution, federal tax codes, city ordinances, or prior case law. As stated above, suspending plaintiff's pension benefits during his period of reemployment by the city was in accordance with the amendment and was not a diminishment of his benefits. The cases cited by plaintiff in support of his argument that defendant acted arbitrarily and capriciously, in addition to their lack of precedential value, see MCR 7.215(C)(1) and (J)(1), were decided before the enactment of the amendment in 2001 and before it went into effect in January 2002.[7]

Accordingly, we find that the trial court did not err in granting GRS's motion for summary disposition and denying plaintiff's motion for summary disposition.

Affirmed.

/s/ Kathleen Jansen
/s/ Christopher M. Murray
/s/ Mark T. Boonstra

[7] Plaintiff cites *Association of Professional & Technical Employees v Detroit*, 154 Mich App 440; 398 NW2d 436 (1986), and *Trager v City of Detroit (On Remand)*, unpublished opinion per curiam of the Court of Appeals, August 18, 2000 (Docket Nos. 209668/214835).