Newman v New York State Dept. of Banking
2010 NY Slip Op 32751(U)
October 1, 2010
Sup Ct, NY County
Docket Number: 103709/10
Judge: Saliann Scarpulla
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SCANNED ON 10/5/2010

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA Justice

PART 19

Index Number : 103709/2010
NEWMAN, HOWARD W.
VS.
NYS BANKING DEBT
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion / proceeding ~~motion and cross-motion~~ are decided in accordance with accompanying memorandum decision.

FILED
OCT 05 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/1/10

Saliann Scarpulla J.S.C.

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

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

----------X

HOWARD W. NEWMAN,

Petitioner/Plaintiff

-against-

NEW YORK STATE DEPARTMENT OF BANKING and RICHARD H. NEIMAN, Superintendent of Banks,

Respondents/Defendants.

----------X

Index No.:103709/10
Submission Date: 7/28/2010

DECISION AND ORDER

For Petitioner/Plaintiff:
Weiner Brodsky Sidman Kider PC
1300 19th Street, NW, Fifth Floor
Washington, DC 20036

Law Office of Howard W. Newman
1979 Marcus Ave., Ste 210
New Hyde Park, NY 11042

For Respondents/Defendants:
Andrew M. Cuomo, Attorney General of the State of New York
120 Broadway, 24th Floor
New York, NY 10271

FILED
OCT 05 2010
COUNTY CLERK'S OFFICE
NEW YORK

Papers considered in review of this petition and cross motion to dismiss:

Petition 1
Cross Motion and Opp 2
Reply 3

HON. SALIANN SCARPULLA, J.:

In this hybrid action brought as an Article 78 proceeding in the nature of mandamus, petitioner/plaintiff Howard W. Newman ("Newman") seeks an order compelling the respondents/defendants Superintendent of Banks ("Superintendent") and the New York State Department of Banking ("Banking") (collectively the "Respondents" or the "Department") to issue a declaratory ruling interpreting N.Y. Banking Law § 6-l (1)(f) and 3 N.Y.C.R.R. 41.1, defining "points and fees" in the context of a table-funded loan, for the purposes of determining whether a home loan is "high cost, and stating that

the servicing release fee that a Mortgage Banker receives in connection with a table-funded transaction is not included in the "points and fees" test.

In the alterative, Newman seeks a declaratory judgment stating that the servicing release fee that a mortgage banker receives in connection with a table funded transaction is not included in the "points and fees" test, and an injunction preventing Respondents from taking enforcement action based on a contrary interpretation.

N.Y. Banking Law § 6-l (1)(f) defines "Points and Fees" as:

> (I) All items listed in 15 U.S.C. § 1605(a)(1) through (4), except interest or the time-price differential;
> (ii) All charges for items listed under § 226.4(c)(7) of Title 12 of the Code of Federal Regulations, as amended from time to time, but only if the lender receives direct or indirect compensation in connection with the charge or the charge is paid to an affiliate of the lender, otherwise, the charges are not included within the meaning of the phrase "points and fees";
> (iii) All compensation paid directly or indirectly to a mortgage broker, including a broker that originates a loan in its own name in a table-funded transaction, not otherwise included in subparagraphs (I) and (ii) of this paragraph;
> (iv) The cost of all premiums financed by the lender, directly or indirectly, for any credit life, credit disability, credit unemployment, or credit property insurance, or any other life or health insurance, or any payments financed by the lender directly or indirectly for any debt cancellation or suspension agreement or contract, except that insurance premiums calculated and paid on a monthly basis shall not be considered financed by the lender.

"Points and fees" are defined in 3 N.Y.C.R.R. 41.1(h), in pertinent part, as:

> (I) all items listed in 15 U.S.C.* § 1605(a)(1) through (4), except interest or the time-price differential; (ii) all charges for items listed under section 226.4(c)(7) of Title 12 of the Code of Federal Regulations but only if the lender receives direct or indirect compensation in connection with the

> charge or the charge is paid to an affiliate of the lender; and (iii) all compensation paid directly or indirectly to a mortgage broker not otherwise included as points and fees pursuant to clauses (I) and (ii) of this subdivision 41.1(h).

Newman is an attorney, licensed to practice law in the State of New York. As a regulatory compliance attorney, he has represented mortgage bankers "operating within the jurisdiction of the Mortgage Banking Division of the Department [of Banking]." In his verified petition, Newman states that his law practice "consists primarily of counseling clients on how to make sure that the loans they make are not high-cost, how to cure any provisions that could make a loan high-cost, and how to comply with [3 N.Y.C.R.R.] Part 41 for loans that are high-cost." The Department regulates state-licensed and state-chartered financial institutions, including mortgage bankers and brokers.

Newman commenced this hybrid proceeding, brought as an Article 78 proceeding in the nature of mandamus and also including a declaratory judgment cause of action, with the filing of a verified complaint, dated March 21, 2010. In it, Newman states that prior to April 2009, and "on information and belief since that time as well," the Department has "informed some members of the mortgage banking industry" that they should not buy or hold table-funded loans,[1] because they are "high-cost," as determined

---

[1] Newman defines a table-funded loan as one in which "the Mortgage Banker issues a commitment in its own name, closes the loan in its own name, and funds the loan in its own name. The source of the funding is the funds of the Mortgage Banker's investor, and after the Mortgage Banker has completed the mortgage loan, the investor

(continued...)

by the Department. Newman asserts that the Depart's determination is incorrect due to the "mistaken inclusion" of certain servicing release fees in the "points and fees" test under 3 N.Y.C.R.R. 41.1.

Newman further avers that he received a demand by a "certain mortgage owner" requesting repurchase of the loans that had been purchased in the secondary market, and as a result he made a written inquiry, dated April 1, 2009, to the Department, asking for clarification of the Department's interpretation of 3 N.Y.C.R.R. 41.1. In particular, Newman asked the Department whether the servicing release fee received by a mortgage banker as part of the assignment of a closed mortgage loan in a table-funded transaction is includable in the "points and fees" calculation for purposes of determining whether such a loan is a high-cost home loan.

Newman reports that he and the Department exchanged additional correspondence, and then on June 5, 2009, the Department issued an informal guidance letter written by Assistant Counsel Harry Goberdhan (the "Guidance Letter"). In the Guidance Letter, the Department stated that the servicing release fee received by a mortgage banker as part of the assignment of a closed mortgage loan in a table-funded transaction is includable as "points and fees" under 3 N.Y.C.R.R. 41.1. The Department also stated in the Guidance

---

[1](...continued)
takes assignment of the closed mortgage loan at the closing table. As part of the assignment of the closed loan, the Mortgage Banker receive a servicing release fee."

Letter that when a mortgage banker makes a table-funded loan, it is treated as acting in a mortgage broker capacity.

Newman argues that the Guidance Letter is internally inconsistent and "contradicts the letter of the law and regulation that it interprets." Newman also asserts that the Guidance Letter constitutes a new ruling from the Department. To correct what Newman viewed as errors in the Guidance Letter, and to exhaust his administrative remedies, Newman submitted a Petition for Declaratory Ruling, dated September 9, 2009, to the Superintendent. This petition asked the Superintendent to issue a Declaratory Ruling that a servicing fee paid to a mortgage banker as part of the assignment of a closed mortgage loan at the closing table, in a table-funded transaction, is not included in the points and fees used to determine whether a loan is "high-cost." After additional correspondence between the parties, the Department sent Newman a letter, dated November 23, 2009, declining to issue a formal declaratory ruling.

Consequently, Newman initiated this special proceeding/action. Newman asserts in the verified petition that he is "faced with severe reputational and tangible professional injury if Respondents are able to retroactively make loans 'high-cost' on the basis of their new 'interpretation,' potentially triggering massive repurchase demands that could devastate Newman's clients and may therefore prevent Newman from maintaining himself through his law practice."

In opposition, the Department cross moves to dismiss the petition, arguing that Newman has failed to state a basis for an Article 78 writ of mandamus, lacks standing to pursue his claim, that his claims are not justiciable, and that the Guidance Letter is not subject to the State Administrative Procedure Act rulemaking requirements.

Discussion

"Standing is, of course, a threshold requirement for a plaintiff seeking to challenge governmental action." *New York State Assn. of Nurse Anesthetists v. Novello*, 2 N.Y.3d 207, 211 (2004). The two-part test for determining standing is well settled: "First, a plaintiff must show 'injury in fact,' meaning that plaintiff will be actually harmed by the challenged administrative action. As the term itself implies, the *injury must be more than conjectural*. Second, the injury a plaintiff asserts must fall within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted." *New York Stat Assn. of Nurse Anesthetists*, 2 N.Y.3d at 211 (emphasis added). An assertion of "only 'tenuous' and 'ephemeral' harm, [] is insufficient to trigger judicial intervention." *Rudder v. Pataki*, 93 N.Y.2d 273, 279 (1999)

Here, Newman asserts that he has suffered actual harm, but cannot establish it. The injury asserted in his verified petition is vague and speculative. Thus, Newman asserts that he is "faced with severe reputational and tangible professional injury *if* Respondents are able to retroactively make loans 'high-cost' on the basis of their new 'interpretation,' *potentially* triggering massive repurchase demands that *could* devastate

Newman's clients and *may* therefore prevent Newman from maintaining himself through his law practice." (Emphasis added.) A mere possibility of a future harm is too tenuous to support a finding of standing.

Newman's other attempts to more concretely formulate his injury also fall short. In his affirmation in opposition to the motion to dismiss, Newman states "I am representing my own interests . . . and not those of my clients, and I myself have suffered harm as a result of Respondents' action and policies, not only my clients [sic]." Newman fails to establish the exact harm he has suffered or will suffer. He argues that he "has suffered, and will continue to suffer, real economic and non-economic injury as a result of the damages to his relationship with clients and other industry figures from the pressure being put on investors and others with respect to loans made long ago." However, Newman does not point to a single instance of a damaged relationship between himself and a client or "industry figure," nor does he specify any concrete harm – economic or non-economic – he has suffered.[2]

---

[2] Newman's reliance on *Salles v. Chase Manhattan Bank*, 300 A.D.2d 226 (1st Dep't 2002) for the proposition that attorneys are granted standing when the harm falls to their clients is misplaced. In *Salles*, the attorney-plaintiffs had successfully represented Salles in a prior action, in which Salles was awarded a judgment. When defendants in that action refused to comply with a demand to pay the judgement, Salles sought to enforce the judgement at defendants' bank, Chase Manhattan Bank ("Chase"). Salles asserted that Chase fraudulently refused to acknowledge that it held any assets of defendants to satisfy the judgment. The attorney-plaintiffs asserted that due to Chase's fraudulent actions, they were forced to perform unnecessary and uncompensated additional work. The Court found that, on a motion to dismiss, the attorney-plaintiffs successfully stated a cause of action for fraud. The Court did not directly address Chase's

(continued...)

As Newman has failed to establish he has standing to bring this hybrid action, the Article 78 petition is denied and action for declaratory judgment is dismissed.

In accordance with the foregoing it is

ORDERED that petitioner Howard W. Newman's petition is denied; and it is further

ORDERED that the cross-motion of respondents New York State Department of Banking and Richard H. Nieman, Superintendent of Banks, to dismiss the hybrid action brought as an Article 78 proceeding in the nature of mandamus (and also including a declaratory judgment cause of action) is granted, and the proceeding is dismissed.

This constitutes the decision and order of the court.

Dated: New York, New York
October 1, 2010

ENTER:

Saliann Scarpulla, J.S.C.

FILED
OCT 05 2010
COUNTY CLERK'S OFFICE
NEW YORK

[2](...continued)
argument that the attorneys lacked standing.