

Matter of Executive Life Ins. Co. of N.Y.

2013 NY Slip Op 30338(U)

January 25, 2013

Sup Ct, Nassau County

Docket Number: 91-8023

Judge: John M. Galasso

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - COUNTY OF NASSAU
PRESENT: HONORABLE JOHN M. GALASSO, J.S.C.

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In the Matter of the Rehabilitation of
EXECUTIVE LIFE INSURANCE
COMPANY OF NEW YORK,

Index No. 91-8023
Sequence # 122
Part 37

01/04/13

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Upon the foregoing papers petitioner, the Superintendent of Financial Services of New York in his capacity as Receiver of Executive Life Insurance Company of New York (ELNY's) application for an order pursuant to New York Judiciary Law 753 (A) and 756 and New York Civil Practice Law and Rules 5104 enjoining the Objector-Plaintiffs and their counsel from further violating this Court's anti-suit injunctions and proceeding with the action *Jeanice Dolan, et al. v. Benjamin M. Lawsky, Superintendent, et al.*, 12-CV-8171 (S.D.N.Y.) and holding counsel for the Objector-Plaintiffs in contempt and ordering them to pay for costs and attorney's fees is determined as follows:

This motion is made after the failed rehabilitation and ultimate liquidation of ELNY ordered April 16, 2012 and entered April 19, 2012 after over 20 years on the State of New York Supreme Court's docket. The Order of Liquidation is currently on appeal before the Second Department (Doc. No. 2012-05969).\*

The Objector-Plaintiffs have recently filed a purported class action against Benjamin M. Lawsky and his predecessors in their capacities as Receiver throughout the course of this litigation. Also named as defendants in the federal action are Metropolitan Life Insurance Company (Met Life) and Credit Swisse Group AG. The Superintendent asserts herein that the filing of the federal suit is in violation of the injunctions contained throughout the Court's orders in the case at bar. The Objector-Plaintiffs maintain that the federal complaint is in compliance with the several Court orders and is neither against the ELNY estate or its assets nor is it against the Superintendents for their good-faith conduct.

The federal class action lawsuit filed November 8, 2012 on behalf of the so-called shortfall payees contains a litany of allegations against the New York Liquidation Bureau (NYLB) headed by a Special Deputy Superintendent in charge acting on behalf of the Superintendent that allegedly caused the ELNY rehabilitation estate to be depleted to the point where liquidation was the only viable choice.

\* For a more detailed explanation of the Order, see the undersigned's Memorandum Decision dated April 16, 2012.

Included in the allegations is that in 1991 the NYLB allowed defendant Met Life to take over and manage certain assets of the estate without employing a bidding process, resulting in benefits to Met Life while decreasing the value of ELNY assets. The subject agreement with Met Life was submitted by the Deputy Superintendent and thereafter approved by the Rehabilitation Court in March 1992. The papers submitted for approval approximated \$139 million up to \$150 million as the expected payment from Met Life, as compared to a purported privately expected commission of \$80 million.

The federal complaint's first cause of action is for a breach of fiduciary duty of the receiver defendants, in their "non-regulatory" capacity to plaintiffs and to the ELNY estate in addition to a cause of action for fraudulent omission.

Petitioner herein seeks an order of contempt since at the time the federal suit was filed the plaintiffs were aware of the anti-suit injunctions contained in the Rehabilitation Order, The Rehabilitation Plan Approval Order and the recent Liquidation Order, (Judiciary Law 753 (A)(3)). Indeed, in their brief before the Appellate Division, Second Department, before which an appeal of the Liquidation Order is pending, Objector-Plaintiffs' counsel acknowledges that the undersigned granted the Superintendent's request to permanently enjoin the commencement of lawsuits against the Receiver or others, including claims in their personal capacities, thereby making an admission of knowledge of the injunctions at bar.\* Since the federal action was commenced before a decision on the appeal, the original orders are still in effect.

Consequently, this application must be considered within the context of the Court enforcing its own directives which are still lawful (Judiciary Law 753 (A); CPLR 5104; see *Dalessio v. Kressler*, 6 AD3d 57). Counsel for plaintiffs are to be held in contempt if, by commencing the federal lawsuit against the Superintendent, an order has been disobeyed (see *McCormick v. Axelrod*, 59 NY2d 574); *Astrada v. Archer*, 71 AD3d 803; see also *Busters Cleaning Corp. v. Frati*, 203 AD2d 409).

The injunctions at issue are actually three: the ones contained in both the Rehabilitation Order and the Rehabilitation Plan Approval of 1991 and 1992, as well as the recent injunction set forth in the Liquidation Order.

The injunction contained in the Liquidation Order of April 16, 2012 states at page 3, paragraph 6 "[a]ll persons are enjoined and restrained from commencing or further prosecuting any actions at law or other proceedings against..the Receiver or the New York Liquidation Bureau, or their present or former employees, attorneys, or agents, with respect to this proceeding or the discharge of their duties under Insurance Law Article 74."

\* The same attorneys who represent the federal plaintiffs also represent the Objector-Plaintiffs on appeal. In addition, counsel represented some objectors at the liquidation hearing.

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Prior to this recent injunction, there was an injunction at page 5 of the Order of Rehabilitation dated April 23, 1991 reading, “[All persons], be and they are hereby enjoined and restrained from bringing or further prosecuting any action at law, suit in equity, special or other proceeding against [ELNY] or its assets, or the Superintendent of Insurance of the State of New York and his successors in office as Rehabilitators thereof, or their agents from making and executing any levey upon the assets of [ELNY], or from in any way interfering with the Superintendent of Insurance, as Rehabilitator, or his successors in office in his or their possession, control and management of the property of [ELNY], or in the discharge of his or their duties, as Rehabilitator, under the provisions of Article 74 of the Insurance Law of the State of New York.”

This injunction was followed by a discharge from liability contained within the Approval Order of December 16, 1992 of the plan submitted by the Superintendent of Insurance and his agent, Deputy Superintendent Kevin E. Foley. The order states that the Superintendent as Rehabilitator and his agents, employees, etc., are discharged from any liability for their acts prior to the approval of the Rehabilitation Plan in the performance of their duties incident to the rehabilitation of ELNY. The discharge ordered was in addition to any statutory or other immunity to which they might be entitled.\*

The Court determines that these earlier injunctions and the discharge order continue to remain in effect. Indeed, these provisions were continued by the undersigned in an order dated December 17, 2010.

Before proceeding further, the Court must clarify that questions concerning immunity, which are also raised in the pending appeal, are not a subject of this application for contempt of court. The question before this Court is did the Objector-Plaintiffs, through counsel, violate this Court’s orders in filing an action in federal court against the Superintendent and his predecessors in their “non-regulatory” (statutory) capacities as Receiver for breach of fiduciary duty and fraudulent omission (see *Matter of Emmet*, 164 AD 586).

In considering the four elements for civil contempt of court, the undersigned concludes by a reasonable certainty that the answer is yes (*McCormick v. Axelrod, supra*).

Counsel for the Objector-Plaintiffs have already admitted their knowledge of the prior court orders. Moreover, the orders are a matter of record. Prejudice to the receiver defendants is demonstrated in the federal complaint by virtue of their being sued, according to the Ojector-Plaintiffs herein, in their personal capacity for events occurring, in some cases, decades ago.

As set forth above, the prior court orders were clearly expressed and the continuing order of discharge from liability was unequivocal. Insurance Law section 7419 (b) provides that the court at any time during a proceeding under Article 74 for rehabilitation or liquidation of insurers may issue injunctions or orders necessary to prevent interference with the superintendent or the proceeding or plan.

\* Federal defendant Met Life is also specifically mentioned.

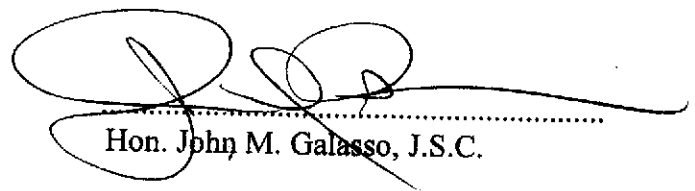
Counsel for the Objector-Plaintiffs' argument that the federal claims are against the receivers in their personal capacity and the complaint does not seek damages payable from the estate assets or affect or prevent the Liquidation Order from proceeding as directed does not support the contention that no harm or waste would inure to the ELNY estate as a result of the federal action (see, e.g., *In the Matter of the Rehabilitation of United Community Insurance Company*, 226 AD2d 948). On their face, the acts complained of are neither ultra vires nor illegal. The caption names Benjamin M. Lawsky in his non-regulatory capacity as Receiver and "Certain Predecessor Receivers", without clearly prosecuting the receiver defendants in their individual capacities. This appears to be a deliberate obfuscation in an effort to avoid a charge of violating the mandates of the state injunctions still in force.

In any event even if counsel are "hedging their bets," this Court is not empowered to dismiss the federal complaint outright. Moreover, the results of the pending State appeal may also impact the viability of the federal action (see also *Astrada v. Archer, supra*).

Nevertheless, at this juncture this Court determines that counsel to the Objector-Plaintiffs are in civil contempt of the anti-suit injunction orders. Pursuant to the Judiciary Law section 773, the Court imposes a fine to be paid to the Superintendent totaling the costs, disbursements and reasonable attorney's fees for defending the federal action thus far and for making this application. Should the Superintendent accrue additional legal expenses, such as in filing a motion to dismiss the federal complaint upon a successful appellate result, counsel to the Objector-Plaintiffs may be subject to an additional fine.

The amount of the fine will be settled upon the Court's receipt of an affidavit in support of attorney's fees, costs and disbursements along with a proposed judgment. The attorney's fees amount submitted shall be capped at \$5,000. Consequently, a hearing will not be necessary.

January 25, 2013



Hon. John M. Galasso, J.S.C.

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**ENTERED**  
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