Melrose Credit Union v Shegelman
2018 NY Slip Op 30513(U)
February 15, 2018
Supreme Court, Queens County
Docket Number: 709983/2017
Judge: Leonard Livote

SHORT FORM ORDER

NEW YORK STATE SUPREME COURT - QUEENS COUNTY
Present: Honorable Leonard Livote COMMERCIAL DIVISION
Acting Supreme Court Justice

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Melrose Credit Union, Index No: 709983/2017
Plaintiff(s),

-- against -- Motion Date: 10/24/17

Galina R. Shegelman, et al., Seq. No: 1
Defendant(s).
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The following papers numbered 1 to 7 were read on this motion by defendant for an order pursuant to CPLR 3211 dismissing plaintiff's complaint in its entirety.

	PAPERS NUMBERED
Notice of Motion, Affirmation, Affidavits and Exhibits.....	1 - 4
Answering Affirmations, Affidavits and Exhibits.....	5 - 7
Reply Affirmations, Affidavits and Exhibits.....	
Other.....	

Upon the foregoing papers, the motion is denied.

Defendants have now moved pursuant to CPLR 3211 (a)(3) and (7), to dismiss plaintiff's complaint. The court will first address the branch of defendants' motion made pursuant to CPLR 3211 (a)(3), which provides that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that: ... the party asserting the cause of action has not legal capacity to sue." In general, "[o]n a defendant's motion pursuant to CPLR 3211(a)(3) to dismiss the complaint based upon the plaintiff's alleged lack of standing, the burden is on the moving defendant to establish, prima facie, the plaintiff's lack of standing as a matter of law" *(U.S. Bank N.A. v Guy*, 125 AD3d 845, 847 [2d Dept 2015]; *see HSBC Mtge. Corp. [USA] v MacPherson*, 89 AD3d 1061, 1062 [2d Dept 2011]).

In support of this branch of their motion, defendants have argued that plaintiff does not have the requisite standing to commence the instant action since it has been placed in a

conservatorship and no longer has legal capacity to bring the instant suit on its own behalf. In opposition, plaintiff has argued that the 12 USC § 1787 (b)(2)(B) & (C), more commonly known as the Federal Credit Union Act (FCUA), does not vitiate its right to commence this action or to litigate its rights under its contract with defendants. The record contains, among other things, copies of the pleadings, the affidavit of non-party Gary Luvera (Luvera), Director of Special Actions for the NCUA, and the affidavit of non-party Andrew Bastone (Bastone), plaintiff's Chief Credit Officer.

A "conservator" is defined as "[a] guardian, protector, or preserver" (Black's Law Dictionary [10th ed 2014]). Generally, a conservator is appointed to discharge an entity's responsibilities to "protect those who are incompetent to adequately conduct their personal and business affairs" (*Matter of Scrivani's Estate*, 116 Misc 2d 204, 206 [New York Sup Ct 1982]). Pursuant to the provisions of 12 USC §§ 1751 and 1752a (a), the National Credit Union Administration Board (NCUA), an independent agency formed within the executive branch of the government, which oversees and regulates credit unions and operates credit union insurance and stabilization funds, is permitted to step into the role of conservator and/or liquidating agent of a failed or failing credit union.

12 USCA § 1787 (b)(1) and (b)(2) (A) and (B) set forth the powers and duties of the NCUA as follows:

> "(1) Rulemaking authority of Board. The Board may prescribe such regulations as the Board determines to be appropriate regarding the conduct of the Board as conservator or liquidating agent.
>
> (2) General powers. (A) Successor to credit union. The Board shall, as conservator or liquidating agent, and by operation of law, succeed to- (i) all rights, titles, powers, and privileges of the credit union, and of any member, accountholder, officer, or director of such credit union with respect to the credit union and the assets of the credit union; and (ii) title to the books, records, and assets of any previous conservator or other legal custodian of such credit union. (B) Operate the credit union. The Board may, as conservator or liquidating agent- (i) take over the assets of and operate the credit

> union with all the powers of the members or shareholders, the directors, and the officers of the credit union and shall be authorized to conduct all business of the credit union; (ii) collect all obligations and money due the credit union; (iii) perform all functions of the credit union in the name of the credit union which is consistent with the appointment as conservator or liquidating agent; and (iv) preserve and conserve the assets and property of such credit union."

12 USCA § 1787 (b)(2) (C) and (D) further provide the following:

> "(C) Functions of credit union's officers, directors, and shareholders. The Board may, by regulation or order, provide for the exercise of any function by any member or stockholder, director, or officer of any credit union for which the Board has been appointed conservator or liquidating agent. (D) Powers as conservator. The Board may, as conservator, take such action as may be- (i) necessary to put the credit union in a sound and solvent condition; and (ii) appropriate to carry on the business of the credit union and preserve and conserve the assets and property of the credit union."

It is undisputed in the record that plaintiff was placed in conservatorship on or about February 10, 2017, and that at the time of the commencement of this action the NCUA was not liquidating plaintiff. Pursuant to the above provisions, it is true that as conservator of plaintiff, the NCUA assumes all rights and privileges of plaintiff, including the ability to bring suit for pending claims (12 USC § 1787 [b][2] [A] and [B]; *see Natl. Credit Union Admin. Bd. v Morgan Stanley & Co., Inc.*, Fed Sec L Rep P 97794 [SDNY Jan. 22, 2014]). However, 12 USC § 1787 (b)(2) (B), (C) and (D), merely provide that the NCUA may, as conservator, take over the credit union's assets, collect all obligations and money due, perform all functions of the credit union, and may take such action as may be necessary to put the credit union in a sound and solvent condition. There is no requirement set forth in the FCUA that the NCUA must take such action. Nor is there any requirement set forth in the FCUA which provides that plaintiff must cease and desist all operations. A careful reading of the provisions of the FCUA does, however,

demonstrate that, acting in its role as conservator, the NCUA may permit certain actions of its conservatee as a part of its oversight.

In this matter, as an employee of the NCUA, Luvera has stated in his affidavit that the NCUA, as conservator, has authorized plaintiff to bring the instant action in its own name, that the NCUA has retained outside counsel to serve as plaintiff's counsel and to assist plaintiff in collecting monies due and owing on underperforming loans, such as has been alleged in the instant matter. Bastone has stated that plaintiff is the owner of the note at issue in this matter and that the note has never been assigned, sold or transferred to another party. In light of the above, defendants have failed to satisfy their burden of establishing, prima facie, that plaintiff lacks the requisite standing to bring this action as a matter of law (CPLR 3211 [a][3]; *see MLB Sub I, LLC v Bains*, 148 AD3d 881, 882 [2d Dept 2017]).

The motion to dismiss on the grounds that a prior action is pending is denied on the grounds that the prior action concerns a separate note.

Accordingly, the motion is denied.

This constitutes the Order of the Court.

Dated: February 15, 2018

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Leonard Livote, A.J.S.C.

FILED
FEB 23 2018
COUNTY CLERK
QUEENS COUNTY