Melrose Credit Union v Garber
2018 NY Slip Op 30776(U)
March 8, 2018
Supreme Court, Queens County
Docket Number: 708484/2017
Judge: Marguerite A. Grays
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE MARGUERITE A. GRAYS** IAS PART 4
Justice

----------x	Index
MELROSE CREDIT UNION,	No.: 708484/2017
Plaintiff(s),	Motion Date: October 17, 2017
-against-	
SYMON V. GARBER, ALEXANDER LEMPERT, and BOO-BOO KITTY HACKING CORP.,	Motion Cal. No.: 14
Defendant(s).	Motion Seq. No.: 1
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The following numbered papers numbered 1 to 6 read on this motion by defendants Symon V. Garber, Alexander Lempert, and Boo Boo Kitty Hacking Corp., (collectively referred to as defendants), made pursuant to CPLR 3211 (a)(3) and (7), to dismiss the complaint of plaintiff Melrose Credit Union (plaintiff).

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1-4
Answering Affidavits - Exhibits	5
Reply Affidavits	6

Upon the foregoing papers it is ordered that the motion is determined as follows:

This is an action to recover amounts allegedly owed by defendants on a balloon note dated March, 28, 2013, and an additional security agreement to secure the repayment of the note. Both were executed by defendants in favor of plaintiff for the principal amount of $584,000, at an interest rate of 3.5% per year in favor of plaintiff, which granted plaintiff a lien and security interest in New York Taxi Medallion numbers 5M60 and 5M61, along with the rate card and any vehicle to which it was attached.

Plaintiff also seeks to recover amounts allegedly owed by defendants on a second balloon note dated April 16, 2015, and an additional security agreement to secure the repayment of this note. Both the note and the security agreement were executed by defendants in favor of plaintiff for the principal amount of $765,200, at an interest rate of 4% per year in favor of plaintiff, which granted plaintiff a lien and security interest in New

York Taxi Medallion numbers 5M60 and 5M61, along with the rate card and any vehicle to which it was attached.

Plaintiff has further alleged that defendants defaulted under the terms of both notes by failing to make the necessary payments and failed to make payment in full on March 28, 2016 and on October 16, 2016, the maturity dates of the respective notes. Plaintiff has alleged that defendants have failed to surrender the collateral to plaintiff and, as a result, plaintiff commenced the instant action.

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 (the Act), 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 National Credit Union Administration (NCUA), and the affidavit of non-party Dennis Davis, plaintiff's Director Special Assets.

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 [Sup Ct, New York County 1982]). Pursuant to the provisions of 12 USC §§ 1751 and 1752a (a), the 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 [SD NY 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 Act that the NCUA must take such action. Nor is there any requirement set forth in the Act which provides that plaintiff must cease and desist all operations. A careful reading of the provisions of the Act 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. Mr. Davis has stated that plaintiff is the owner of both notes at issue in this matter and that the notes 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]).

As to the next branch of defendants' motion to dismiss plaintiff's causes of action for common-law replevin, CPLR 3211 (a)(7) provides that a party may move to dismiss an action on the ground that "the pleading fails to state a cause of action." "On a motion to dismiss pursuant to CPLR 3211(a)(7), the complaint is to be afforded a liberal construction, the facts alleged are presumed to be true, the plaintiff is afforded the benefit of every favorable inference, and the court is to determine only whether the facts as alleged fit within any cognizable legal theory" (*Gorbatov v Tsirelman*, 155 AD3d 836 [2d Dept 2017]; CPLR 3026; *see Feldman v Finkelstein & Partners, LLP*, 76 AD3d 703, 704 [2d Dept 2010]).

In support of this branch of their motion, defendants have argued that plaintiff has failed to allege that demand was made upon defendants for possession of the collateral. "To state a cause of action for replevin, a plaintiff must allege that he or she owns specified property, or is lawfully entitled to possess it, and that the defendant has unlawfully withheld the property from the plaintiff" (*Khoury v Khoury*, 78 AD3d 903, 904 [2d Dept 2010]; *see Nissan Motor Acceptance Corp. v Scialpi*, 94 AD3d 1067 [2d Dept 2012]). "[A] substantive element of a cause of action for replevin is that the plaintiff demand the return of the subject property and the one in possession thereof refuses to return it" (*Matter of Vogel*, 19 Misc3d 853, 857 [Sur Ct, Westchester County 2008]; *see Solomon R. Guggenheim Found. v Lubell*, 77 NY2d 311, 319 [1991]; *Malanga v Chamberlain*, 71 AD3d 644, 645 [2d Dept 2010] [replevin cause of action accrues when a defendant refuses to return property after a demand is made]; *see also Feld v Feld*, 279 AD2d 393, 394 [1st Dept 2001][replevin requires a demand for the return of the property and refusal]).

After a careful reading of the pleadings, the court has determined that plaintiff has failed to sufficiently state the essential elements required for a cause of action sounding in common-law replevin (CPLR 3211 [a][7]). Thus, plaintiff's causes of action for replevin are hereby dismissed.

Accordingly, the branch of defendants' motion to dismiss plaintiff's causes of action for replevin is granted and the motion is denied in all other respects.

Dated: MAR 08 2018

J.S.C.

FILED
MAR 16 2018
COUNTY CLERK
QUEENS COUNTY