SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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SLS CAPITAL, S.A.

Through Maître Yann Baden, Liquidator,

Plaintiff,

- against -

CRT CAPITAL GROUP LLC,

Defendant.

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DECISION AND ORDER
Index No.: 652595/2015

Motion Sequence No.: 002

O. PETER SHERWOOD, J.:

The Liquidator (Liquidator) of plaintiff SLS Capital, S.A. (SLS) brings this action on behalf of SLS's investors/bondholders, who are creditors of its bankrupt estate. SLS alleges that the bondholders lost over $100 million due to fraud in which defendant CRT Capital Group LLC (CRT) played a pivotal role. CRT moves to dismiss the complaint pursuant to CPLR 3211, based on lack of legal capacity to sue, collateral estoppel, statute of limitations, failure to state a cause of action, and lack of jurisdiction.

SLS is a Luxembourg société anonyme (the equivalent of a corporation in the United States) formed in 2004 by nonparty David Elias for the purpose of raising capital by selling bonds to investors. CRT is a Delaware brokerage and investment advisor firm. In March 2005, CRT purchased 55% of the shares in SLS. Nonparty BWT, a Malaysian company controlled by Elias, owned the rest of the shares in SLS. In March 2005, CRT and SLS entered into an engagement letter, in which SLS retained CRT to act as advisor. CRT, "in conjunction with [BWT] as the Arranger, has structured this transaction and is responsible for all structural matters" (Letter, at 1). The letter stated that disputes would be settled by arbitration in the City of New York.

The directors of SLS were companies that, under Luxembourg law, exist for the purpose of acting as independent corporate directors. These companies were owned by a professional trust company, MeesPierson Intertrust (MPI). MPI provided directors for and administered SLS.

SLS issued and sold bonds and used the proceeds to buy life insurance policies. CRT chose the insurance models used to decide which policies to buy. The life insurance policies were the principal collateral securing the bonds. The business plan was that SLS would collect the life insurance proceeds as the policies matured, that is, as the insureds died. Upon maturity, the bondholders would redeem their bonds. Until the bonds matured, SLS would pay interest on the bonds to the bondholders. One of CRT's responsibilities was to obtain a liquidity facility for SLS. A liquidity facility is a standby line of credit and "the backstop in the event cash flow was insufficient" (complaint ¶ 7). CRT approached several banks, but was never able to secure a liquidity facility.

According to their terms, the bonds had to maintain at all times a Required Asset Cover (RAC) at or above a 2:1 ratio. The RAC "is a commonly used financial metric . . . expressed as ratio of total assets to debt" (complaint at 4, n 1). The higher the RAC the more times a company can cover its debt, and a company with a high RAC is a better investment risk than a company with a low RAC. SLS's RAC was supposed to reflect that its assets were twice the size of its debt. A RAC that was not certified at 2:1 was a default according to the terms of the bonds. In the event of that default, the bondholders would not be paid interest and SLS would call a meeting of all the bondholders. At the meeting, the bondholders had the option of voting to redeem their bonds and receiving all the interest that was due to them. This action, according to the Liquidator, would effectively liquidate SLS.

CRT was responsible for calculating and certifying the RAC every quarter. Beginning in the second quarter 2006, SLS failed to meet the 2:1 ratio for the RAC. CRT knew this from at least July 2006, but concealed it from SLS's directors and only disclosed the nonconforming RAC in October 2006. Then MPI threatened to not pay the interest that was due on the bonds, to notify the bondholders that there was a default, and to seek a bondholder vote to require return of all principal and interest. Elias put pressure on CRT to "somehow produce a conforming RAC" (complaint, ¶ 61).

In January 2007, CRT falsely certified the RAC as 2:1. MPI wanted to verify this RAC. CRT responded that it was the sole arbiter of the RAC. MPI "backed down" and paid the

overdue interest to the bondholders (complaint, ¶ 70). By issuing a false RAC, CRT and BWT/Elias avoided an event of default, an early liquidation of SLS, and a loss of their investment in SLS.

In April 2007, CRT again falsely certified that the RAC was 2:1 and "desperately tried to unload its interest in SLS and terminate its role as advisor" (complaint, ¶ 36). In September 2007, CRT stopped being SLS's advisor and sold its shares to BWT for $3 million, "an amount far in excess of what CRT had been prepared to accept, let alone" the $72,000 that another company had been prepared to pay a month or two earlier (*id.*). The Liquidator alleges that this payment by BWT was intended to ensure CRT's silence about the false RACs and other damage done to SLS.

When determining the RACs, CRT included policies ineligible to be included in the calculations. CRT "started to degrade SLS's capital which served as the bondholders' collateral by buying 'high ratio' policies, i.e., that provided more face value with less cost but which were mostly outside the purchase parameters" (complaint, ¶ 34). In addition, CRT engaged in lending and selling policies between SLS and another company "in what amounted to a shell game in which the same policies were used to meet the RAC for both companies" (complaint, ¶ 40). CRT's purpose was to produce a 2:1 RAC by using false data.

After CRT stopped acting as advisor, Elias hired a new advisor which continued to issue false RAC certifications. Elias continued CRT's policy of replacing policies selected in accordance with the purchase parameters with high ratio policies, and the "shell game" was continued after CRT left. By the end of 2008, Elias had sold off the entire SLS portfolio and taken the proceeds. The bondholders were left with valueless bonds and SLS was left without assets. It is also alleged that Elias and BWT controlled SLS until it dissolved and that, while SLS was still operative, they diverted its funds through undisclosed and improper commissions.

In November 2005, a CRT employee reported to CRT that bond marketing materials prepared by CRT and BWT and distributed to potential investors contained several false statements, among them that SLS had a line of credit and that SLS had a cash reserve of $50 million (complaint, ¶ 43). The Liquidator alleges that CRT was thus aware that SLS solicited investments through offering materials containing misrepresentations.

The complaint states that if CRT had not falsely certified the RACs, there would have been a default and SLS's capital would have been preserved for its creditors. That is, the bondholders would have been able to redeem their bonds. The complaint alleges that the bondholders would have received most and possibly all of the principal and interest owed on their bonds. By issuing the RACs, CRT committed a fraud on the bondholders, and aided and abetted BWT and Elias in their fraudulent conduct.

In October 2009, the Luxembourg court ordered the liquidation of SLS and appointed the Liquidator to superintend SLS's bankruptcy. In 2012, The Liquidator commenced a chapter 15 bankruptcy proceeding in the United States District Court, Southern District of New York. The purpose of chapter 15 of the U.S. Bankruptcy Code is to provide "effective mechanisms for dealing with cases of cross-border insolvency" (11 USC § 1501).

In July 2014, the Liquidator commenced an arbitration with the Financial Industry Regulatory Authority ("FINRA") in New York City. The arbitration statement of claim was made on behalf of SLS and the bondholders against CRT and two of its employees who allegedly were the principal instruments by which CRT engaged in the wrongful conduct that injured SLS and the bondholders.

CRT moved to dismiss the arbitration application and, in July 2016, the Arbitration Panel (the Panel) issued its decision, granting part of the motion and denying part. The Panel granted the motion to dismiss as it concerned the two individual employees of CRT, pursuant to FINRA Rule 12206 (a), which sets the statute of limitations. The Panel dismissed the bondholders from the arbitration, pursuant to FINRA Rule 12504 (a) (6) (B), which allows dismissal where the moving party was not associated with the accounts or conduct at issue. The Panel determined that the bondholders were not parties to the engagement letter in which SLS and CRT agreed to arbitrate their disputes and that CRT, the moving party, was not associated with any bondholder accounts. The Panel denied CRT's motion to the extent of refusing to dismiss SLS's claims against CRT.

Subsequently, SLS filed a second amended statement of claim against CRT only. This statement of claim purported to be on behalf of SLS only and not the bondholders. Otherwise, the causes of action in the second amended statement of claim were the same as in the previous statements of claim. The causes of action in the second amended statement of claim sounded in

fraud, based on the fraudulent RAC certifications, breach of fiduciary duty to SLS, based on fraudulent marketing materials and false statements to SLS directors, negligence based on all of CRT's failures, unjust enrichment based on the $3 million "payoff" CRT gained when it sold its SLS shares, breach of the engagement based on failing to competently structure SLS's business, and common law indemnification based on CRT's liability for the bondholders' injuries and for SLS's expenses in the arbitration.

The Panel issued an award after a hearing in March 2018. It denied SLS's claims in their entirety and found SLS liable, under the terms of the engagement letter, to pay CRT indemnification damages, costs, and fees of $4.2 million, and attorneys' fees of $149,000. The Panel recommended expungement of all references to the individual CRT employees. The Panel wrote, "Pursuant to Rule 12805 of the [FINRA] Code, the Panel has made the following Rule 2080 affirmative findings of fact: The claim, allegation or information is false. The Panel has made the above Rule 2080 finding based on the following reasons: Respondents [the individual employees] did not cause Elias's theft." FINRA Rules 12805 and 2080 relate to expungment of information from FINRA records. The Panel did not expand on the reasons for its decision because, under FINRA Rule 1200 (b) (D), the parties did not jointly request an "explained decision."

The complaint in this case makes the same allegations against CRT as the statements of claim in the arbitration but are asserted on behalf of the bondholders, not SLS. The first three causes of actions sound in fraud, negligent misrepresentation, and aiding and abetting BWT to commit fraud based on the allegedly fraudulent marketing materials. The fourth and fifth causes of action allege fraud and negligent misrepresentation based on the allegedly false RAC certifications.

In determining a motion to dismiss for failing to state a cause of action under CPLR 3211 (a) (7) , the court is limited to determining whether the complaint, liberally construed, "fit[s] within any cognizable legal theory" (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 120-121 [1st Dept 2002]). The court must accept the factual allegations as true, deem the complaint to allege whatever can be reasonably implied from its statements, and determine only whether the allegations amount to a cause of action (*see Ambassador Factors v Kandel & Co.*, 215 AD2d

305, 306 [1st Dept 1995]; *Stendig, Inc. v Thom Rock Realty Co.,* 163 AD2d 46, 48 [1st Dept 1990]).

JURISDICTION OVER CRT

The complaint alleges that CRT is a Delaware company with a principal place of business in Connecticut and an office in New York City. As relevant to this case, New York recognizes two kinds of jurisdiction over parties not domiciled in the state, general jurisdiction under CPLR 301 and specific jurisdiction under CPLR 302. New York jurisdiction may also be founded on a defendant's consent (*see Matter of Merrill Lynch, Pierce, Fenner & Smith, Inc. v Barnum*, 162 Misc 2d 245, 250–51 [Sup Ct New York County 1994]). The Liquidator claims that this court may exercise general jurisdiction over CRT because it has a physical presence in this state, it is registered to do business here, and has consented to New York jurisdiction when it designated the Secretary of State of New York as its agent for service of process within the state.

Under CPLR 301, a party who is not domiciled in New York but who is doing business in New York or is otherwise at home here is subject to general jurisdiction and may be sued in New York on causes of action unrelated to acts done in New York (*see Overseas Media, Inc. v Skvortsov,* 407 F Supp 2d 563, 567-568 [SD NY 2006], *affd* 277 Fed Appx 92 [2d Cir 2008]; *Lebron v Encarnacion*, 253 F Supp 3d 513, 520 [EDNY 2017]; *ABKCO Indus., Inc. v Lennon*, 52 AD2d 435, 439-440 [1st Dept 1976]). A company is at home in New York when its affiliations with the state are "so continuous and systematic as to render [it] essentially at home in" the state (*Daimler AG v Bauman*, 571 US 117, 138 [2014]; *AlhaniaBEG Ambient Sh.p.k v End S.p.A.,* 160 AD3d 93, 102 [1st Dept 2018]). A company does business here when its activities in the state demonstrate a fair measure of permanence and continuity [and are of a] quality and nature ... to make it reasonable and just that it be required to defend the action here (*Laufer v Ostrow,* 55 NY2d 305, 310 [1982] [internal citations and quotation marks omitted]; *see also RSM Prod. Corp. v Fridman,* 643 F Supp 2d 382, 400 [SDNY 2009]), *affd* 387 Fed Appx 72 [2d Cir 2010]).

Under *Daimler,* a company is at home and subject to general jurisdiction in its place of incorporation or principal place of business, unless there are exceptional circumstances that compel a conclusion that the company is at home elsewhere (*Daimler,* 571 US at 139 n19). When a company "is neither incorporated nor maintains its principal place of business in a state,

mere contacts, no matter how 'systematic and continuous,' are extraordinarily unlikely to add up to an 'exceptional case' warranting the exercise of general jurisdiction" by the state (*Wilderness USA, Inc. v Deangelo Bros. LLC*, 265 F Supp 3d 301, 309 [WD NY 2017] [citing *Daimler*]).

CRT is not a New York corporation and does not maintain its principal place of business here. The Liquidator does not allege any facts tending to show that this is an "exceptional case" such that CRT is essentially at home in New York and has permanence and continuity here. Although CRT has an office in New York, in the absence of a systematic and continuous presence, a mere office is not enough for general jurisdiction (*see Fekah v Baker Hughes Inc.*, 2018 NY Slip Op 32174[U], *4 [Sup Ct, New York County 2018], *affd* 176 AD3d 527 [1st Dept 2019]).

While New York and federal courts have traditionally ruled that registration to do business constitutes consent to general jurisdiction, that law is no longer viable in light of *Daimler*, (*see Amelius v Grand Imperial LLC,* 57 Misc 3d 835, 849 [Sup Ct, NY County 2017] for extended discussion; *see also Wilderness,* 265 F Supp 3d at 310; *Aybar v Aybar,* 169 AD3d 137, 147 [2d Dept 2019]; *Kyowa Seni, Co. v ANA Aircraft Technics, Co., Ltd.* 60 Misc 3d 898, 903-904 [Sup Ct, NY County 2018]). Most recently, the First Department has confirmed that a foreign defendant does not consent to jurisdiction by registering to do business here and designating the Secretary of State to accept service of process (*see Fekah*, 176 AD3d 527).

Consent cannot be based on the engagement letter between CRT and SLS. While an agreement to arbitrate disputes in New York constitutes consent to jurisdiction, the jurisdiction is limited to arbitration-related proceedings (*see Alstom Brasil Energia e Transporte Ltda. v Mitsui Sumitomo Seguros S.A.*, 2016 WL 3476430, *5, 2016 US Dist LEXIS 80151, *17 [SD NY 2016]; *Sterling Natl. Bank & Trust Co. of N.Y. v Southern Scrap Export Co.*, 468 F Supp 1100, 1103 [SD NY 1979]; *Shalik v Coleman*, 111 AD3d 816, 818 [2d Dept 2013]). Even if the arbitration award has some effect on the instant disposition, this case is not, properly speaking, an arbitration-related proceeding. The court is not being asked to approve, disapprove, or alter the arbitration award.

Turning to specific jurisdiction under CPLR 302 (a) (1), the longarm statute, there are two requirements. This court may wield specific jurisdiction over a non-domiciliary who in person or through an agent transacts any business within New York or who contracts anywhere

to supply goods or services in New York. In addition, there must be a substantial relationship between the New York activity and the claims against the non-domiciled party or said claims must arise out of the New York activity (*see Wilson v Dantas,* 128 AD3d 176, 181-182 [1st Dept 2015]; *Lebel v Tello*, 272 AD2d 103 [1st Dept 2000]). The demonstration of a substantial relationship between the New York activity and the claims requires "at a minimum, a relatedness between the transaction and the legal claim such that the latter is not completely unmoored from the former, regardless of the ultimate merits of the claim" (*Licci v Lebanese Can. Bank, SAL,* 20 NY3d 327, 339 [2012]). "[C]ausation is not required, and . . . the inquiry under the statute is relatively permissive" (*id.*). Proof of just one transaction in New York is sufficient to invoke jurisdiction, so long as the defendant's activities here were purposeful (*see Deutsche Bank Sec, Inc. v Montana Bd. of Invs.,* 7 NY3d 65, 71 [2006]). "Purposeful activities are volitional acts by which the non-domiciliary avails itself of the **privilege of** conducting activities within the forum State, thus invoking the benefits and **protections of its laws"** (*Paterno v Laser Spine Inst.,* 24 NY3d 370, 376 [2014] [internal quotation marks and citation omitted]; *Fischbarg v Doucet,* 9 NY3d 375, 382 [2007]). A defendant need not be physically present in New York to be subject to jurisdiction (*see Fischbarg,* 9 NY3d at 382). Lastly, the assertion of longarm jurisdiction must comport with due process (*see Wilson,* 128 AD3d at 182).

On a jurisdictional inquiry, the court examines the totality of circumstances around the defendant's interactions with and in New York (*see Scheuer v Schwartz*, 42 AD3d 314, 316 [1st Dept 2007]). Not all purposeful activity amounts to the transaction of business. It is the quality rather than the quantity of the defendant's New York contacts that determine whether it transacted business (*see Paterno,* 24 NY3d at 378).

The Liquidator alleges the engagement letter invokes New York law and a New York site for arbitration. The engagement letter incorporates the terms and conditions of the bonds, which confirm that CRT will act as SLS's advisor. The bonds provide that nonparty HSBC Bank USA (HSBC) will be the United States trustee for the transaction. HSBC held legal title to the life insurance policies. The SLS accounts were housed at HSBC in New York City. CRT directed that funds be released from SLS's accounts with HSBC to purchase the insurance policies. These funds were the bondholders' payments for the bonds. Money from the HSBC accounts were used to pay the premiums on the policies. SLS entered into contracts with nonparty Life

Settlement Solutions, Inc. (LSS), which were governed by New York Law, as were the contracts with HSBC. LSS was charged with originating the policies purchased by SLS. CRT acted as SLS's agent in SLS's dealings with HSBC and LSS.

The Liquidator further states that, on December 6, 2005, at the New York office of MPI's parent company, MPI and CRT held a "critical" meeting at which they discussed SLS's marketing of the bonds and commissions paid to BWT from bondholder-provided funds. Two days later, a CRT officer who had attended the meeting told the head of CRT's investment banking unit that the marketing materials contained numerous inaccuracies and recommended notifying the bondholders. CRT did not follow this recommendation and hid the information from bondholders.

Viewed liberally and in favor of plaintiff, these allegations do not suggest that CRT "projected itself" into New York, engaged in the transaction of business here, or purposely availed itself of the privilege of conducting business activities in the state (*see Fischbarg*, 9 NY3d at 382; *see also D& R Global Selections, S.L. v Bodega Olegario Falcon Pineiro*, 29 NY3d 292, 298 [2017] [jurisdiction found where defendant sought out and initiated contact with New York]). SLS, not CRT, had accounts at HSBC in New York. That CRT ordered funds to be released from SLS's account in New York does not establish a substantial link between CRT and the bondholders' claims.

For jurisdiction to be predicated on a meeting in New York, it must have been essential to the formation or development of the relationship between the non-domiciliary defendant and the plaintiff (*see Kahn Lucas Lancaster, Inc. v Lark Intl. Ltd.*, 956 F Supp 1131, 1136 [SDNY 1997]; *Greco v Ulmer & Berne L.L.P.*, 23 Misc 3d 875, 889 [Sup Ct, Kings County 2009]). Jurisdiction has been founded on "very significant meetings," meetings "instrumental" to the decision to expand business with plaintiff, meetings at which there were substantial preliminary negotiations or meetings at which the entire range of business was discussed (*see Greco supra*; *see Newmont Mining Corp. v AngloGold Ashanti Ltd.*, 344 F Supp 3d 724, 736 [SDNY 2018]; *Bastile Props. v Hometels of Am., Inc.*, 476 F Supp 175, 177 [SDNY 1979]). Jurisdiction was found where defendants negotiated and executed contracts in New York, laying the foundation for a large investment plan and a continuing relationship for nearly a decade (*Wilson*, 128 AD3d at 184). When the meeting in New York is not for the purpose of initiating or forming a

relationship, but is to alleviate problems under a pre-existing relationship, New York courts have declined to assert jurisdiction (*see Greco,* 23 Misc 3d at 889).

Jurisdiction cannot be founded on the New York meeting. Plaintiff alleges that the meeting was critical. Yet, the facts alleged do not indicate that the meeting was essential to the formation or continuance of the relationship between CRT and SLS or the bondholders. A discussion of the marketing materials and improper payments to BWT does not show that CRT engaged in sufficiently purposeful activities or somehow availed itself of the benefits of New York law.

The claims against CRT do not have a substantial relationship to its New York activity. The bondholders' claims do not flow from any of CRT's New York activity. The operative facts evoking the claims, such as the creation of marketing materials, did not occur in New York. CRT's New York activity, whether the meeting or CRT ordering money from HSBC to be used as payment for policies are "too attenuated" from the bondholders' claims (*see Licci,* 20 NY3d at 340 [citation and internal quotation marks omitted])..,

The choice of law provisions in SLS's agreements with HSBC and LSS do not confer jurisdiction over CRT. CRT was not party to those agreements. In addition, a choice of law clause is not equivalent to a choice of forum clause (*see Borden, Inc. v Meiji Milk Prods. Co.,* 919 F2d 822, 827 [2d Cir 1990], *cert denied* 500 US 953 [1991]). Choice of law is relevant to a jurisdiction inquiry, yet is not enough by itself to establish personal jurisdiction under CPLR 302 (a) (1) (*see America/Intl. 1994 Venture v Mau*, 146 AD3d 40, 59 [2d Dept 2016]). Given the lack of connections to New York, SLS's New York choice of law is not a reason for CRT to be sued here.

Moreover, exercising specific jurisdiction over CRT would violate due process. Due process is satisfied if the defendant has sufficient minimum contacts with New York and should reasonably forsee defending a suit here (*see Deutsche,* 7 NY3d at 71). CRT did not have sufficient minimum contacts here and could not be reasonably expected to defend its actions in New York.

If jurisdiction is not found, the Liquidator requests leave to amend the complaint to include other agreements and terms and conditions of the bonds that reflect CRT's transactions in

New York relating to the bonds. Alternatively, the Liquidator seeks to conduct disclosure on the full extent of CRT's New York activities.

Although leave to amend should be freely given, it will be denied where the amended pleadings are not shown to have merit (*see Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 25 [1st Dept 2003]). Nothing is alleged to show that CRT is subject to longarm jurisdiction more than has already been alleged. To obtain jurisdictional discovery pursuant to CPLR 3211 (d), a plaintiff must demonstrate the possible existence of essential jurisdictional facts that are not yet known (*see Peterson v Spartan Indus.*, 33 NY2d 463, 466 [1974]). The Liquidator has already conducted discovery into CRT, HSBC, and LSS under the auspices of the Bankruptcy Court. It does not appear from the allegations that "facts essential to justify opposition may exist, but cannot now be stated" (*Findlay v Duthuit,* 86 AD2d 789, 790–791 [1st Dept 1982]). No connections are alleged with the bondholders.

THE LIQUIDATOR'S STANDING

CRT argues that the Liquidator has no standing to assert claims on behalf of the bondholders/creditors of SLS. Under CPLR 3211 (a) (3), a cause of action may be dismissed where a party lacks standing to sue. The critical question in determining whether a party standing is whether the party suffered an injury that gives it "an actual legal stake in the matter being adjudicated" and "ensures that the party seeking review has some concrete interest in prosecuting the action" (*Society of Plastics Indus. v County of Suffolk,* 77 NY2d 761, 772 [1991]; *see Shearson Lehman Hutton, Inc. v Wagoner,* 944 F2d 114, 118 [2d Cir 1991] [standing is present when the bankruptcy trustee has a stake in the outcome of the case]).

"Upon the commencement of a bankruptcy case, the trustee succeeds to a debtor's rights, including the ability to sue and be sued" (*In re Food Mgt. Group, LLC,* 380 BR 677, 693 [Bankr SD NY 2008]). A bankruptcy trustee has standing to assert causes of action that belong to the debtor's estate (*see Shafferman v Queens Borough Pub. Library (In re JMK Constr. Group, Ltd.)*, 502 BR 396, 404 [Bankr SD NY 2013]). Those are causes of actions that the debtor itself could have brought prior to declaring bankruptcy (*see Hirsch v Arthur Andersen & Co.*, 72 F3d 1085, 1093 [2d Cir 1995]). The trustee is authorized to sue on those causes of action in order to reach property belonging to the debtor which the trustee will distribute to the debtor's creditors (*see Jeziorowski v Credit Protection Assn., L.P.*, 2017 WL 1549965, *1, 2017 US Dist LEXIS 66084,

*3 [WD NY 2017]; *Shafferman*, 502 BR at 404). Thus, the trustee protects the interests of both the debtor and its creditors (*see Bondi v Grant Thornton Intl. (In re Parmalat Sec. Litig.)*, 377 F Supp 2d 390, 420 [SD NY 2005]; *Pereira v Marshall & Sterling, Inc. (In re Payroll Express Corp.),* 2005 WL 2438444, *7, 2005 Bankr LEXIS 1933, * 21 [Bankr SD NY 2005]). "However, while a trustee pursues the interests of the bankruptcy estate and derivatively the interests of its creditors, he or she does not have standing to pursue the individual claims of creditors or even of creditors as a class" (*Bondi,* 377 F Supp 2d at 420).

Bankruptcy trustees do not have standing "to sue third parties on behalf of the estate's creditors, but may only assert claims held by the bankrupt corporation itself" (*Breeden v Kirkpatrick & Lockhart LLP (In re Bennett Funding Group, Inc.),* 336 F3d 94, 99–100 [2d Cir 2003]; *and see Caplin v Marine Midland Grace Trust Co. of New York*, 406 US 416, 428 [1972]). A trustee lacks standing to assert the claims of creditors against third parties who are alleged to bear responsibility for a debtor's loss (*see Shearson*, 944 F2d at 118). Thus, a trustee has standing to sue a third party only when it is alleged that the third party injured the debtor (*see Payroll,* 2005 WL 2438444, *7, 2005 Bankr LEXIS 1933, *20). The trustee has no standing when the injury was only to the creditors (*see Shafferman,* 502 BR at 404; *Schmutz v Fleet Bank, N.A.,* 278 AD2d 19, 19 [1st Dept 2000]).

The Liquidator has no standing to press claims that belong to the creditors only and not to SLS. Whether a claim belongs to the bankruptcy estate or to a creditor is a question of state law (*see Bondi,* 377 F Supp 2d at 420). The Liquidator sues on fraudulent statements made to bondholders not to SLS. A party has no standing to assert fraud, when the fraudulent statements were not made to him or to her but to another (*see Kuiters v Kukulka,* 57 AD3d 1469, 1470 [4th Dept 2008]; *Aymes v Gateway Demolition Inc.,* 30 AD3d 196, 197 [1st Dept 2006]).

The Liquidator contends that his standing is set forth in the order issued by the District Court of Luxembourg on October 23, 2014. The US Bankruptcy court granted comity to that order on July 20, 2015, pursuant to 11 USC §1507 (*see In re SLS Capital, S.A.*, 2015 Bankr LEXIS 2468, *45 [SDNY 2015] [granting comity to the Luxembourg order while refusing to interpret it] *see also* NYSCEF 77).

The October 2014 Luxembourg order states that the Liquidator may file any suit in Luxembourg and abroad "he deems necessary for the protection of the interests of creditors or to

liquidate or realise *[sic]* or take possession of all assets, instruments, securities or debts that are part of the company in liquidation" (NYSCEF 78, at 17 of 25). The order further states that the Liquidator was recognized by the United States court so that he can take legal action "related to the fraud in favour of the SLS investors." The Liquidator is "able to document the Luxembourg Law particularly with regards to his double capacity as legal agent of the company in legal liquidation and of creditors of this company." The Liquidator is applying for a ruling that specifies that he "acts as the representative of both the company in liquidation and its creditors." "[I]n particular, he is authorised to take legal action against third parties in favour of both the company in liquidation and its creditors." He "may file and support any proceeding or suit before any jurisdiction [including] abroad he deems necessary for the protection of the interests of creditors or to liquidate or realise [*sic*] [SLS assets]."

In addition, the Liquidator submits a statement by a Luxembourg attorney that the Liquidator represents both the company in liquidation and its creditors. The attorney states as follows. "The court appointed liquidator is thereby neither an agent of the corporate entity nor of its creditors, but by virtue of his appointment he is entitled to exercise the rights of either the corporate entity, its creditors, or both, in order to fulfil his mission . . . " (NYSCEF 81, at 6 of 7). He represents the "creditors collectively" and, in order to have all creditors treated equally, their rights and actions are vested with the liquidator (*id.*).

The Liquidator argues for the application of Luxembourg law. Under New York choice of law rules, the first question is whether there is an actual conflict between the relevant laws of the implicated jurisdictions (*see Matter of Allstate Ins. Co.*, 81 NY2d 219, 223 [1993]). An actual conflict exists where the jurisdictions' laws provide different substantive rules. Such differences must be relevant to the issue to be determined and have a significant possible effect on the outcome of the proceeding (*see TBA Global, LLC v Proscenium Events, LLC,* 114 AD3d 571, 572 [1st Dept 2014]). Here, the evidence of foreign law does not show an actual conflict with New York or federal law. The evidence shows only that, under the foreign law, a liquidator represents both the debtor and the creditors. Neither the Luxembourg order, nor the attorney's statement, states that the Liquidator has standing to bring claims on behalf of the creditors of the debtor without also making a claim on behalf of the debtor. Nor is it shown that

foreign law on standing in general is different from New York law. As there is no actual conflict, New York law applies.

Given the lack of jurisdiction and standing, there is no need for the court to address CRT's statute of limitations or collateral estoppel defenses.

In conclusion, it is

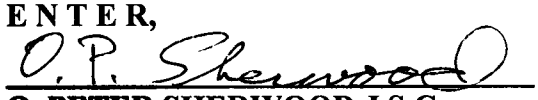
ORDERED that the motion of defendant CRT Capital Group, LLC to dismiss the complaint is granted and the complaint is hereby dismissed with costs and disbursements as taxed by the Clerk of the Court upon presentation of a proper bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

DATED: **March 2, 2020**

E N T E R,



O. PETER SHERWOOD J.S.C.