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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39

In the matter of the application of

THE BANK OF NEW YORK MELLON, (as Trustee under various Pooling and Servicing Agreements and Indenture Trustee under various Indentures),

Petitioners,

for an order, pursuant to C.P.L.R. § 7701, seeking judicial instructions and approval of a proposed settlement.

Index No. 651786-2011

Assigned to: Kapnick, J.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO SHOW CAUSE WHY THE COURT SHOULD NOT STRIKE THE OBJECTORS' JURY DEMAND (DOC. 703)

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INTRODUCTION

After nearly two years of proceedings in this matter, and on the eve of a final hearing, AIG and certain other objectors (the "Objectors") have asserted, for the first time, that this wholly equitable proceeding must be tried before a jury. This jury demand, the latest in a long series of thinly veiled attempts to interfere with and delay a prompt resolution of this matter, is frivolous. It is flatly contrary to well established New York law, and it should be stricken.

This proceeding – in which The Bank of New York Mellon ("BNYM") as trustee of 530 securitization trusts has invoked the Court's equitable powers seeking a traditional equitable remedy (judicial approval of a trustee's exercise of discretion) – is an equitable proceeding. The relevant authorities (including the New York Court of Appeals) are unanimous on this point. This ends the inquiry. Decades of New York case law make clear that there is no right to a jury trial in an equitable proceeding, and none of the irrelevant cases cited by the Objectors supports their demand that the Court deviate from this well established rule. Accordingly, the Objectors' jury demand is meritless and should be stricken.

ARGUMENT

I. There is No Right to a Jury Trial in This Equitable Proceeding

As the Objectors acknowledge, "[t]he determination of whether a claim entitles the claimant to a trial by jury begins with an analysis of whether the right to a jury historically attached to that claim." Objectors' Brief at 2. As one court has explained it:

> Since the merger of law and equity, few situations remain in which the courts are required to make distinctions between what would once have been an action at law and what would have been a suit in equity. One of these situations is the determination of whether a litigant is entitled to a trial by jury.

Hudson View II Assoc. v. Gooden, 222 A.D.2d 163, 164 (1st Dep't 1996).

The distinction between law and equity is critical because New York law is clear: "In an action in equity there is no right of trial by jury." *Jamaica Sav. Bank v. M.S. Investing Co.*, 274 N.Y. 215, 221 (1937) (emphasis added). Decades of New York case law support this plain, and controlling, rule.[1]

In this Article 77 proceeding, BNYM seeks a traditional equitable remedy long made available to trustees by courts of equity: judicial direction, instruction, and approval regarding matters of trust administration. As one leading treatise has explained it, "courts of equity in the exercise of their jurisdiction over the administration of trusts have been accustomed to give instructions to trustees at their request as to their duties and powers. A trustee is not compelled to act at his peril in the administration of the trust. He need not act first and discover later whether his act was in breach of trust. He is entitled to the instructions of the court as a protection." 4

[1] *See e.g., Phoenix Mut. Life Ins. Co. v. Conway*, 11 N.Y.2d 367, 370 (1962) ("Since the plaintiff brought an action in equity . . . the defendants do not become entitled as a matter of law, constitutionally or otherwise, to a trial by jury."); *Centrifugal Assocs, Inc. v. Highland Metal Indus., Inc.*, 224 A.D.2d 254 (1st Dep't 1996) ("[P]laintiff was not entitled to a jury trial since its action was primarily equitable in nature."); *Kaplan v. Long Island Univ.*, 116 A.D.2d 508, 509 (1st Dep't 1986) ("The critical consideration [in deciding the right to trial by jury] is whether the facts stated show that the action is equitable or legal in nature."); *Pecorella v. Greater Buffalo Press, Inc.*, 107 A.D.2d 1064, 1065-66 (4th Dep't 1985) ("[T]he question of a party's right to an equitable remedy is not a matter for jury determination."); *Gillette v. Warren*, 258 A.D. 847 (4th Dep't 1939) ("The allegations of fact and the demand for relief, which are set forth in plaintiffs complaint, clearly show that this is an action in equity rather than one at law. The appellant, therefore, is not entitled as a matter of right, to a jury trial on the issues which the pleadings present."); *Bernardo Steelco, Div. of Met. Steel Indus., Inc.*, 115 Misc.2d 1020, 1024 (N.Y. Sup. Ct. Queens Cnty. 1982) ("[T]here is no right to a jury trial in an equity action."); N.Y. C.P.L.R. 4101, Practice Commentaries ("As a general rule, a jury trial is available in the law actions – those evolved from the common law – as opposed to those evolved in chancery (equity), which continue to be triable by the court."); Siegel, N.Y. Prac. § 377 (5th ed.) ("[I]f a matter was historically cognizable at equity, where there were no juries, no right to a jury exists today."); 7C Carmody-Wait 2d New York Practice with Forms § 49.8 (2013) ("If the relief demanded is traditionally cognizable in equity, there is not right to a trial by jury for none was available at common law. While actions at law are, as a general matter, subject to constitutional right to a jury trial, equitable actions generally are not, and therefore, a party is not entitled to a jury trial in equitable actions as a matter of right.").

Scott on Trusts § 259, at 406-07 (4th ed. 1989) (emphasis added). The authorities are unanimous that such a proceeding sounds in equity and invokes the equitable powers of the court.[2]

The New York Court of Appeals has recognized that an Article 77 proceeding such as this one, where a trustee seeks approval of a prospective transaction regarding trust property, is one that sounds in equity. *See In the Matter of Scarborough Prop. Corp.*, 25 N.Y.2d 553, 559 (1969). In *Scarborough*, a trustee who wished to purchase trust property for his own account brought an Article 77 proceeding seeking judicial approval of the sale. *Id.* at 555. The Court of Appeals held that the transaction could be approved in an Article 77 proceeding, because the Supreme Court, sitting as a court of equity, had reviewed the transaction and approved the trustee's request. *Id.* at 590. As the Court of Appeals explained, "[t]he reason why the permission or approval of the court is sufficient to justify a sale of trust property to the trustee personally is that a court of equity is a court having general supervision over the administration of trusts, and if the parties are properly represented before it, it has authority to authorize what would otherwise not be permissible." *Id.*, *quoting*, 2 *Scott on Trusts* at 1319 (3d ed. 1967) (emphasis added).

The equitable nature of an Article 77 proceeding seeking approval of a trustee's actions was also recognized in *Matter of Lipin*, 9 Misc.2d 708, 710 (Sup. Ct. N.Y. Cnty. 1957), *aff'd* 6

[2] *See, e.g.,* Bogert, *The Law of Trusts and Trustees* § 559, at 162 (2d ed. 1978) ("As part of its general jurisdiction over trusts, the court of equity has power to instruct and advise the trustee as to his powers and duties, on his request or at the request of a beneficiary. . . . Equity has jurisdiction over all matters relating to trust property, and in the execution and administration of the trust, in all cases of doubt as their rights and liabilities and what their conduct should be, trustees are entitled to and should seek instruction and direction from the court.") (emphasis added); RESTATEMENT (THIRD) OF TRUSTS § 71, cmt. a (2003) ("The power to grant instructions to trustees has long been viewed, in prior Restatements and in most states, as inherent in the equitable powers of courts having jurisdiction over trusts") (emphasis added); Uniform Trust Code § 201, cmt., 7C U.L.A. at 455 ("courts in equity have heard petitions for instructions") (emphasis added).

A.D.2d 1011 (1st Dep't 1958). In *Lipin*, the court was concerned with article 79 of the Civil Practice Act, the predecessor to CPLR Article 77. *Id*. The court explained that the statute was enacted to provide a more expeditious procedure for the traditional equitable proceeding, which "permitted a trustee to voluntarily petition the Chancellor to review his record and approve or disapprove his actions in furtherance of his trust." *Id*. As the *Lipin* court made clear, the enactment of the statute "did not, however, change the inherent nature of the action which is in equity." *Id.* (emphasis added).

The authorities discussed above establish beyond dispute that: (1) there is no right to a jury trial in an equitable proceeding; and (2) the present action, in which BNYM seeks judicial approval of its exercise of discretion as trustee, is a traditional, well recognized, equitable proceeding. Thus, there is no right to a jury trial in this case, so the Objectors' jury demand should be stricken.

II. There Is, in Any Event, No Right to a Jury Trial for Objections to a Settlement Approval Proceeding

Separate and apart from the fact that a jury is not available in this equitable proceeding, there is no authority (and the Objectors have cited none), in New York or elsewhere recognizing a jury trial right for objections to a proposed settlement, in any context. *See In re Estate of Palma*, 17 A.D. 3d 817, 818 (3d Dep't 2005) (affirming denial of objector's demand for a jury trial in a proceeding filed by executor of an estate "seeking advice and direction from the Surrogate's Court . . . to permit compromise" of an estate's claim in part because "in situations where SCPA proceedings are 'essentially equitable in nature,' they do not require jury trials.").[3]

[3] *See also In re Carter Paper Co., Inc.*, 220 B.R. 276, 308 (Bankr. M.D. La. 1998) ("[a]ccording to the logic of the debtor, a debtor or other party in interest who objected to a proposed settlement and compromise of an estate action against a non-party (say, this antitrust claim) would have the right to a jury trial of their objection, as resolution of the underlying claim (legal

Unsurprisingly, neither the First Department nor the Supreme Court that addressed the trustee's Article 77 petition for a settlement approval in *In re IBJ Schroder Bank & Trust Co.* even considered the possibility that any entity other than the Supreme Court would resolve any of the issues raised by the objectors. *See In re IBJ Schroder Bank & Trust Co.*, 271 A.D.2d 322, 322 (1st Dep't, 2000) (remanding the matter "to the IAS court to consider all relevant factors in determining whether such approval is warranted.").

Likewise, in the class action context, courts routinely make factual findings regarding the propriety of conduct by the parties entering into a proposed settlement, without submitting the underlying factual issues to a jury, notwithstanding the fact that a settlement of any class action directly extinguishes the rights of class members against at least one of the settling parties.

III. The Objectors Have Cited No Authority Supporting a Right to a Jury Trial in this Equitable Proceeding

The Objectors' brief ignores both the well-established New York rule that no right to a jury trial exists in an equitable proceeding, and the fact that this Article 77 proceeding is such an equitable proceeding. The Objectors cite no case, because there is none, where a New York court sitting in equity – whether asked to give instruction or direction to a trustee, or otherwise – has held that a right to a jury trial on disputed factual issues exists in an equitable proceeding. Instead, the Objectors premise their arguments on misread cases, misstatements of the law, and inapposite authorities that do not support their 11th hour jury demand. Each of these cases is discussed below.

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in nature) would be required before this Court could determine whether to approve a proposed settlement and compromise. Clearly, this is not correct.").

A. There is No Support for the Objectors' Assertion that Factual Issues Raised in Equitable Proceedings Are Subject to a Right of Jury Trial

Relying on a single decision from the Supreme Court, from Bronx County, the Objectors claim that "in an equitable proceeding, the jury determines those disputed issues that are triable by right of jury, 'such as bad faith or good faith,' which must be established before the court determines whether the equitable relief should be granted." Objectors' Brief at 7, *citing In re Application of Schapira*, 2006 WL 2353194 (N.Y. Sup. Ct. Bronx Cnty. 2006). Were this the actual holding in *Schapira* – which it is not – it might be worthy of note because such a holding would run counter to decades of New York case law that no right to a jury trial exists, on any issue, in an equitable proceeding. *See* Section I, *supra*. The holding in *Schapira* does not, however, remotely resemble the Objectors' assertion. To the contrary, it supports the opposite conclusion.

In *Schapira*, a shareholder sought mandamus relief compelling the inspection of corporate records, and the question before the court was whether the claimant was entitled to a jury trial on the issue of its good faith (a prerequisite for granting such relief). *Schapira*, 2006 WL 2353194, at * 1. After noting that the question turned on whether the right to inspection of corporate records was legal or equitable, the *Schapira* court held that it was *legal*, not equitable, *and for this reason* held that the underlying factual issue of good faith was the proper subject of a jury trial in the proceeding. *Id*. at 2-3.[4]

Thus, the *Schapira* holding does *not*, as the Objectors claim, stand for the novel proposition that underlying factual issues in an equitable proceeding are to be tried to a jury.

[4] "In a mandamus proceeding for enforcement of an established legal right, as here, the court makes the ultimate determination whether and how to order the performance of the legal duty. Nevertheless, where facts that are disputed must be established, such as bad faith or good faith, to confer the legal right on the claimants that entitle them to relief ordered by the court, those facts are triable by a jury." *Id*. at *3 (emphasis added).

Instead, *Schapira* supports the opposite conclusion. Indeed, if the *Schapira* court believed that underlying factual issues were tried to juries in both legal and equitable proceedings, there would have been no need for the court to take on the daunting task of unearthing the answer to the question, "buried in the law of earlier centuries," whether the right to inspect corporate records was legal or equitable, because the result would have been the same regardless of the answer. *Id.* at * 1.

B. The Objectors' Assertion that Factual Issues Underlying Equitable Defenses Are Tried to a Jury is Irrelevant, and Wrong

Next, the Objectors argue that factual issues underlying equitable defenses, asserted in legal actions, are subject to a right to jury trial. Objectors' Brief at 7. In making this assertion, the Objectors ignore the relevant statute and controlling New York Court of Appeals decision (both of which directly contradict their assertion), and direct the Court to a single, cryptic opinion of the Supreme Court, Oneida County as support for their claim. *Id., citing Placentino v. Quinn*, 12 Misc.3d 1057 (N.Y. Sup. Ct. Oneida Cnty. 2006).

In the first instance, even if it was the rule that factual issues underlying equitable defenses had to be tried to a jury in legal proceedings (and it is not), that "rule" would not apply here: no one in this Article 77 equitable proceeding is asserting an equitable defense to anything. More importantly, the Objectors' theory is not a correct statement of the law.

The New York Court of Appeals has made clear that, even in a legal proceeding, factual issues raised by equitable defenses and equitable counterclaims are to be decided by the court and not by a jury. *Mercantile & Gen. Reinsurance Co., plc v. Colonial Assurance Co.*, 82 N.Y.2d 248, 252-53 (1993) ("Under the plain terms of CPLR 4101, when a legal claim is met with an equitable defense or counterclaim, the issues of fact shall be tried by a jury except that equitable defenses and equitable counterclaims are tried by the court, . . . [thus] [a]ll issues

pertaining to th[e] equitable defense and counterclaim, whether matters of fact or law, were to be determined by the Court under CPLR 4101.") (emphasis added, citations and quotations omitted).[5]

The fact that equitable defenses (even when raised in legal cases) are decided by the court, not by a jury, directly contradicts, rather than supports, the Objectors' jury demand here. In the face of clear law that factual issues underlying equitable defenses and counterclaims are decided by a court even in a legal action, it is frivolous to suggest that factual issues underlying equitable remedies are to be decided by a jury in an equitable action.

C. The Objectors' Claim that They are Being Deprived of a Jury Trial Through "Artful Pleading" is Meritless

Finally, the Objectors wrongly claim support for their jury demand by resort to cases holding that a "plaintiff cannot by artful pleading deprive a defendant of his constitutionally guaranteed right to a jury trial by limiting his demand for relief to a declaration of his rights." Objectors' Brief at 3, *citing Gordon v. Cont'l Cas. Co.*, 457 N.Y.S.2d 844, 845 (2d Dep't 1983). No such "artful pleading" is present here. The right of a trustee to seek prospective approval of a proposed action, in order to avoid later criticism or claims by dissenting beneficiaries, is a time honored equitable remedy that has long been available to trustees.[6] *See* Part II, *supra*. This is

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[5] *Accord Hudson View Assoc.*, 222 A.D.2d at 166 ("The practice of submitting equitable defenses to a jury, whether by statutory mandate or as matter of discretion, was eliminated by the enactment of CPLR 4101 providing that 'equitable defenses and equitable counterclaims shall be tried by the court'"), *citing Mercantile & Gen. Reinsurance*, 82 N.Y.2d at 253.

[6] *See, e.g.,* 4 *Scott on Trusts* § 259, at 406-07 (4th ed. 1989) ("courts of equity in the exercise of their jurisdiction over the administration of trusts have been accustomed to give instructions to trustees at their request as to their duties and powers. A trustee is not compelled to act at his peril in the administration of the trust. He need not act first and discover later whether his act was in breach of trust. He is entitled to the instructions of the court as a protection."); RESTATEMENT (SECOND) OF TRUSTS § 192, cmt. d ("If the trustee is in doubt whether he should compromise or submit to arbitration a claim, he may ask the instruction of the court or he may agree thereto conditionally upon the subsequent approval of the court.").

precisely the procedure that was employed with the approval of the New York Court of Appeals in *Scarborough*, where a trustee seeking to purchase trust property obtained prior approval for the sale in an equitable Article 77 proceeding, thus negating any possibility of a later claim by the objecting beneficiary, after the sale. *Scarborough*, 25 N.Y.2d at 555.

No Objector is being deprived of any right to a jury trial on a legal claim against BNYM arising out of its decision to enter into the proposed settlement because BNYM came to this Court before the proposed settlement was consummated, and made its finalization dependent on the Court's approval of BNYM's exercise of discretion.[7] Thus, no Objector has any presently existing claim, subject to a right to a jury trial, arising out of BNYM's decision to enter into the settlement. Rather, just as in *Scarborough*, the very purpose of this equitable Article 77 proceeding is to prevent any such claim from ever arising by either approving the trustee's intended plan of action, or disapproving it and preventing it from ever occurring.[8]

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[7] *See* Settlement Agreement (Doc. No. 3) at ¶ 2(a) ("Where provided for herein, the terms of this Settlement Agreement are subject to and conditioned upon 'Final Court Approval.'").

[8] Thus, the Objectors' citations to *Halladay v. Verschoor*, 381 F.2d 100, 109 (8th Cir. 1967) has no bearing on the question presented. It merely holds that a *trustee's* action for money damages against third party who conspired with a former trustee to defraud the trusts is a legal action, subject to a right to a jury trial. But New York courts have consistently dismissed demands for jury trials in actions by beneficiaries against trustees or estate executors for conduct pertaining to trust administration or breach of trust. *See In re Estate of Blumenkrantz*, 881 N.Y.S.2d 362, 2009 WL 632453, at *2 (N.Y. Sur. Ct. Mar. 12, 2009) ("[w]here . . . the claims against a trustee are made by trust beneficiaries and are grounded in allegations of mismanagement of the trust assets, courts consistently hold that the claims are equitable in nature, and do not entitle the beneficiaries to a trial by jury." (collecting cases)); *id.* at *3 (beneficiaries' claim for monetary payment by way of a "surcharge" against the trustee does not confer a jury trial right); *Matter of Nelson*, 433 N.Y.S.2d 314, 318 (N.Y. Sur. Ct. 1980) ("objections . . . directed at the administration, management and business judgment" of the executor of the estate "are essentially equitable in nature" and objectors' relief is "cognizable only in equity for which historically and traditionally no jury trial is available under any statute or constitution."); *see also* RESTATEMENT (THIRD) OF TRUSTS § 95 (2011) ("The remedies of trust beneficiaries are equitable in character and enforceable against trustees in a court exercising equity powers."); RESTATEMENT (SECOND) OF TRUSTS § 197 cmt. b (1959) ("[Q]uestions of the administration of trusts have always been

The cases relied on by the Objectors simply have no application here. Each of them concerned a situation where a legal claim, subject to a right to a jury trial, was in existence at the time the declaratory judgment action was commenced. In all of them, the complained of breach of a legal duty had already occurred and caused damages.[9] That has not happened here and it will not happen here. If the Court determines that it would be a breach of BNYM's duties as trustee to consummate the settlement, it will not be consummated and no damage will (or even could) occur.

CONCLUSION

Because no right to a jury trial exists in this equitable proceeding, the Objectors, jury demand should be stricken.

Dated: New York, New York
May 9, 2013

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regarded as of a kind which can adequately be dealt with in a suit in equity rather than in an action at law, where questions of fact would be determined by a jury and not by the court."). In any event, here, no action for money damages has been, or could possibly be, asserted against BNYM for entering into the proposed settlement because the settlement has yet to be consummated.

[9] *Gordon*, 457 N.Y.S.2d at 845 (insurer alleged to have breached insuring agreement by failing to pay claims); *Strachman v. Palestinian Auth.*, 73 A.D.3d 124, 125 (1st Dep't 2010) (action to establish ownership of frozen assets); *Utica Mut. Ins. Co. v. Beers Chevrolet Co.*, 250 A.D. 348 (4th Dep't 1937) (auto insurer refused to defend under insurance agreement); *In re Allcity Ins Co.*, 96 Misc.2d 864 (N.Y. Sup. Ct. N.Y. Cnty. 1978) (insurer failed to pay claim under insuring agreement based on alleged lack of notice); *Dairy Queen, Inc. v. Wood*, 369 U.S.469, 473 (1962) (trademark licensee alleged to have breached license agreement by failing to make required payments and continuing to make use of the license after it was terminated).

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