Grossman v Akker
2016 NY Slip Op 31551(U)
August 8, 2016
Supreme Court, New York County
Docket Number: 652402/15
Judge: Joan B. Lobis

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 6

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HOWARD L. GROSSMAN, on behalf of himself and all others similarly situated,

Plaintiff,

Index No. 652402/15

-against-

MICHAEL AKKER, EVELYN F. MURPHY, DAVID JEFFERSON, DEBORAH AGUIAR-VELEZ, THERESA BALOG, SAMUEL M. BEMISS III, G. THOMAS ROGERS, ROBERT DAMANTE and PROSPERITY LIFE INSURANCE GROUP, LLC as successor to SBLI USA MUTUAL LIFE INSURANCE COMPANY, INC.,

Defendants.

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In the Matter of the Application of HOWARD L. GROSSMAN, on behalf of himself and all others similarly situated,

Petitioner,

Index No. 100199/15

-against-

BENJAMIN W. LAWSKY, Superintendent of Financial Services New York Banking Department, ROBERT EASTON, Executive Deputy Superintendent, Insurance Division and DEPARTMENT OF FINANCIAL SERVICES,

Respondents.

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Joan Lobis, J.:

Motions bearing sequence numbers 002 and 003 in the action commenced under index number 652402/15 are consolidated for disposition. Motions bearing sequence numbers 001 and 002 in the special proceeding commenced under index number 100199/15 are consolidated for

disposition.

This is a class action (Class Action) and a special proceeding under Article 78 of the CPLR (Article 78 proceeding), arising in connection with the conversion of SBLI Mutual Life Insurance Company (SBLI) from a mutual life insurance company into a stock life insurance company, pursuant to New York Insurance Law § 7312. In the Article 78 proceeding, respondents Benjamin Lawsky, Robert Easton and the Department of Financial Services move to dismiss the petition of petitioner Howard L. Grossman (Grossman), which seeks an order setting aside a decision by respondents which approved the conversion of SBLI. In motion sequence 002, respondents move for an order granting consolidation of the Class Action and the Article 78 proceeding.

In the Class Action, in motion sequence 003, defendants Michael Akker, Evelyn F. Murphy, David Jefferson, Deborah Aguiar-Velez, Theresa Balog, Samuel M. Bemiss III, G. Thomas Rogers, Robert Damante (collectively, the Individual defendants) and Prosperity Life Insurance Group, LLC (Prosperity) move, pursuant to CPLR 3211 (a) (1) and (7), for an order dismissing the amended complaint. Defendants also move, in sequence 002, for an order granting consolidation of the Class Action and the Article 78 proceeding.

For the reasons stated below, the motions for consolidation are denied as moot. The motion to dismiss the amended complaint is granted. The motion to dismiss the petition is granted.

Parties

Grossman was a policyholder of SBLI, which was a mutual life insurance company organized under the laws of the State of New York. Essentially, a mutual life insurance company is one which is owned by the policyholders (Policyholders), who have voting rights and who receive dividends arising from their ownership interests.

Michael Akker was the President and Chief Executive Officer of SBLI and a member of its board of directors. Robert Damante was an Executive Vice President and the Chief Financial Officer of SBLI and a member of its board of directors.

Defendants Evelyn Murphy, David Jefferson, Deborah Aguiar-Velez, Theresa Balog, Samuel M. Bemiss III and G. Thomas Rogers were also members of SBLI's board of directors. According to the amended complaint, these defendants, along with Akker and Damante, comprised the board of SBLI at the time the plan to convert SBLI was approved. Prosperity is a privately held life and annuity insurance holding company, and is the successor to SBLI.

Benjamin Lawsky was the Superintendent of Financial Services New York Banking Department (Superintendent) when the conversion was approved and one of the parties under whose name the decision to approve the conversion was issued. Robert Easton was Executive Deputy Superintendent, Insurance Division of Financial Services at the relevant time, and was also a

signatory to the decision approving the conversion. The Department of Financial Services is the agency of the State of New York which approved the conversion.

Background

According to the amended complaint, SBLI began in 1939 as The Savings Banks Life Insurance System. It was incorporated as SBLI Mutual Life Insurance Company of New York, Inc. in 1999 and was licensed to issue life insurance, annuities, and accident and health insurance on December 28, 1999.

The complaint alleges that, at some point thereafter, SBLI invested a significant portion of its assets in mortgage-backed securities (MBS). However, the value of such MBS's collapsed in 2008, which caused SBLI's financial condition to deteriorate to the point that the New York Superintendent of Insurance ordered SBLI to stop writing new insurance policies.

The complaint states that, in March 2012, Prosperity contacted SBLI with a proposal and plan (Plan) for a sponsored demutualization in which Prosperity, through a subsidiary, would acquire SBLI. Specifically, SBLI would be converted to a domestic stock company, which would then issue stock to be acquired by Prosperity.

The parties executed a Stock Purchase and Investment Agreement in October 2012,

and on November 25, 2013, SBLI's Board of Directors unanimously approved a merger agreement to complete the acquisition. The merger agreement was executed on November 27, 2013 and provided, as relevant here, for $36 million to be paid to the Policyholders.

In order for the demutualization and merger to be effective, New York Insurance Law § 7312 required: (1) approval by three-fourths of the board of directors upon finding it fair and equitable to the Policyholders; (2) approval by two-thirds of participating voting Policyholders; and (3) a determination by the Superintendent, after a public hearing, that the demutualization plan is fair and equitable to the Policyholders.

In July 2014, the SBLI Board approved the Plan, and, soon thereafter, mailed an information booklet (Information Booklet) to the Policyholders, which included a copy of the Plan as well as a notice of public hearing, as required by Insurance Law § 7312 (i).

On August 21, 2014, the Superintendent held a public hearing to consider: 1) the reasons and purposes for SBLI's demutualization; 2) the fairness of the Plan; 3) whether the reorganization was in SBLI's interest and in the interest of the Policyholders; and 4) whether demutualization was detrimental to the public.

Five witnesses spoke in support of the Plan, while eight Policyholders spoke in

opposition. The Superintendent also received 13 written submissions, six of which supported the Plan and seven of which opposed it, including written submissions from Grossman in opposition. One of the main issues raised by opponents was whether the compensation provided to Policyholders was too low.

The Superintendent approved SBLI's demutualization in a 41-page written decision dated October 8, 2014. The Superintendent found that the Plan satisfied Insurance Law § 7312 because, among other things, it provided fair and equitable compensation to the Policyholders, it was not detrimental to the public, it did not violate the Insurance Law and it left SBLI with sufficient resources for its future solvency.

Relevant here, the Superintendent also reviewed and approved the contents of the Information Booklet, determining that it provided sufficient information to SBLI's Policyholders to enable them to make an informed decision about the merits of the Plan.

The Policyholder vote was held on August 28, 2014. Out of the 186,211 Policyholders eligible to vote, 34,769 Policyholders actually voted with respect to the Plan. 81.82% of the voting Policyholders voted in favor of the Plan. 18.18% voted against the Plan.

On February 6, 2015, Grossman commenced the instant Article 78 proceeding against

the Superintendent and the individual officials who approved the Plan. Grossman seeks a determination that the Superintendent's approval of the Plan was improper, and seeks rescissory damages.

On July 7, 2015, Grossman commenced the instant Class Action on behalf of himself and other Policyholders against SBLI's Board of Directors and against Prosperity. The amended complaint asserts three causes of action. The first cause of action alleges: 1) that defendants violated section 7312 of the Insurance Law because the Information Booklet failed to provide Policyholders with sufficient information to cast a meaningful vote; and 2) that the terms of the Plan were not fair and equitable to the Policyholders.

The second cause of action is for breach of the implied covenant of good faith and fair dealing. Specifically, it alleges that the Policyholders entered into contracts with SBLI, and that defendants breached the implied covenant of good faith and fair dealing in those contracts by disseminating an insufficient Information Booklet and by approving an unfair plan for SBLI's demutualization and reorganization.

The third cause of action is against Prosperity for unjust enrichment. The amended complaint alleges Prosperity obtained SBLI through the Plan at less than fair value.

Consolidation

As noted above, the defendants in the Class Action and the respondents in the Article 78 proceeding have moved for consolidation of the two matters. However, at oral argument, on March 29, 2016, the parties to both the Article 78 proceeding and the Class Action agreed that, in lieu of consolidation, the parties would conduct both cases in a coordinated manner. Therefore, the motions to consolidate are denied as moot.

Class Action/Collateral Attack

Defendants move, pursuant to CPLR 3211 (a) (1) and (7), for an order dismissing the amended complaint in the Class Action. As set forth above, plaintiffs assert three causes of action, each of which arises from plaintiffs' central contention that the terms of the demutualization and conversion of SBLI were not fair or equitable to the Policyholders and that the Information Booklet failed to provide Policyholders with sufficient information to cast a meaningful vote.

Defendants contend that these causes of action must be dismissed because they constitute an impermissible collateral attack on the Superintendent's approval of SBLI's demutualization Plan. Specifically, defendants argue that the determinations as to whether the Plan was fair, and whether the Information Booklet was sufficient, were solely within the purview of the Superintendent in considering whether to approve the Plan. As such, defendants contend that any party challenging the Superintendent's determination that the Plan was fair, or that the Information

Booklet was sufficient, may only do so by means of an Article 78 proceeding, and plaintiffs are therefore precluded from relitigating these issues in a plenary action.

Plaintiffs contend that the collateral attack doctrine does not apply here because: 1) nothing in Insurance Law § 7312 indicates an intent to extinguish the rights of Policyholders who object to a demutualization plan to assert claims in a plenary action; and 2) the Superintendent's decision was not the result of a quasi-judicial proceeding which permitted Policyholders a fair opportunity to be heard prior to the Superintendent making his determination.

For the reasons stated below, the court finds that the three causes of action in the amended complaint constitute an impermissible collateral attack on determinations made by the Superintendent in approving the Plan, and, as such, the amended complaint must be dismissed. To sustain these causes of action would permit plaintiffs to relitigate, through a plenary action, issues that were previously decided by the Superintendent, as required by Insurance Law § 7312, and which therefore must be challenged in an Article 78 proceeding.

It is well-settled that a party challenging the Superintendent's approval of a demutualization plan under Insurance Law § 7312 must do so in a proceeding under CPLR article 78. See Fiala v. Metropolitan Life Ins. Co., 6 A.D.3d 320, 321 (1st Dep't 2004); Financial Services Law § 308; CPLR 7801. This is because, in the context of a demutualization plan, "'the Legislature

expressly placed the determination as to whether a plan of reorganization complied with the statute and was fair and equitable to policyholders in the (exclusive jurisdiction) of the Superintendent [citation omitted].'" ABN AMRO Bank, N.V. v. MBIA Inc., 17 N.Y.3d 208, 225 (2011)(ABN AMRO).

Under the collateral attack doctrine, a party is precluded from indirectly challenging the Superintendent's approval of a demutualization plan through a plenary action. See Fiala v. Metropolitan Life Ins. Co., 6 A.D.3d at 321; Chatlos v. MONY Life Ins. Co., 298 A.D.2d 316 (1st Dep't 2002). In other words, because the Superintendent has exclusive jurisdiction to determine whether a plan complies with the statute, litigants may not use a plenary action as a means to achieve a different result, but rather, must avail themselves of CPLR Article 78.

The collateral attack doctrine is limited, however, to the extent that "where a claim challenges the sufficiency of a plan approved by the Superintendent . . . . the preclusive effect of the Superintendent's decision is necessarily limited by the scope of the Superintendent's review." Aurelius Capital Master, Inc. v. MBIA Ins. Corp., 695 F. Supp. 2d 68, 74 (S.D.N.Y. 2010), citing Fiala, 6 A.D.3d at 321. Thus, a plaintiff "cannot be precluded from litigating an issue upon which the Superintendent did not pass." Aurelius Capital Master, Inc., 695 F. Supp. 2d at 74.

In the case at hand, it is undisputed that, before the public hearing was held, SBLI was

required to send the Policyholders "a true and complete copy of the plan, or . . . a summary thereof approved by the Superintendent, and such other explanatory information as the superintendent shall approve or require." See Insurance Law § 7312 (i). SBLI was then required to demonstrate to the Superintendent that the Plan was fair and equitable to the Policyholders. See Insurance Law § 7312 (c), (j).

Relevant here, SBLI was also required to send a true and complete copy of the Plan to the Policyholders before the vote on whether to approve or disapprove the Plan, and the Superintendent was authorized to supervise such vote. See Insurance Law § 7312 (k) (1) and (3).

In the Decision, the Superintendent considered both whether the Information Booklet, which contained a copy of the Plan, was sufficient to permit voters to make an informed decision and ultimately, whether the Plan was fair and equitable to the Policyholders. The Superintendent found that the Information Booklet, along with related policyholder notices and accompanying documents, "contained sufficient information about the proposed Demutualization to enable Eligible Policyholders to make an informed decision regarding the Plan and, for that reason, were approved by the Department pursuant to Sections 7312 (i) and (k) (l)." Decision at 38. The Superintendent then found, after a detailed analysis, that the Plan was fair and equitable to the Policyholders. Id. at 36.

As described above, each cause of action in the amended complaint arises directly from plaintiffs' contentions that: 1) the terms of the demutualization and conversion of SBLI were not fair or equitable to the Policyholders; and 2) that the Information Booklet failed to provide Policyholders with sufficient information to make an informed decision in voting whether to approve the Plan.

However, both of these issues were necessarily addressed and decided by the Superintendent in approving the Plan, under his exclusive jurisdiction to determine whether the demutualization of SBLI complied with the statute. Therefore, for this court to sustain plaintiffs' causes of action asserted in the Class Action would impermissibly enable the Class Action plaintiffs to collaterally attack the Superintendent's decision through a plenary action, rather than through an Article 78 proceeding. See Fiala, 6 A.D.3d at 321. This would clearly violate the plain language of Insurance Law § 7312 and plaintiffs' claims must therefore be dismissed.

Despite the foregoing, plaintiffs argue that the amended complaint should not be dismissed because there is nothing in Insurance Law § 7312 which indicates an intent to extinguish all rights of Policyholders who object to a demutualization plan to assert claims in a plenary action. However, that is not the issue here and defendants do not make such an argument.

It is clear that certain claims may arise in connection with a demutualization plan that

were not within the purview of the Superintendent, and not addressed by the Superintendent, and, as such, are sustainable in a plenary action. See Fiala, 6 A.D.3d at 321; see also ABN AMRO, 17 N.Y.3d at 225 (sustaining causes of action under the Debtor and Creditor Law in connection the corporate restructuring of an insurance company, which restructuring was approved by the Superintendent). However, this is not such a case, as discussed above, because the issues underlying plaintiffs' claims were specifically delegated to the Superintendent by the Insurance Law.

Plaintiffs also argue that their claims should not be dismissed because the public hearing conducted by the Superintendent here was not quasi-judicial in nature. This argument is also unpersuasive. "An administrative decision is quasi-judicial in character when it is rendered pursuant to the adjudicatory authority of an agency to decide cases brought before its tribunals employing procedures substantially similar to those used in a court of law [internal quotation marks and citations omitted]." ABN AMRO, 17 N.Y.3d at 226. Here, it is undisputed that the public hearing and proceeding conducted by the Superintendent did not rise to the full level of those employed in a court of law. However, plaintiffs have not demonstrated that a quasi-judicial proceeding was required under Insurance Law § 7312.

Plaintiffs' argument arises from the decision in ABN AMRO, 17 N.Y.3d 208, in which the Court found that policyholders were not collaterally estopped from bringing claims in a plenary action under the Debtor and Creditor Law in connection with the corporate restructuring of

an insurance company, where the restructuring was approved by the Superintendent. In that case, the Court found that the plaintiffs' claims were sustainable for two reasons. First, nothing in the Insurance Law placed the review of claims asserted under the Debtor and Creditor Law under the exclusive jurisdiction of the Superintendent. Therefore, the statute did not specifically exclude the assertion of such claims in a plenary action.

Furthermore, even if the Superintendent had addressed the Debtor and Creditor claims, which it did not, the plaintiffs could not be collaterally estopped from asserting such claims because they had not had a full and fair opportunity to contest the issues. Specifically, for collateral estoppel to apply, the proceeding conducted by the Superintendent would have to have been quasi-judicial in nature, which, as described above, would be one employing procedures substantially similar to those used in a court of law. Id. at 226.

In finding that the plaintiffs did not have a full and fair opportunity in that case, the Court noted that the corporate defendant had submitted a private application to the Superintendent and the Superintendent accepted the truth of defendants' submissions. Id. The Court also noted that the Superintendent did not conduct public hearings or provide public notice before rendering his determination. Id.

The case at hand is distinguishable from the decision in ABN AMRO. Here, the

issues underlying plaintiffs' causes of action were specifically placed within the exclusive purview of the Superintendent, to be decided pursuant to the procedures set forth in the Insurance Law. Further, such procedures, unlike those at issue in ABN AMRO, provided plaintiffs with an opportunity to be heard by the Superintendent before the Plan was approved.

Specifically, a copy of the Plan was provided to the Policyholders along with notice of the public hearing. Moreover, the Superintendent held such a public hearing and Grossman, among others, spoke at the hearing and submitted written opposition to the Plan to the Superintendent. In fact, it is undisputed that the objections raised in Grossman's submission, particularly as to the fairness of the Plan, were directly considered by the Superintendent and rejected. Moreover, unlike ABN AMRO, the Policyholders here were given a chance to vote to approve or disapprove the Plan, and they voted overwhelmingly to approve it. In light of the foregoing, the court finds that plaintiffs have not demonstrated that the public hearing held by the Superintendent had to be quasi judicial in nature as described in the ABN AMRO decision.

In sum, the Court finds that the issues underlying plaintiffs' causes of action, i.e., whether the terms of the demutualization and conversion of SBLI were fair or equitable to the Policyholders and whether the Information Booklet provided Policyholders with sufficient information to make an informed decision in voting whether to approve the Plan, are within the exclusive jurisdiction of the Superintendent to determine in the first instance. As such, they must

be challenged pursuant to CPLR Article 78, as Grossman has done under a separate index number, rather than in a plenary action. Therefore, the motion to dismiss the amended complaint is granted and the amended complaint is dismissed.

Article 78

Grossman commenced the instant Article 78 proceeding in February 2015, against the Superintendent and the individual officials who approved the Plan. Grossman seeks a determination that the Superintendent's approval of the Plan was improper, and seeks rescissory damages. Respondents move to dismiss the petition for failure to state a cause of action. For the reasons stated below, the motion is granted and the petition is dismissed.

The petition sets forth two causes of action. The first cause of action alleges that the Superintendent abused his discretion by electing, under such discretion, to hold an adjudicatory hearing, i.e. a quasi-judicial hearing, rather than an informational public hearing as required by Insurance Law § 7312 (i). The petition further alleges that, in holding such a hearing, the Superintendent failed to follow the procedures for such adjudicatory hearings as set forth in the New York State Administrative Procedure Act (APA), § 301, et seq.

This cause of action is dismissed. Insurance Law § 7312 (i) provides that, in the context of a demutualization,

> "The superintendent shall hold a public hearing upon the fairness of the terms and conditions of the plan of reorganization, the reasons and purposes for the mutual life insurer to demutualize, and whether the reorganization is in the interest of the mutual life insurer and its policyholders, and not detrimental to the public."

It further provides, in relevant part, that

> "Notice stating the time, place and purpose of the hearing shall be mailed by the mutual life insurer to each policyholder entitled to notice of the hearing . . . . Such notice shall be preceded or accompanied by a true and complete copy of the plan, or by a summary thereof approved by the superintendent, and such other explanatory information as the superintendent shall approve or require."

Here, it is undisputed that the Superintendent held a public hearing after proper notice to the Policyholders. Further, it is undisputed that several of the Policyholders, including Grossman, submitted oral and/or written arguments against the Plan, which submissions were directly considered by the Superintendent in the Decision. In light of these facts, it is clear that the Superintendent followed the requirements of section 7312.

Grossman's assertion that the Superintendent, in fact, held an adjudicatory hearing, is unpersuasive. First, the Decision specifically states that "[c]ontrary to Mr. Grossman's assertion, the public hearing required by Section 7312(i) does not constitute an adjudicatory proceeding under the New York State Administrative Procedure Act." Decision at 10, n. 33. Moreover, it is well-established that public hearings do not generally rise to the level of quasi-judicial hearings. See

Tuccio v. Central Pine Barrens Joint Planning and Policy Commn, 67 A.D.3d 689, 692 (2d Dep't 2009); Yilmaz v. Foley, 63 A.D.3d 955, 956 (2d Dep't 2009).

Nothing in the record here indicates that the Superintendent held an adjudicatory hearing, such as would be governed by the APA. The record indicates that the Superintendent held a public hearing as set forth in the Insurance Law, and that Grossman availed himself of the opportunity to participate in that hearing and to have his arguments considered by the Superintendent.

The court notes Grossman's assertion that the hearing held by the Superintendent was flawed because the Superintendent failed to accept a supplemental submission from Grossman, which, Grossman admits, was submitted after the deadline for such submissions. However, the Decision specifically states that "on September 12, 2014, over a week after the hearing record closed, the Department received a supplemental submission from Howard Grossman. This submission was not made a part of the hearing record but was considered as part of the Department's review and analysis of the Sponsored Demutualization." Decision at 10, n 33. Thus, Grossman's assertion that the Superintendent failed to consider his supplemental submission is unpersuasive.

In light of the foregoing, the first cause of action in the petition is dismissed.

Grossman's second cause of action asserts that the Superintendent's approval of the Plan is not supported by substantial evidence, under CPLR 7803 (4). Specifically, the petition alleges that the Superintendent erred in finding the compensation provided to the Policyholders was fair and equitable. The gravamen of the petition is that the amount of such compensation was derived from an inaccurate assessment of SBLI's financial health at the time of the demutualization. Grossman alleges that, after the Plan was conceived by the SBLI's board, SBLI's financial status improved, as the market for mortgage-backed securities improved. Thus, the petition contends that the Policyholders are entitled to an increased amount of monetary compensation.

As a threshold matter, the court finds that whether the Decision is supported by substantial evidence is not the appropriate standard of review here. As discussed above, the public hearing held by the Superintendent was not quasi-judicial in character, "employing procedures substantially similar to those used in a court of law." ABN AMRO, 17 N.Y.3d at 226. As such, review under CPLR 7803 (4) is not appropriate. See Board of Trustees of Inc. Vil. of E. Williston v. Board of Trustees of Inc. Vil. of Williston Park, 119 A.D.3d 679, 679 (2d Dep't 2014).

Instead, the court finds that review of the Superintendent's decision is appropriate under CPLR 7803 (3), which provides, in relevant part that the court must review whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion. Grossman contends that the petition should be

granted, in any event, because the Superintendent's decision was arbitrary and capricious and not supported by the facts.

"The test for whether an administrative agency's determination is arbitrary and capricious is whether the determination is without sound basis in reason and is generally taken without regard to the facts." Muhammad v. Zucker, 137 A.D.3d 429, 430 (1st Dep't 2016)(internal quotation marks omitted), quoting Pell v. Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 N.Y.2d 222, 231 (1974); Mankarios v. New York City Taxi & Limousine Commn., 49 A.D.3d 316, 317 (1st Dep't 2008).

"[I]t is not the role of the court to weigh the desirability of the proposed action, choose among alternatives, resolve disagreements among experts, or substitute its judgment for that of the agency." Coalition Against Lincoln W., Inc. v. Weinshall, 21 A.D.3d 215, 222 (1st Dep't 2005) (internal quotation marks and citations omitted); see Roosevelt Islanders for Responsible Southtown Dev. v. Roosevelt Is. Operating Corp., 291 A.D.2d 40, 54 (1st Dep't 2001). Here, the petition fails to demonstrate that the Decision is arbitrary and capricious or without sound basis in reason or that it was made without regard to the facts. The court finds that the Superintendent based his decision on a detailed analysis of the merits of the Plan and reasonably found that the Plan, particularly the amount of Policyholder compensation, was fair and equitable to the Policyholders.

In the Decision, the Superintendent recognized that, "[w]hile all of the statutory factors must be satisfied, the issue of whether the Plan fairly and equitably compensates SBLI's policyholders is the overarching concern of Section 7312, and is the fundamental issue for the Department's review." Decision at 12. In order to determine whether the compensation was fair, the Superintendent considered expert opinions as well as the testimony and objections of Policyholders, including Grossman.

The Superintendent conducted a detailed analysis of SBLI's financial history, including its dividend history, as well as its current financial status and its financial prospects. Based on all these factors, the Superintendent first determined that it was in the best interests of SBLI to be reorganized and sold to a third party, rather than to maintain the status quo or to be placed in receivership.

In determining whether the specific amount of compensation was fair, the Superintendent considered similar cases of demutualization and examined the amount of compensation received in such cases. He noted that SBLI had been searching for a buyer since at least 2004, but had only found one prospect, i.e. Prosperity. The Superintendent noted that

> "Valuing a small life insurance company such as SBLI is imprecise in that there is a limited market for such companies, and, thus few similar transactions available to use as benchmarks. The limited market is due to the fact that the potential profit margin to be realized from acquiring a small life insurance company is small while the potential loss is large, resulting in an uncertain or even unfavorable

risk/reward calculus."

He also noted that Prosperity's first offer was for only $12.5 million in consideration to eligible Policyholders. However, that offer eventually improved to $36 million, on top of $4 million in expenses. He further stated that, the fact that Prosperity's offer was by far the best that the company had "received either before or after the financial crisis tends to support a determination that the Policyholder Consideration is fair and equitable."

The Superintendent also considered the risk to Prosperity in purchasing SBLI. He stated that

> "In acquiring SBLI, Prosperity will need to rebuild a sales platform and SBLI's name recognition by developing a viable market strategy, constructing products suitable to that strategy and hiring and training sales staff to sell these products. It will have to grapple with the inadequate records left behind by the SBLI System and confront an unusually high expense structure that, despite the fact that SBLI does not have any acquisition expenses, ranks in the fourth quartile for per policy expenses."

"In other words, Prosperity is spending $40 million - $36 million of which will go to Eligible Policyholders - for the opportunity to right the SBLI ship." Decision at 23.

Based on these factors, and others, the Superintendent reasonably found that the amount of compensation was fair and equitable to the Policyholders.

The Superintendent also analyzed the sufficiency of the "Closed Block", which "is an accounting mechanism that provides certain protections to owners of traditional dividend-paying life insurance policies. Assets are allocated to the Closed Block to produce income which, together with anticipated revenue from the Closed Block Policies, is reasonably expected to be sufficient to pay claims, expenses, and to maintain SBLI's current dividend scale." Decision at 18.

The Superintendent found that the amount of funds in the Closed Block set forth in the Plan, approximately $900 million, "are estimated to be sufficient to pay for the claims and dividends owed on the Closed Block Policies . . . ." Decision at 26. Grossman has not demonstrated that this finding is without basis in reason or was made without regard to the facts of this case.

With regard to the issue of funding the Closed Block with sufficient assets to maintain SBLI's current dividend scale, the Superintendent acknowledged the complaint of some of the Policyholders that the current dividend scale was lower than its historical dividend scale. However, the Superintendent reasonably found that the current dividend scale was the correct means by which to measure such funding because it reflected SBLI's current experience on its in-force policies. Id.

Grossman contends that, in any event, the Superintendent's analysis is flawed because the financial markets began to improve after the Plan was developed. Specifically he contends that, by 2013, the market for mortgage-backed securities had improved, which meant that SBLI's

financial condition was improving. He contends that the Superintendent failed to account for this change. However, in the Decision, the Superintendent specifically addressed this issue, stating

> "Mr. Grossman . . . . believes that the terms of the Sponsored Demutualization are stale, as Prosperity and SBLI entered into an agreement in 2012. However, the terms of the Sponsored Demutualization have changed since that time. The proposal first submitted to the Department called for SBLI policyholders to receive $12.5 million in policyholder consideration. The Department deemed the Policyholder Consideration to be insufficient under the circumstances. The current terms of the Plan did not come together until November 2013.

As set forth above, the court's role here is not to substitute its judgment for that of the Superintendent, but to determine whether his decision was arbitrary and capricious. Petitioner has not made such a showing. Based on the foregoing review of the Decision, it is clear that the Superintendent's approval of the Plan had a sound basis in reason and was not made without regard to the facts of this case.

Finally, the court notes that the parties sharply dispute two other issues. Specifically, they dispute whether the petition would be moot because, as argued by respondents, SBLI's conversion cannot be undone, and whether rescissory damages would be available to respondents. However, in light of the dismissal of the petition, the court need not address those issues. Accordingly, it is

ORDERED that the motion by defendants Michael Akker, Evelyn F. Murphy, David

Jefferson, Deborah Aguiar-Velez, Theresa Balog, Samuel M. Bemiss III, G. Thomas Rogers, Robert Damante and Prosperity Life Insurance Group, LLC for an order dismissing the amended complaint is granted and the amended complaint is dismissed; and it is further

ORDERED that defendants' motion for consolidation is denied as moot; and it is further

ORDERED the motion by respondents Benjamin W. Lawsky, Robert Easton and Department of Financial Services move to dismiss the petition is granted; and it is further

ADJUDGED that the petition is denied and the proceeding is dismissed; and it is further

ORDERED that respondents' motion for consolidation is denied as moot; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

DATED: August 8, 2016

ENTER:

Joan B. Lobis, J.S.C.