VERMONT SUPERIOR COURT
Windsor Unit
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CIVIL DIVISION
Case No. 22-CV-01710

Michael Bandler v. Bank of New York Mellon Trust

DECISION ON MOTIONTO DISMISS

Plaintiff Michael Bandler filed this action seeking a declaration that a suit filed by Defendant Bank of New York Mellon Trust Company ("BNY Mellon") in the Rutland Unit "may not conclude in Defendant's favor" for a variety of reasons, all arising out of a note and mortgage that BNY Mellon now holds but as to which Mr. Bandler is a stranger. BNY Mellon moves to dismiss, arguing that Mr. Bandler lacks standing, and that in any event, this suit is an impermissible collateral attack on the Rutland action. The court grants the motion.

According to his complaint, Mr. Bandler is one of the current record owners of property located in Benson. The other record owner is Debra Tyler; she and her late husband acquired title in 1977. At some point, she and her husband executed a promissory note secured by a mortgage on the property. BNY Mellon is the current holder of the note and assignee of the mortgage. BNY Mellon has filed suit in the Rutland Unit, seeking to foreclose on the mortgage. BNY Mellon did not name Mr. Bandler in that suit; when he sought to intervene, the Rutland Unit denied the request. He then sought an interlocutory appeal, which the Supreme Court denied, in part because it was untimely.

Mr. Bandler's complaint asserts six counts. The first five assert defenses to the action on the note and mortgage. Those defenses, however, are personal to Ms. Tyler; the only allegation in each count that pertains to Mr. Bandler is that he "may suffer a substantial financial loss, if the Rutland Suit proceeds and [BNY Mellon] prevails in whole or part." The obligations that Mr. Bandler claims were breached were owed, if at all, only to Ms. Tyler. Even the relief he seeks is personal to Ms. Tyler; in each count, he seeks a declaration that the Rutland action (which names only Ms. Tyler) may not conclude in BNY Mellon's favor because of the various alleged breaches of obligations owed to Ms. Tyler. The sixth count—inexplicably labeled Count VII—is a baldfaced collateral attack on the Rutland action; it claims the Rutland Unit has denied his due process rights.

The first five counts fail for lack of standing. To survive a motion to dismiss, Mr. Bandler's claims must meet the "case or controversy" requirement. *See Town of Cavendish v. Vermont Pub. Power Supply Auth.*, 141 Vt. 144, 147 (1982) ("The 'actual controversy' requirement is jurisdictional, and may not be waived by either the parties or the tribunal.). One component of this requirement is standing. *Parker v. Town of Milton*, 169 Vt. 74, 77 (1999). "To meet this burden, a plaintiff 'must show (1) injury in fact [in the form of an invasion of a legally protected interest], (2) causation, and (3) redressability.' " *Turner v. State*, 2017 VT 2, ¶ 11, 204 Vt. 78 (quoting *Brod v. Agency of Nat. Res.*, 2007 VT 87, ¶ 9, 182 Vt. 234); *see also Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (plaintiff must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.") (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61).[1] Moreover, "[t]he requirement of an actual or justiciable controversy means that the consequences of the dispute must be so set forth that the court can see that they are not based upon fear or anticipation but are reasonably to be expected." *Anderson v. State*, 168 Vt. 641, 644 (1998) (quotation omitted). "A claim is not constitutionally ripe if the claimed injury is conjectural or hypothetical rather than actual or imminent." *Turner*, 2017 VT 2, ¶ 9; *see also Spokeo*, 578 U.S. at 338 (injury must be " 'actual or imminent, not conjectural or hypothetical,' ") (quoting *Lujan*, 504 U.S. at 560).

In the present posture of the case, the court must read Mr. Bandler's allegations liberally. "In determining whether a complaint can survive a motion to dismiss under Rule 12(b)(6), courts must take the factual allegations in the complaint as true, and consider whether it appears beyond doubt that there exist no facts or circumstances that would entitle the plaintiff to relief." *Colby v. Umbrella, Inc.*, 2008 VT 20, ¶ 5, 184 Vt. 1 (quotation omitted). A court need not accept as true, however, "conclusory allegations or legal conclusions masquerading as factual conclusions." *Id.* ¶ 10 (quoting *Smith v. Local 819 I.B.T. Pension Plan*, 291 F.3d 236, 240 (2d Cir.2002)). Thus, at the pleading stage, a plaintiff still bears the burden of alleging facts that "plausibly" demonstrate each element of standing. *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 996 (11th Cir. 2020).

Even read most charitably, Mr. Bandler's first five counts fail to meet this standard. He alleges no injury in fact. Rather, the only injury he alleges is hypothetical, and attenuated: the "substantial financial loss" he "may suffer" "if the Rutland Suit proceeds and [BNY Mellon] prevails in whole or in part." He alleges no action by BNY Mellon that has caused this injury; rather, it is the action of the

[1] The Vermont Supreme Court "has adopted the constitutional and prudential components of the standing doctrine enunciated by the United States Supreme Court." *Schievella v. Dep't of Taxes*, 171 Vt. 591, 592 (2000) (mem.). Thus, Vermont courts properly consider federal precedent in determining the contours of the doctrine.

Rutland Unit, in allowing that case to proceed without him, that "may" cause injury. Finally, because, as discussed below, a collateral attack on the Rutland suit is impermissible, he has not alleged redressability.

Even if Mr. Bandler has standing—which he does, at least arguably, for Count VII—all six counts fail for an equally fundamental reason. Mr. Bandler's suit is a bald-faced attack on the Rutland Unit's exercise of jurisdiction over the Rutland action. Each count seeks to have this court substitute its judgment for that of the Rutland Unit. Even if he had standing to request such relief, Mr. Bandler's complaint would fail to state a claim. "It is firmly established that judgments that appear to have been regularly obtained are conclusive upon parties and privies, and cannot be collaterally attacked." *Bennett Est. v. Travelers Ins. Co.*, 140 Vt. 339, 343 (1981), *overruled on other grounds by Bevins v. King*, 147 Vt. 645 (1986). "A collateral attack is one questioning the validity of a judgment in a proceeding which is not brought for the purpose of modifying, setting aside, vacating or enjoining the judgment." *Hixson v. Plump*, 167 Vt. 202, 205 (1997) (quotation omitted).

While there has not yet been a final judgment in the Rutland action, the principle remains the same: the place to challenge the Rutland Unit's exercise of jurisdiction is in that unit, or on appeal from any order or judgment from that unit. Mr. Bandler had an opportunity to seek interlocutory review of the Rutland Unit's denial. The Supreme Court denied that effort. This court will not tread where the Supreme Court declined to go. Mr. Bandler must await the final judgment of the Rutland Unit, and take such appeal as he thinks warranted from that judgment. In short, it remains the exclusive province of the Rutland Unit to determine and exercise its jurisdiction. If any party is dissatisfied with that decision, its avenue of review is not through a collateral attack but a direct appeal.

ORDER

The court grants the motion. The complaint is dismissed with prejudice.

Electronically signed pursuant to V.R.E.F. 9(d): 5/12/2023 1:23 PM

Samuel Hoar, Jr.
Superior Court Judge

Vermont Superior Court
Filed 05/16/23
Windsor Unit