

## SUPREME COURT OF THE STATE OF NEW YORK- NEW YORK COUNTY

PRESENT: Hon. DORIS LING-COHAN, Justice

PART 36

## INTERIM ORDER

In the Matter of

The Rehabilitation of

FINANCIAL GUARANTY INSURANCE COMPANY.

INDEX NO. 401265/12  
MOTION DATE  
MOTION SEQ. NO. 004  
MOTION CAL. NO.

The following papers, numbered 1 to 10 were read on this application to/for:  
approval of a plan of rehabilitation

Papers

Notice of Motion/Order to Show Cause - Affidavits - Exhibits

Answering Affidavits - Exhibits (Memo)

Replying Affidavits (Reply Memo)

Numbered1, 2  
3,4,5,6,7,8,9,10Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, and after oral arguments on January 15, 2013, it is

ORDERED that the court cancels the evidentiary hearing date, as to the proposed plan, scheduled for Monday, January 28, 2013, given the lack of sufficient evidence in the submissions to raise a material question of fact. Thus, a need for an evidentiary hearing has not been established.

This is a rehabilitation proceeding brought under Insurance Law Article 74. Insurance Law 7402, in relevant part, permits the "Superintendent...[to] apply...for an order directing him to rehabilitate a domestic insurer which...is insolvent...". Previously, a rehabilitator of Financial Guaranty Insurance Company was appointed without objection, by order dated June 28, 2012.

It is not disputed that such proceedings are considered special proceedings governed by Article 4 of the Civil Practice Law and Rules.<sup>1</sup> See *In re Corcoran*, 171 AD2d 431 (1<sup>st</sup> Dep't 1991). As such, CPLR § 409(b) is applicable: "[t]he court shall make a summary determination upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised. The court may make any orders permitted on a motion for summary judgment." Citing CPLR § 409(b), the Appellate Division, First Department has held that "[i]t is settled that a special proceeding is subject to the same standards and rules of decision as apply on a motion for summary judgment, requiring the court to decide the matter 'upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised'." *Karr v Black*, 55 AD3d 82, 86 (1<sup>st</sup> Dep't 2008) (internal citations omitted). The standards for summary judgment are well settled, and undisputed. The movant must tender evidence, by proof in

<sup>1</sup> See January 15, 2013 tr at 14, lines 2-5.

admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." CPLR § 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Once such an entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to "demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to so do." *Zuckerman v City of New York*, 49 NY2d 557, 560 (1980). Moreover, the Court of Appeals has made clear that bare allegations or conclusory assertions are insufficient to create genuine, bona fide issues of fact necessary to defeat such a motion. See *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978). To grant summary judgment it must be clear that no material and triable issue of fact is presented. See *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957).

Here, no affirmations/affidavits have been supplied which raise any material issues of fact requiring an evidentiary hearing as to the proposed plan. The few affirmations provided to the court merely lay the foundation for documents which have been proffered by objectors to the plan of rehabilitation. As stated above, conclusory assertions that issues of fact exist are insufficient. Significantly, none of the objectors were able to articulate a material issue of fact during oral argument on January 15, 2013, and thus, an evidentiary hearing is unnecessary in this summary proceeding. See *Matter of Professional Liability Ins. Co. of Am.*, Sup Ct, NY County, April 28, 2010, Stallman, J., index No. 400986/10. The court notes that there were no objections, from any interested party, to the appointment of a rehabilitator; the objectors merely object to the approval of the plan of rehabilitation, as proposed by the rehabilitator.

Although counsel for Jefferson County Warrantholders (Jeffco Holders) argue that Insurance Law § 7403(d) is applicable, and a full hearing is required, the plain language of such statute specifically states that it applies only to terminations of rehabilitation proceedings.<sup>2</sup> Further, while Jeffco Holders also argue that, given the consequences and the amount of money at stake, it is entitled to an evidentiary hearing prior to an approval of the plan of rehabilitation, such argument is misplaced. The legislature did not specifically provide for such an evidentiary hearing based on the stakes or consequences, and instead, clearly provided that this is a special proceeding, in

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<sup>2</sup> Insurance Law § 7403(d) states that "[t]he rehabilitator or any interested person upon due notice to the superintendent, at any time, may apply for an order terminating any rehabilitation proceeding and permitting such insurer to resume possession of its property and the conduct of its business, but no such order shall be granted except when, after a full hearing, the court shall determine that the purposes of the proceeding have been fully accomplished."

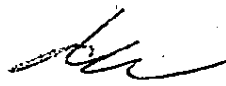
which the standards of summary judgment apply. See CPLR § 409(b). Nonetheless, all objectors were afforded an opportunity to provide submissions on the issue of whether the plan should be approved and are granted a further opportunity to be heard, as provided below. As previously noted, the rehabilitator was appointed, without opposition.

The rehabilitator, and objectors to the plan of rehabilitation, have submitted papers, at the court's request, regarding the standard for approval of a plan of rehabilitation. It is thus

ORDERED that the court shall hear oral argument by those who provided a brief/memo on such issue,<sup>3</sup> on Tuesday, January 29, 2013, at 9:30am, as to whether such standard was met.

Counsel for the rehabilitator shall provide a copy of this order to all interested parties, expeditiously.

Dated: 1/24/13



Doris Ling-Cohan, JSC

Check One: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION  
☐ Do not post

J:\Interim Orders\Matter of FGIC - no material issues of fact, evidentiary hearing.wpd

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<sup>3</sup> All others are invited, but not required, to appear.