UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 12-17645
	)	
VINCENT J. GLOBOKAR, JR. and VIRGINIA L. GLOBOKAR,	)	Chapter 7
	)	
Debtors.	)	Chief Judge Pat E. Morgenstern-Clarren
	)	
MARVIN A. SICHERMAN, TRUSTEE,	)	Adversary Proceeding No. 13-1113
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
NATIONAL CREDIT UNION ADMINISTRATION BOARD, *et al.*,	)	**MEMORANDUM OF OPINION**[1]
	)	
Defendants.	)	

Defendant National Credit Union Administration Board, acting in its capacity as Liquidating Agent for St. Paul Croatian Federal Credit Union (the Liquidating Agent), moves to dismiss the plaintiff-trustee's 11 U.S.C. § 544(a)(3) lien avoidance action for lack of subject matter jurisdiction. The trustee opposes dismissal. For the reasons stated below, the motion to dismiss is granted.[2]

I. FEDERAL CIVIL RULE OF PROCEDURE 12(b)(1)

The Liquidating Agent moves to dismiss for lack of subject matter jurisdiction under Federal Civil Rule 12(b)(1). FED. R. CIV. P. 12(b)(1) (made applicable by FED. R. BANKR. P.

[1] This opinion is not intended for publication, either in print or electronically.

[2] Docket 48, 51, 52, 53.

7012(b)). Under this rule,

> [a] . . . motion can either attack the claim of jurisdiction on its face, in which case all allegations of the plaintiff must be considered as true, or it can attack the factual basis for jurisdiction, in which case the trial court must weigh the evidence and the plaintiff bears the burden of proving that jurisdiction exists.

DLX, Inc. v. Kentucky, 381 F.3d 511, 516 (6th Cir. 2004). The court has wide discretion to consider documents, affidavits, and even hold a limited evidentiary hearing to resolve disputed jurisdictional facts. *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990). While the Liquidating Agent's motion presents a factual challenge to the existence of subject matter jurisdiction in this proceeding, the parties jointly submitted stipulations and exhibits which establish the facts. *See Howard v. Whitbeck,* 382 F.3d 633, 636-37 (6th Cir. 2004).

II. THE FACTS[3]

In 2002, the debtors Vincent Globokar, Jr. and Virginia Globokar refinanced a loan related to their home with St. Paul Croatian Federal Credit Union (St. Paul) and executed a note and mortgage in connection with the refinance. St. Paul's files also contain a second note related to the property, which note is dated July 7, 2003. On February 18, 2004, St. Paul recorded a mortgage to secure payment of the second note. In April of 2010, the National Credit Union Administration Board placed St. Paul into conservatorship, involuntarily liquidated St. Paul, and appointed itself as the liquidating agent thereby succeeding to St. Paul's rights, title and interest in the notes and mortgages.

[3] These facts are drawn from the parties' pleadings, stipulations, and the supplement to the trustee's objection.

The debtors filed their chapter 7 case on October 18, 2012. The Liquidating Agent moved for relief from stay, which the trustee opposed. The court adjourned the matter by agreement to allow the parties to conduct discovery. The chapter 7 trustee then filed this adversary proceeding on May 20, 2013.

The amended complaint names the Liquidating Agent as a defendant and requests a determination as to the validity, priority, and amount of the liens encumbering the debtors' real property.[4] Put simply, the Liquidating Agent asserts an interest in the property by reason of the two mortgages, while the trustee seeks to avoid the mortgages using his status as a bona fide purchaser of the property under Bankruptcy Code § 544(a)(3).[5]

Several months after the trustee served the amended complaint on the Liquidating Agent, the Liquidating Agent sent a letter to the trustee stating: (1) the waiver date as to claims was August 8, 2010; (2) the Liquidating Agent may consider claims filed after that date if the claimant did not receive notice of the Liquidating Agent's appointment in time to file a claim

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[4] The interests of the other defendants have been resolved. The court entered an agreed judgment as to defendant Cuyahoga County Treasurer and default judgments against debtor-defendants Virginia and Vincent Globokar. (Docket 22, 36, 37).

[5] There have been a few procedural hiccups along the way. Both sides filed motions for summary judgment on the merits of the avoidance issue, although they had agreed to submit the matter on stipulated facts. After confirming that the parties still intended to submit it on stipulated facts, the court treated the plaintiff's motion for summary judgment as the opening brief on the merits, the Liquidating Agent filed a brief in opposition, and the trustee filed a reply. (Docket 42, 43, 45). The Liquidating Agent then filed the motion to dismiss that is now under consideration. Because subject matter jurisdiction cannot be waived, and a court must always determine that it has such jurisdiction, the court will decide the motion to dismiss first. The disposition of the motion to dismiss makes it unnecessary to reach the merits.

before that date and the claim is filed in time to permit payment; and (3) that the trustee could file a claim with supporting documentation on or before January 30, 2014.[6]

III. 12 U.S.C. § 1787(b)(13)(D)

The Federal Credit Union Act is a "comprehensive scheme designed to protect the interests of creditors of defunct federal credit unions." *Nat'l Credit Union Admin. Bd. v. Lormet Comm. Fed. Credit Union*, No. 1:10 CV 1964, 2010 WL 4806794 at *2 (N.D. Ohio Nov. 18, 2010); *see* 12 U.S.C. §§ 1751-1795. For purposes of this dispute, the critical section of the Act is § 1787. That section establishes an administrative process for asserting claims against a liquidated credit union and precludes courts from acquiring jurisdiction over claims and certain actions against the National Credit Union Administration Board (Board) acting as liquidating agent for the credit union. 12 U.S.C. § 1787(b).

Congress added the administrative claims process and the jurisdictional bar as part of the Financial Institution Reform, Recovery and Enforcement Act of 1989 (FIRREA), which was "enacted to respond to a national emergency threatening many federally-insured and federally-created financial institutions[.]" *International Union, United Automobile, Aerospace & Agric. Implement Workers of Am., Local 737 v. Auto Glass Emp. Fed. Credit Union*, 72 F.3d 1243, 1249 (6th Cir. 1996) (citing H. R. Rep. No. 101–54(I), 101st Cong. 1st Sess. 291–308, *reprinted in* 1989 U.S.C.C.A.N. 87–104). FIRREA is codified in various sections of Title 12, including § 1787. As each party acknowledges, the FIRREA provisions at issue here are identical in all material respects to the provisions regarding the administrative claims procedures and limitation on judicial review when the FDIC acts as receiver for a failed institution. *See* 12

[6] Trustee's Supplement at Exh. A, docket 52.

U.S.C. § 1821(d). Consequently, case law construing those provisions is relevant in deciding this matter. *See International Union,* 72 F.3d at 1250 (noting that it is useful to examine issues under 12 U.S.C. § 1821(e) when deciding an issue under 12 U.S.C. § 1787(c) based on the similar language and the fact that the provisions were enacted at the same time as part of FIRREA).

The administrative process for resolving claims centers on the Board as liquidating agent. Generally, the Board as liquidating agent is given authority to determine claims and to prescribe regulations regarding the allowance or disallowance of claims. 12 U.S.C. § 1787(b)(3)(A) and (b)(4). The Board as liquidating agent is required to: (1) publish and republish notice that the failed credit union's creditors must file claims by a specified date, which is not less than 90 days after the publication of the notice, 12 U.S.C. § 1787(b)(3)(B), and (2) mail notice to known creditors, 12 U.S.C. § 1787(b)(3)(C). Claims which are filed after the specified date are disallowed, unless the claimant did not receive notice of the liquidating agent's appointment in time to timely file a claim and the claim is filed in time to permit payment. 12 U.S.C. § 1787(b)(5)(C). If the liquidating agent disallows a claim or fails to take timely action on the claim, a claimant can file suit in district court, continue an action commenced before the liquidating agent's appointment, or request administrative review. 12 U.S.C. § 1787(b)(6)(A).

The Act expressly limits judicial action in connection with the administrative claims process:

> Except as otherwise provided in this subsection, no court shall have jurisdiction over –
>
> (i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any credit union for which the Board has been appointed liquidating agent,

> including assets which the Board may acquire from itself as such liquidating agent[.]

12 U.S.C. § 1787(b)(13)(D)(i). This provision requires parties to exhaust their administrative remedies under FIRREA before bringing a claim or action against the Board acting as liquidating agent for a credit union. *See Village of Oakwood v. State Bank & Trust Co.*, 539 F.3d 373, 385–86 (6th Cir. 2008) (concluding that 12 U.S.C. § 1821(d)(13)(D) imposes a statutory exhaustion requirement). "In other words, failure to comply with the claims process will remove jurisdiction." *Molosky v. Washington Mut., Inc.*, 664 F.3d 109, 121 (6th Cir. 2011).

IV. THE POSITIONS OF THE PARTES

The Liquidating Agent argues that the trustee is required to pursue his § 544(a)(3) avoidance action through the administrative claim process set out in § 1787(b). And that, because the trustee did not file a claim, there is now a jurisdictional bar against bringing the action in this court. That bar, according to the Liquidating Trustee, requires that the adversary proceeding be dismissed under § 1787(b)(13)(D).

In response, the trustee argues that there is no jurisdictional bar because: (1) 28 U.S.C. § 1334(e) gives the bankruptcy court exclusive jurisdiction over the property of the debtors' estate; (2) he is seeking avoidance of the mortgages defensively in response to the Liquidating Agent's motion for relief from stay; and (3) he did not have an opportunity to participate in the administrative claims process and is not requesting the type of relief contemplated under that process.

V. DISCUSSION

The Sixth Circuit's decision in *Superior Bank, FSB v. Boyd (In re Lewis)*, 398 F.3d 735 (6th Cir. 2005), and its discussion regarding the analogous provisions that apply when the FDIC is acting as a receiver, effectively resolves this dispute in favor of the Liquidating Agent.[7]

In *Lewis*, the bank filed a motion for relief from stay. Later, the chapter 7 trustee filed an adversary proceeding seeking to avoid the bank's mortgage as a preference. Still later, the FDIC was appointed as receiver for the bank, but did not participate in the litigation or notify the trustee that he had to participate in the administrative claim process. The bankruptcy court granted summary judgment in favor of the trustee and avoided the mortgage; the bank appealed. At that point, the trustee filed a notice of intent to sell the property at issue. The bank objected to the sale and argued that the bankruptcy court lacked jurisdiction under FIRREA. The bankruptcy court approved the sale, but concluded that it could not rule on the jurisdictional challenge as it was essentially a collateral attack on the mortgage avoidance judgment, which was then on appeal before the Circuit. On appeal by the bank of the sale order, the district court stayed all proceedings until the Circuit could decide the jurisdictional issue.

The Circuit started from the general premise that subject matter jurisdiction is tested as of the date the action is filed. When the trustee filed his action, the bankruptcy court had jurisdiction. The Circuit continued that if the bankruptcy court lost jurisdiction, it would have to be because the § 1821(d)(13)(D) exhaustion requirement stripped the court of that jurisdiction. The Circuit rejected that notion, finding that § 1821(d)(13)(D) and the other provisions of

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[7] The Liquidating Agent cited *Lewis* in its notice of supplemental authority, but did not brief its applicability to this case. (Docket 53).

FIRREA did not serve to "strip the bankruptcy court of its jurisdiction in a pre-receivership context." *Id.* at 743. The Circuit noted, however, that § 1821(d)(13)(D) does "preclude[ ] a court from *acquiring* jurisdiction *after* the receiver is appointed." *Id*. at 744 (emphasis in original). And that "[t]he only exception in such a post-receivership case is § 1821(d)(6)(A), which confers jurisdiction upon a federal court in the district where the bank's principal place of business is located or the D.C. Circuit to hear a claim disallowed by the receiver through the administrative claim process." *Id.*

This is the relevant time sequence in this case: the Board placed St. Paul into receivership and appointed itself as the Liquidating Agent, the debtors filed their bankruptcy case, and the trustee filed this adversary proceeding. Under *Lewis*, therefore, this court could not and did not acquire jurisdiction over the avoidance action because it was filed after the receivership came into existence.

The trustee argues that § 1787(b)(13)(D) does not apply because this is a bankruptcy case. The *Lewis* court, however, specifically rejected that argument in the context of an analogous provision: "We are troubled by the argument that the language in a statute has a different meaning when it is read in the context of a bankruptcy case than it has in the context of any other case . . . The fact that the claim is associated with a bankruptcy proceeding does not suddenly render the language ambiguous." *Id.* at 742. Similarly, that argument is rejected here.

The trustee next contends that the jurisdictional bar does not apply because this is not a "claim . . . or action seeking a determination of rights with respect to" an asset of the Liquidating Agent. Instead of a claim, he characterizes the adversary proceeding as a defense in response to the Liquidating Agent's motion for relief from stay. This argument is, again, not persuasive

based on *Lewis*. The *Lewis* case arrived at the Circuit in substantially the same procedural posture that exists here: a bank filed a motion for relief from stay and the trustee followed that with an adversary proceeding challenging the underlying mortgage. There is nothing in *Lewis* to suggest that the Circuit viewed the dispute as anything other than an action with respect to the assets of a failed institution. Although the trustee in this case may have been prompted to file the adversary proceeding and assert his rights under § 544(a)(3) as a result of the motion for relief from stay, this action cannot be characterized as an affirmative defense to that motion.

The trustee's final two-part argument concerns the administrative claims process. Initially, the trustee argued that the jurisdictional bar should not apply because he did not have the opportunity to file a claim. That argument is now moot because the Liquidating Agent belatedly gave the trustee notice and an opportunity to file a claim as provided under the statute. *See* 12 U.S.C. § 1787(b)(5)(C)(ii) (providing that an untimely claim may be considered by a liquidating agent if the claimant did not receive notice of the liquidating agent's appointment in time to file a timely claim and if the claim is filed in time to permit payment).

The second part of the trustee's argument is that the jurisdictional bar does not apply because St. Paul did not owe the debtors any money and the trustee's lien avoidance action is not the type of claim contemplated by the claim form. Essentially, the trustee is arguing that the § 1787(b)(13)(D) jurisdictional bar applies only to a failed credit union's creditors. The *Lewis* decision, again, rejected this argument. As the Circuit stated in that opinion:

> While the notice provisions of § 1821 apply only to creditors, and there is no specific mention of a bank's debtors, § 1821(d)(13)(D) clearly applies to "any action" with respect to the failed institution's assets. The fact that the claim is associated with a bankruptcy proceeding does not suddenly render the language ambiguous. We, therefore, decline to hold that § 1821(d)(13)(D)

> does not apply simply because the person asserting the claim, in this case, the trustee, is not a creditor of the bank.

Lewis, 398 F.3d at 742.

VI. CONCLUSION

For the reasons stated, § 1787(b)(13)(D) prevented this court from acquiring jurisdiction over the trustee's avoidance action. The Liquidating Agent's motion to dismiss is, therefore, granted. A separate order will be entered to reflect this decision.

Pat E. Morgenstern-Clarren
Chief Bankruptcy Judge

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Plaintiff,	)	
	)	
v.	)	
	)	
NATIONAL CREDIT UNION ADMINISTRATION BOARD, *et al.*,	)	**ORDER**
	)	
Defendants.	)	

For the reasons stated in the memorandum of opinion entered this same date, the motion of Defendant National Credit Union Administration Board, acting in its capacity as Liquidating Agent for St. Paul Croatian Federal Credit Union, to dismiss for lack of subject matter jurisdiction is granted. (Docket 48).

IT IS SO ORDERED.

Pat E. Morgenstern-Clarren
Chief Bankruptcy Judge