

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In re: :

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AGENCY FOR DEPOSIT INSURANCE, :

REHABILITATION, BANKRUPTCY AND :

LIQUIDATION OF BANKS, AS BANKRUPTCY :

ADMINISTRATOR OF JUGOBANKA A.D., :

BEOGRAD and BEOGRADSKA BANKA A.D., :

BEOGRAD, :

:

Petitioner-Appellant, :

:

-v.- :

:

SUPERINTENDENT OF BANKS OF THE :

STATE OF NEW YORK, :

:

Respondent-Appellee. :

:

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03 Civ. 9320 (JSR)
03 Civ. 9321 (JSR)

MEMORANDUM ORDER

JED S. RAKOFF, U.S.D.J.

Petitioner-Appellant, Agency for Deposit Insurance,
Rehabilitation, Bankruptcy and Liquidation of Banks
("Petitioner"), an agency of the State Union of Serbia and
Montenegro (the former Federal Republic of Yugoslavia), suing
here in its capacity as administrator of two failed Yugoslavian
banks, seeks a stay pending appeal of the order of November 3,
2003 of the Honorable Cornelius Blackshear, United States
Bankruptcy Judge, which dismissed the above-captioned petitions
on the basis of 11 U.S.C. § 109, a provision of the Bankruptcy
Code that excludes foreign banks from the definition of who may
be a debtor. By summary order dated February 17, 2004, the Court

granted the stay. This Memorandum Order serves to confirm that ruling and to state the reasons therefor.

By way of background, Jugobanka A.D. Beograd and Beogradska Banka A.D. Beograd (the "Banks"), which, prior to their liquidation, were banks authorized by the National Bank of Yugoslavia, see Affidavit of Vesna Dzinic sworn to February 8, 2002 ("Dzinic Aff."), at ¶¶ 4, 23, were licensed in 1980 by the Superintendent of Banks of the State of New York (the "Superintendent") to open agency offices in New York, id. at ¶¶ 7, 26. The agency offices did not accept consumer deposits but served primarily to facilitate trade financing between Yugoslavia and the United States. Id. at ¶¶ 8, 11, 27. On May 30, 1992, President Bush issued an executive order that, as part of the sanctions imposed on the former Milosevic regime in Yugoslavia, blocked the assets of the Banks in the United States. See Executive Order 12808, 57 Fed. Reg. 23,299 (May 30, 1992). Thereafter, the Treasury Department's Office of Foreign Asset Control ("OFAC") seized the Banks' physical property in New York and closed the Banks' New York agencies. See Affidavit of Daniel A. Muccia sworn to August 15, 2002 ("Muccia Aff.") at ¶ 27.

In 2001, following the change of government in the former Federal Republic of Yugoslavia, Petitioner became the sole owner of the Banks. Dzinic Aff. at ¶ 14, 31. In January, 2002, Petitioner instituted liquidation proceedings against the Banks

in Belgrade's Commercial Court. Id. at ¶ 16, 33.

Simultaneously, the Superintendent issued an order purporting to take possession of the New York business and property of the Banks (at least 100 million dollars). Muccia Aff. at ¶ 31. The order was issued pursuant to New York Banking Law § 606(4), which provides that the Superintendent may "take possession of the business and property in this state of any foreign banking corporation that has been licensed by. . . the superintendent under the provisions of this chapter. . . that [] is in liquidation at its domicile or elsewhere" and allows the Superintendent to liquidate the property and to distribute to creditors who have claims arising out of transactions involving the foreign banks' New York agencies or branches. See N.Y. Banking Law § 606(4). Although the Banks' assets were then being held by OFAC, the Superintendent later received licenses from OFAC authorizing the Superintendent's seizure but prohibiting the Superintendent from transferring the assets without the further authorization of OFAC. See Muccia Aff. ¶¶ 35-36.

The likely effect of any transfer by the Superintendent would be to prefer the Banks' New York creditors over its other creditors. Accordingly, in June, 2002, Petitioner responded to the Superintendent's order under N.Y. Banking Law § 606(4) by filing the instant consolidated petitions in U.S. Bankruptcy Court, seeking to avail itself of the relief afforded by 11

U.S.C. § 304, which in effect accords comity to foreign bankrupts in certain circumstances so as to prevent piecemeal and preferential distribution of their assets in this country. See Victrix S.S. Co., S.A. v. Salen Dry Cargo, A.B., 825 F.2d 709, 713-14 (2d Cir. 1987).¹ The Superintendent in turn moved to dismiss the petitions.

While that motion to dismiss was pending in the Bankruptcy Court,² OFAC published new regulations effectively lifting some of its restrictions on the Superintendent's transfer of the Banks' assets commencing February 25, 2003. See 67 Fed. Reg. 78973 (December 27, 2002). In response, and so as to preserve the status quo ante, Petitioner sought, and the Bankruptcy Court granted, a temporary restraining order, followed by a preliminary

¹Section 304(b) allows a bankruptcy court to enjoin the commencement or continuation of actions brought in the United States against "a debtor with respect to property involved in such foreign [bankruptcy] proceeding" or "the enforcement of any judgment against the debtor with respect to such property." 11 U.S.C. § 304(b)(1). It also allows a court to "order turnover of the property of such estate, or the proceeds of such property, to such foreign representative [of the bankrupt as the Petitioner here]" § 304(b)(2). Section 304(c) provides that the bankruptcy court, in deciding whether to fashion relief, "shall be guided by what will best assure an economical and expeditious administration" of the foreign estate consistent with, inter alia, the just treatment of all claimholders, protection of U.S. claimholders against discrimination in the foreign proceeding, due process, and comity.

²Prior to oral argument on the motion to dismiss, the United States moved before this Court to withdraw the reference to the Bankruptcy Court. By Order dated December 30, 2003, this Court denied the motion to withdraw the reference.

injunction, prohibiting any transfer of the Banks' assets pending resolution of the motion to dismiss. See Bankruptcy Court Orders dated February 24, 2003 (temporary restraining order) and March 11, 2003 (preliminary injunction).

On November 3, 2003, as noted above, the Bankruptcy Court granted the Superintendent's motion to dismiss on the ground that the protections afforded foreign debtors in foreign bankruptcies by § 304 of the Bankruptcy Code do not apply to foreign banks in foreign bankruptcies because § 109 excludes foreign banks from the Bankruptcy Code's definition of who may be a debtor, thus depriving the Bankruptcy Court of jurisdiction over the instant Petitions. See Bankruptcy Court Order, November 3, 2003; see also Opinion after Trial, August 18, 2003. Thereafter, the Bankruptcy Court denied the Petitioner's request for a stay of the November 3 order pending appeal, see Order, December 24, 2003, the effect of which would be to lift the restrictions on the Superintendent's transfer of the Banks' New York assets unless the District Court were to reinstate the stay.³ Accordingly, Petitioner, in connection with noticing its appeal

³As this Court has previously noted, such an application should be made in the first instance to the Bankruptcy Court before a stay is sought from the District Court. See In re General Credit Corp., et al., 283 B.R. 658, 659 n.1 (S.D.N.Y. 2002).

from the November 3 order,⁴ moved for the instant stay.

Following briefing, the Court granted the stay, see Order, February 17, 2004. That determination is hereby reaffirmed, for the following reasons:

First, it is important to note at the outset that the Superintendent -- the only party that presently has the power to distribute the assets in question -- does not oppose the stay. Indeed, the November 3 Order makes clear that the preliminary injunction barring transfer remains in effect as against all persons other than the Superintendent. See Order, November 3, 2003. Thus, for all practical purposes the Petitioner's motion for a stay is granted on the consent of the only parties with standing to challenge it.

Second, assuming arguendo that any other party has standing to oppose the stay, only Sage Realty ("Sage"), a judgment creditor of one of the Banks, has filed any opposition. Sage, which obtained a judgment against the Banks now worth approximately \$4.2 million that it is seeking to enforce, opposes the stay in the belief that it may yet convince the Superintendent to move promptly to transfer assets in satisfaction of that judgment.

⁴In accordance with this Court's prior Order dated December 30, 2002, all appeals relating to the instant Petitions are referred to this Judge as related cases. See Order, December 30, 2002.

The factors governing a court's decision whether to issue a stay pending appeal are:

(1) whether the movant will suffer irreparable injury absent a stay, (2) whether a party will suffer substantial injury if a stay is issued, (3) whether the movant has demonstrated "a substantial possibility, although less than a likelihood, of success" on appeal, and (4) the public interests that may be affected.

Hirschfield v. Bd. of Elections, 984 F.2d 35, 39 (2d Cir. 1993) (citations omitted). See also In re General Credit Corp., et al., 283 B.R. 658, 660 (S.D.N.Y. 2002).

Here, it is patent that if Petitioner ultimately prevails in its claim that it is entitled to protection against the Superintendent's determination of the Banks' assets in favor of New York creditors, it will have been severely, and quite possibly irretrievably, harmed, by a premature distribution to Sage that will not readily be recompensable without substantial litigation, if at all. Indeed, it was just to avoid such harms that the Bankruptcy Court issued its preliminary injunction. See Order, March 11, 2003.

Conversely, Sage will not be substantially harmed by the stay since (a) this Court intends to adjudicate the underlying appeal promptly, and (b) the Superintendent has, in not opposing the stay, effectively indicated its present intention not to begin distribution until this appeal is adjudicated. Sage's

belief that it may convince the Superintendent to change her mind and begin transfers to Sage is, at best, gross speculation.

Further, Petitioner has demonstrated a "substantial possibility," though not necessarily a "likelihood," of success on the merits, since the underlying issue of the applicability of § 109 to a § 304 proceeding is one on which the relatively few precedents favor Petitioner. See, e.g., In re Georg, 844 F.2d 1562, 1568 (11th Cir. 1988) (concluding that "the debtor in a section 304 proceeding need not qualify as a 'debtor' under the Code's definition of that term"); In re Saleh, 175 B.R. 422, 425 (Bankr. S.D. Fla. 1994) ("in order to be eligible for relief ancillary to a foreign proceeding under § 304, it is not necessary to be a 'debtor' under § 109 of the Bankruptcy Code"); In re Brierley, 145 B.R. 151, 159-60 (Bankr. S.D.N.Y. 1992) (section 109(a) does not apply to cases brought under § 304); In re Lines, 81 B.R. 267, 271 (Bankr. S.D.N.Y. 1985) ("An ancillary proceeding under § 304 is not a . . . Chapter 11 proceeding; nor is it a full scale bankruptcy proceeding. Thus, sections 109(b) and (d), by their terms, simply do not apply.").

Lastly, the involvement in this case of agencies representing no fewer than three different sovereigns, *i.e.*, the former Federal Republic of Yugoslavia, the United States, and the State of New York, bear testament to the important, and conflicting, public interests involved.

Accordingly, since Sage lacks standing to oppose
Petitioner's motion for a stay and since, even if standing is
assumed, Petitioner has satisfied all four factors favoring the
granting of its requested stay, the Court hereby reaffirms its
Order of February 17, 2004, staying the Superintendent (and
anyone else) from any distribution of the Banks' assets in the
United States pending determination of the instant appeal.

SO ORDERED.



JED S. RAKOFF, U.S.D.J.

Dated: New York, New York
March 1, 2004