
In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:)	
)	
TOPGALLANT LINES, INC.)	Adversary Proceeding
(Chapter 7 Case <u>89-41996</u>))	Number <u>91-4141</u>
)	
<i>Debtor</i>)	
)	
JAMES L. DRAKE, JR., TRUSTEE)	
)	
<i>Plaintiff</i>)	
v.)	
)	
FRANK K. PEEPLES, et al.)	
)	
<i>Defendants</i>)	
_____)	
)	
TOPGALLANT GROUP, INC.)	Adversary Proceeding
(Chapter 7 Case <u>89-41997</u>))	Number <u>91-4142</u>
)	
<i>Debtor</i>)	
)	
JAMES L. DRAKE, JR., TRUSTEE)	
)	
<i>Plaintiff</i>)	
v.)	
)	
FRANK K. PEEPLES, et al.)	
)	
<i>Defendants</i>)	

ORDER ON MOTION FOR STAY PENDING APPEAL

Movant, First American Bulk Carrier Corporation (“FABC”), requests a

stay of the execution on a judgment pending an appeal pursuant to Bankruptcy Rule 8005. In the alternative, FABC requests an opportunity to post a supersedeas bond and stay the execution of a judgment pursuant to Bankruptcy Rule 7062(d). After considering the arguments of all counsel, FABC's Motion pursuant to Rule 8005 is denied and pursuant to Rule 7062(d) is granted.

Pursuant to Bankruptcy Rule 8005, FABC's Motion is denied because it has failed to prove a likelihood of success on the merits. *See In re Trans World Airlines, Inc.*, 18 F.3d 208, 211 (3rd Cir. 1994). In that regard, FABC contends that this Court's previous Orders are inconsistent and, therefore, it has "most likely a likelihood of success on the merits." *Brief in Support of FABC's Motion for Stay Pending Appeal*, p. 4. I disagree. In the Order on FABC's Motion to Reconsider I held only that trustees and not individual creditors may pursue a Section 506(c) action. *See Ambassador Factors v. First American Bulk Carrier Corp. (Matter of Topgallant Lines Inc.)*, Case No. 89-41996, Adv. Proc. 91-4072, Doc. No. 374, slip op., p. 2 (Bankr.S.D.Ga., Aug. 30, 1996) (Davis J.). In the Order approving compromise, I held that a trustee cannot assert a Section 506(c) claim for the benefit of only a single creditor and noted that a single creditor's remedy typically is under Section 503 (for priority unsecured treatment) or Section 364 (for secured treatment). *See Ambassador Factors v. First American Bulk Carrier Corp. (Matter of Topgallant Lines Inc.)*, Case No. 89-41996, Adv. Proc. 91-4141, Doc. No. 239, slip op., p. 5 (Bankr.S.D.Ga., Dec. 23, 1996) (Davis J.). That Order would have been more comprehensive had it also recognized a third possible scenario - that a trustee might seek

to surcharge a secured creditor under Section 506 and place any recovered funds in the estate to be paid, not to the creditor who advanced funds, but pro-rata to all priority claimants, including the creditor which made advances. If such a case were proven any “windfall” to a secured creditor would be eliminated, the trustee would remain in control of asserting 506(c) claims, and the creditor advancing funds would retain equal, not elevated, footing with priority claimants.

At the hearing on the Motion to Compromise, Trustee and his counsel stated that he abandoned any 506(c) claim that he might assert as burdensome, that he wished to be relieved of the duty to pursue it, and that he was releasing only his 506(c) rights as Trustee, not any rights that FABC might have, if my rulings are reversed. From this presentation I must conclude that as part of a global settlement of complex, protracted, and costly litigation of questionable collectibility, the Trustee balanced the possible 506(c) surcharge amount, contrasted with the costs and uncertainty of future litigation, and determined his 506(c) claim to be included in the consideration payable to settle all issues. FABC’s contention that it has “most likely a likelihood of success on the merits” is based on its reading of this Court’s prior orders as inconsistent, a view which is incorrect. FABC still has its remedy under Section 503, and the amount of funds to pay FABC and other creditors’ priority claims will be enhanced by the Trustee’s compromise of the claims which are the subject of this appeal.

In the alternative, FABC's Motion to stay my Order pursuant to 7062(d)

will be granted subject to the requirement that FABC post a bond to cover the costs of all the potential harm which the parties opposing the motion were able to articulate at the hearing. Accordingly, a supersedeas bond pursuant to Rule 7062(d) is required in the amount of \$1,031,250.00 which represents the principal amount which might be placed at risk in the absence of security, plus 25 percent to cover the expected accrued interest and cost that will be incurred during the pendency of the appeal.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of February, 1997.