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

In the matter of:)	
)	Adversary Proceeding
TOPGALLANT LINES, INC.)	
(Chapter 7 Case <u>89-41996</u>))	Number <u>92-4123</u>
)	
<i>Debtor</i>)	
)	
)	
AMBASSADOR FACTORS,)	
Division Fleet Factors Corp.)	
)	
<i>Plaintiff</i>)	
)	
)	
v.)	
)	
FIRST AMERICAN BULK)	
CARRIER CORPORATION)	
)	
<i>Defendant</i>)	

MEMORANDUM AND ORDER ON MOTION TO DISMISS

I. Background

On or about April 21, 1987, First American Bulk Carrier Corporation ("FABC") and Topgallant Group, Inc., entered into a charter agreement. This agreement gave FABC the right to take certain bunkers upon redelivery of the vessels.

On or about April 19, 1989, Ambassador Factors, Division Fleet Factors Corporation, ("Ambassador") entered into a security agreement with Debtor giving

Ambassador a security interest in "inventory, machinery, and equipment," which allegedly included the bunkers.

On December 13, 1989, FABC took redelivery of the vessels, and Debtor filed bankruptcy later that same day. On December 14, 1989, the bunkers were arrested for unpaid bills. Ambassador also claimed the bunkers under its security agreement with the Debtor. FABC posted a guarantee for the debts on the vessels, with the unpaid creditors, Ambassador, and FABC to submit their claims, at least as to the M/V Chesapeake Bay, to arbitration.

Ambassador has filed an adversary against FABC for converting its security interest. FABC filed a motion to dismiss arguing that the claims between the two were not related to the bankruptcy and that the adversary should be stayed pending an outcome in the arbitration matter.

II. Discussion

Under the Arbitration Act, 9 U.S.C. Section 3, the court must stay its proceedings if an issue before the court is subject to arbitration. The two leading cases discussing the stay pending arbitration are Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985) and Shearson/American Exp., Inc., v. McMahon, 482 U.S. 220, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987). In Dean Witter, the Supreme Court examined the legislative history of the Arbitration Act and concluded that the purpose of the Act was "to ensure judicial enforcement of privately made agreements to arbitrate." 105 S.Ct. at 1242. The Supreme Court ordered the lower court to compel arbitration. The court

further noted that arbitration would not necessarily have a preclusive collateral estoppel effect and that the preclusive effect of arbitration should be determined after the arbitration is completed. *Id.* at 1244. In McMahon, the court noted a federal policy favoring arbitration and ordered the parties to arbitrate their claims. In Hays and Co. v. Merrill Lynch, 885 F.2d 1149 (3rd Cir. 1989), the Third Circuit concluded that the district court did not have the authority or discretion to refuse to enforce an arbitration clause in a non-core proceeding filed by the trustee opposing arbitration. According to the court, the party opposing arbitration has the burden of showing that the provisions of the Bankruptcy Code conflict with the enforcement of an arbitration clause. The court noted that even if there were a possibility of an adverse effect on the core proceeding, "such as inefficient delay, duplicative proceedings, or collateral estoppel effect," the movant failed to show that any such concerns were "substantial enough to override the policy favoring arbitration." Hays, 885 F.2d at 1158.

In the case at bar the bankruptcy concerns certainly do not outweigh the policy favoring arbitration. Here, the arbitration matter is between two creditors; the trustee has not expressed an interest in the proceeding. Although the outcome of the arbitration matter will have an effect on the amount of the claim against the Debtor, such an effect is not sufficient to overcome the preference for arbitration.

The parties disagree whether a decision in the arbitration matter would be collateral estoppel as to certain issues. As noted in Dean Witter, *supra*, the preclusive effect of the arbitration may be limited and should be considered after the arbitration has ended.

The issues under arbitration and the adversary are sufficiently similar for the court to stay the adversary pending the arbitration. This adversary is hereby stayed until a party in interest requests a hearing based on a decision by the arbitration panel. However, if the arbitration panel does not render a decision within a reasonable time, the court may consider additional motions or hearings as requested by a party in interest. *See generally Hays*, 885 F.2d at 1158.

As a final consideration, the Eleventh Circuit in Suarez-Valdez v. Shearson Lehman/American Exp., 858 F.2d 648 (11th Cir. 1988), specifically held that a stay pending arbitration also stayed discovery as the parties agreed to proceed under arbitration instead of under court rules. Thus, FABC's motion for stay of discovery pending arbitration is also granted.

As the preference for arbitration is clearly present in this case, I must grant FABC's Motion for Stay Pending Arbitration and decline to rule on FABC's Motion to Dismiss at this time. The Motion to Dismiss will be considered at a later time after conclusion of the arbitration or after request for a hearing by a party in interest. FABC's Motion for Stay Pending Arbitration is granted and the Motion to Stay Discovery Pending Arbitration is granted.

ORDER

IT IS HEREBY THE ORDER OF THIS COURT that FABC's Motion for Stay Pending Arbitration is granted. The Motion to Stay Discovery Pending Arbitration is

granted. The Motion to Dismiss will remain pending without reassignment for additional hearings until further order of this court.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 31st day of March, 1993.