IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HSH NORDBANK	:	CIVIL ACTION
v.	:	
M/V AHMETBEY, ODIN DENIZCILIK	:	NO. 03-3520

Padova, J. **MEMORANDUM** **August __, 2003**

Defendant shipowner has filed a Motion to Vacate the arrest of the M/V Ahmetbey. Plaintiff has filed a Motion for Interlocutory Sale of the ship. For the reasons that follow, the Court denies both Motions at this time.

I. BACKGROUND

Plaintiff HSH-Nordbank, AG ("Plaintiff" or "Bank") filed a Complaint against the M/V Ahmetbey in rem and Odin Denizcilik, A.S., in personam (collectively, "Defendant") to foreclose a preferred ship mortgage (the "First Preferred Mortgage") on the vessel which secures a loan to Defendant Olin Denizcilik. Plaintiff alleged that the vessel owner is in default under the mortgage. A sum of $792,000 in principal, plus accruing interest, charges, costs, and expenses, is due and owing the Bank under this mortgage.[1]

[1] On June 24, 2003, Plaintiff filed an Amended Complaint in Admiralty in which it asserted that Defendant was also in default

On June 6, 2003, by order of this Court, pursuant to Rule C of the Supplemental Rules for Certain Admiralty Claims of the Federal Rules of Civil Procedure (hereinafter "Supplemental Rule" or "Supplemental Rules"), United States Marshals arrested the M/V Ahmetbey at a dock at Novalog Terminal in Bucks County, and served process by Writ of Summons on the Owner by serving the master of the vessel.[2]

II. DISCUSSION

1. Defendant's Motion to Vacate Arrest

Mr. Denizcilik, as owner, seeks to vacate the arrest or alternatively, seeks counter-security for the claims which he has against Plaintiff for the additional costs and expenses incurred by this wrongful arrest. (See Supplemental Rule E(7)). When a Motion to Vacate Arrest is filed, the defendant is entitled to a hearing,[3] and the Plaintiff has the burden of proof and must show why the

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on a "Third Preferred Mortgage" on the Ahmetbey (the Second Preferred Mortgage on the Ahmetbey has been paid off and is not relevant to this case). (See Amend Compl. ¶ 19). Plaintiff alleges that $1,800,000 in principal, plus interest, is currently outstanding on the Third Preferred Mortgage. (See id.) Plaintiff asserts that Defendant is in default on the Third Preferred Mortgage by virtue of its insolvency and inability to pay off its debts (including its inability to pay off the First Preferred Mortgage). (See id.)

[2] The Ahmetbey had been previously arrested by a different Plaintiff on June 2, 2003, by order of this Court. (See Sanayi v. Ahmetbey, 03-3434 (E.D. Pa.) (Padova, J.). The vessel was subsequently released from this prior arrest.

[3] The Court held a hearing on this matter on July 15, 2003.

arrest should not be vacated or other, alternative relief granted. (See Supplemental Rule E(4)(f)). Defendant alleges that the arrest was improperly obtained based upon the following grounds.

A. Whether the Mortgage is a Preferred Mortgage Under The Ship Mortgage Act

Defendant argues that Plaintiff has not met its burden of demonstrating that the First Preferred Mortgage on which the arrest of the Ahmetbey was based was a preferred mortgage under the relevant provision of the Ship Mortgage Act, 46 U.S.C. § 31301(6)(B). Defendant argues that, in order to have a right to foreclose on this mortgage, and therefore to have a right to arrest the ship, Plaintiff must prove that the mortgage qualifies as a preferred mortgage under this provision. Pursuant to 46 U.S.C. § 31301(6)(B), a mortgage on a foreign vessel is a "preferred mortgage" so long as it is validly "executed under the laws of the foreign country under whose laws the ownership of the vessel is documented and has been registered under those laws in a public register at the port of registry of the vessel or at a central office." 46 U.S.C. §31301(6)(B).

Plaintiff has submitted an affidavit of Sema Yerlikaya (hereinafter, "Sema Affidavit") who testifies that both the First and Third Preferred Mortgages are properly registered under the laws of Turkey and meet the requirements of the Ship Mortgage Act. (Pl's Response Ex. 1, Sema Aff. ¶ 12). Proof of a properly executed and registered mortgage may be provided by affidavit.

Neptune Orient Lines v. Halla Merchant Marine Co., Civ. A. No. 97-3828, 1998 WL 128993 (E.D. La. July 17, 1998) (citing Oil Shipping v. Royal Bank of Scotland, 817 F. Supp. 1254, 1258 (E.D. Pa. 1993)). As Defendant has failed to produce an affidavit or any documentation which alleges that the mortgages were not properly recorded, Plaintiff has met its burden of proof on this issue, and the arrest will not be vacated on this ground.

B. Whether The Ship Mortgage is in Default

i. Whether the Bank Followed Proper Procedures Under The Loan Agreement

Defendant further argues that Plaintiff failed to follow its own procedures for demanding repayment of a loan upon the default of a debtor as described in Plaintiff's "General Loan Conditions for Mortgages on Seagoing Vessels and Ships" ("General Loan Conditions") (See Def's Mot. Vacate, Ex. A).[4] Defendant argues that the plain language of this document allows Plaintiff to demand immediate repayment of a loan only where the borrower receives a demand letter from Plaintiff after having been in default for any amount for a period of over two weeks, and then fails to repay this amount within two weeks of receiving the demand letter. (See Def's Mot. Vacate, at 4). Defendant therefore asserts that Plaintiff has no right to seek foreclosure under the terms of its own agreement with Defendant, and therefore that the Ahmetbey's

[4] The parties do not dispute that these General Loan Conditions are applicable to the First Preferred Mortgage on the Ahmetbey.

arrest based on an alleged default on the mortgage is improper.

Plaintiff argues, persuasively, that the procedure described in the General Loan Conditions and discussed by Defendant is not a mandatory procedure for the bank to follow. Indeed, the terms of the mortgage state that:

> The Landebank may demand immediate repayment of the loan and initiate proceedings to enforce the ship mortgage should there be an important reason to do so. Such reason shall exist in particular where:
> a) the Borrower is under default with any amount due for more than two weeks and has not been paid this amount within two further weeks after he has received a demand from the Landesbank...

(Def's Mot. Vacate, Ex. A)(emphasis added). Thus, the mortgage agreement itself indicates that the bank may demand repayment and initiate proceedings any time there is an important reason to do so.

Plaintiff further notes that Defendant first defaulted on the mortgage agreement on November 21, 2001, when it failed to make a $100,000 payment, and then failed to make a balloon payment of $1,100,000 on January 4, 2002. (See Pl's Response, Ex. 2, Brandt Aff. ¶ 4). Initial notification of the first default was made in person on November 30, 2001. (Id.) Notification of the second default was made in person on January 9, 2002. (Id.) Furthermore, Defendant was informed of the first default by letter dated December 17, 2002. (Id. ¶ 5). After the January 9, 2002 meeting,

the formal notices of default were held in escrow (apparently by agreement of both the Bank and Defendant.) (Id. ¶ 5). Subsequently, the Bank issued regular monthly statements to Defendant which confirmed the debt owed. (Id. ¶ 6). Furthermore, regular discussions were held with Defendant during which the default was discussed. (Id. ¶ 7).

Thus, under the terms of the First Preferred Mortgage, all Plaintiff needed was an "important reason" to demand immediate payment and enforce the ship mortgage. Clearly, the fact that Defendant was in default for over one year qualifies as an important reason. Moreover, Plaintiff made repeated oral and written demands for payment throughout this time period. (See Pl's Response, Ex. 2, Brandt Aff. ¶ 5-7 and attached documents).

ii. The April 25, 2003 Loan Agreement

At oral argument and in Defense Counsel's Affidavit, Defendant raises the issue of a subsequent loan agreement between the parties dated April 25, 2003. Defendant argues that this subsequent loan agreement supercedes the First Preferred Mortgage and renders it null and void, thereby making it impossible for Defendant to be in default on the original loan agreement. Plaintiff responds that this April 25th loan agreement by its own terms required Defendant to pay to Plaintiff a sum of $459,803.59 by April 30, 2003 (the end of the "Commitment Period" of the new loan agreement). This $459,803.59 sum represented the first installment of the loan

agreement. (See Def's Mot. Vacate, Ex. B, p. 189). When Defendant failed to make this payment, the April 25th Agreement expired by its own terms. (See Pl's Response, Ex. 2, Brandt Aff. at ¶ 20-21).

Defendant does not seem to dispute that it failed to pay the entire required amount of $459,803.39 by this date. Defendant also does not appear to dispute the fact that the written terms of the April 25th Agreement required Plaintiff to make payment on or before April 30, 2003. Rather, Defendant insists that, at the time that the April 25th, 2003 Agreement was consummated, there was an oral agreement that the Commitment Period would continue past April 30, 2003 until "formalities" had been complied with.[5] (Def's Aff. at ¶ 50). However, by the written terms of the Agreement, the Commitment Period expired on April 30, 2003, and payment was required on that date. Furthermore, there is a letter, dated April 25, 2003, which indicates that, in the event that the loan failed to be "drawn down" by April 30, 2003, Plaintiff would still expect payment of $459,803.59 on or before April 30th, a sum equal to the amount due under the first installment. (Def's Mot. Vacate, Ex. B, P. 29).

Thus, there does not appear to be any serious dispute that the written terms of the Loan Agreement required Defendant to pay a sum of $459,803.59, that Plaintiff expected Defendant to pay this sum whether or not the Loan Agreement was "drawn down" by this date,

[5] These formalities ostensibly are related to proper registration of the loan agreement with the Turkish authorities.

and that Defendant failed to make the entire payment on time. Plaintiff has therefore met its burden of proof in establishing that the First Preferred Mortgage was in default at the time that the Ahmetbey was arrested, and the arrest will not be vacated on this ground.

C. Whether the Ahmetbey was "Ready to Sail" Under Turkish Law When it Was Arrested

Defendant argues that, under Turkish law, a ship that is "Ready to Sail" cannot be arrested in the manner in which the Ahmetbey was arrested on June 6, 2003. Defendant further argues that the Ahmetbey was "Ready to Sail" as that term is understood in Turkish law on June 6, 2003. The Court disagrees.[6]

"When analyzing foreign law, the district court may consider any relevant material or source, including testimony, whether or

[6] The parties dispute whether Turkish or United States law applies to the procedure used to arrest a ship in United States waters. The mortgage agreement between the parties contains a clause which provides that Turkish law will govern this dispute. These clauses are enforceable in this Court. Trinidad Foundry v. K.A.S. Kamilla, 966 F.2d 613, 615 (11th Cir. 1993). However, Plaintiff argues that the method used to arrest a ship described in the Supplemental Rules is procedural, and applies regardless of any analogous procedural rules in Turkish law (there is no dispute that United States law does not prohibit the arrest of ships which are ready to sail). Plaintiff further argues that, under Turkish law, the law of the place where the ship is seized will govern in in rem proceedings, such as this one. (See Pl's Response, Ex. 1, Sema Aff. at ¶ 13). Because the Court finds, based upon the record before it, that the ship was properly arrested in accordance with Turkish law, the Court declines to engage in a choice of law analysis regarding this issue. Cf. Oil Shipping, B.V. v. Denizcilik, 10 F.3d 1015, 1018 (3d Cir. 1993) (noting that a choice of law analysis is only necessary where an actual conflict between two bodies of law exists.)

not submitted by a party or admissible under the Federal Rules of Evidence." Trinidad Foundry, 966 F.2d at 615 (11th Cir. 1993)(citing Fed R. Civ. P. 44.1). According to the Affidavit of Sema Yerlikaya, "For a ship to be 'ready to sail,' there can be no obstruction, physical or legal, which prevents the start of the new voyage." (Sema Aff. at ¶ 7). Furthermore, although many factors are considered under Turkish law in determining whether a vessel is "ready to sail," a crucial factor to be considered is whether the vessel is still discharging cargo from its prior voyage. Thus, "A Master cannot claim that his vessel is ready for a New Voyage if his vessel is still discharging cargo when served with an arrest order." (Id. at ¶ 9).

Defendant conceded at oral argument that the Ahmetbey was still discharging cargo on June 6, 2003, the day it was arrested. However, Defendant appears to disagree with the proposition from the Sema Affidavit that a vessel still discharging cargo is not "ready to sail." Rather, Defendant argues that, because the Ahmetbey received its clearance papers from Customs officials giving it permission to sail before June 6, 2003, it was "ready to sail." Defendant provides no affidavit which contradicts Sema Yerlikaya's assertions. Rather, Defendant has submitted to the Court a series of opinions from Turkish courts which it claims support its position. However, none of the cases submitted by Defendant supports the proposition that a vessel that has been

given clearance by customs authorities but that is still discharging cargo is "ready to sail". For example, the case of "Veli Alemday Gemi v. Ali Acik" found that a vessel could not be arrested because it was "full and ready to move." (Pl's Mot. Vacate Ex. B, at p. 154). Similarly, the case of "Sotrade Denizilik v. T. Emiak Bankasi" found that a vessel was "ready to sail" because, in addition to having received permission from customs authorities to leave, it had already been loaded with its cargo for its voyage. (Pl's Mot. Vacate Ex. B, at 156). Because Defendant's submissions do not contradict Plaintiff's assertion that a vessel which is still discharging cargo cannot be "ready to sail" under Turkish law, the Court finds that the Ahmetbey was not "ready to sail" under Turkish law when it was arrested on June 6, 2003, and the arrest will not be vacated on this ground.

D. Whether Judgments of the Turkish Court Should be Granted Comity

At a hearing held on August 7, 2003, Defendant conceded that there is currently no pending Turkish Court order or judgment which voids or invalidates the arrest of the Ahmetbey. Thus, the question of comity is currently moot.

2. Plaintiff's Motion for Sale of the Vessel

Plaintiff moves for an order of interlocutory sale of the M/V Ahmetbey, pursuant to Rule E of the Supplemental Rules. Plaintiff notes that more than 10 days have passed since the date of the Ahmetbey's arrest, and further that the vessel owner has failed to

post security for the vessel. (See Pl's Mot. Sale at ¶4). Plaintiff further argues that the expenses that it is incurring in keeping the Ahmetbey under arrest are disproportionate to the ship's value. (See Pl's Mot. Sale at ¶¶ 10-11). Supplemental Rule E(9) provides that, on application of a party, "the court may order all or part of the property sold...if...the expense of keeping the property is excessive or disproportionate." (Supplemental Rule E(9)(B)). Although the statute does not specifically so state, courts have interpreted the statute's use of the term disproportionate to mean disproportionate to the value of the arrested vessel. E.N. Bisso & Son, Inc. v. One Twenty-Two Foot Survey Boat, Civ. A. No. 96-1443, 1996 WL 715506, at *2 (E.D. La. Dec. 11, 1996).

At a hearing held on August 7, 2003, Plaintiff represented to the Court that the current daily cost of maintaining the vessel under arrest is approximately one thousand nine hundred dollars ($1,900) per day.[7] At the hearing, the parties represented that the Ahmetbey is valued at approximately three million dollars ($3,000,000).[8] While the sum of one thousand nine hundred dollars ($1,900) per day is significant, the Court cannot say that this amount is excessive or disproportionate to the value of the ship,

[7] This is, according to Plaintiff, mainly due to the cost of providing security on board the ship.

[8] Defendant asserts that the value is actually somewhere between three and four million dollars.

particularly in light of the fact that the Court has cleared its calender and scheduled this matter for a trial date on September 22, 2003. The Court therefore denies Plaintiff's Motion for Sale of the Vessel at this time.

III. CONCLUSION

For the foregoing reasons, the Court denies Defendant's Motion to Vacate the Arrest of the M/V Ahmetbey, and denies Plaintiff's Motion for Interlocutory Sale of the ship. An appropriate order follows.

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ORDER

AND NOW, this 27th day of August, 2003, upon consideration of Defendants' Motion to Vacate Attachment (Docket # 12) and Plaintiff's Motion for Interlocutory Sale of the M/V Ahmetbey (Docket # 11), **IT IS HEREBY ORDERED** that both Motions are **DENIED**.

BY THE COURT:

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John R. Padova, J.