IN THE UNITED STATES BANKRUPTCY COURT FOR THE
DISTRICT OF PUERTO RICO

IN RE: LA ELECTRONICA, INC.,	:	CASE NO. 89-02727(ESL)
Debtor	:	CHAPTER 11
LA ELECTRONICA, INC.,	:	ADV. NO. 89-0075
Plaintiff	:	
v.	:	
OLGA CAPO ROMAN,	:	
Defendant	:	
COMMONWEALTH OF PUERTO RICO	:	
Intervenor	:	

OPINION AND ORDER

This case is before the court as a result of the pretrial conference held on March 5, 1992 (dkt. #27). On that same date the court considered debtor/plaintiff's "Emergency Informative Motion" (dkt. #18), in which they request an emergency hearing and an order of this court directing the registry of property of Puerto Rico to discharge the cautionary notices of "lis pendens" placed by defendant Olga Capo Roman over three of debtor's real properties, citing an immediate need for debtor to obtain funds in order to continue operations. At the pretrial conference the court indicated that the complaint, as filed, would be dismissed, based upon the decisions in Correa Sanchez v. Registry, 113 D.P.R. 581, 13 Official Translations of the Opinions of the Supreme Court of Puerto Rico 750 (1982), and this court's decision in In re: Carlos A. Rivera, Inc., 130 B.R. 377 (Bankr. D.P.R. 1991). However, in light of arguments raised by counsel at the pretrial conference, the court granted the plaintiff

ten days to amend the complaint to include a challenge as to the constitutionality of the cautionary notice provisions of Puerto Rico law. The court further directed plaintiff to file a brief within thirty days addressing this court's jurisdiction to consider the issue and discussing the merits of the constitutional challenge. Defendant was granted thirty days to respond.

Debtor/plaintiff filed an amended complaint (dkt. #22), including the Commonwealth of Puerto Rico through its Secretary of Justice as intervenor. The "Second Claim for Relief" alleges that Rules 56.4 and 56.7 of the Rules of Civil Procedure of the Commonwealth of Puerto Rico[1] and Articles 112 and 113 of the Puerto Rico Mortgage Law of 1979,

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[1]Rule 56.4 provides, in pertinent part:

Attachment or prohibition to alienate

> If the requirements of Rule 56.3 have been met, the court shall issue, on motion ex parte of a claimant, an order of attachment or of prohibition to alienate. The attachment and prohibition to alienate real property shall be effected by recording them with the Registry of Property and notifying the defendant.

[Note: Rule 56.3 provides, in pertinent part:

> **Bond**
>
> A provisional remedy may be granted without the filing of a bond in any of the following cases:
> (1) If it appears from public or private documents, as defined by law, signed before a person authorized to administer oaths, that the obligation may be legally enforced;
> . . .
> In all other cases, the court shall require the filing of a bond sufficient to secure all the damages arising from the remedy.]

Rule 56.7 provides, in pertinent part:

30 L.P.R.A. §§2401 and 2402[2], along with their corresponding Rules and Regulations of 1980, §§2003-115.4 and 20033-115.5, are unconstitutional because they permit the taking of a substantial interest in property without due process of law, in that they permit

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Notice of lis pendens

> In an action affecting the title or the right of possession of real property, the plaintiff, at the time of filing the complaint, . . . may, after serving notice upon the affected adverse party, record in the Registry of Property in the district in which the property, or part thereof, is situated, a notice of the pendency of the action or defense, and a description of the property affected thereby.

[2]Article 112 of the Mortgage Law of 1979, codified at 30 L.P.R.A. §2401, provides, in pertinent part:

Cautionary notice--Who may request

> The following may request that cautionary notices on their respective rights be entered in the Registry:
> 1st. A person who, in a lawsuit, claims ownership to real property or the constitution, declaration, modification or extinction of any recordable right or one who files his claim in an action that affects a title to real property, or on the validity and force, or the lack of validity or force, of the title or titles involved in the acquisition, constitution, declaration, modification or extinction of the above-cited recordable rights.

Article 113 of the Mortgage Law of 1979, codified at 30 L.P.R.A. §2402, provides, in pertinent part:

Judicial claims; requirements

> In the case of number 1 of the preceding section, the cautionary notice can only be made by order of the court handed down at the request of a legitimate party and by virtue of adequate documentation for prudent judicial discretion, except when the basis for the action is a recorded real right, in which case, presentation of a certified copy of the suit shall be sufficient for its notation in the Registry.

the registration of a cautionary notice of "lis pendens" against a property without notice and a hearing, a court order, or the posting of a bond. Debtors filed a memorandum of law as requested by the court (dkt. #26). Subsequently, defendant Olga Capo Roman filed a reply (dkt. #34), and the Commonwealth of Puerto Rico filed their memorandum of law (dkt. #36). Among defendants' arguments is that this court should abstain from determining the constitutionality of the challenged Puerto Rico statutes and dismiss this case. Debtor has since filed two motions reiterating their request for relief, to which the codefendants have replied.

Background

1. On October 25, 1988, defendant Olga Capo Roman filed a complaint entitled Olga Capo Roman v. Reinaldo Betancourt Viera, La Electronica, Inc., Mario Ronda Castillo, John Doe and Richard Roe for the dissolution of the community property existing between her and Reinaldo Betancourt Viera, as well as corporate dissolution and liquidation, and damages, before the Superior Court of Puerto Rico, San Juan Part, Civil No. KAC-88-1795(901). The case was assigned to the Hon. Angel F. Rossy Garcia. This action followed a divorce judgment entered by the Superior Court on July 26, 1988.

2. In the aforementioned complaint, Capo alleges that she is entitled to fifty percent of the common stock of La Electronica, Inc. held by Reinaldo Betancourt Viera.

3. On November 14, 1988, Capo presented for recordation at the Registry of Property of Puerto Rico, Third Section of San Juan a petition of cautionary notice of "lis pendens", accompanied by a

certified copy of the complaint, against certain real properties of debtor/plaintiff. The cautionary notices were recorded on November 3, 1989, after certain defects were corrected.

4. On that same date, Capo presented for recordation at the Registry of Property of Puerto Rico, Guaynabo section, a petition of cautionary notice of "lis pendens" against one real property of debtor/plaintiff. The cautionary notice was recorded on August 30, 1991, after a defect was corrected.

5. The petition for cautionary notices of "lis pendens" was granted by the Hon. Angel F. Rossy Garcia, the Superior Court of Puerto Rico, Bayamon Section, by an ex parte order issued on April 21, 1989.

6. Debtor/plaintiff filed its petition for relief under Chapter 11 of the Bankruptcy Code on June 28, 1989.

7. A judgement has not been entered in the aforementioned action before the Superior Court of Puerto Rico as the same was stayed pursuant to 11 U.S.C. §362(a)(1).

8. This adversary proceeding was filed on September 1, 1989.

9. On March 2, 1990, the Superior Court held that Capo has a valid claim to fifty percent of the incremental value of debtor's stock held by Betancourt.

10. La Electronica's plan of reorganization was confirmed on November 29, 1990 (dkt. #367).

11. La Electronica has commenced making payments under its plan and the transfer of real property is not contemplated or pending. The plan of reorganization is substantially consummated as defined in 11 U.S.C. § 1101(2). (See opinion and order of December 17, 1993,

entered in La Electronica, Inc. v. Empresas Omajede, Inc., adversary proceeding no. 92-0098 (dkt. #13)).

Discussion

The court has jurisdiction over this proceeding pursuant to 28 U.S.C. §§157 and 1334. It has already been determined that this is a core proceeding under §157(a)(c)(1).[3]

Our initial inquiry is as to whether this court may find the questioned Puerto Rico statute unconstitutional. Several courts have held that a bankruptcy judge is empowered to decide upon the constitutionality of a state statute. In re Spears, 744 F.2d 1225 (6th Cir. 1984); In re McManus, 681 F.2d 353 (5th Cir. 1982); In re Wines, 113 B.R. 787 (Bankr. S.D. Fla. 1990); and Credithrift of America v. Lawson, 52 B.R. 369 (E.D. Ky. 1985) (reversing In re Lawson, 42 B.R. 206 (Bankr. Ky. 1984)), citing In re Pine, 717 F.2d 281 (6th Cir. 1983).

Although this court has jurisdiction to entertain the issue at bar, it need not necessarily do so. "Courts may elect to abstain from exercising jurisdiction they have because some other tribunal seems better suited to try the matter or because some other solution to the problem seems possible and preferable." 1 Daniel R. Cowans, Bankruptcy Law and Practice §1.4(a) (6th ed. 1994). There is strong precedent for federal abstention when the problem might be solved in state courts, even where federal constitutional issues may be

[3]See Order of October 31, 1989, wherein the court found "An action to avoid a lis pendens over property of the estate is a matter which directly affects the administration of the estate and is, thus, a core proceeding over which this court has jurisdiction". (dkt. #3).

presented to the state court. Id., citing Penzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987).

Although previously the district court had to decide a motion for abstention, the 1990 amendment to §1334(c)(2) and the 1991 amendment to Fed. R. Bankr. P. 5011 authorize bankruptcy courts to enter final orders on motions to abstain, rather than merely filing a report and recommendation for disposition of the abstention motion with the district court. In re AK Services, Inc., 159 B.R. 76, 81, fn. 3 (Bankr. D. Mass. 1993); In re Nationwide Roofing & Sheet Metal, Inc., 130 B.R. 768, 777-778 (Bankr. S.D. Ohio 1991). It has been noted that "the Bankruptcy Code explicitly gives the bankruptcy judge broad discretion to abstain from hearing a bankruptcy case altogether on a discretionary basis and to dismiss the case." Ginsberg at p. 1-84, referring to 11 U.S.C. §305.

The court may abstain from hearing a particular matter arising under Title 11 pursuant to 28 U.S.C. §1334(c)(1), which provides:

> Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect with State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

Under this provision, a court may abstain in core proceedings as well as related matters. Lawrence P. King, et al., Collier on Bankruptcy ¶3.01 (15th ed. 1994); In re MEC Steel, Inc., 136 B.R. 606, 611 (Bankr. D.P.R. 1992). Such abstention is permissive or discretionary, in contrast to the mandatory abstention provided for in §1334(c)(2). Bankruptcy courts have abstained for a number of reasons, including situations where the court would be forced to consider unresolved

questions of state law better addressed by the state courts, where unique questions of state law could better be resolved by the state courts, or where the bankruptcy court's jurisdiction is in doubt. Robert E. Ginsberg and Robert D. Martin, Bankruptcy: Text, Statutes, Rules §1.03(e) (3rd ed. 1992), citing In re Muir, 107 B.R. 13 (Bankr. E.D.N.Y. 1989); In re National Real Estate Ltd. Partnerships-II, 104 B.R. 968 (Bankr. E.D. Wis. 1989); In re Coan, 95 B.R. 87 (Bankr. N.D. Ill. 1988); In re Kirby, 36 B.R. 133 (Bankr. E.D. Tenn. 1983); In re Marrs, 36 B.R. 22 (Bankr. M.D. Tenn. 1983); In re Desmarais, 33 B.R. 27 (Bankr. D. Me. 1983); In re Beattie, 31 B.R. 703 (Bankr. W.D. N.C. 1983); In re Lyco Leasing, Inc., 26 B.R. 231 (Bankr. M.D. Pa. 1982).

According to one commentator, "a litmus test has developed which helps to determine when abstention under (c)(1) is appropriate. When the state issue is of substantial public importance, abstention would not hinder reorganization, and little or no state precedent exists to help guide the bankruptcy court, abstention is particularly appropriate." 3 David G. Epstein, et al., Bankruptcy §12-5 at 211 (citations omitted). Another commentator lists the following relevant factors in determining whether to abstain:

> 1. the effect or lack thereof on the efficient administration of the estate if abstention is recommended,
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> 2. the extent to which state laws preodminate over bankruptcy issues,
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> 3. the difficulty or unsettled nature of the applicable law,
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> 4. the presence of a related proceeding commenced in state court or other non-bankruptcy court,
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> 5. the jurisdictional basis, if any, other then 28 U.S.C.A. §1334,

> 6. the degree of relatedness or remoteness of the proceeding to the main bankruptcy case,
>
> 7. the substance rather than the form of an asserted "core" proceeding,
>
> 8. the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court,
>
> 9. the burden on the bankruptcy court's docket,
>
> 10. the likelihood that the commencement of the proceeding in the bankruptcy court involves forum shopping by one of the parties,
>
> 11. the existence of a right to a jury trial, and
>
> 12. the presence in the proceeding of nondebtor parties.

Cowans, supra, §1.4(c), citing In re Republic Reader's Service, Inc., 81 B.R. 422 (Bankr. D.Tex. 1987). Accord, In the Matter of Chicago, Milwaukee, St. Paul & Pacific Railroad Company, 6 F.3d 1184, 1189 (7th Cir. 1993); In re Tucson Estates, Inc., 912 F.2d 1162, 1167 (9th Cir. 1990); In re Diversified Contract Services, Inc., 167 B.R. 591, 597 (Bankr. N.D. Cal. 1994); In re AK Services, Inc., 159 B.R. 76, 80 (Bankr. D. Mass. 1993); In re Nationwide Roofing & Sheet Metal, Inc., 130 B.R. 768, 780 (Bankr. S.D. Ohio 1991). These factors must be applied flexibly, as their relevance and importance vary with the circumstances of each case. Chicago, Milwaukee, 6 F.3d at 1189. Although no factor is determinative, whether a case involves unsettled issues of state law is particularly significant in light of §1334(c)(1)'s concern with comity and respect for state law. Id.

Certain of these factors are of particular importance in the case at bar. First, the validity of Puerto Rico's procedures for securing a judgment is an issue of substantial public importance. One of the

primary determinants in discretionary abstention is whether the case involves an unsettled issue of state law or will involve the bankruptcy court in matters of substantial public importance. In the matter of Federated Department Stores, 1990 Bankr. LEXIS 2599 (Bankr. S.D. Ohio, December 14, 1990). In Pennzoil Company v. Texaco, Inc., the Supreme Court held that the lower federal courts should have abstained under the principles of federalism set forth in Younger v. Harris, stating that the courts "failed to recognize the significant interests harmed by their unprecedented intrusion into the Texas judicial system." 107 S.Ct. at 1525. The Court noted that the important reasons for abstention include proper respect for state functions and the avoidance of unwarranted determinations of federal constitutional questions. Id. at 1526.[4] The Court further observed the state's important interest in administering its judicial system and enforcing the orders and judgments of its courts. Id. at 1527. Penzoil involves Texas statutes which provide for the recording of judgment liens in the county real property registries. The Court found that when a litigant had not presented its federal claims in a related state-court proceeding, the federal court should assume that the state procedures would provide an adequate remedy. Id. at 1528. Similarly, this court should avoid unnecessarily interfering with

[4]"When federal courts interpret state statutes in a way that raises federal constitutional questions, 'a constitutional determination is predicated on a reading of the statute that is not binding on state courts and may be discredited at any time--thus essentially rendering the federal-court decision advisory and the litigation underlying it meaningless.'" 107 S.Ct. at 1526, citing Moore v. Sims, 442 U.S. 415, 428, 99 S.Ct. 2371, 2379, 60 L.Ed.2d 994 (1979).

Puerto Rico's judicial system.

Second, abstention from this matter will not hinder La Electronica's reorganization, nor effect the administration of the estate. Debtor's plan has been confirmed for nearly four years and has been substantially consummated within the meaning of 11 U.S.C. §1101(2). According to debtor it has only two payments of approximately $170,000.00 each remaining to be made to creditors under its plan, having already paid approximately $1,800,000.00, or 83% of its debt. (See debtor's "Urgent Motion Requesting Ruling, dkt. #518, filed on March 14, 1994.) Thus, the results of this litigation are not essential to the formulation or confirmation of a plan. As noted in Nationwide Roofing, "the efficient administration of this chapter 11 case, as opposed to the distribution of funds under the plan, will not be affected by granting the motion to abstain." 130 B.R. at 780. The court's abstention from deciding this matter will not significantly affect the progress of La Electronica's bankruptcy case.

Third, the Supreme Court of Puerto Rico has already addressed the constitutionality of Rule 56.4 of the Puerto Rico Rules of Civil Procedure. In Rivera Rodriquez & Co. v. William Abram Lee Stowell Taylor, 93 J.T.S. 111 (June 30, 1993), the Court found that Rule 56.4 is unconstitutional when it permits the court to issue an attachment, without celebrating a prior hearing, in those situations where the claimant does not allege or demonstrate a previous proprietary interest in the item being attached, extraordinary circumstances, nor probability of prevailing at the trial on the merits and, through documentary evidence, that the debt is liquid, due and payable. This

decision is in accordance with Connecticut v. Doehr, 111 S.Ct. 2105 (1991), which held that a Connecticut statute which authorized a prejudgment attachment of real estate without prior notice or hearing and without a showing of exigent circumstances violates the due process requirements of the United States Constitution. However, Rivera Rodriquez does not resolve the matter before us. The factors set forth in Rivera Rodriquez are not present in this case, as Olga Capo Roman alleges a proprietary interest in the property attached, as well as the existence of extraordinary circumstances. Said allegations were considered by the Superior Court before issuing the "lis pendens" orders. Furthermore, Rivera Rodriquez does not address the other provisions of Puerto Rico law which are being challenged herein; namely, the cautionary notice provisions of 30 L.P.R.A. §2401 and 2402.

Fourth, the dissolution of community property proceeding is still pending before the Superior Court of Puerto Rico. That action was stayed by the filing of La Electronica's bankruptcy petition; no party requested the lifting of the automatic stay to proceed with that case through judgment. La Electronica has not challenged the constitutionality of the Puerto Rico provisional remedy statutes in that commonwealth court proceeding.

Fifth, the determination of the matter before the court is not closely related to the debtor's reorganization. The debtor has a confirmed plan of reorganization which has been substantially consummated. The debtor's own allegations are that releasing their properties from the "lis pendens" will enable them to use those

properties as collateral to obtain financing. The determination of whether Puerto Rico's provisional remedy statutes are constitutional cannot be said to be closely related to the debtor's bankruptcy proceedings.

A final factor to be considered is this court's heavy caseload. Subsequent to the recent appointment of a third bankruptcy judge in this district, the pending caseload of the undersigned has diminished from approximately 10,000 cases to approximately 7,000 cases, each one requiring the careful attention of this judge. This court does not have the resources to entertain matters which are more appropriately brought before other tribunals. As noted in Republic Reader's,

> One important factor, relevant to determining whether a proceeding can be timely adjudicated in state court, is the burdens of my caseload. Adversary proceedings, such as the one involved here, require an enormous expenditure of scarce judicial resources. Many pressing matters which cannot be delayed without harm to estates or creditors place increasing demands on the court's time. Adversary proceedings, as a consequence, are often positioned last in priority. The delay attendant upon abstention from a proceeding, therefore, must be compared with the effect adjudicating the proceeding has upon the allocation of a court's scarce judicial resources to essential matters concerning administration of all estates.

81 B.R. at 428 (fn. omitted).

The general rule in nonbankruptcy cases is that abstention is the narrow exception to the congressional grant of subject matter jurisdiction to the federal courts. Republic Reader's, 81 B.R. at 424. Exceptions have been created due to the importance of federalism in our judicial systems. Id. Abstention in the bankruptcy context is different from abstention in the nonbankruptcy context, in that while

nonbankruptcy abstention derives from case law[5], bankruptcy abstention is specifically authorized by 28 U.S.C. §1334(c). Id. at 425. According to Judge Mahoney,

> The intent of Congress is that abstention must play a far more significant role in limiting those matters, which although properly brought within the reach of jurisdiction under Title 11, are nonetheless best left for resolution to a state or other nonbankruptcy forum.

Id. However, discretionary abstention under §1334(c)(1) is guided by the principles developed under judicial abstention doctrines, and courts usually look to these well-developed doctrines in applying §1334(c)(1). Chicago, Milwaukee, 6 F.3d at 1189.

Upon taking into consideration all of the relevant factors, the court finds that it should abstain from hearing this matter. The court is particularly concerned with respect for the courts of the

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[5]The four abstention doctrines recognized by the Supreme Court are:

> (1) Pullman abstention, where a state court determination of pertinent state law may moot a federal constitutional issue;
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> (2) Thibodeaux or Burford abstention, where the federal court faces difficult questions of state law bearing on policy problems of substantial public importance transcending the case then at bar;
>
> (3) Younger abstention, where federal jurisdiction has been invoked to restrain state criminal or tax proceedings;
>
> (4) Colorado River abstention, based upon exceptional circumstances and considerations of wise judicial administration.

Standing Rock Housing Authority v. Tri-County State Bank, Inc., 700 F.S. 1544, 1545 (D.S.D. 1988), citing Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976). Accord, In re Plus Gold, Inc., 1994 Bankr. LEXIS 320 (Bankr. N.D. Ohio 1994).

Commonwealth of Puerto Rico and avoiding the unwarranted determination of federal constitutional questions, as well as the efficient use of judicial resources.

Conclusion

The court finds that it should abstain from hearing plaintiff's amended complaint, challenging the constitutionality of Puerto Rico's provisional remedy statutes, pursuant to the provisions of 28 U.S.C. §1334(c)(1). Accordingly, this adversary proceeding is hereby dismissed. The clerk shall enter judgment accordingly.

SO ORDERED.

In San Juan, Puerto Rico, this ____ day of September, 1994.

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ENRIQUE S. LAMOUTTE
Chief, U.S. Bankruptcy Judge