

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

In re:

THE FINANCIAL OVERSIGHT AND
MANAGEMENT BOARD FOR PUERTO
RICO,

as representative of

THE COMMONWEALTH OF PUERTO RICO,
et al.,

Debtor.¹

HON. ROSSANA LOPEZ LEON,

Plaintiff,

-v-

HON. RICARDO ROSSELLÓ-NEVARES, et
al.,

Defendants.

PROMESA
Title III

No. 17 BK 3283-LTS
(Jointly Administered)

Adv. Proc. No. 17-137-LTS
in Case No. 17 BK 3283-LTS

MEMORANDUM OPINION AND ORDER

Plaintiff Rossana Lopez Leon (“Plaintiff”) originally filed this action (the “Mandamus Action”) in the Commonwealth of Puerto Rico Court of First Instance, San Juan Part (the “Commonwealth Court”) seeking to compel Defendants (as defined below) to produce all documents that may have been used in drafting the fiscal plan for the Commonwealth of

¹ The Debtors in these Title III Cases, along with each Debtor’s respective Title III case number and the last four (4) digits of each Debtor’s federal tax identification number, as applicable, are the (i) Commonwealth of Puerto Rico (Bankruptcy Case No. 17 BK 3283-LTS) (Last Four Digits of Federal Tax ID: 3481); (ii) Puerto Rico Sales Tax Financing Corporation (“COFINA”) (Bankruptcy Case No. 17 BK 3284-LTS) (Last Four Digits of Federal Tax ID: 8474); (iii) Puerto Rico Highways and Transportation Authority (“HTA”) (Bankruptcy Case No. 17 BK 3567-LTS) (Last Four Digits of Federal Tax ID: 3808); and (iv) Employees Retirement System of the Government of the Commonwealth of Puerto Rico (“ERS”) (Bankruptcy Case No. 17 BK 3566-LTS) (Last Four Digits of Federal Tax ID: 9686). (Title III case numbers are listed as Bankruptcy Case numbers due to software limitations).

Puerto Rico (the “Plan”). Defendants removed the action to the United States District Court for the District of Puerto Rico. (Docket Entry No. 1.) Defendants’ notice of removal (the “Removal Notice”) asserts that this Court has original jurisdiction of the action pursuant to 48 U.S.C. § 2166(a)(2) because it arises “under,” arises “in,” or is “related to” the Title III proceeding In re Commonwealth of Puerto Rico, No. 3:17-bk-3283 (D.P.R. May 3, 2017) (the “Title III Proceeding”), filed pursuant to the Puerto Rico Oversight, Management, and Economic Stability Act (“PROMESA”).

On June 13, 2017, this Court entered an Order requiring Defendants to show cause as to why the above-captioned adversary proceeding should not be remanded to the Commonwealth Court for substantially the reasons set forth in this Court’s Memorandum Opinion and Order entered on June 13, 2017, in Gautier v. Rosselló-Nevarés, Adv. Proc. No. 17-136-LTS (“Gautier”). (Docket Entry No. 16.) Defendants filed a response arguing that the facts of this case are distinguishable from those in Gautier due to the breadth of the documentation sought by Plaintiff in this Mandamus Action. (“Response,” Docket Entry No. 13.) In addition, certain defendants have moved pursuant to Federal Rule of Civil Procedure 12(b)(6) for entry of an order dismissing the amended complaint. (Docket Entry Nos. 7 and 12.)

The Court has considered carefully all of the parties’ submissions. For the following reasons, the Mandamus Action is remanded to the Commonwealth Court. In light of its conclusion that it lacks jurisdiction of this action, the Court does not address the motion to dismiss.

BACKGROUND

Except as otherwise indicated, the following facts are alleged in the Removal Notice or drawn from the documents annexed thereto and are taken as true for purposes of this

Memorandum Opinion and Order. Plaintiff is a Puerto Rico state senator. (Removal Notice ¶ 1.) Defendants are the Commonwealth of Puerto Rico (the “Commonwealth” or “Puerto Rico”), Ricardo Rosselló-Nevarés, in his capacity as Governor of Puerto Rico (together with the Commonwealth, the “Commonwealth Defendants”), the Puerto Rico Fiscal Agency and Financial Advisory Authority (“AAFAF”), Gerardo Portela Franco in his capacity as the Executive Director of AAFAF (together with AAFAF, the “AAFAF Defendants” and, with the Commonwealth Defendants, the “Respondents”), and Wanda Vázquez Garced in her capacity as the Puerto Rico Secretary of Justice. (Removal Notice at 1.) Under PROMESA, Governor Rosselló may submit fiscal plans and budgets to the Financial Oversight and Management Board for Puerto Rico (the “Board”) for review and certification. See 48 U.S.C. § 2141. On March 13, 2017, the Board certified the Plan. (Removal Notice ¶ 3.)

On April 17, 2017, Plaintiff filed a petition for writ of mandamus, under Puerto Rican law, before the Commonwealth Court seeking public disclosure of “all of the documents, studies, reports, memoranda, letters, analyses, actuarial studies, reports of projections of cutbacks and income, expenses and investments and any other document that may have been used in drafting the [Plan].” (Docket Entry No. 10-1 at 3.)

The Board, as representative of the Commonwealth, commenced the Commonwealth’s Title III Proceeding on May 3, 2017. (Case No. 17-BK-3283-LTS, Docket Entry No. 1.) On May 19, 2017, Defendants filed the Removal Notice, removing the action to this Court as an adversary proceeding in connection with the Commonwealth’s Title III case. (Docket Entry No. 1.)

On June 19, 2017, the Commonwealth Defendants filed a motion to dismiss the amended complaint (the “Motion to Dismiss”). (Docket Entry No. 7.) The AAFAF Defendants subsequently filed a motion seeking to join the Motion to Dismiss.

As noted above, this Court has directed the Defendants to show cause (the “Order to Show Cause”) as to why the above-captioned adversary proceeding should not be remanded to the Commonwealth Court for substantially the same reasons set forth in Gautier. (Docket Entry No. 6.) In Gautier, the defendants removed a mandamus action, seeking public disclosure of a draft budget pursuant to Puerto Rico substantive and procedural law, to this Court. In their Removal Notice, the defendants argued that this Court had jurisdiction of the action pursuant to 48 U.S.C. § 2166(a)(2) because the draft budget could not exist outside of the Title III Proceeding and, as such, any litigation regarding such document would necessarily take place in the context of the Commonwealth’s Title III Proceeding. This Court rejected the defendant’s arguments and remanded the mandamus action to Commonwealth of Puerto Rico Court of First Instance, San Juan Part. Specifically, this Court held that the draft budget, and controversies concerning rights of access to it, did not arise “under,” arise “in,” or “relate to” the Commonwealth’s Title III Proceeding. Familiarity with the Gautier decision is assumed.

In response to the Order to Show Cause, Respondents argue that the facts in this case are distinguishable from those in Gautier because—unlike in Gautier, where the plaintiff sought public disclosure of a single document prepared by the Commonwealth—the Plaintiff in the Mandamus Action seeks disclosure of all documentation that may have been used in drafting the Plan. (Response at 2-3.) Respondents argue that the documents sought by the Plaintiff are “central to the most important disputes in the Title III proceedings and related adversary proceedings” and, as such, any ruling regarding public disclosure of such documents could have

a “substantial effect” on the Title III cases. (Id.) On these facts, Respondents argue the Court has “related to” jurisdiction over the dispute.

DISCUSSION

Title III of PROMESA permits the removal of a civil action pending in another court to this District Court, if the District Court has jurisdiction of the claim or cause of action under PROMESA. 48 U.S.C. § 2166(d)(1). If a case is removed and the court determines that it lacks jurisdiction over the matter, the court must remand the case. 28 U.S.C. § 1447. The removal statute is “strictly construed against removal jurisdiction, and the burden of establishing federal jurisdiction falls to the party invoking the statute.” Rios Ortiz v. Velazquez-Ortiz, No. CIV. 14-1467 JAF, 2014 WL 3734490, at *1 (D.P.R. July 28, 2014) (internal citation omitted). The Court concludes that the same burden applies under PROMESA. The Court may also remand a claim or cause of action of which it has PROMESA Title III jurisdiction “on any equitable ground.” 48 U.S.C. § 2166(d)(2). Defendants assert that this Court has jurisdiction of this action pursuant to 48 U.S.C. § 2166(a)(2), which confers on district courts “original but not exclusive jurisdiction of all civil proceedings arising under [PROMESA], or arising in or related to cases under [PROMESA].” (Removal Notice ¶¶ 6-7.)

For substantially the reasons set forth in Gautier, there is no plausible factual or legal basis for the proposition that the Mandamus Action arises “under” Title III of PROMESA or “in” the Commonwealth’s Title III Proceeding. The Mandamus Action does not arise “under” Title III of PROMESA because the obligations to create and certify fiscal plans are imposed by Title II of PROMESA, which is not addressed in the 48 U.S.C. § 2166 jurisdictional grant. Indeed, the Plan was created and certified by the Oversight Board before the commencement of the Commonwealth’s Title III Proceeding. Moreover, the Mandamus Action does not arise “in”

the Commonwealth's Title III Proceeding, as it existed, independently, outside of the Title III context and it was brought under Puerto Rican law.

Turning to the Defendants argument that the action is "related to" the Commonwealth's PROMESA Title III, the Mandamus Action fails to satisfy the Pacor conceivable effects test. See Pacor, Inc. v. Higgins, 743 F.2d 984 (3rd Cir. 1984) (holding that "related to" jurisdiction exists when "the outcome of [the] proceeding could conceivably have any effect on the estate being administered in bankruptcy.") Importantly, "the mere fact that there may be common issues of fact between a civil proceeding and a controversy involving the bankruptcy estate does not bring the matter within the scope" of the provision. (Id. at 994.)

There has been no showing that the outcome of the litigation regarding access to the documents used in drafting the Plan could affect the Commonwealth's rights, liabilities or freedom of action, or otherwise conceivably have an effect on the adjustment of its debts or treatment of its property, in the context of the Commonwealth's Title III Proceeding.

Furthermore, even if the Mandamus Action satisfied the conceivable effect test, the Court finds that equitable remand of the issues herein is appropriate. PROMESA permits the remand of a claim or cause of action "on any equitable ground." See 48 U.S.C. § 2166(d)(2). Under the analogous statutory provision that applies to the remand of actions within the bankruptcy jurisdictional grant under 28 U.S.C. § 1452, courts in the First Circuit look to the following non-exclusive list of factors in determining whether equitable remand of a bankruptcy-related claim or cause of action is appropriate:

- (1) the effect of the action on the administration of the bankruptcy estate;
- (2) the extent to which issues of state law predominate;
- (3) the difficulty of applicable state law;
- (4) comity;
- (5) the relatedness or remoteness of the action to the bankruptcy case;
- (6) the existence of the right to a jury trial; and
- (7) prejudice to the involuntarily removed party.

In re Santa Clara Cty Child Care Consortium, 223 B.R. 40, 46 (B.A.P. 1st Cir. 1998). These factors favor equitable remand of the Mandamus Action. The Defendants have failed to articulate any plausible way in which the action will affect the administration of the Title III Proceeding. Plaintiff's claim exclusively involves Puerto Rican law. Comity considerations favor remand, as Commonwealth legal issues substantially predominate in the Mandamus Action. Finally, Defendants have not identified any prejudice, other than complication of discovery issues, that would result from this action being remanded to the Puerto Rican court.

CONCLUSION

For the foregoing reasons, the Clerk of Court is directed to effectuate the remand and close the above-captioned adversary proceeding. The Court does not address the Motion to Dismiss, which may be prosecuted in the original forum. This Memorandum Opinion and Order resolves Docket Entry No. 12.

SO ORDERED.

Dated: July 7, 2017

/s/ Laura Taylor Swain
LAURA TAYLOR SWAIN
United States District Judge