

ORIGINAL

S E R V E D

December 21, 2010

FEDERAL MARITIME COMMISSION

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WASHINGTON, D.C.

DOCKET NO. 09-08

**SSA TERMINALS, LLC and
SSA TERMINALS (OAKLAND), LLC**

v.

**THE CITY OF OAKLAND, ACTING BY AND THROUGH
ITS BOARD OF PORT COMMISSIONERS**

**ORDER GRANTING RESPONDENT'S MOTION FOR LEAVE TO APPEAL
AND RESPONDENT'S MOTION TO STAY PROCEEDING**

I.

On November 23, 2010, the City of Oakland, acting by and through its Board of Port Commissioners ("Port of Oakland" or "Port"), filed Respondent's Motion for Leave to Appeal November 8, 2010, Order Denying its Motion to Dismiss and Appeal Brief ("Appeal Motion"). The Port of Oakland seeks leave to appeal the November 8, 2010, Order on Motion to Dismiss and Motion to Stay Proceedings which denied the Port of Oakland's motion to dismiss on Eleventh Amendment grounds and dismissed as moot the Port's motion to stay pending determination of the motion to dismiss. *SSA Terminals, LLC and SSA Terminals (Oakland), LLC v. The City of Oakland, Acting by and Through its Board of Port Commissioners*, FMC Docket No. 09-08 (Nov. 8, 2010) (Order on Motion to Dismiss and Motion to Stay Proceedings).

On December 6, 2010, the Port of Oakland filed a Motion to Stay ("Stay Motion") seeking to stay the proceeding while the appeal is pending before the Commission.

On December 15, 2010, SSA Terminals, LLC and SSA Terminals (Oakland), LLC ("SSAT") filed Complainants' Opposition to Respondent's Motions for Leave to Appeal and for a Stay Pending Appeal ("Opposition") and Complainants' Reply to Respondent's Appeal.

On December 17, 2010, the Port of Oakland filed Respondent's Notice of Supplemental Material of State Lands Commission and SSAT Relating to Motion to Stay, Motion for Leave to Appeal, and Appeal. SSAT has not had an opportunity to respond to this supplemental material. However, the supplemental material was not relied upon in ruling on the Appeal Motion or the Stay Motion. It is noted that the Port of Oakland did not request reconsideration of its motion to dismiss on the basis of this supplemental information and that such reconsideration does not appear warranted.

II.

The Port of Oakland argues that the motion for leave to appeal satisfies the requirements of Commission Rule 153 and that denying the motion would cause substantial delay, unnecessary expense, and undue prejudice and would not be in the public interest. Appeal Motion at 1-2. The Port of Oakland also contends that the proceeding should be stayed pending its appeal to the Commission and that it has made a strong showing that it is likely to prevail on the merits of its appeal: it will suffer irreparable injury if the stay is not granted; SSAT will not suffer substantial harm if the proceeding is stayed; and it is in the public interest for this matter to be stayed. Stay Motion at 1-6.

SSAT oppose the motions, arguing that granting leave to appeal is extraordinary and should be limited to exceptional issues. Opposition at 1-2. SSAT contend that the claim to immunity is only partial, the collateral order doctrine does not apply, and immediate appeal is not warranted. Opposition at 3. Even if an appeal is authorized, SSAT argue that a stay is not required, contending that there is no likelihood of success; financial harm is not sufficient to justify a stay and the Port has waived any right to claim injury by participation in the case; SSAT would be harmed by a delay in the proceeding; and the public interest is in prompt resolution of the matter and therefore weighs against a stay. Opposition at 3-12.

III.

The case *sub judice* involves a novel Eleventh Amendment issue – whether the Port of Oakland's role as trustee of California's tidelands is sufficient to extend California's Eleventh Amendment immunity to the Port. This constitutional and jurisdictional issue is distinct from the factual issues of the merits of the case and should be resolved prior to continuing the proceeding. As discussed below, the case law clearly indicates that the benefit of sovereign immunity is lost or severely eroded if the suit is allowed to proceed past the motion stage.

Commission Rule 153 states in relevant part:

(a) Rulings of the presiding officer may not be appealed prior to or during the course of the hearing, or subsequent thereto, if the proceeding is still before him or her, except where the presiding officer shall find it necessary to allow an appeal to the Commission to prevent substantial delay, expense, or detriment to the public interest, or undue prejudice to a party.

46 C.F.R. § 502.153(a). “Unless otherwise provided, the certification of the appeal shall not operate as a stay of the proceeding before the presiding officer.” 46 C.F.R. § 502.153(d).

The Supreme Court has held “that States and state entities that claim to be ‘arms of the State’ may take advantage of the collateral order doctrine to appeal a district court order denying a claim of Eleventh Amendment immunity.” *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993). The Ninth Circuit stated “the reason we will hear a state’s appeal from a decision denying immunity to it under the Eleventh Amendment is that the benefit of the immunity is lost or severely eroded once the suit is allowed to proceed past the motion stage of the litigation.” *Thomas v. Nakatani*, 309 F.3d 1203, 1207-08 (9th Cir. 2002); *see also Vann v. Kempthorne*, 534 F.3d 741, 745 (D.C. Cir. 2008) (“we may hear an interlocutory appeal from the denial of [a motion to dismiss on sovereign immunity grounds.]”).

In previous cases before the Commission, parties have been permitted to appeal denials of motions to dismiss on Eleventh Amendment grounds, and in those cases the proceeding was generally stayed. *See, e.g., Int’l Shipping Agency, Inc. v. The Puerto Rico Ports Auth.*, No. 04-01 (FMC Sept. 21, 2004) (Notice); *see also Odyssey Stevedoring of Puerto Rico, Inc. v. Puerto Rico Ports Auth.*, 30 S.R.R. 1339 (FMC Mar. 5, 2007) (Order) (D.C. Circuit granted motion to stay administrative proceedings pending review of sovereign immunity issue). In *South Carolina Maritime Services, Inc.*, Judge Kline allowed a stay pending consideration of a petition for review of an Eleventh Amendment issue to the circuit court, stating that “the right or privilege not to have to defend against a private complaint under the 11th Amendment, if violated, has been found by the courts to cause irreparable injury without regard to ‘financial impact’ as a matter of law.” *South Carolina Mar. Services, Inc. v. South Carolina State Ports Auth.*, 2000 WL 722270, at *6 (ALJ May 10, 2000).

Motion for Leave to Appeal to the Commission

SSAT argues that “the City’s arguments have shifted away from a claim that it is an arm of the state and focused instead on the alleged ownership of the Port Revenue Fund” and therefore the claim to immunity is only partial and the collateral order doctrine accordingly does not apply, relying on *Espinal-Dominguez v. Puerto Rico*, 352 F.3d 490 (1st Cir. 2003). However, in that case, the commonwealth did not assert that it was immune from suit in federal court, but merely objected to “a particular strain of damages.” *Espinal-Dominguez*, 352 F.3d at 496. Similarly, in *Burns-Vidlak v. Chandler*, 165 F.3d 1257, 1260 (9th Cir. 1999), cited by SSAT, the state conceded that it was

subject to suit and merely invoked the Eleventh Amendment as a defense to liability for punitive damages. In this case, while the Port of Oakland may be shifting its argument to focus on the ownership of the Port Revenue Funds, it has not abandoned its claim of immunity to the entire suit.

If the motion for leave to appeal is denied, the determination of the immunity issue will be delayed until the final ruling on the merits and the Port of Oakland will have lost the benefit of the immunity, thereby sustaining delay and undue prejudice. In addition, the Port, which is utilizing public funds in this litigation, will have suffered substantial expense and detriment to the public interest. The appeal is therefore appropriate under Rule 153 and will prevent substantial delay, expense, or detriment to the public interest and will prevent undue prejudice to a party.

Motion to Stay Proceeding

Motions to stay are generally evaluated under the factors established in *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir.1958). These factors are:

- (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal;
- (2) the likelihood that the moving party will be irreparably harmed absent a stay;
- (3) the prospect that others will be harmed if the court grants the stay; and
- (4) the public interest in granting the stay.

Wisconsin Gas Co. v. FERC, 758 F.2d 669, 673-74 (D.C. Cir. 1985) (citing *Virginia Petroleum Jobbers Ass'n*, 259 F.2d at 925). These factors are applicable to claims of sovereign immunity. *Odyssey Stevedoring of Puerto Rico, Inc. v. Puerto Rico Ports Auth.*, 30 S.R.R. 1324 (ALJ Feb. 12, 2007). A case may qualify for appeal but not meet the standards for a stay. 46 C.F.R. § 502.153(d); *McSurely v. McClellan*, 697 F.2d 309, 318 n.17 (D.C. Cir. 1982).

The Port of Oakland contends that it has made the requisite showing of likelihood of prevailing on the merits of the appeal because the Port operates as a tidelands trust and as a trustee for California. Stay Motion at 2. In the appeal, the Port of Oakland focuses on the nature of the Port Revenue Funds, describing them as state funds. Stay Motion at 2. SSAT counters that as a municipality and department of the City of Oakland, immunity is not available. Opposition at 4-10. The Port of Oakland relies on the cases and arguments which were unsuccessfully argued in its motion to dismiss. While the Port of Oakland has not made a strong showing of a likelihood of success on the merits, its arguments on the other three factors are stronger.

The Port of Oakland contends that a party that must defend a claim when it has Eleventh Amendment immunity is irreparably harmed as a matter of law. Appeal Motion at 3. Relying on *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. at 143-44, the Port of Oakland states that it will suffer a constitutional violation even if, as the immune party, it suffers no adverse financial impact. Appeal Motion at 3. SSAT responds that financial injury is not sufficient to justify a stay. Opposition at 10-11. Under *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, collateral appeals are permitted in Eleventh Amendment immunity cases to protect the

dignity of the state, a separate issue from financial injury, and a basis which would be undermined by permitting the proceeding to continue.

Complainants also argue that the Port of Oakland waived its right to pursue its Eleventh Amendment claim because the Port delayed filing its motion to dismiss until seven months after commencement of the litigation, and that the harm will be minimal because trial has not begun in the proceeding. Opposition at 10-11. The timing of the motion to dismiss may have been impacted by the expectation of developments relevant to the case, including California Public Resources Code section 6009, which was enacted on September 25, 2010, after the motion to dismiss was filed. Under these facts, immunity was not waived because there was a reason to delay filing and the filing was made by the date required in the proceeding. *See Ceres Marine Terminals, Inc. v. Maryland Port Admin.*, 30 S.R.R. 358 (2004). Moreover, the proceeding is now headed to the final stages of discovery and could be in the trial stage prior to the resolution of the Eleventh Amendment issue. Thus, the irreparable harm factor weighs heavily in favor of the stay.

The Port of Oakland contends that SSAT will not suffer substantial harm if the proceeding is stayed while SSAT replies that it will be harmed by a delay in the proceeding. Stay Motion at 5; Opposition at 11. The choice is between delaying a determination of the merits and delaying a determination of the constitutional right to immunity. Although both sides make valid points regarding harm to others, SSAT's injury will be compensable while loss of state dignity cannot be rectified later in the proceeding. Accordingly, this factor weighs in favor of the stay.

In addition, non-party Ports America Outer Harbor Terminal, LLC, a competitor of SSAT, currently has a motion to quash or modify subpoena duces tecum pending and is the subject of a pending motion to compel inspection of premises. This non-party, which is facing discovery costs, commercial interruption, and potential competitive consequences, has continuously objected to participating in this proceeding. The immunity issue should be resolved prior to requiring the participation of this non-party.

The Port of Oakland argues that the Port is a public entity and any further defense of the claims will require an unrecoverable expenditure of public resources. SSAT contends that the public interest is in prompt resolution of the claim. Although prompt resolution of the matter is certainly preferred, that interest will not trump a party's right to assert a claim of constitutional immunity. This factor also weighs in favor of the stay.

Under the *Jobbers* standard, the Port of Oakland is entitled to a stay of the proceeding pending appeal to the Commission. Although the undersigned does not agree that the Port of Oakland is likely to prevail on the merits of the appeal, this area of the law is evolving. Strong arguments are made that the Port will be irreparably injured by being required to participate in the proceeding if it is found entitled to immunity; that SSAT will not suffer substantial harm if the proceeding is stayed as any injuries are compensable; and that it is in the public's interest for the proceeding to be stayed because public resources are being spent on the matter. Moreover, to require the proceeding to continue would undermine the very basis for allowing the appeal. Given the case


law, the constitutional and jurisdictional nature of the Eleventh Amendment issue, and the interests of the public, leave to appeal to the Commission and a stay pending the appeal to the Commission are warranted under these circumstances.

IV.

For the reasons indicated above, it is hereby

ORDERED that Respondent's Motion for Leave to Appeal be **GRANTED**. It is

FURTHER ORDERED that Respondent's Motion to Stay be **GRANTED**.



Erin M. Wirth
Administrative Law Judge