

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

In re NEW YORK CITY OFF-TRACK BETTING
CORPORATION,

Debtor.

NEW YORK RACING ASSOCIATION, INC.,

Appellant,

vs.

1:10-cv-03958-MGC

NEW YORK CITY OFF-TRACK BETTING,

Appellee.

**MEMORANDUM OF LAW IN SUPPORT OF NEW YORK CITY OFF-TRACK
BETTING CORPORATION'S MOTION TO DISMISS APPEAL
OF NEW YORK RACING ASSOCIATION, INC.**

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May 26, 2010

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
PRELIMINARY STATEMENT	1
STATEMENT OF FACTS	1
ARGUMENT	3
I. NYRA’S APPEAL SHOULD BE DISMISSED BECAUSE THE OPINION AND THE ORDER FOR RELIEF ARE NOT FINAL ORDERS.	3
A. An Appeal By Right May Be Taken Only From A Final Order.....	3
B. An Order Permitting a Bankruptcy Case to Proceed Is Not A Final Order.....	5
C. The Opinion And The Order For Relief Are Non-Final And Not Appealable By Right.....	6
CONCLUSION.....	7

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Barben v. Donovan (In re Donovan)</i> , 532 F.3d 1134 (11th Cir. 2008)	5
<i>Collect Pond House, Inc. v. CSM Realty Corp (In re CSM Realty Corp.)</i> , 2001 WL 987919 (S.D.N.Y. Aug. 29, 2001)	4
<i>Dubin v. S.E.C. (In re Johns-Manville Corp.)</i> , 824 F.2d 176 (2d Cir. 1987)	3, 4
<i>Foster Secs., Inc. v. Sandoz (In re Delta Servs. Indus.)</i> , 782 F.2d 1267 (5th Cir. 1986).....	4
<i>In re 405 N. Bedford Dr. Corp.</i> , 778 F.2d 1374 (9th Cir. 1985).....	5
<i>In re The Bennett Funding Group, Inc.</i> , 439 F.3d 155 (2d Cir. 2006).....	4
<i>In re Committee of Asbestos-Related Litigants</i> , 749 F.2d 3 (2d Cir. 1984).....	5
<i>In re Sonnax Indus., Inc.</i> , 907 F.2d 1280 (2d Cir. 1990)	4
<i>Local 1186 v. City of Vallejo (In re City of Vallejo)</i> 408 B.R. 280 (9th Cir. B.A.P. 2009).....	6
<i>Official Committee Of Subordinated Bondholders v. Integrated Res., Inc. (In re Integrated Res.)</i> , 3 F.3d 49 (2d Cir. 1993).....	4
<i>Promenade Nat’l Bank v. Phillips (In re Phillips)</i> , 844 F.2d 230 (5th Cir. 1988).....	5
<i>Shimer v. Fugazy (In re Fugazy Exp., Inc.)</i> , 982 F.2d 769 (2d Cir. 1992)	3, 4
<i>Silver Sage P’ners, Ltd. v. City of Desert Hot Springs (In re City of Desert Hot Springs)</i> , 339 F.3d 782 (9th Cir. 2003)	5, 6
Statutes & Rules	
11 U.S.C. § 301(a)	2
11 U.S.C. § 301(b)	2
11 U.S.C. § 921(c)	2
11 U.S.C. § 921(d)	2
28 U.S.C.A. § 158(a)	7
28 U.S.C. § 158(a)(1).....	3, 4, 7

PRELIMINARY STATEMENT

Appellee New York City Off-Track Betting Corporation (“NYC OTB”), in accordance with Rule 8011 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), hereby moves this Court for dismissal of the Notice of Appeal of Appellant New York Racing Association, Inc. (“NYRA”) on the grounds that the appeal is from non-final orders of the Bankruptcy Court in NYC OTB’s chapter 9 case and therefore, NYRA’s appeal by right under 28 U.S.C.A. § 158(a)(1) is improper and should be dismissed.

STATEMENT OF FACTS

NYC OTB is a New York public benefit corporation created by the New York State Legislature on April 22, 1970 to raise revenues for the state and certain municipalities and to fight the role of organized crime in horse-race gambling. As of November 30, 2009, NYC OTB employed 1,343 people. Over its 40-year existence, NYC OTB contributed approximately \$2 billion to New York State’s racing industry, \$1.4 billion to New York City, and almost \$600 million to New York State.

NYC OTB’s financial troubles did not arrive recently. For the past nine years, NYC OTB has been caught in a downward spiral, based in large part on the business model that its authorizing legislation imposed. On June 16, 2008, in the face of a threatened shut-down by the Mayor of New York City, New York State took over NYC OTB from New York City. After the takeover, NYC OTB’s operations continued for another 17 months, still hampered by the required statutory payments scheme. Before filing for protection from its creditors with nearly \$100 million in unpaid liabilities, NYC OTB estimated that it would run out of cash by the end of 2009. It filed a petition for adjustment of its debts under chapter 9 of Title 11 of the United States Code, a municipal bankruptcy case, in the United States Bankruptcy Court for the Southern District of New York on December 3, 2010. *See* docket in In re New York City Off-

Track Betting Corp., Case No. 09-B-17121 (MG) (S.D.N.Y. Bankr. Ct.) (“Bankr. Docket”) at Docket No. 1.¹ A copy of the Bankruptcy Court docket is attached hereto as Addendum A.

Its chapter 9 filing enabled NYC OTB to delay certain payments, stretching its available cash and enabling operations to continue. The filing also was designed to give the New York State Legislature time to enact legislative changes, including changes to mandatory statutory distributions, to ensure the health and continued operation of NYC OTB, which could then develop and seek bankruptcy court confirmation of a plan for adjustments of its debts.

In an ordinary commercial or individual bankruptcy case under chapter 7, 11 or 13, the commencement of a voluntary case by the filing of a petition constitutes an order for relief. 11 U.S.C. § 301(a), (b). In a municipal bankruptcy case, however, a party in interest may file an objection to the petition before the entry of an order for relief. *See id.* § 921(c). If an objection is filed, then the bankruptcy court may order relief under chapter 9 only after finding that the petition meets the requirements of the Bankruptcy Code and that the debtor filed the petition in good faith. *Id.* § 921(c), (d). On January 4, 2010, New York Racing Association, Inc. (“NYRA”) filed an objection to the petition, arguing that NYC OTB failed to satisfy the requirements to be a debtor under chapter 9 and that NYC OTB filed the petition in bad faith. *See* Bankr. Docket, Docket No. 33. NYRA’s objection was joined by New York Thoroughbred Horsemen’s Association on January 4, 2010, and by New York Thoroughbred Breeders, Inc. on January 6, 2010. *See* Bankr. Docket, Docket No. 34, 37.

After an evidentiary hearing on February 22, 2010, Judge Martin Glenn issued the “Opinion and Order Overruling Objections of New York Racing Association, Inc., New York

¹ NYC OTB is advised that a copy of the record on appeal, which includes all of the documents filed in the bankruptcy court and designated in NYRA’s Statement of Issues and Designation of Record on Appeal, has been transmitted to the clerk of the district court in accordance with Rule 8007(b) of the Bankruptcy Rules. Copies of the documents cited in this Memorandum are also attached hereto for the convenience of the Court as Addendums A, B and C and D.

Thoroughbred Horsemen's Association, Inc., and New York Thoroughbred Breeders, Inc. to Debtor's Bankruptcy Petition and Statement of Qualifications Under § 109(c)" (the "Opinion") on March 22, 2010. *See* Bankr. Docket, Docket No. 63. A copy of the Opinion is attached hereto as Addendum B. In the Opinion, Judge Glenn made extensive findings and determined that NYC OTB satisfied each of the chapter 9 eligibility requirements of section 109(c) of the Bankruptcy Code and that the NYC OTB's chapter 9 petition was filed in good faith. The Opinion concluded:

The practical implications of this decision are limited. Protected for now by Chapter 9 of the Bankruptcy Code, NYC OTB will either reorganize or liquidate under the watch of this Court, depending on the actions of the New York State Legislature and NYC OTB's further negotiations with each of its important constituencies.

Opinion at 43. On March 22, 2010, Judge Glenn also issued an Order for Relief in NYC OTB's chapter 9 case, which reads in its entirety: "Upon consideration of New York City Off-Track Betting Corporation's (NYC OTB) Chapter 9 Petition and a determination that NYC OTB is eligible to file for relief under chapter 9 of the US Bankruptcy Code, an Order for Relief is hereby granted in the above-captioned case." Bankr. Docket, Docket No. 64. A copy of the Order for Relief is attached hereto as Addendum C.

On April 5, 2010, NYRA filed a Notice of Appeal to this Court under 28 U.S.C. § 158(a)(1) from both the Opinion and the Order for Relief. *See* Bankr. Docket, Docket No. 72.

ARGUMENT

I. NYRA'S APPEAL SHOULD BE DISMISSED BECAUSE THE OPINION AND THE ORDER FOR RELIEF ARE NOT FINAL ORDERS.

A. An Appeal By Right May Be Taken Only From A Final Order.

The jurisdictional section under which NYRA appeals, 28 U.S.C.A. § 158(a)(1), provides, "The district courts of the United States shall have jurisdiction to hear appeals (1) from

final judgments, orders, and decrees”. By its terms, the statutory jurisdictional grant in 28 U.S.C.A. § 158(a)(1) limits appeals as of right to appeals from bankruptcy court rulings that are final.

The standards of finality in a bankruptcy case differ from those in ordinary civil litigation. *Shimer v. Fugazy (In re Fugazy Exp., Inc.)*, 982 F.2d 769, 775 (2d Cir. 1992). A final order in a bankruptcy case is one that “finally disposes of discrete disputes within the larger case.” *Dubin v. S.E.C. (In re Johns-Manville Corp.)*, 824 F.2d 176, 179-180 (2d Cir. 1987) (citation, emphasis and internal quotes omitted). However, the looser standard of finality is not unlimited. For an order to be final, the “discrete dispute” that it resolves must not pertain simply to procedural or preliminary issues, but must involve a substantive claim and a request for relief:

“By ‘disputes’ we do not mean merely competing contentions with respect to separable issues Given the strong federal policy against piecemeal appeals, a ‘dispute’, for appealability purposes in the bankruptcy context, means at least an entire claim on which relief may be granted.”

In re Fugazy Exp., Inc. 982 F.2d at 775-76 (citations omitted). Thus, final orders are typically those that conclusively determine the substantive rights of a party or the disposition of the assets of the debtor, such as an order authorizing assumption and assignment of a lease, which fully resolves a discrete issue. *Collect Pond House, Inc. v. CSM Realty Corp (In re CSM Realty Corp.)*, 2001 WL 987919, 3 (S.D.N.Y. Aug. 29, 2001).

By contrast, “bankruptcy court orders that constitute only a preliminary step in some phase of the bankruptcy proceeding and that do not directly affect the disposition of the estate’s assets are interlocutory”. *Foster Secs., Inc. v. Sandoz (In re Delta Servs. Indus.)*, 782 F.2d 1267, 1270-71 (5th Cir. 1986) (order approving the appointment of an interim trustee and his counsel). Examples include an order denying a shareholder request for official committee status, *In re Johns-Manville Corp.*, 824 F.2d at 179-180 (2d Cir. 1987); an order granting relief

from the automatic stay, *In re Sonmax Indus., Inc.*, 907 F.2d 1280, 1284-85 (2d Cir. 1990); an order approving a settlement, *In re The Bennett Funding Group, Inc.*, 439 F.3d 155, 160 (2d Cir. 2006); and an order approving a break-up fee in a process for a sale of property of the bankruptcy estate, with the bankruptcy court retaining jurisdiction over a continuing dispute over the actual amount payable, *Official Committee Of Subordinated Bondholders v. Integrated Res., Inc. (In re Integrated Res.)*, 3 F.3d 49 (2d Cir. 1993).

B. An Order Permitting a Bankruptcy Case to Proceed Is Not A Final Order.

Applying these finality standards, orders in ordinary consumer or commercial bankruptcy cases similar to the Opinion and the Order for Relief here are non-final. The “weight of circuit authority has concluded that orders denying a motion to dismiss [a voluntary bankruptcy case] for bad faith” are interlocutory. *Barben v. Donovan (In re Donovan)*, 532 F.3d 1134, 1137 (11th Cir. 2008) (citing cases); *In re 405 N. Bedford Dr. Corp.*, 778 F.2d 1374, 1377 (9th Cir. 1985) (order is interlocutory where creditors are not “faced with irreparable injury by the denial of the motion”); *In re Committee of Asbestos-Related Litigants*, 749 F.2d 3 (2d Cir. 1984). As the Court of Appeals for the Second Circuit explained, “The issue of bad faith has not been permanently laid to rest by the bankruptcy court’s decision.... A finding of good faith at the time of [reorganization plan] confirmation will bear the indicia of completeness and finality that are lacking in the bankruptcy court’s present order.” *Id.*, at 5-6. Similarly, a determination that the debtor is eligible for relief under section 109 of the Bankruptcy Code is non-final. *Promenade Nat’l Bank v. Phillips (In re Phillips)*, 844 F.2d 230 (5th Cir. 1988). “[A]n order determining that a debtor is eligible allows the bankruptcy proceedings to continue. It thus is a preliminary step in some phase of the bankruptcy proceeding, and does not directly affect the disposition of the estate’s assets.” *Id.* (internal quotes omitted).

The analysis is the same in a municipal bankruptcy case under chapter 9, even though, unlike in commercial cases, chapter 9 contemplates an eligibility and good faith determination at the beginning of the case. *Silver Sage P'ners, Ltd. v. City of Desert Hot Springs (In re City of Desert Hot Springs)*, 339 F.3d 782, 790 (9th Cir. 2003). In that case, the objecting creditor challenged the City's good faith in filing its chapter 9 petition. The Court of Appeals for the Ninth Circuit explained that the touchstone of a final, appealable order was whether an order finally determines an issue in such a way that delaying the appeal would subject the appellant to irreparable injury. It concluded that the bankruptcy court's denial of the objection to the petition "merely allows the municipality to proceed with the bankruptcy" and that the commencement of the case itself would not cause the creditor irreparable injury. *Id.* The Ninth Circuit Bankruptcy Appellate Panel reached the same conclusion where the objection was to the municipality's eligibility for relief under section 109(c) rather than to its good faith under section 921(c). *Local 1186 v. City of Vallejo (In re City of Vallejo)*, 408 B.R. 280, 288, n12 (9th Cir. B.A.P. 2009).

Thus, an order that launches a bankruptcy case or permits one to continue is a preliminary step in the proceeding and does not determine substantive rights, affect the disposition of assets, confront creditors with irreparable injury nor resolve an entire claim on which relief may be granted. It is therefore not a final order.

C. The Opinion And The Order For Relief Are Non-Final And Not Appealable By Right.

Here, the Opinion and the Order for Relief are the same for purposes of determining finality as the orders for relief in *In re City of Desert Hot Springs* and *In re City of Vallejo, supra*, which were non-final orders. The Opinion and the Order for Relief are a preliminary step in NYC OTB's chapter 9 case. They do not determine any substantive rights of either NYC OTB or any of its creditors, including NYRA, nor resolve any claims on which relief

may be granted. They do not affect the disposition of any of NYC OTB's assets. They do not confront creditors with any injury that cannot be addressed in the course of the chapter 9 case. Like the order in *In re Johns-Manville Corp.*, the Opinion and the Order for Relief only set forth the framework and process for resolution of NYC OTB's financial distress, as Judge Glenn made clear: "The practical implications of this decision are limited. Protected for now by Chapter 9 of the Bankruptcy Code, NYC OTB will either reorganize or liquidate under the watch of this Court." *Opinion* at 43.

Accordingly, both the Opinion and the Order are non-final orders for which appeal by right is unavailable under 28 U.S.C.A. § 158(a)(1). NYRA's appeal by right under 28 U.S.C.A. § 158(a)(1) from these non-final orders is therefore improper and should be dismissed.

CONCLUSION

Based upon the foregoing and on the record before the Court, NYC OTB respectfully requests that the Court dismiss NYRA's appeal and grant such further and additional relief as may be appropriate.

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