

In the United States Bankruptcy Court
for the Northern District of Iowa

GARY L. RICHARDSON and PHYLLIS J. RICHARDSON Debtors.	BANKRUPTCY NO. 87-01132M
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MICHAEL DUNBAR, Trustee Plaintiff vs. DONALD D. GOODNOW, in his official capacity as Clerk of Stafford Superior Court, and PETER O. WIDMARK Defendants.	ADVERSARY NO. 87-0293M
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MEMORANDUM OF OPINION AND ORDER

The matter before the Court is a Motion to Intervene under Bankr. R. 7024 by Gary Richardson and Phyllis J. Richardson (Debtors). A hearing was held on November 19, 1987 and the matter was submitted to the undersigned for consideration. The Court now issues this Ruling which shall constitute Findings and Conclusions as required by Bankr. R. 7052.

I.

By Complaint filed August 24, 1987, the trustee, Michael Dunbar (Trustee), petitioned the Court under 11 U.S.C. section 542 to have certain property turned over to the estate. The defendant, Donald G. Goodnow (Defendant), is a court clerk in New Hampshire who has custody of certain monies which Trustee claims should be delivered to him pursuant t" 11 U.S.C. section 543(a) and which should be available for his use under 11 U.S.C. section 363. Trustee also seeks a temporary injunction to prevent any violation by defendants of the automatic stay provided by 11 U.S.C. section 362.

The monies held by Defendant apparently represent assets of Debtors and Francis (Franc) Richardson, a non-party to this proceeding. Several entities involved in the New Hampshire action claimed an interest in this proceeding as judgment creditors to Francis' portion of the monies and as attachment creditors to Debtors' portion of the monies. They have already been permitted to intervene in this matter.

Debtors now seek to be parties in this proceeding. They argue that they meet the mandates of both Fed.R.Civ.P. 24(a)(2) and 24(b)(2). See Bankr. R. 7024.

II.

Intervention in an adversary proceeding is governed by Fed.R.Civ.P. 24 through Bankr. R. 7024. The rule requires that "[a] person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. (fn.1) The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought." Fed.R.Civ.P. 24(c) (emphasis added)(quoted in pertinent part).

Here, Debtors failed to meet the requirement of Rule 24(c) since no pleading has been provided. Accordingly, Debtors' Motion to Intervene must be denied. Absent an appropriate pleading, the Court is deprived of necessary allegations upon which to judge the satisfaction of conditions for intervention. See Bank of New Orleans and Trust Co. v. Marine Credit Corp., 583 F.2d 1063, 1068 (8th Cir. 1978); Stadin v. Union Electric Co., 309 F.2d 912, 917 (8th Cir. 1962).

III.

Lest Debtors think that the Court's Ruling is hasty or harsh, a brief review of their Motion and arguments made at trial clearly indicates that neither intervention of right pursuant to Fed.R.Civ.P. 24(a)(2) nor permissive intervention pursuant to Fed.R.Civ.P. 24(b)(2) is appropriate.

Intervention of right under Fed.R.Civ.P. 24(a)(2) is premised upon a showing by applicant that (1) he has an interest in the subject matter of the primary litigation; (2) his interest is not adequately represented by an existing party to the action; (3) disposition of the action will impair his ability to protect his interest, and (4) the application is timely. Corby Recreation, Inc. v. General Electric Co., 581 F.2d 175, 175-76 (8th Cir. 1978) (citing *inter alia* Planned Parenthood v. Citizens for Community Action, 558 F.2d 861, 869[-701] (8th Cir. 1977)); *see also* S.E.C. v. Flight Transportation Corp., 699 F.2d 943, 947-48 (8th Cir. 1983).

Assuming arguendo that Debtors meet the timeliness requirement as well as the first two prongs of the test delineated above, Debtors, in their brief as well as at hearing, concede that they seek the same relief as Trustee and that they intend to pursue the same theories of recovery as Trustee.

When the party seeking intervention has the same ultimate objective as a party to the suit, a presumption arises that its interests are adequately represented. Against this presumption the party seeking intervention must demonstrate either: (a) collusion between the representative and an opposing party, (b) that the representative has or represents an interest adverse to the intervenor, or (c) that the representative is incompetent or is otherwise not fulfilling its duties. (Fn.2)

J.C. Wyckoff & Associates v. Aetna Casualty & Surety Co. (In re J. C. Wyckoff & Associates., 41 B.R. 791, 793 (Bankr. E.D. Mich. 1984). While Debtors have alleged that Trustee and his counsel suffer from a lack of background on the New Hampshire suit, this Court concludes that such deficiency, if any, can be overcome absent intervention. See Rollert Co. v. Charter Crude Oil Co. (In re The Charter Co.), 50 B.R. 57, 63 (Bankr. W.D. Tex. 1985). Moreover, assistance offered by Debtor's counsel to Trustee and his counsel need not be premised upon a grant or denial of their Motion to Intervene.

Debtors' arguments are likewise unpersuasive in establishing the appropriateness of permissive intervention by Debtors under Fed.R.Civ.P. 24(b)(2). Permissive intervention requires a showing that: (1) a motion has been timely filed, (2) the applicant's claim and the main action are common, and (3) the court has considered the potential for undue delay or prejudice to the original parties. Fed.R.Civ.P. 24(b)(2); Kaiser v. Namekaqon Mutual Town Insurance Co. (In re DeLap), 44 B.R. 21, 22 (Bankr. W.D. Wisc. 1984).

Assuming arguendo that Debtors' petition is timely and that their claim and the Trustee's claim share a common question of law or fact, see Rollert Co., 50 B.R. at 63, "[i]t is then left to the exercise of the Court's discretion to allow intervention. The principal consideration is whether such intervention will 'unduly delay or prejudice the adjudication of the rights of the original parties.' It has been said that this language is 'a caution to the Court so that in its zeal to avoid a multiplicity of suits it will not hamper or vex the claims of the original parties.'" *Id.* (quoting Commonwealth Edison Co. v. Allis-Chalmers Manufacturing Co., 207 F.Supp. 252, 257 (D.C. Ill. 1962), *aff'd*, 315 P.2d 564 (7th Cir. 1963)). The court should balance whatever delay and burdens additional parties always cause against the advantages of disposing of all claims or defenses in one proceeding. Rollert Con., 50 B.R. at 63; Stadin, 309 F.2d at 920-21.

In this action, the Court can only conclude that the disadvantages of having Debtors as parties outweigh the advantages. While Debtors may offer expertise on the New Hampshire action, that benefit may accrue to Trustee without burdening existing parties by the addition of other complaintants who represent the same interest as Trustee and who espouse the same legal theories as Trustee. See Edmondson v. Nebraska, 383 F.2d 123, 127 (8th Cir. 1967). Consequently, permissive intervention under Rule 24(b)(2) is not appropriate.

ORDER

IT IS THEREFORE ORDERED that Debtors' Motion to Intervene is denied for failure to provide the requisite pleading under Fed.R.Civ.P. 24(c)[see Bankr. R. 7024]. Judgment should enter accordingly.

SO ORDERED ON THE 24TH DAY OF DECEMBER 1987.

William L. Edmonds
Bankruptcy Judge

Fed.R.Civ.P. 5 governs service of process and filing of pleadings.

2 This list is not intended to be exhaustive. See Stadin v. Union Electric Co., 309 F.2d 912, 919 (8th Cir. 1962); Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d section 1909.