In the United States Bankruptcy Court

for the Northern District of Iowa

JONES COUNTY OIL COMPANY, INC. also d/b/a Tara Takeout Debtor.	Bankruptcy No. 82-00071 Chapter 7
DELHI SAVINGS BANK Plaintiff vs. JONES COUNTY OIL COMPANY, INC. and R. FRED DUMBAUGH, Trustee Defendants vs. DANIEL L. McALEER Intervener.	Adversary No. 87-0104C

MEMORANDUM OF OPINION AND ORDER

The matter before the Court is a Motion to Intervene under Bankr. R. 7024 by Daniel L. McAleer (McAleer). A hearing was held on November 13, 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 Bankruptcy Rule 7052.

I.

By Amended Complaint filed June 22, 1987, Delhi Savings Bank (Bank) pursuant to 11 U.S.C. section 506 sought a determination by the Court of the extent of Bank's secured interest in several assets of the debtor, Jones County Oil Co. (Debtor),l and requested an order compelling the trustee, R. Fred Dumbaugh (Trustee), to turn over these assets plus interest and to pay costs. By Answer filed June 30, 1987, Trustee admitted all allegations of the Amended Complaint and requested the Court to enter the appropriate equitable relief.

McAleer filed a Motion to Intervene under Bankr. R. 7024 [Fed.R.Civ.P. 24]. He states that he is a guarantor of Debtor's debt, if any, to Bank and that he is a creditor of Debtor for federal taxes he paid on Debtor's behalf. McAleer disputes Bank's interest in several of the assets Bank seeks from Trustee and requests that the Complaint as amended be dismissed with costs borne by Bank and that the Court find Bank has no lien on any of Debtor's assets held by Trustee. Bank resists McAleer's motion. It argues that intervention of right is inappropriate because McAleer does not have a sufficient interest in the proceeding. It further argues that permissive intervention is inappropriate because McAleer's allegations will broaden the scope of this proceeding and unduly delay it.

II.

Intervention in an adversary proceeding in bankruptcy is governed by Fed.R.Civ.P. 24 pursuant to Bankr. R. 7024. McAleer does not claim be is entitled to intervene by any conditioned or unconditioned right conferred by federal statute. See Fed.R.Civ.P.. P. 24(a)(1) and 24(b)(1). Therefore, he must meet the criteria for intervention of right pursuant to 24(a)(2) or he must establish the appropriateness of permissible intervention pursuant to 24(b)(2). There are

two prerequisites for consideration of intervention under either 24(a)(2) or 24(b)(2): the application must be timely and the appropriate procedure for intervention must be followed.

Bank strongly argues that McAleer's motion is untimely. The question of timeliness is to be determined by the Judge in his discretion from all of the circumstances. Nevilles v. Equal Employment Opportunity Commission, 511 F.2d 303, 305 (8th Cir. 1975). The factors to consider are: how far the proceedings have gone before the movant sought intervention, prejudice which may result from delay, and the reason for the delay. Id..; see also Michigan Assoc. for Retarded Citizens v. Smith, 657 F.2d 102, 105 (6th Cir. 1981); Stallworth v. Monsanto Co., 558 F.2d 257, 263-64 (5th Cir. 1977)(followed in Texas Extrusion Corp. v. Palmer, Palmer & Coffee (Tn re Texas Extrusion Corp.). 68 B.R. 712, 721-22 (Bankr.. N.D. Texas 1986)).

As soon as McAleer learned that his interests may no longer be protected by the Trustee (i.e., when the Trustee admitted all allegations), he moved to intervene. Kaiser v. Namekagon Mutual Town Insurance Co. (Tn re DeLap), 44 R.R. 21; 23 (Bankr. W.D. Wisc. 1984); see also Stadin v. Union Electric Co., 309 F.2d 912; 919 (8th Cir. 1962). Moreover, McAleer's motion was filed less than thirty days after the Amended Complaint and only fourteen days after Trustee answered. Therefore, the Court concludes that McAleer's motion was timely.

The procedure for intervention is set forth in Fed.R.Civ.P. 24(c). It requires a motion to be served upon the parties as provided in Fed.R.Civ.P. 5 and that "[t]he 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)(in pertinent part].

It appears that McAleer has properly served his motion. Ho also submitted a "Petition of Intervention" and a supporting affidavit was supplied by McAleer's attorney. Though not captioned as a pleading, the Court construes the "Petition of Intervention" as such since it disputes the allegations of Bank's Amended Complaint and prays for relief. See Fed.R.Civ.P. 8(f).

III.

Initially, it is important to identify the two interests which McAleer represents. He alleges he is both a co-maker of Debtor's debt to Bank and an unsecured creditor of Debtor because he paid federal taxes on Debtor's behalf. The claims for intervention under each interest, at least facially; are not synonymous and were considered separately.

Upon review of the motion and proposed pleading of McAleer and after due consideration of Fed.R.Civ.P. 24(b)(2) and relevant case low, the Court concludes that McAleer as a co-maker of Debtor's note to Bank shall be granted leave to intervene permissively in this proceeding.

Permissive intervention is governed by Fed.R.Civ.P. 24(b)(2).

It is appropriately granted

> when an applicant's claim or defense in the main action have a question of law or fact in common. . . . In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Fed.R.Civ.P. 24(b)(2). This subdivision of Fed.R.Civ.P. 24 does not have the "interest" requirement demanded in subdivision (a)(2). See S.B.C. v. Flight Transportation Corp., 699 F.2d 943, 947-48 (8th Cir. 1923). Instead, a more flexible standard appears to be the basis for permissive intervention since the Court is explicitly summoned to use its discretion. See S.E.C. v. U. S. Realty and Improvement Co., 310 U.S. 434, 459 (1940)("This provision [Fed.R.Civ.P. 24(b)] plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation"). Moreover, "Rule 24 is to be liberally construed, Kozak v. Wells, 278 F.2d 104, 111-12 (8th Cir. 1960); and doubts should be resolved in favor of allowing intervention, Corby Recreation, Inc. v. General Electric Co., 581 F.2d 175, 177 (8th Cir. 1978)." Arkansas Electric Energy Consumers v .Middle South Energy, Inc., 772 F.2d 401, 404 (8th Cir. 1985).

McAleer, as a co-maker of Debtor's note of indebtedness to Bank, embraces the same concern as Debtor when the extent

of Bank's security interest is litigated. Accordingly, while permissive intervention is rarely appropriate when the proposed intervenor merely underlines issues and claims presented by the primary parties, see United States v. American Institute of Real Estate Appraisers, 442 F.Supp. 1072, 1083 (N.D. ill. 1977), the Court concludes that sufficient commonality is established and that the advantages of McAleer, as a co-maker of Debtor's note to Bank, participating in this action outweigh the disadvantages. See .Edmondson v. Nebraska, 383 F.2d 123, 127 (8th Cir. 1967); Stadin, 309 F.2d at 920.

The Court considered several factors in weighing the merits of McAleer's intervention. The primary benefit from McAleer's intervention is that property of the estate may be recovered if his allegations prove correct. The Court also recognizes the well established public policy which favors hearing cases on their merits. Kaiser, 44 B.R. at 23 (quoting Webber v. Eye Corp., 721 F.2d 1067, 1071 (7th Cir. 1983)).

The disadvantages of adding McAleer at this time are obvious. See Stadin; 309 P.2d at 920. However, any delay from protracted discovery may be minimized by this Court's power to insure prompt adjudication. S Kaiser, 44 B.R. at 23; Rollert Co. v. Charter .Crude Oil Co. (In re Charter Co.), 50 B.R. 57, 64 (Bankr. W.D. Tex. 1985); compare F.D.I.C. v. Jennings, 107 F.R.D. 50, 55 (W.D. Ok. @ 1985). Accordingly, McAleer's Motion to Intervene will be granted pursuant to Fed.R.Civ.P.. P. 24(b)(2). Appropriate orders will be entered, however, to insure prompt adjudication.

As an unsecured creditor, McAleer is unable to establish either intervention of right or the appropriateness of permissive intervention. Under the Code, Trustee is elected by and represents unsecured creditors. 11 U.S.C. section 702. It is his duty to collect the property of the estate, reduce it to money, and make appropriate distributions. 11 U.S.C. section 704. As an unsecured creditor, McAleer has the same objective as Trustee--to seek all available funds for distribution to general unsecured creditors.

> 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 duty.

J.C. Wyckoff & Associates, Inc. v. Aetna Casualty & Surety Co. (In re Wyckoff & Associates Inc.); 41 B.R. 791, 793 (Bankr. E.D. Mich. 1984). Though the burden is "minimal," Trbovich v. United Mine Workers, 404 U.S. 528; 538 n.10 (1972); Planned Parenthood v. Citizens for Community Action, 558 P.2d 861, 869-70 (8th Cir. 1977),3 McAleer has not alleged or disclosed any facts which indicate that Trustee has not done his job.2

Trustee's Answer which admitted all of Bank's allegations is no indication of lack of attention to duty. The Court must presume the opposite absent a showing to the contrary.

Bankr. R. 9011(a)(quoted in pertinent part)(emphasis added). Therefore, the Court concludes that McAleer, as an unsecured creditor, is adequately represented by the Trustee and intervention of right is not established.

The above conclusions which dictate against intervention of right by McAleer as an unsecured creditor also render permissive intervention inappropriate. Assuming arguendo that McAleer has a claim or defense with a question of law or fact in common with the main action, the relative merits of his participation in this section 506 action as an unsecured creditor are insufficient to warrant departure from Trustee's role as the representative of unsecured creditors. See Rollert Co,, 50 B.R. at 63; Arkansas Power & Light Co. v. Arkansas Public Service Commission, 107 F.R.D. 335, 340 (E.D. Ark. 1985).

ORDER

IT IS, THEREFORE, ORDERED that the motion of Daniel L. McAleer to intervene in Adversary Proceeding No. 87-0104 is hereby granted without costs;

IT IS FURTHER ORDERED that all Parties to said adversary proceeding shall complete discovery by February 1, 1988

and that a trial, if necessary, shall be held on February 16, 1988 in Cedar Rapids, Iowa.

SO ORDERED THIS 24th DAY OF DECEMBER, 1987.

William L. Edmonds
Bankruptcy Judge

(file stamped 2/24/87)

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1 Entry of Default was ordered by the undersigned against Debtor but entry of Judgment was stayed pending resolution of McAleer's Motion to intervene.

2 This list is not intended to be exhaustive. See Stadin v. Union Electric Co., 309 P.2d 912, 919 (8th Cir. 1962); Wright, Miller & Kane, Federal Practice and Procedure: Civil 20, section 190-

The signature of an attorney or a party constitutes a certificate that the attorney or party has read the document; that to the best of the attorney's or party's >knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose[.]

3 Some courts have placed the burden of showing adequate representation on those opposing intervention because of the conditional language ("unless the applicant's interest is adequately represented by existing parties") of Fed.R.Civ.P. 24(a)(2). Smuck v. Hobson; 408 P.2d 175, 181 (D.C. Cir. 1969). The Eighth Circuit Court of Appeals finds the burden is on the applicant. Little Rock School District v. Pulaski County Special School District No. 1, 738 F.2d 82, 84 (8th Cir. 1984); S.E.C. v. Flight Transportation Corp., 699 F.2d 943, 947 (8th Cir. 1983).

4 See Kaiser v. Namekagon Mutual Town Insurance Co. (In re DeLap), 44 B.R. 21, 23 (Bankr. W.D. Wisc. 1984) (Where acts of trustee in an adversary proceeding to avoid preferential transfer bind estate creditors, the commonality required for permissive intervention is present)(citing Arizo"a v. California, 460 U.S. 605; 614 (1983)