

STATE OF MICHIGAN
COURT OF APPEALS

ABBOTT LABORATORIES CORPORATION,

Plaintiff-Appellee,

v

F S PATHOLOGICAL LABORATORY, INC.,

Defendant-Appellee,

and

FAWZI B. SHAYA and MARY SHAYA,

Proposed Intervening
Defendants-Appellants

UNPUBLISHED

March 4, 1997

No. 189844

Oakland Circuit Court

LC No. 94-438882

Before: Corrigan, C.J., and Doctoroff and R.R. Lamb,* JJ.

PER CURIAM.

Fawzi and Mary Shaya appeal by leave granted from the April 18, 1995, order denying their motion to intervene. We reverse.

The Shayas owned and operated F S Pathological Laboratory, Inc. (F S). In March of 1993, F S transferred all of its assets to Universal Standard Medical Laboratory (Universal). In partial consideration for the transfer, Universal executed a promissory note to F S, which F S later assigned to the Shayas in consideration for money they had loaned to F S and for five years of deferred compensation owed to them by F S.

In August of 1992, plaintiff filed suit against F S seeking payment for goods delivered and services rendered. The trial court entered judgment in favor of plaintiff. The Shayas were not parties to this action.

* Circuit judge, sitting on the Court of Appeals by assignment.

After judgment was entered, plaintiff brought garnishment proceedings against the Shayas and Universal. Plaintiff filed a motion to order Universal to stop paying the Shayas on the note, and to instead pay plaintiff in satisfaction of the judgment. The trial court granted the motion. The Shayas moved to intervene and to set aside the motion to pay, arguing that as assignees of the note from Universal to F S, they were necessary parties to any action regarding the payment of the note proceeds. The trial court denied the motion, finding that there was no basis to grant the motion, and that the Shayas were guilty of laches because they knew of the proceedings against F S, yet took no action.

The decision whether to grant a motion to intervene is within the trial court's discretion. *Black v Dep't of Social Services*, 212 Mich App 203, 204; 537 NW2d 456 (1995). The rule should be liberally construed to allow intervention where the applicant's interest may be inadequately represented. *Id.*

The Shayas argue that they are necessary parties to the action under MCR 2.205(A), which provides that:

Persons having such interest in the subject matter of an action that their presence in the action is essential to permit the court to render complete relief must be made parties and aligned as plaintiffs or defendants in accordance with their respective interests.

They also argue that they were entitled to intervene in the action as of right under MCR 2.209(A)(3) because, as holders of a promissory note, the proceeds of which were garnished to satisfy the judgment, they had an interest relating to the subject of the litigation which was not adequately represented. Under MCR 2.209(A)(3), there are three elements that must be satisfied before a party may intervene as of right: (1) timely application, (2) the parties' interests are inadequately represented by existing parties, and (3) disposition of the action may as a practical matter impair or impede the applicant's ability to protect his interests. *Oliver v Dep't of State Police*, 160 Mich App 107, 113; 408 NW2d 436 (1987). In the present case, the trial court denied the Shayas' motion to intervene, holding that, because they knew of plaintiff's suit against F S and took no action, they were barred by laches from intervening in the suit.

The requirement of timely application means that "an intervenor must be diligent, and any unreasonable delay after knowledge of the action will justify a denial of the intervention where no satisfactory excuse is shown for the delay." *Prudential Ins Co of America v Oak Park School Dist*, 142 Mich App 430, 434; 370 NW2d 20 (1985). As a general rule, the right to intervene should be asserted within a reasonable time. Laches or unreasonable delay by the intervenor is a proper reason to deny intervention. *American States Ins Co v Albin*, 118 Mich App 201, 209; 324 NW2d 574 (1982). "There should be considerable reluctance on the part of the courts to allow intervention after an action has gone to judgment and a strong showing must be made by the applicant." *Dean v Dep't of Corrections*, 208 Mich App 144, 150; 527 NW2d 529 (1994). However, the Michigan Supreme Court has held that, in some cases, intervention may be proper even after judgment has been entered:

The question sometimes arises whether an intervention may be after final judgment. If it does not relate to the merits of the question, as where it is a proceeding to determine the validity of an attachment or whether specified property is subject thereto, the intervention need not delay the main action nor necessarily unsettle any judgment rendered therein. Hence, in such case there is no reason why an intervention may not be after, as well as before, final judgment. Even in other cases, unless restrained by some statute, the court may authorize an intervention after final judgment, wherein, notwithstanding such judgment, some relief may still be granted in furtherance of justice without violating the rules of res judicata, but generally the discretion of the court will be exercised against granting so tardy an application, and if so exercised, will not be reviewed by the appellate court. [*School Dist of the City of Ferndale v Royal Oak Twp School Dist No 8*, 293 Mich 1, 11; 291 NW 199 (1940), quoting 123 Am St Rep 294, citations omitted.]

The Shayas argue that their application was timely because they filed it as soon as they became aware that their interest would be affected by the disposition of the action, and they did not receive this notice until the post-judgment garnishment proceedings when the trial court entered the order to pay. The Shayas argue that the trial court erroneously found that they should have intervened earlier and were guilty of laches.

The Shayas assert that they had no reason to intervene before the entry of the order to pay because (1) they were not parties to the original lawsuit, (2) they submitted a garnishee disclosure form, as required by MCR 3.101(H), which indicated that they were not indebted to F S, and (3) there was never a finding that the assignment of a promissory note from F S to the Shayas was invalid or that the corporate veil should be pierced to reach the Shayas' assets. By entering the order to pay, which directed garnishee defendant Universal to pay the proceeds of the note to plaintiffs rather than to the Shayas, the trial court effectively invalidated the assignment of the note to them, or the court determined that the corporate veil should be pierced to reach the Shayas' assets. The Shayas argue that this was inappropriate because, in the absence of an evidentiary hearing, the promissory note was an asset of theirs and not of defendant's. We agree.

MCR 3.101(M)(1) provides:

If there is a dispute regarding the garnishee's liability or if another person claims an interest in the garnishee's property or obligation, the issue shall be tried in the same manner as other civil actions.

In this case, the Shayas were not given an opportunity to litigate their interest in the proceeds, as permitted by MCR 3.101(M)(1). Furthermore, the trial court failed to establish the priority of the parties claiming entitlement to the proceeds of the promissory note issued by Universal to F S and assigned to the Shayas. See *Blue Water Fabricators, Inc v New Apex Co, Inc*, 205 Mich App 295, 301; 517 NW2d 319 (1994).

In the present case, the trial court entered an order on March 22, 1995, directing Universal to pay to plaintiff the proceeds of a promissory note it had issued to F S and F S had assigned to the Shayas. On April 5, 1995, the Shayas filed a motion to intervene, to set aside the order to pay, and for an evidentiary hearing, which the trial court denied. On this record, it appears that the Shayas moved to intervene in the suit between plaintiff and F S as soon as they became aware that their interests were affected. We find that it would be unjust to deny the Shayas the opportunity to intervene in this action. See *SND Bank and Trust v Kensey*, 145 Mich App 765; 378 NW2d 594 (1985).

The Shayas also argue that the trial court abused its discretion in denying their motion to intervene without conducting a hearing to determine whether defendant's assignment of a promissory note to them was valid, or whether to pierce the corporate veil. We agree. Generally, the law treats a corporation and its shareholders as separate entities, even where one person owns all of the corporation's stock. *Kline v Kline*, 104 Mich App 700, 702; 305 NW2d 297 (1981). However, a court may pierce the corporate veil to avoid fraud or injustice, or where the community of interest between corporation and shareholders is so great that, to meet the purposes of justice, they should be considered as one and the same. *Id.*, at 702-703.

In the present case, the trial court ordered the judgment owed by F S to plaintiff to be satisfied out of the assets of the Shayas, the sole shareholders of F S. In so ordering, the trial court disregarded the corporate form, and effectively held that F S, and its shareholder, Fawzi Shaya, should be treated as one entity. The trial court did this without any findings of fact on the record that the corporate form was being used to defeat public convenience, justify a wrong, protect fraud, or defend crime, or that the interest of justice would in any way be served by disregarding the corporate form in this case. Therefore, the trial court abused its discretion in denying the motion to intervene, to set aside the order to pay, and for an evidentiary hearing. *Kline, supra* at 703.

Plaintiff argues that, even if the Shayas had been allowed to intervene, they would not have been able to prevent the garnishment of the proceeds of the promissory note because plaintiff was first to perfect its interest in the proceeds and, therefore, has priority over them. The Shayas argue that they have priority in the proceeds of the note because the assignment of the note predates plaintiff's judgment. Because this issue was not raised in the trial court, it is not properly preserved for appellate review. *Garavaglia v Centra, Inc.*, 211 Mich App 625, 628; 536 NW2d 805 (1995).

Reversed and remanded. We do not retain jurisdiction.

/s/ Maura D. Corrigan
/s/ Martin M. Doctoroff
/s/ Richard R. Lamb