

STATE OF MICHIGAN
COURT OF APPEALS

CLARENCE SMITH, BETTY SMITH, CLAYTON
E. HOBSON, DAPHNA HOBSON, CLAYTON S.
HOBSON, NIANA V. HOBSON, MARCEL
FEYERS and TAWAS LAKE IMPROVEMENT
ASSOCIATION,

UNPUBLISHED
June 18, 1999

Plaintiffs-Appellees,

and

TAWAS LAKE PRESERVATION SOCIETY,
WALLY STOPCZYNSKI, JACKI REINKE,
DOUG REINKE, DELORES CZERNEAWSKI and
PETER CZERNIAWSKI,

No. 209634
Iosco Circuit Court
LC No. 94-009204 AW

Intervenors-Appellants,

v

IOSCO COUNTY BOARD OF
COMMISSIONERS,

Defendant-Appellee.

Before: Neff, P.J., and Hood and Murphy, JJ.

PER CURIAM.

Plaintiffs filed a complaint seeking to have defendant take necessary steps to provide for and maintain the water level of Lake Tawas at a level established by a 1959 court order. After a feasibility study determined that the construction of a dam was a viable option, a proposed judgment was filed with the court. Before the judgment was entered, appellants filed a motion to intervene in an effort to oppose the construction of the dam and, the corresponding special tax assessment. Appellants' motion was denied, and judgment in the underlying action was subsequently entered. Appellants appeal the denial of their motion as of right, and we affirm.

The trial court had discretion to decide whether to grant appellants' motion to intervene. *Precision Pipe & Supply, Inc v Meram Construction, Inc*, 195 Mich App 153, 156; 489 NW2d 166 (1992). We review for an abuse of that discretion. *Id.* at 156-157.

Although appellants' motion fails to set forth the subrules under which they moved, it appears that they moved for intervention as of right pursuant to MCR 2.209(A)(3), and, in the alternative, for permissive intervention pursuant to MCR 2.209(B)(2). MCR 2.209(A) governs intervention by right, and the relevant subsection provides:

On timely application a person has a right to intervene in an action:

* * *

(3) when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The court rule "should be liberally construed to allow intervention when the applicant's interest may otherwise be inadequately represented." *Id.* However, the court rule also requires that the application to intervene be timely and that the applicant's rights or interests be effected by the disposition of the underlying action. All of the elements must be met before an applicant qualifies to intervene as of right. See *Karrip v Twp of Cannon*, 115 Mich App 726, 731; 321 NW2d 690 (1982) (interpreting GCR 1963, 209.1, the predecessor to MCR 2.209(A)).

MCR 2.209(B) governs permissive intervention and the relevant subsection provides:

On timely application a person may intervene in an action

* * *

(2) when an applicant's claim or defense and the main action have a question of law or fact in common.

Timeliness is a requirement of both of the intervention subrules. A right to intervene should be asserted within a reasonable time, and laches or an unreasonable delay are proper reasons to deny intervention. *Karrip, supra* at 731. In other words, one asserting a right to intervene "must be diligent, and any unreasonable delay after knowledge of an action will justify denial of 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).

There are several factors to consider when determining if an application to intervene is timely. See *Bradley v Milliken*, 828 F2d 1186, 1191 (CA 6, 1987)¹, where the court stated:

Timeliness should be evaluated in the context of all relevant circumstances, such as the purpose of the motion to intervene, the length of time the applicant for intervention should have known of his interest in the case, whether the original parties would be prejudiced by further delays, whether there are any unusual circumstances which would bear on granting or denying the motion and to what stage the lawsuit has progressed.

In this case, appellants claim that they satisfied the diligence requirement and did not unreasonably delay where they filed the motion to intervene shortly after they learned the outcome of the feasibility study, which was conducted pursuant to a 1995 stipulation between the parties. We disagree.

The underlying action was filed in November of 1994. Subsequently, the case proceeded with motions being made and a scheduling order being entered. Apparently, the parties conducted some discovery and began settlement negotiations. In December 1995, a stipulation was signed by the parties and entered. It provided that mediation was adjourned and that all other proceedings were to be adjourned "to allow the parties to continue their ongoing settlement negotiations in good faith in an attempt to resolve this suit." The stipulation also provided that the parties were to have an engineering study conducted for the purpose of determining the feasibility of maintaining the lake at the amount previously ordered by the court in 1959, and more significantly, it stated:

Upon completion and submittal of the engineering study, the parties will determine if the engineering study provides a feasible means in which to establish the normal lake level as ordered by the 1959 Circuit Court for the County of Iosco.

If a feasible means by which to establish the lake level exists, Defendant will proceed with the necessary steps to maintain the Tawas Lake level at 582.0 feet above sea level. All necessary expense to maintain the Tawas Lake level at 582.0 feet above sea level, shall be special assessed through the Special Assessment District currently in existence.

There was no question at the hearing on the motion to intervene that appellants were aware of the lawsuit and were aware that a feasibility study was being conducted. Presumably they were also aware of the stipulation pursuant to which the study was conducted. They did not, however, move to intervene during this time.

In May 1997, the feasibility study was completed. It concluded that construction of a lake level control structure would be feasible to keep the lake level at the amount ordered in 1959. On June 11, 1997, a public hearing on the matter was held before the county board of commissioners, a fact that is not contested by appellants.² On October 29, 1997, plaintiffs filed a notice of hearing for entry of judgment. On November 18, 1997 a proposed judgment was filed by plaintiffs, which was objected to by defendants on November 21, 1997. On November 21, 1997, appellants' counsel finally filed an appearance and finally moved to intervene.

The trial court did not abuse its discretion in determining that appellants' motion to intervene was untimely. The length of time was unreasonable and the reason for delay is disingenuous. Appellants

claim that they had to wait for the completion of the feasibility study and could not know whether intervention was necessary until that time. When the parties entered their stipulation in 1995, they clearly indicated that, during the adjournment, they intended to continue settlement negotiations in an attempt to resolve the suit. Thus, the suit could have settled prior to the completion of the study and therefore, appellants' excuse does not weigh in favor of allowing intervention. Moreover, even if we assume that it was reasonable for appellants to wait until the feasibility study was complete, it was complete and subject to a public hearing by June of 1997, yet appellants took no action until more than five months later, on November 21, 1997, after a hearing for entry of judgment was noticed. At best, the delay was still more than five months, but we believe that appellants had an obligation to intervene several years earlier, i.e. as soon as they knew of the pending suit, or at the very least, when they learned of the stipulation and feasibility study, which was a product of the stipulation. Both the pending suit and the stipulation had a direct effect on appellants' rights.

We also note that at the time the motion to intervene was filed, there was virtually nothing more to be done, except to have the judgment entered pursuant to the terms of the stipulation. Although it undoubtedly took time to organize the Tawas Lake Preservation Society, any of the organizers could have tried to intervene immediately and put the court and the parties on notice that they were attempting to organize a more formal entity for the purpose of opposing the relief sought by plaintiffs. They did not. The suit had clearly progressed to a point where it was untimely for appellants to be granted the right to intervene.

Moreover, intervention at this late stage does prejudice to the parties. Further litigation would cause additional expenses for plaintiffs and for the county and its taxpayers, especially because appellants have requested discovery. Further, various public meetings and hearings were already held to gather input from the citizens, including appellants; experts already examined the issues and reached conclusions; and the parties to the underlying litigation already settled the matter per the December 1995 stipulation. Intervention will result in reopening settled issues and duplicating efforts already made, which in turn will result in more cost and a delay in the relief sought by plaintiffs in November 1994.

Although we agree that refusing to allow intervention does prejudice appellants to some degree, we find that it was not an abuse of discretion to fail to tip the scales in appellants' favor based on this factor alone. Appellants had ample opportunity to challenge this suit prior to November 1997. Any prejudice now suffered by appellants is a result of their tardy actions. We also note that the claimed environmental interests of appellants will be adequately protected because the construction of a dam may only be accomplished if a valid permit is issued in accordance with MCL 324.31507 *et seq.*; MSA 13A.31507 *et seq.*, regardless of the judgment in the underlying suit. Further, the law provides specific procedures that must be followed before defendant may assess additional taxes for the purpose of maintaining the lake level. MCL 324.30701 *et seq.*; MSA 13A.30701 *et seq.* These procedures adequately protect appellants with regard to additional taxation.

Although appellants are correct in noting that their interests were probably not adequately represented by the parties, this factor alone, without the making of a timely application, does not warrant a finding that the trial court abused its discretion. *Karrip, supra* at 731. The motion to intervene, either permissibly or as of right, was properly denied.

In making our ruling, we also address appellants' argument that the trial court erred by failing to allow them to submit affidavits at the motion hearing. Whether to admit evidence is within the discretion of the trial court. *Chmielewski v Xermac, Inc.*, 457 Mich 593, 614; 580 NW2d 817 (1998). At the hearing, plaintiffs opposed the admission of the affidavits, claiming that they had not been given proper notice. Even though the trial court previously had indicated that appellants could submit affidavits at the hearing, MCR 2.116(G)(1) requires that affidavits such as those offered must be submitted at least twenty-one days prior to the motion hearing. The affidavits were not properly submitted. Moreover, even though the court did not admit the affidavits, it was clear from the record that the court recognized and considered the information contained in the affidavits.

Affirmed.

/s/ Janet T. Neff

/s/ Harold Hood

/s/ William B. Murphy

¹ Because MCR 2.209 is similar to FRCP 24, it is proper to look to the federal courts for guidance. *D'Agostini v City of Roseville*, 396 Mich 185, 188; 240 NW2d 252 (1976).

² Apparently there were approximately five different hearings on the matter throughout the time that the suit was pending.