

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000619-MR

M.T.I., INC.

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE LEONARD L. KOPOWSKI, JUDGE
ACTION NO. 94-CI-00105

ALEXANDRIA VILLAGE LIMITED PARTNERSHIP
AND CUMBERLAND SURETY INSURANCE
COMPANY, INC.

APPELLEES

OPINION
REVERSING AND REMANDING
** **

BEFORE: BARBER, DYCHE, AND GUIDUGLI, JUDGES.

DYCHE, JUDGE. M.T.I., Inc., brings this interlocutory appeal from an order of the Campbell Circuit Court denying MTI's motion to intervene in a lawsuit between Alexandria Village Limited Partnership and Cumberland Surety Insurance Company, Inc. We reverse.

This case has a lengthy and somewhat tortured procedural history. Because all parties to this litigation are thoroughly familiar with the course it has taken, we will merely sketch the outline of that litigation in this opinion. On

October 8, 1991, AVL P and J.F. Cox & Company, Inc., contracted for Cox to develop the Alexandria Village Green Shopping Center. MTI subcontracted with Cox to perform site work and excavation for the project. On November 18, 1991, Cox and MTI, as principals, entered into two performance and payment bonds with Cumberland Surety, each bond in the amount of \$800,000.00.¹ Cox and MTI also entered into an indemnity agreement with Cumberland, wherein Cox and MTI agreed to indemnify and hold harmless Cumberland if the surety were required to perform on any of the bonds.

Cox claimed that AVL P was repeatedly late with payments, and Cox ceased work on the project on July 8, 1992. AVL P terminated the contract with Cox for cause the following day and assumed the role of general contractor. On December 23, 1992, Cumberland issued a notice that AVL P had made a claim against all three performance bonds.

On September 8, 1993, MTI filed a demand for arbitration against AVL P, citing an ongoing pattern of late payments. AVL P answered and counterclaimed for an excess of \$261,761.77. Cumberland elected not to participate in this proceeding. On January 31, 1994, AVL P filed its original complaint in this action against Cumberland, alleging that Cox and MTI had failed to perform and that AVL P was entitled to collect on the bonds.

¹ Cox entered into a third performance bond with Cumberland in the amount of \$711,802.00, on which MTI is not a principal.

On May 18, 1994, MTI and AVL P settled their dispute prior to the arbitration hearing. In the agreement, the parties mutually agreed to release the other from any and all claims arising from the project; however, both parties indicated that this release was not a waiver of any claims either party might have against a third party.

AVLP continued pursuing relief from Cumberland under the performance bonds, including the two bonds on which MTI was a principal. Consequently, on August 27, 1996, Cumberland filed a separate civil action in Fayette Circuit Court seeking indemnification from MTI. On October 30, 1996, MTI filed a third-party complaint against AVL P in Fayette Circuit Court,² claiming that AVL P's suit against Cumberland was a breach of the settlement agreement reached between MTI and AVL P because the natural result of that suit was Cumberland's action seeking indemnification from MTI. AVL P was granted an extension of time to file an answer because it was involved in mediation talks with Cumberland and hoped to settle that mediation without becoming involved in this companion action.

On February 7, 1997, MTI learned that the mediation talks between AVL P and Cumberland had failed and were not to be resumed. On February 10, 1997, MTI filed the motion to intervene which is the subject of this appeal. On March 21, 1997, the Campbell Circuit Court granted the motion, stating the following in its order:

² This action was transferred by the Fayette Circuit Court to the Campbell Circuit Court on June 4, 1997.

The claims of Alexandria Village Limited Partnership against Cumberland Surety are derivative of Alexandria Village's claims against MTI, Inc. If there is no claim or legal obligation against MTI, Inc., then Cumberland Surety has no financial obligation. On the other hand, if MTI, Inc. was found to have breached its contract with Alexandria Village then Cumberland Surety could be required to pay Alexandria Village as much as 2.5 million [sic] pursuant to the bonds on which MTI, Inc. is either the principal or guarantor. . . . MTI, Inc. is not presently a party to this case. CR 24.01 gives MTI, Inc. a right of intervention since the allegations by Alexandria Village are basically a breach of contract by MTI, Inc.

The record is clear that whatever liability is ultimately determined against Cumberland Surety as a result of Alexandria Village's claims in this case, Cumberland Surety will seek complete indemnity from MTI, Inc. with respect to such liability. Under the circumstances, particularly in light of the potential economic loss which could result in this litigation against MTI, Inc., MTI Inc.'s application must be adjudged timely.

MTI and AVL P each filed motions for summary judgment in the companion case, styled Cumberland Surety Insurance Company, Inc. v. MTI, Inc., Civil Action No. 97-CI-00702 (2nd Division). On September 29, 1998, the court found that AVL P had reserved the right to seek performance from Cumberland under the performance bonds in the settlement agreement with MTI, and that the settlement agreement in no way barred AVL P's claims against Cumberland. The court denied MTI's motion for summary judgment in that case, and granted AVL P's motion for summary judgment. The court also dismissed MTI's claims against AVL P recited in MTI's third-party complaint.

Subsequently, AVL P filed a motion for the court to reconsider its order allowing MTI to intervene. On January 6,

1999, the court reconsidered its ruling of twenty-two months prior and vacated that order, thus denying MTI's motion to intervene. In contrast to the detailed explanation in its original order granting intervention, the second order merely stated that the court had reviewed the record and had been sufficiently advised of the facts. MTI's motion to reconsider was denied, and this appeal related solely to the issue of intervention ensued.

CR 24.01 governs intervention as of right. That rule states as follows:

(1) Upon timely application anyone shall be permitted to intervene in an action (a) when a statute confers an unconditional right to intervene, or (b) 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 that interest is adequately represented by existing parties.

(2) Anyone possessing a statutory right of intervention under (1)(a) above, may move the court to intervene in a pending action and, on failure of a party to file an objection within ten (10) days to the intervention and a notice of hearing on the objection, have an order allowing the intervention without appearing in court for a hearing.

Thus there are four factors to be considered in a motion to intervene: (1) whether the motion is timely; (2) whether the applicant has an interest in the property or transaction that is in dispute; (3) whether the applicant's ability to protect that interest will be impaired by the disposition of the action absent the party's participation; and (4) whether the applicant's interests are adequately represented

by existing parties. The rule is to be liberally construed "in order to effect the purpose of intervention." Yocom v. Hi-Flame Coals, Inc., Ky. App., 568 S.W.2d 757, 759 (1978). An appellate court will affirm a trial court's denial of a motion to intervene as of right unless the denial was erroneous. Ashland Public Library Board of Trustees v. Scott, Ky., 610 S.W.2d 895, 896 (1981).

The rule places no time limitation on the right to intervene. Timeliness is a question of fact, and its determination is ordinarily left to the discretion of the trial court. Ambassador College v. Combs, Ky., 636 S.W.2d 305, 307 (1982). In the order precipitating this appeal, however, the trial court made no finding with regard to timeliness. We are therefore left to determine timeliness based on the totality of the circumstances. See Schultz v. Connery, 863 F.3d 551, 553 (7th Cir. 1988) (citing NAACP v. New York, 413 U.S. 345, 93 S. Ct. 2591, 37 L. Ed. 2d 648 (1973) (interpreting Fed. R. Civ. P. 24)).

We believe the trial court was correct in its initial assessment that the motion to intervene was timely. While MTI was aware of the litigation pending between AVL P and Cumberland, it elected not to file a motion to intervene while mediation talks were progressing. We do not fault them for exercising reasonable restraint in litigation. Immediately after learning that the mediation talks had failed, MTI sought to intervene. In light of all the circumstances, including the substantial liability which MTI could incur as a result of this lawsuit and the absence of the court's reasons for vacating its original

grant of intervention, the trial court's initial determination that the motion was timely will stand.

MTI also has an interest in the transaction that is the subject of the dispute. As the trial court noted, Cumberland will only be liable on the bonds if MTI is determined to have breached its contract with AVL. Pursuant to the indemnity agreement, MTI might then be responsible to Cumberland. Both parties cite Gayner v. Packaging Service Corporation of Kentucky, Ky. App., 636 S.W.2d 658 (1982), but that case aids the cause of MTI. In Gayner, Bernard Chapnick and Packaging Service entered into a stock option purchase agreement. Packaging Service advised Chapnick that it wanted to sell its shares, and Chapnick indicated that he wanted to purchase them. A dispute arose, and Packaging Service sued Chapnick seeking a declaration of rights. Gayner, a prospective financial backer for Chapnick, sued Packaging Service and sought to intervene in the Packaging Service/Chapnick suit. The Court denied intervention because "Gayner was a total stranger to the employment contract . . . which contained the stock option purchase." The Court ruled that Gayner was not a third party beneficiary of that employment agreement. Id. at 659-60.

The relationships between the parties in the present case are much more intertwined than those in Gayner. MTI was a subcontractor in AVL's proposed development, and MTI was a principal on two bonds for which Cumberland was surety. MTI is not situated as a total stranger to the AVL/Cumberland

litigation, as Gayner was. Therefore, MTI has an interest in the transaction that is the subject of this litigation.

Similarly, MTI's ability to protect that interest will be impaired if the motion to intervene is denied. AVLP contends that MTI's interest is merely contingent or speculative. Generally, however, "[t]he liability of a surety arises only upon the nonperformance of the underlying promise by the principal and is, therefore, secondary in nature." Taylor Building Corporation v. Boutcher, Ky. App., 836 S.W.2d 455, 457 (1992). In order for AVLP to succeed against Cumberland, it must show that MTI breached its contractual obligation to AVLP. To suggest that MTI's resultant interest in the litigation between AVLP and Cumberland is remote or contingent strains credulity. Preventing MTI from participating in the litigation that will determine whether it breached its contract would significantly impair or impede MTI's interest.

The only remaining question is whether MTI's interests are adequately represented by existing parties. MTI contends that its interests are similar, but not identical, to Cumberland's, and that the divergence of interests is sufficient to justify granting the motion to intervene. AVLP counters that since Cumberland and MTI are seeking the same outcome – namely, to avoid paying on the bonds – then MTI's interests are already fully represented in the litigation.

The question of who bears the burden of showing that there is adequate representation of a party's interests has not been directly addressed by courts in the Commonwealth. The

United States Supreme Court, examining Fed. R. Civ. P. 24, stated that "[t]he requirement of the Rule is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be minimal." Trbovich v. United Mine Workers of America, 404 U.S. 528, 538 n.10, 30 L. Ed. 2d 686, 694, 92 S. Ct. 630, 636 (1972). In light of this statement, and of the proposition that the rule is to be liberally construed in order to effect intervention, Yocom, supra, we believe that applicants for intervention need only show the potential for inadequate representation. See Grutter v. Bollinger, 188 F.3d 394, 400 (6th Cir. 1999).

MTI contends that its interests are not adequately represented by Cumberland in that Cumberland will be defending the action so as to position itself to recover from MTI under the indemnity agreement. MTI also asserts that it is in its interests to have recovery limited to the one bond on which it is not a principal, while Cumberland has no similar interest in determining the bonds on which AVLP might be entitled to recover. As such, MTI has shown a sufficient potential for inadequate representation to allow intervention.

AVLP cites Rosenbalm v. Commercial Bank of Middlesboro, Ky. App., 838 S.W.2d 423 (1992), and Pearman v. Schlaak, Ky., 575 S.W.2d 462 (1978), as cases which require a proposed intervenor show that its interests **are** not represented by existing parties, as opposed to the more relaxed standard that the interests **may** not be represented. Those cases are inapposite to this action. In Rosenbalm, this Court reversed a circuit court decision that

the intervenors' interests were adequately represented by a receiver, noting that a receiver represents **no** party in litigation, but is merely a representative of the appointing court. 838 S.W.2d at 429. Pearman dealt with post-judgment intervention (which requires a special burden in excusing the lack of timeliness), and whether a party was required to appeal from an adverse judgment in order to adequately represent the interests of a non-party. 575 S.W.2d at 463.

Finally, AVL P argues that MTI failed to file a pleading setting forth the claim or defense for which it sought intervention. MTI did file a pleading as an attachment to its motion to alter, amend, or vacate the trial court's January 6, 1999, order. Further, MTI's pleadings throughout the nearly two years it was a party to this litigation provided ample notice to AVL P of the nature of MTI's claims.

AVL P has not demonstrated, and we have been unable to discern, any possible prejudice to AVL P by allowing MTI to intervene. The trial court erred in vacating its order allowing intervention and removing MTI as an intervening party after twenty-two months of participation.

The judgment of the Campbell Circuit Court is reversed, and this case is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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