

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)	
)	
MYRON J. JACOBSON and)	
VIRGINIA A. JACOBSON,)	CASE NO. BK84-2119
)	
DEBTOR)	A87-0426
)	
MYRON J. JACOBSON and)	
VIRGINIA A. JACOBSON,)	
)	CH. 11
Plaintiff)	
vs.)	
)	
JESS C. NIELSEN and)	
RICHARD A. BIRCH,)	
)	
Defendant)	

MEMORANDUM

BACKGROUND

The Chapter 11 debtors filed an adversary proceeding on November 6, 1987, to challenge the administrative expense claims filed by the debtors' former attorneys, Jess C. Nielsen and Richard A. Birch, and granted by this court on December 23, 1986. The debtors sought the following: disallowance of the administrative expense claim for attorney fees, a setoff against the attorney fees equal to the amount of fees spent on replacement counsel, and a judgment for damages proximately resulting from the negligence of the attorneys while representing the debtors in their Chapter 11 bankruptcy case.

On May 9, 1990, this court found the debtors failed to show the attorneys acted negligently under Nebraska legal malpractice standards and denied the setoff and damage awards that the debtors requested. The court refused to overturn its earlier order which had allowed the administrative expense claim, denied affirmative relief to the debtors, and entered judgment in favor of the attorney. The debtors subsequently missed the time period to file an appeal, and the court denied the debtor's motion to extend time to appeal in a Memorandum dated June 14, 1990.

On September 6, 1990, the District Court for the District of Nebraska affirmed the decision to deny an extension of time to appeal. The debtors appealed to the Eighth Circuit Court of Appeals which affirmed the District Court on May 15, 1991.

Meanwhile, on September 19, 1990, the attorneys, Nielsen and Birch, filed a Praecipe For Writ of Execution to satisfy the judgment for attorney's fees and expenses in the amount of \$11,372.26. Since the debtors appealed to the Eighth Circuit on October 2, 1990, the Writ was not executed. Thereafter, Nielsen and Birch filed another Praecipe For Writ of Execution on June 10, 1991. This Writ was served upon the debtor by a United States Marshal on June 26, 1991. For reasons not in the record, no sale occurred. A third Praecipe was filed on June 21, 1993, and this court appointed the Sheriff of Sheridan County, Nebraska to carry out the Writ on July 30, 1993.

In response to the latest Writ of Execution, Michael Jacobson, son of the debtors and creditor of the debtors' estate, filed an Emergency Motion To Quash the Writ of Execution and a Motion for Judge Mahoney to Disqualify Himself From this Case on September 21, 1993. Clerk of the Bankruptcy Court issued a Notice of Noncompliance on September 22, 1993, granting Michael Jacobson 14 days to comply with the local rules adopted on January 4, 1993, or have the Motions abandoned. Michael Jacobson did not comply with local rules and, therefore, the motions may be considered abandoned. However, because one of the motions requested this judge to disqualify himself from the case, this memorandum and journal entry are being filed so Michael Jacobson and any reviewing court will be aware that this judge did not simply ignore the motions or the allegations contained therein.

DISCUSSION

Michael Jacobson is a proper party to bring these motions only if he has the right to intervene in this adversary proceeding.

Section 1109(b) provides that a "party in interest. . . including a creditors' committee, a creditor. . . , may raise and may appear and be heard on any issue in a case under this chapter." Michael Jacobson is clearly a "party in interest" under section 1109(b). However, section 1109(b) by referring to "case" does not state whether "case" only includes the bankruptcy case or whether the right to be heard also extends to adversary proceedings, where the absolute right to intervene is questionable. In re Bumper Sales, 907 F.2d 1430 (4th Cir. 1990).

Fed. Bankr. R. 7024 states that Fed. R. Civ. P. 24 applies in adversary proceedings. Rule 24 governs a parties right to intervene and reads as follows:

(a) Intervention of Right. Upon timely application, anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant 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.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and 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.

Michael Jacobson has not made a formal motion to intervene in this proceeding. By failing to properly intervene, Michael Jacobson has no standing to file motions in this adversary proceeding. Stainer v. Latimer (In re Latimer), 918 F.2d 136, 137 (10th Cir. 1990). Even if his motions were accompanied by a motion to intervene, he still would not have standing to raise his motions in the adversary proceeding. This conclusion is reached by the analysis of the rule and caselaw stated below.

a. Rule 24(a)(1)

Whether a party has an unconditional right to intervene under section 1109 has created a split in the circuits. The Third Circuit holds that section 1109 creates a mandatory right under 24(a)(1) for a party in interest, such as a creditor, to intervene in the adversary proceeding. In re Marin Motor Oil, Inc., 689 F.2d 445 (3rd Cir. 1982), cert. denied 459 U.S. 1207, 103 S.Ct. 1196, 75 L. Ed. 2d 440 (1983) (finding that the word "case" extended to adversary proceedings). The Fifth Circuit rejected Marin by

holding that section 1109 when read with Rule 24(a) did not create an absolute right to intervene because 24(a)(2) would grant the bankruptcy court the discretion to restrict intervention to those parties whose interests are not adequately protected by the existing parties, while 24(a)(1) would not give the court any discretion. Fuel Oil Supply and Terminaling (The Official Creditors Committee v. Gulf Oil Corporation), 762 F.2d 1283 (5th Cir. 1985) (finding that Congress by distinguishing between "case" and "proceeding" in other parts of the Code did not intend to create an absolute right to intervene in the bankruptcy adversary proceeding).

The approach taken by the Fifth Circuit is the more reasonable interpretation of section 1109. This judge believes that section 1109 does not confer an absolute right under Fed. R. Civ. P. 24(a)(1) to intervene in an adversary proceeding. An adversary proceeding represents a regular civil lawsuit between two or more parties, and it does not seem logical to permit others, who may have an interest in the bankruptcy case but are not in any other way associated with the adversary proceeding, to unconditionally intervene without judicial consideration of the necessity or appropriateness of allowing the intervention. See 5 Collier On Bankruptcy ¶ 1109.02, at 32 (15th ed. 1993).

b. Rule 24(a)(2)

The test to determine whether a party may intervene under 24(a)(2) is that a nonparty is entitled to intervene when: 1) the motion to intervene is timely; 2) the nonparty has an interest relating to the property or transaction in dispute; 3) the nonparty is so situated that disposition of the action between the existing parties may, as a practical matter, impair its ability to protect that interest; and 4) the nonparty's interest will not be adequately protected by the existing parties. Yniquez v. Arizona, 939 F.2d 727 (9th Cir. 1991); Harris v. Reeves, 946 F.2d 215 (3rd cir. 1991); Coop. v. Massachusetts Mun. Wholesale Elec. Co., 922 F.2d 92 (2d Cir. 1990); Purnell v. City of Akron, 925 F.2d 941 (6th Cir. 1991); Worlds v. Department of Health & Rehabilitative Services, State of Florida, 929 F.2d 591 (11th Cir. 1991).

Michael Jacobson may not intervene under Rule 24(a)(2) because he does not satisfy the four elements of this test. First, Jacobson's attempt to intervene in this lawsuit is not timely. This court initially allowed the administrative expense claim nearly seven years ago, which was once again allowed in this adversary proceeding. The adversary proceeding was filed more than six years ago and decided three years ago. Even though timeliness measured in years is not dispositive to prevent intervention, the time it took the nonparty to intervene must be considered with the

other circumstances of the case to decide whether the application is timely. United Nuclear Corp. v. Cranford Ins. Co., 905 F.2d 1424 (10th Cir. 1990).

In this case, Michael Jacobson had the opportunity to object to the administrative expense claim at the time the attorneys filed their proof of claim. If he could have proven a sufficient interest in the adversary proceeding, he possibly could have intervened when his parents, the debtors, filed this adversary proceeding up to the time of the hearing on the malpractice claim. Michael Jacobson was a witness for the debtors in the trial of the adversary proceeding. His active participation in the hearing and the proceedings surrounding the hearing convinces this court that he had several opportunities to intervene before this court decided this adversary case in 1990. To wait until the judgment holder executes on property of the debtor to even attempt to become a party to the proceeding is too long. See 3B Moore's Federal Practice ¶ 24.13, at 126 (2d ed. 1993).

Another reason for denying him the opportunity to intervene is that Michael Jacobson does not have a sufficient interest in this litigation to intervene. Mr. Jacobson claims he has an interest in the proceeding because the sale of the debtors' property will reduce his return as a creditor of the estate. Although, for purposes of this memorandum, such an assertion will be accepted as true, his interest is so general that it does not satisfy the interest requirement of Rule 24(a)(2). Assuming for the moment that a bankruptcy estate would remain after confirmation of the debtor's plan, to permit him to intervene under section 1109 in an adversary proceeding which is complete, but for collection efforts, could create chaos in the efficient administration of the estate. Sarah R. Neuman Foundation, Inc. v. Garrity (In re Neuman), 103 B.R. 491, 499 (Bankr. S.D.N.Y. 1989). Where his interest in the adversary proceeding relates only to the effect of the adversary proceeding on the size of the bankruptcy estate or the potential return to a claimholder pursuant to a confirmed plan, he should not be allowed to intervene. Id.

The adversary proceeding was filed to reconsider this court's allowance of the attorneys' administrative claim because of alleged malpractice. This court found in favor of the administrative claimant and against the debtor. Mr. Jacobson is attempting to assert a right that is not his own. He has no interest in the malpractice case and no interest at this point in time in the allowance of the administrative claim outside of the fact that he is the son of the debtors who originally hired the attorneys. See, Neuman, 103 B.R. at 497-98 (quoting In re Penn Central Commercial Paper Litigation, 62 F.R.D. 341 (S.D.N.Y. 1974), affirmed without opinion sub nom Shulman v. Goldman, Sachs & Co., 515 F.2d 505

(1975))(stating that "A[n] intervenor has standing to prosecute a suit in the federal courts only if he is the 'real party in interest.'"). He does not have an interest in the malpractice litigation or in the administrative claim litigation that is now final. Therefore, he does not have a significantly protected interest as required by Rule 24(a)(2). Donaldson v. United States, 400 U.S. 517, 531, 91 S. Ct. 534, 542, 27 L. Ed. 2d 580 (1971); Crown Financial Corporation v. Winthrop Lawrence Corporation, 531 F.2d 76 (2d Cir. 1976) (Purchaser of land subject to judgment lien has no interest in underlying action where lien was secured and intervention denied); Restor-A-Rent Dental Laboratories, Inc. v. Certified Alloy Products, Inc., 725 F.2d 871 (2d Cir. 1984) (holding that the insurer of defendant does not have interest in action for damages for breach of contract so as to permit intervention). Since Mr. Jacobson has only suffered a general injury that is common to all creditors and derivative of any injury to the debtors, he lacks standing to intervene when the debtors have the proper standing to object to the Writ of Execution. Hall v. Sunshine Mining Co. (In re Sunshine Precious Metals, Inc.), 157 B.R. 159, 163 (Bankr. D. Idaho 1993).

Finally, under Rule 24(a)(2), Michael Jacobson's interests were adequately protected by the debtors' action against the attorneys. Because Jacobson's injury was derivative of the alleged injury to the debtor, the debtors were the appropriate party to assert the malpractice action. Hall, 157 B.R. at 164. The factors that must be considered to determine whether his interests were adequately protected are whether there was collusion between the existing parties, whether the debtors failed to fulfill a duty to him, and whether the debtors had an interest in the adversary proceeding that was adverse to his. Purnell v. City of Akron, 925 F.2d 336 (9th Cir. 1991). To each of these factors, the answer is "no" because there was no collusion, the debtors as debtors-in-possession fulfilled their duty to defend the estate, and his only interest in this suit was through the debtors' claim against the attorneys.

The debtors lost their case. It is a well-settled rule that "intervention will not be allowed for the purpose of impeaching a decree already made." United States v. California Coop. Canneries, 279 U.S. 553, 556, 49 S. Ct. 423, 424, 73 L. Ed. 838, 841 (1929). Michael Jacobson has no right to intervene into this bankruptcy proceeding under Rule 24(a)(2).

c. 24(b): Permissive Intervention

Under Rule 24(b), he must seek the court's permission to intervene. This court has broad discretion to determine whether to grant permissive intervention. United States v. Mississippi, 958

F.2d 112 (5th Cir. 1991). The factors this court will use in this case to decide whether to allow him to intervene will be whether the intervention will result in undue delay, Washington Elec. Coop. v. Massachusetts Mun. Wholesale Elec. Co., 922 F.2d 92 (2d cir. 1990); United States v. Texas Eastern Transmission Corp., 923 F.2d 410 (5th Cir. 1991), whether the applicant has an adequate remedy in another action, Meyer Goldberg, Inc. v. Goldberg, 717 F.2d 290 (6th Cir. 1983), and judicial economy. Venegas v. Skaggs, 867 F.2d 527 (9th Cir. 1989), aff'd 110 S. Ct. 1679, 109 L. Ed. 2d 74 (1990).

For the reasons listed above in the discussion of intervention under Fed. R. Civ. P. 24(a), this court will not allow Mr. Jacobson the opportunity to intervene to challenge the court's order regarding the attorney fees and the administrative priority that resulted from the allowance of the fees. His Motion To Disqualify Judge Mahoney and the portions of his Motion To Quash that address money judgments, priority claims, and the status of Nielsen and Birch as creditors may not be readdressed by intervening in this adversary proceeding. Once this court issued its May 9, 1990 order denying the debtors' malpractice claim and the reconsideration of allowance of the attorneys fees and once the debtors exhausted their appeals remedies, the decision became final. If this court were to reconsider the points listed above, the court would be unduly delaying the judicial process in this case. Michael Jacobson could have objected to the administrative claim in the bankruptcy case or attempted to intervene at the beginning of this adversary case (if he could demonstrate a sufficient interest in the property). Now that Nielsen and Birch have had their claim allowed in the case and have won the adversary proceeding, they are entitled to pursue remedies to satisfy the judgment, and this court will not permit a third party to interfere with that right by re-litigating previously decided issues.

The motion to quash is denied.

d. Motion to Disqualify

The motion to disqualify asserts "continuing personal bias and prejudice exhibited by Judge Mahoney to the benefit of officers of the court, attorneys Nielsen and Birch." The motion then lists as reasons various factual findings made by the judge in the order of May 9, 1990, none of which Mr. Jacobson thinks are correct.

The decision by this judge of May 9, 1990, is final and has been final for several years. This judge has had nothing to do with this adversary proceeding or the bankruptcy case for several years, except to sign orders concerning the execution on the judgment.

If a party to an adversary proceeding (which Mr. Jacobson is not) believes a judge's factual findings are wrong, the correct path for review of such findings is a timely appeal, not a motion to disqualify the judge. All allegations in the motion to disqualify have been considered. They do not reflect personal bias by this judge and this judge denies such allegations of bias.

The motion to disqualify is denied.

Separate journal entry to be entered.

DATED: October 15, 1993.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

CC: Mr. Michael Jacobson, Mr. Nielsen and United States Trustee

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<u>DEBTOR(S)</u>)	
)	CH. 11
MYRON J. JACOBSON and)	
VIRGINIA A. JACOBSON,)	Filing No.
Plaintiff(s))	
vs.)	<u>JOURNAL ENTRY</u>
)	
JESS C. NIELSEN and)	
RICHARD A. BIRCH,)	
)	DATE: October 15, 1993
<u>Defendant(s)</u>)	

Before a United States Bankruptcy Judge for the District of Nebraska regarding adversary proceeding.

APPEARANCES

Michael Jacobson, 613 N. Ash, Gordon, NE 69343
Nielsen & Birch, P.O. Box 1006, North Platte, NE 69103-1006

IT IS ORDERED:

1. The motion to quash the writ of execution is denied.
2. The motion to disqualify the judge is denied.

See memorandum entered this date.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

CC: Mr. Michael Jacobson, Mr. Nielsen and United States Trustee