FILED
United States Court of Appeals
Tenth Circuit

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ROBERT L. HOECKER
Clerk

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SEVENTH ELECT CHURCH IN ISRAEL; and PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiffs,

v.

GERALD ROGERS; WESTLAKE INVESTMENT CORP.; MONARCH RECREATION CORP.; PERRIANDER CORPORATION; COMMERCIAL TIME SHARES, LTD., & ASSOCIATES; and AETNA SOUTHWEST INSURANCE & INVESTMENT,

Defendants,

and

UNITED STATES OF AMERICA,

Plaintiff-Intervenor-Appellee,

v.

SEVENTH ELECT CHURCH IN ISRAEL; and PEOPLE OF THE STATE OF CALIFORNIA,

Defendants-Intervenors-Appellees,

GERALD ROGERS; PRISCILLA ROGERS; and PERRIANDER CORPORATION,

Defendants-Intervenors,

SEYMOUR C. YUTER; and ELINOR V. YUTER,

Applicants in Intervention-Appellants.

No. 89-1061
(D.C. No. 88-Z-466)
(D. Colo.)

ORDER AND JUDGMENT*

Before LOGAN, MOORE, Circuit Judges, and THOMPSON,** Chief Judge.

**The Honorable Ralph G. Thompson, Chief Judge, United States District Court for the Western District of Oklahoma, sitting by designation.

Proposed intervenors Seymour C. and Elinor V. Yuter appeal the district court's order denying as untimely their motion to intervene as of right pursuant to Colo. R. Civ. P. 24(a). They also appeal the trial court's denial of their motion for post-trial relief under Colo. R. Civ. P. 59. We affirm.

I.

We review only those facts which are relevant to this appeal. The Yuters seek intervention in United States v. Seventh Elect Church In Israel, et al., a case originally filed in Chaffee County District Court in Colorado but which was later removed to the United States District Court for the District of Colorado following the intervention of the United States. All parties, including the Yuters, previously obtained independent judgments

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

or, in the case of the United States, a federal tax lien, against Mr. Gerald L. Rogers, now a fugitive from justice. The underlying action seeks enforcement of those state court judgments.

Appellees State of California (State) and Seventh Elect Church In Israel (Church) filed the Colorado action in 1983 seeking enforcement of separate judgments they obtained in California and Washington state court against Mr. Rogers. Their consolidated suit alleged, inter alia, that Rogers fraudulently purchased stock in Monarch Recreation Company of Colorado (Monarch) in the name of Westlake Mortgage and Investment, S.A. (Westlake) in order to avoid creditors' attachment of the asset. Judgment was entered upon a finding that Westlake was the alter ego of Gerald Rogers. The company was served with a writ of garnishment in July, 1985. The answer to that writ, however, alleged the stock was previously transferred to the Perriander Corporation (Perriander), organized under the laws of the Netherland Antilles. Church and State then brought suit against Perriander.

On February 21, 1986, the Chaffee County District Court issued a preliminary injunction ordering Perriander to deposit the Monarch stock certificates in the court registry to avoid further transfers. On December 21, 1987, the court entered its decision in the case, holding Perriander was also the alter ego of Gerald Rogers and ordering the stock be sold to satisfy Church and State's judgments. The court stayed execution of the order until final judgment entered, which occurred on January 28, 1988.

At that time, the stock shares were released to the sheriff for sale at public auction with Church and State authorized to bid up to the amount of their judgment balances against Mr. Rogers. On March 4, 1988, the United States intervened in the case pursuant to 26 U.S.C. § 7424.[1] The sheriff's sale occurred on April 25, 1988, with Church and State purchasing the certificates, which constituted ninety-eight percent of outstanding Monarch stock. Church and State placed the certificates in the federal court registry pending resolution of the conflicting claims between them and the United States.

The Yuters independently filed suit against Gerald Rogers in the United States District Court for the Southern District of New York in September, 1982. According to Yuters, they first heard about the Chaffee County District Court action on February 5, 1988, when an article regarding the case appeared in the Los Angeles Daily Journal. At that point in time, Yuters's case had been inactive for seventeen months. Upon learning about the Monarch stock, Yuters obtained a default judgment against Mr. Rogers and made their motion to intervene and for post-trial relief. On January 31, 1989, the federal district court entered its final order denying Yuters's intervention motion on the basis that it was untimely.

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[1] The right to intervene was unconditional pursuant to Fed. R. Civ. P. 24(a)(1).

II.

The Yuters initially filed their motion to intervene in state court pursuant to Colo. R. Civ. P. 24(a). The language of that rule is identical to Fed. R. Civ. P. 24(a).[2] Under either, we can reverse only if the district court's denial constitutes an abuse of discretion. Sanguine, Ltd. v. United States Dep't of Interior, 736 F.2d 1416, 1418 (10th Cir. 1984); In re Marriage of Guinn, 522 P.2d 755, 756 (Colo. App. 1974).

Timeliness is a threshold issue which must be addressed prior to considering the remainder of Rule 24(a). NAACP v. New York, 413 U.S. 345, 365 (1973); Diamond Lumber, Inc. v. H.C.M.C., Ltd., 746 P.2d 76, 78 (Colo. App. 1987). In determining whether a motion to intervene is timely, three factors must be addressed including: (1) the stage of the proceeding at which an appellant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay. Orange County v. Air Cal., 799 F.2d 535, 537 (9th Cir. 1986), cert. denied, 480 U.S. 946 (1987). Generally, courts disfavor allowing intervention

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2 **Rule 24. Intervention**

(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.

after judgment is entered. Spickard v. Civil Serv. Comm'n of City & County of Denver, 523 P.2d 149, 151 (Colo. App. 1974); see also, F.T.C. v. American Legal Distribs., Inc., 890 F.2d 363, 365 (11th Cir. 1989)(motion to intervene filed four months after judgment entered and one month after court-ordered sale of assets is untimely).

Here, although Yuters argue they moved quickly following discovery of the Colorado suit, we find the district court acted within its discretion in denying their motion. First, Yuters's motion was filed some six weeks after entry of final judgment. Second, allowing intervention at this juncture would prejudice the existing parties. Church and State spent five years and thousands of dollars to obtain judgments against Westlake and Perriander. They undertook expensive investigation to prove both cases. Allowing Yuters to intervene at this stage would delay the proceedings further and inject new issues in the case requiring additional litigation. For example, it is clear the enforceability of Yuters's default judgment against Gerald Rogers would be contested. Finally, Yuters took no action in their own lawsuit for seventeen months and only pursued a default judgment after they learned about the Monarch stock. While we recognize the Yuters's unfortunate situation, the record before us does not support a finding that the district court abused its discretion.

This finding is buttressed by our conclusion that regardless of the intervention issue, Yuters have no viable claim to the Monarch stock under Colorado law. Yuters argue Colo. R. Civ. P. 102 sanctions their intervention and mandates proration of the

Monarch proceeds. Contrary to this suggestion, Rule 102 relates to prejudgment attachments, not competing writs of execution, as are present here. The plain language of the rule is clear. Church and State had a prior writ of execution which takes priority over the later claim of the Yuters.[3] Further, even if we assume the attachment rule does apply, Yuters's claim is untimely under Colo. R. Civ. P. 102(k).[4] See Hartner v. Davis, 68 P.2d 456, 457 (1937)(under precursor to Colo. R. Civ. P. 102, creditor seeking intervention must file within thirty days after the levy is made under the writ of attachment). In light of our findings, we need not reach the issue of Yuters's motion for post-trial relief.

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3 We also note that even under the language of the attachment rule, Church and State's writ of execution would have priority pursuant to Colo. R. Civ. P. 102(m), due to those parties' diligence in pursuing both Westlake and Perriander.

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> **(k) No Final Judgment Until Thirty Days After Levy.**
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> **(1) Creditors.** No final judgment shall be rendered in a cause wherein an attachment writ has been issued and a levy made thereunder, until the expiration of thirty days after such levy has been made; and any creditor of the defendant making and filing within said thirty-day period an affidavit and undertaking, as hereinbefore required of the plaintiff, together with his complaint setting forth his claim against the defendant, shall be made a party plaintiff and have like remedies against the defendant to secure his claim as the law gives to the original plaintiff.

Accordingly, the judgment of the United States District Court for the District of Colorado is AFFIRMED.

ENTERED FOR THE COURT
PER CURIAM