

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

Case No. C-00-01671 TEH

EDWIN LEE, Plaintiff, v. GATEWAY CENTER LLC, et al.,
Defendants, SDH1, INC., Applicant for Intervention.

This matter comes before the Court on a Motion to Intervene in Plaintiff's Motion for Order Awarding Attorneys' Fees filed by SDH1, Inc. Having carefully considered the parties' papers, the Motion to Intervene is GRANTED, and ruling on the Motion for Order Awarding Attorneys' Fees to SDH1, Inc. is deferred, pending supplemental briefing by the parties, for the reasons set forth below.

BACKGROUND

Plaintiff, Edwin Lee, is the lessee and operator of a cafeteria in Gateway Center in South San Francisco, California. Defendants, Gateway Center LLC, et al., are the owners, property managers, and affiliated companies of the Gateway Center. Plaintiff and Defendants engaged in a dispute over a rent increase that Defendants sought to impose at the time of Plaintiff's renewal of his lease. The parties filed cross summary judgment motions. This Court granted Plaintiff's Motion for Summary Judgment. The current motion is an application to intervene by SDH1, a signatory to the lease.

Defendants' predecessor in interest, Homart Development Company, entered into a lease with Servo Food Systems ("Servo") in September 1984 for the premises at issue in this proceeding. Servo used the premises to operate a cafeteria ("Gateway Cafe"). On October 13, 1987, Servo exercised its first lease renewal option. In late 1987, Servo entered into a sublease or assignment of the premises with Plaintiff Edwin Lee. Several years later, Servo merged with Sodexho Marriott Services ("Sodexho"). The Lease for the Gateway Cafe was operated by a wholly owned subsidiary of Sodexho called Lunchstop. On May 27, 1999, Lunchstop exercised its third option to extend the Lease. On November 12, 1999, Sodexho requested that the Lease be assigned from Lunchstop to SDH1, another of its wholly-owned subsidiaries. Defendants, the lessors, consented to the assignment a few days later. The end result of these transactions, as conceded by the parties, is that SDH1 is the tenant or guarantor on the Lease and Plaintiff is

the subtenant or assignee. When the rent dispute developed, Defendants continued to communicate with Sodexo's inhouse attorney.

This Court entered an order granting summary judgment to Plaintiff on May 18, 2001. SDH1 filed this motion on June 4, 2001 seeking to intervene as a matter of right or permissively on the grounds that it is a signatory to the Lease, the subject of the dispute between Plaintiff and Defendants.

DISCUSSION

I. Intervention

Federal Rule of Civil Procedure 24 governs a party's application for intervention in the federal courts. Rule 24(a) regulates intervention by right and Rule 24(b) sets forth the requirements for permissive intervention. A court may allow intervention by a party under 24 either subsection of Rule 24. Generally, courts interpret Rule 24 broadly in favor of permitting intervention. *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998).

A. Intervention by right.

Rule 24(a)(2) provides:

Upon timely application anyone shall be permitted to intervene in an action when the applicant claims an interest relating to the property or transaction which is 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.

Fed. R. Civ. P. 24(a)(2).

According to the Ninth Circuit, to prevail on a motion to intervene as of right, the applicant must meet four requirements: (1) the motion must be timely, (2) the applicant must claim a "significantly protectable" interest in the property that is the subject of the action, (3) the applicant must demonstrate impairment of its ability to protect that interest, and (4) the applicant must prove that the interest is inadequately represented by the parties to the action. *State of Montana v. E.P.A.*, 137 F.3d 1135, 1141 (9th Cir. 1998);

Sierra Club v. E.P.A., 995 F.2d 1478, 1481 (9th Cir. 1993).

1. Timeliness.

Under the first requirement, this Court must find the motion timely before it can consider any of the other requirements for intervention. *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir. 1997). The Ninth Circuit considers three factors when analyzing timeliness: "(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay." *Id.* (quoting *County of Orange v. Air California*, 799 F.2d 535, 537 (9th Cir. 1986)).

Defendants argue that SDH1's motion is untimely under the first factor because postjudgment intervention is generally disfavored. Postjudgment intervention is disfavored unless sought before appeal for the purpose of appeal. See *United States ex rel. McCough v. Covington Tech., Inc.*, 967 F.2d 1391, 1395 (9th Cir. 1992). However, this Court agrees with SDH1 that a motion for attorneys' fees is collateral to the main action. See *Int'l Ass'n of Bridge, Structural, Ornamental, & Reinforcing Iron Workers' Local Union 75 v. Madison Indus., Inc.*, 733 F.2d 656, 659 (9th Cir. 1984).

Under Rule 54(d)(2), which governs motions for attorneys' fees, the "motion must be filed and served no later than 14 days after entry judgment." Fed. R. Civ. P. 54(d)(2)(b) (emphasis added). SDH1's motion is timely under this rule because it was filed within 14 days of this Court's order granting summary judgment to the Plaintiff. The Advisory Committee Notes to the 1993 Amendment to Rule 54 state that a motion filed for fees under this rule "does not affect the finality or the appeal ability of a judgment." Although motions for attorneys' fees must necessarily be made postjudgment, they are not the type of postjudgment motions for intervention disfavored by the courts because determination of these motions do not affect the determination of issues made in the prior action. SDH1 timely moved to intervene considering the stage of the proceedings in the action between Plaintiff and Defendants.

Additionally, SDH1's motion meets the other two timeliness factors of prejudice and reason for delay. When considering prejudice to the existing parties, courts must remember that an intervenor will be permitted to litigate fully which could result in a relitigation of determined issues and cause considerable

delay in the proceedings. *League of Amer. Latin Citizens*, 131 F.3d at 1304. Additional delay alone cannot preclude intervention. *Id.* Here, because SDH1 seeks to intervene in a proceeding collateral to the main action, the issues to be determined will not affect the judgment. Also, SDH1 has no motive to relitigate issues on which Plaintiff has already prevailed. Although there will necessarily be delay to Defendants as they must defend a claim by a new party, this delay does not result from unnecessary litigation of decided issues and therefore this Court finds no prejudice to the parties in allowing intervention by SDH1.

As for the last timeliness factor, Defendants argue that SDH1 failed to present a reason for its delay in seeking intervention in the lawsuit given that it knew of the action for at least one year. However, the point at which a party knows of the litigation does not factor into an analysis for timeliness of intervention; courts instead look at when the party becomes aware that its interests are no longer adequately protected by the existing parties to the litigation. *Bates v. Jones*, 127 F.3d 870, 873 (9th Cir. 1997). SDH1 knew of the litigation since at least October 24, 2000 when it received a letter from Defendants asking for attorneys' fees. SDH1 became aware that its interest was no longer represented by the Plaintiff when Plaintiff filed his own motion for attorneys' fees. Adequate representation by the existing parties is discussed below.

2. Significant protectable interest.

The second requirement for intervention by right is that the party must have a significant protectable interest in the subject of the action. Defendants contend that SDH1 has no such interest in the motion for attorneys' fees. The Ninth Circuit's standard for determining an intervenor's significant protectable interest is whether the interest is protected under law and whether there is a relationship between the intervenor's legally protected interest and the plaintiffs claims. *Donnelly*, 159 F.3d at 409 (citing *Northwest Forest Res. Council v. Glicknan*, 82 F.3d 825, 837 (9th Cir. 1996)).

Here, SDH1 meets both prongs of the standard. First, attorneys' fees resulting from a contract dispute are protected under California law. Cal. Civ. Code Section 1717 (West 1994). Second, there is a relationship between SDH1's interest and Plaintiffs claim. SDH1 is a signatory to the lease that was the subject of Plaintiff's original claim. According to both

parties' briefs, SDH1 and its attorneys participated in a settlement conference in December 2000 in the dispute between Plaintiff and Defendants over this lease. Given Decl. ¶¶ 12; Kaplan Decl. ¶ 8. SDH1's use of attorneys in Plaintiff's and Defendants' dispute creates an interest in seeking reimbursement for these fees that is related to Plaintiff's claim for attorneys' fees. Therefore, SDH1 has a significant protectable interest in the attorneys' fees.

3. Impairment of interest.

The third requirement in the intervention analysis under Rule 24(a)(2) is that SDH1's ability to protect its interest must be impaired. The standard for this determination is whether a potentially adverse impact on the intervenor's interest would result from the decision or whether the decision may as a "practical matter" impede SDH1's ability to protect its interest. *Cunningham v. David Special Commitment Ctr.*, 158 F.3d 1035, 1038 (9th Cir. 1998). One type of sufficient impairment is a possible foreclosure of the potential intervenor's claims. *Sierra Club v. EPA*, 995 F.2d 1478, 1486 (9th Cir. 1993). Another type of impairment occurs when the upcoming decision would be persuasive authority on another court, including a federal court's interpretation of general state law. *Yniguez v. Arizona*, 939 F.2d 727, 737 (9th Cir. 1991). A decision by this Court determining Plaintiff's right to attorneys' fees may be persuasive in a state court's determination of SDH1's right to attorneys' fees. In fact, SDH1 may be foreclosed from asserting this claim without Plaintiff since Plaintiff actually litigated the underlying action. This impairment of SDH1's ability to protect its interest in obtaining an award of attorneys' fees is sufficient to warrant intervention.

4. Inadequate representation.

Lastly, to successfully intervene, SDH1's interest must be inadequately represented by Plaintiff. The test used to determine whether the existing parties are adequately protecting the interest of a potential intervenor asks whether the existing party will make all of the arguments that the potential intervenor would make. *United States v. Oregon*, 838 F.2d 635, 638 (9th Cir. 1988). The Ninth Circuit has held that the burden of showing inadequacy is minimal; the potential intervenor must only show that "representation of its interests 'may be' inadequate." *Sagebrush Rebellion, Inc. v.*

Watt, 713 F.2d 525, 528 (9th Cir. 1983) (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972)). Plaintiff cannot move for an award of attorneys' fees on behalf of SDH1 and will not likely argue that fees should be awarded to SDH1. Earlier in the litigation, Plaintiffs position as a subtenant or assignee resembled SDH1's position as a tenant or guarantor and therefore Plaintiff adequately represented SDH1's interests in that particular phase of the action. However, Plaintiffs interest in obtaining attorneys' fees after prevailing in the action is now substantially different from SDH1's interest in obtaining its own attorneys' fees. SDH1's interest is no longer adequately protected by Plaintiff.

In short, SDH1 meets the four required elements to intervene as a matter of right pursuant to Federal Rule of Civil Procedure 24(a). SDH1 timely filed its motion after the entry of judgment in accordance with Federal Rule of Civil Procedure 54; attorneys' fees are a protectable interest and here those fees were expended in relation to the lease dispute; SDH1's ability to protect this interest may be impaired by a denial of the right to intervene; and Plaintiff cannot adequately protect SDH1's interest by moving for an award of attorneys' fees on behalf of SDH1.

B. Permissive intervention.

Because this Court finds intervention by right, it does not need to reach the issue of whether SDH1 meets the requirements for permissive intervention.

II. Attorneys' Fees

Neither party adequately briefed the issue of attorneys' fees in this motion. Defendants failed to address the issue in their opposition in the hopes that this Court would deny intervention and therefore never reach the issue of attorneys' fees. Although normally this approach is used by counsel at its own peril, in this situation SDH1 contributed to Defendants' omission by not adequately addressing the issue in its original motion and only later arguing the issue in its reply brief. Consequently, Defendants were deprived of the opportunity to adequately oppose the issue. Because this Court prefers to decide each motion on the merits, it will defer ruling on SDH1's motion for an order awarding attorneys' fees until each party provides supplemental briefing on the issue.

CONCLUSION

In light of the authorities discussed above, and good cause appearing, it is HEREBY ORDERED that:

1. SDH1's motion to intervene is GRANTED.
2. The parties shall file with this Court, and serve on opposing counsel, supplemental briefing on the issue of attorneys' fees according to the following schedule:
 - a. SDH1's motion is due 14 days from the date of this order.
 - b. Defendants' opposition is due 21 days from the date of this order.
 - c. SDH1's reply is due 28 days from the date of this order.

IT IS SO ORDERED.

DATED: 09/10/01

THELTON E. HENDERSON, JUDGE

UNITED STATES DISTRICT COURT