
In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:)	
)	Adversary Proceeding
TOPGALLANT LINES, INC.)	
(Chapter 7 Case <u>89-14996</u>))	Number <u>90-4028</u>
)	
<i>Debtor</i>)	
)	
)	
TOPGALLANT LINES, INC.)	
)	
<i>Plaintiff</i>)	
)	
)	
v.)	
)	
MILITARY SEALIFT COMMAND)	
)	
<i>Defendant</i>)	

MEMORANDUM AND ORDER
ON MOTION TO INTERVENE AS PLAINTIFF

Creditor, Fleet Factors Corporation, Inc., d/b/a Ambassador Factors ("Ambassador Factors") comes before this Court requesting permission to intervene in this adversary proceeding between Topgallant Lines, Inc., Plaintiff ("Trustee") and Military Sealift Command, Defendant ("MSC"). Ambassador Factors asserts intervention as a

matter of right under F.R.Civ.P. 24(a)(2) and in the alternative requests that this Court grant permissive intervention under F.R.Civ.P. 24(b)(2). The Trustee has filed a brief in opposition to this Motion. Based upon the parties' briefs, the record in the file, and applicable authorities, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

The following facts are not in dispute.¹ On June 12, 1989, the MSC issued solicitation, offer and award N0003389-R-2300 First Cycle seeking worldwide ocean and intermodal transportation services for the period October 1, 1989, through March 31, 1990. In response to this solicitation, Topgallant Lines, Inc. ("Debtor") bid on a contract to provide carrier services to the MSC, including the supplying of ocean and intermodal container services on certain trade routes between the United States, Western Europe, and the United Kingdom.

On September 1, 1989, MSC awarded to the Debtor contract number N0003390-C-9013 for the movement of containerized cargo. Under this contract, Debtor agreed to provide ocean and intermodal transportation for MSC cargo time tendered between the United States, Northern Europe, and the United Kingdom. This type of service, referred to as "liner term" service, requires the shipper to assume all responsibility and cost for the transportation of the cargo from the port or point where the cargo was

¹ See Memorandum and Order on Motion for Summary Judgment in Matter of Topgallant Lines, Inc., Adv. Pro. No. 90-4028, Ch.7 Case No. 89-41996.

received to the destination port or point where the shipper makes the cargo available to the MSC.

Debtor chartered vessels M/V Chesapeake Bay and M/V Delaware Bay to perform this contract. Unfortunately, on December 13, 1989, before voyages numbered 33 and 34 had been completed by the two vessels, First American Bulk Carriers ("FABC") declared Debtor to be in default under the Subbareboat Charters by which Debtor had possession of the M/V Chesapeake Bay and M/V Delaware Bay. FABC took possession of both vessels and withdrew them from service. On the same date, December 13, 1989, but after FABC took possession of the vessels, Debtor voluntarily filed a petition for relief under Chapter 11 of the Bankruptcy Code.

When the M/V Chesapeake Bay arrived at its port of call in Bremerhaven, Germany, it was arrested. The M/V Delaware Bay was still at sea en route to its European ports of call when Debtor filed for protection under Chapter 11 of the Bankruptcy Code. The vessel by-passed its scheduled port of call at Rotterdam and proceeded directly with MSC cargo on board to the port of Bremerhaven, Germany. At Bremerhaven, the German authorities immediately arrested the vessel.

Debtor did not complete delivery of MSC's cargo after the arrest of its vessels in Bremerhaven. MSC made substitute arrangements for the discharge and further

carriage of its cargo.

The parties dispute the circumstances under which MSC took delivery of its cargo in Bremerhaven and made arrangements for delivery to its ultimate destination. The government contends that Debtor, unable to secure its vessels from arrest, essentially abandoned the cargo at the port, leaving MSC no choice but to negotiate and pay for the release and further carriage of the cargo by other means. Debtor, on the other hand, contends that the MSC did not allow it an opportunity to secure the vessels and their cargo, instead demanding immediate access to its cargo. Debtor alleges that the MSC's urgency in gaining possession of the cargo was due in large part to the fact that the personal effects of a Navy admiral were located in one or more of the containers. This dispute is the underlying basis for this case in which Plaintiff Ambassador Factors requests permission to intervene.

The debtor-in-possession filed this adversary proceeding to recover unpaid freights on February 16, 1990. The case was converted to a Chapter 7 liquidation on December 17, 1990, and James L. Drake, Jr., was appointed Trustee. After a lengthy period of discovery, MSC filed a motion for summary judgment which this Court denied on July 29, 1994, having found genuine issues of material fact remaining with regard to the factual application of the doctrine of the *pro rata itineris*.

On May 26, 1995, Ambassador Factors filed a motion to intervene as Plaintiff. Ambassador Factors essentially asserts that, (1) the Trustee has engaged in little or irrelevant discovery, (2) all relevant discovery occurred only as a result of defending a motion to dismiss by MSC, and (3) since defending that motion, Trustee has taken no action to advance this case any further. Trustee subsequently filed a brief in opposition to this motion on June 20, 1995. Trustee denies the allegations and asserts that Ambassador Factors' motion pursuant to F.R.Civ.P. 24(a)(2) and 24(b)(2) should be denied because their interest is adequately protected by Plaintiff Trustee.

CONCLUSIONS OF LAW

Bankruptcy Rule 7024 incorporates Rule 24 of the Federal Rules of Civil Procedure which provides for intervention of right for anyone who "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." F.R.Civ.P. 24(a)(2). Rule 24 also provides for permissive intervention 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." F.R.Civ. P. 24(b)(2).

An intervenor under Rule 24(a)(2) must meet the following requirements:

(1) Submit a timely application to intervene; (2) demonstrate an interest in the property or transaction; (3) show that the intervenor's ability to protect such interest might be impaired; and (4) demonstrate that the interest is not adequately represented by the existing parties. Athens Lumber Co. v. Federal Election Commission, 690 F.2d 1364, 1366 (11th Cir. 1982); In re Thompson, 965 F.2d 1136, 1142 (1st Cir. 1992). If an intervenor fails to meet one of these requirements, then it cannot intervene as a matter of right. Matter of Summit Ridge Apartments, Ltd., 104 B.R. 405 (Bankr. N.D.Ala. 1989). Here our focus is on the fourth requirement. For the reasons set forth below, this Court holds that applicant, Ambassador Factors, has not carried its burden demonstrating that its interest is represented inadequately by the existing parties to the suit. Since this Court concludes that the fourth requirement is not met, the other requirements need not be discussed.²

In support of its motion, Plaintiff argues in its brief that the inadequate representation requirement of Rule 24(a)(2) "is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." Trbovich v. United Mine Workers, 404 U.S. 528, 538 n.10

² After only a cursory view, this Court also questions the timeliness of Ambassador Factors' motion. The applicant's decision to enter this litigation comes approximately five years after its inception and near completion of the discovery process. Although the amount of time since the action was initiated is generally disregarded, the point to which a suit has progressed is a relevant factor, NAACP v. New York, 413 U.S. 345 (1973), as are considerations of unnecessary delay or prejudice to the adjudication of the rights of the original parties. Reeves v. Intemational Tel. & Tel. Corp., 616 F.2d 1342 (5th Cir. 1980), cert. denied, 449 U.S. 1077 (1981).

(1972). Further, Ambassador Factors correctly points out that the Eleventh Circuit has adopted this test stating that the applicant, "should be allowed to intervene unless it is clear that [the existing parties] will provide adequate representation." Chiles v. Thornburgh, 865 F.2d 1197 (11th Cir. 1989). (Detainees in a minimum-security prison allowed to intervene in suit by United States Senator Lawton Chiles against the Attorney General of the United States alleging that the federal facility was being operated illegally). However, Ambassador Factors' reliance on cases interpreting Rule 24(a)(2) outside of the bankruptcy context is misplaced. When interpreting each procedural rule, a party must consider the rule's application in both a civil and bankruptcy context, incorporating the Code, its underlying purpose, and the dynamics among the relevant provisions.

As previously mentioned, the issue is whether Ambassador Factors is adequately represented in the Chapter 7 adversary proceeding by the Trustee. The Sixth Circuit considers three factors relevant when reviewing the adequacy of representation for the purpose of intervention: (1) If there is collusion between the representative and an opposing party; (2) if the representative fails in the fulfillment of his duty; and (3) if the representative has an interest adverse to the proposed intervenor. In re Simetco, Inc., Adv. Pro. No. 94-6066, Ch. 11 Case No. 93-61772, slip op. at 3-4 (Bankr. N.D. Ohio, Aug. 15, 1994) (Williams, J.) (*citing* Purnell v. City of Akron, 925 F.2d 941, 949-50 (6th Cir. 1991)). Ambassador Factors alleges that the Trustee has failed in the fulfillment of his duty. However, the Purnell court additionally notices that, "[t]he burden placed on the

would-be intervenor requires 'overcom[ing] the *presumption of adequacy of representation* that arises when the proposed intervenor and a party to the suit . . . have the same ultimate objective'." *Id.* at 950 (citations omitted) (emphasis added).

Clearly, Ambassador Factors possesses the same ultimate objective as the Trustee to recover additional monies from MSC and, therefore, has the additional presumption of adequacy to overcome. In fact, every claim alleged by Ambassador in its complaint derives from the Debtor's causes of action against MSC. *See* Applicant's Complaint P.2, no.6 ("the Defendant is indebted to Plaintiff, and therefore to Ambassador as Plaintiff's assignee, in the amount of \$1,257,515.59 for ocean freight and other related charges plus interest"). Thus, not only does Ambassador have the same ultimate objective as the Trustee, it is actually attempting to assert the same causes of action.

The duty that the Trustee owes to each creditor, the estate, and the bankruptcy courts also creates another additional burden on potential intervenors who must convince the court that the statutory protection provided by requiring the presence of a Trustee³ as well as the remedies already afforded to each individual⁴ are insufficient.

³ Trustees, like executors and administrators, are bound to use reasonable diligence in the discharge of their duty to "collect and reduce to money the property of the estates for which they are trustees" and to secure possession of all the property and collect debts due. Failure to reasonably carry out these fiduciary duties renders a trustee liable for damages. It may also be grounds for the removal of the trustee pursuant to Code Section 324(a). 4 Collier ¶704.04, at 704-11.

⁴ Creditors are entitled to monitor the proceedings as well as receive adequate notice of relevant proceedings. *See* F.R.Bankr.P. §2002(a). Ambassador Factors may petition the bankruptcy court to remove the creditor "for cause." *See* Bankruptcy Code §324, 11 U.S.C. §324. Ambassador Factors possesses the right to proceed with an action to surcharge a trustee's bond for failure to discharge statutory duties. *See* Bankruptcy Code

Therefore, besides the procedural hurdles of Rule 24(a)(2) in a civil context, Ambassador Factors has the substantial burden of proving the inadequacy of representation by a Chapter 7 trustee who shares the same ultimate objective as the intervenor and must also uphold its fiduciary duty to the bankruptcy court.

The case of In re Thompson, 965 F.2d 1136, provides a persuasive analysis of Rule 24(a)(2) that incorporates both general principals of intervention as well as the role of the Chapter 7 trustee in bankruptcy.

In Thompson, Id., the bankruptcy court approved a settlement of an adversary proceeding between a Chapter 7 trustee and the debtor's husband who had asserted claims against the estate. The debtor and her attorney, proceeding separately as an unsecured creditor, attempted to intervene after being notified of a hearing to approve a settlement with the creditor husband. The First Circuit Court of Appeals held that absent *compelling* showing that the Chapter 7 trustee refused to perform fiduciary duty imposed by the Bankruptcy Code, the Chapter 7 debtor and individual unsecured creditor, who were not parties to the adversary proceeding, were without appellate standing to challenge the bankruptcy court order approving compromise or settlement of litigation. Id. The Court stated that, "[a]lthough the burden of demonstrating inadequate representation remains with the putative intervenor throughout, it is at its most onerous where an existing

§322, 11 U.S.C. §322.

party is under legal obligation to represent the interests asserted by the putative intervenor." Id. at 1142.

In the situation where one of the duties of the existing parties is to represent the interests of the intervenor, intervention will not be allowed unless a compelling showing of inadequate representation is made. Application of this principal in the bankruptcy context can be seen in those cases holding that unsecured creditors seeking to intervene in adversary proceedings begun by the trustee have "a heavy burden" to show inadequacy of representation.

Id. at 1142, *quoting* 9 Collier ¶7024.5, at 7024-7. The necessary analysis requires comparing the interests of the intervenor with those of the existing parties. Here, Ambassador Factors fails to convince this Court that its interests are not adequately protected by the Trustee's presence.

Over the previous year, this Court has monitored the litigants at regular status hearings and has been satisfied with their progress. More depositions were taken in New York during July of 1995. Further, the successful defense of a motion for summary judgment may at least offer some indication that the Trustee is proceeding in a proper manner. Finally, whether to file a motion for summary judgment or proceed with more pre-trial discovery is a tactical decision for the Trustee which requires great deference. Therefore, it is the decision of this Court that the applicant has not satisfied its

burden under F.R.Civ.P. 24(a)(2).

Under F.R.Civ.P. 24(b)(2), intervention may be permitted when the applicant's claim or defense and the primary action have a question of law or fact in common. In determining whether to grant permissive intervention, "the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." F.R.Civ.P. 24(b)(2). If resolution of these individual claims in this proceeding would add new issues to an already complex case and unduly delay the adjudication of the adversary proceeding, the motion should be denied. Matter of Summit Ridge, 104 B.R. 405, 410 (Bankr. N.D.Ala. 1989).

Ambassador Factors restates in its 24(b)(2) motion all of the undecided issues of law and fact remaining in the underlying adversary proceeding and then summarily asserts that because Ambassador Factors possesses a security interest in the debtor's assets that as a matter of course there are common issues of law and fact. In other words, any creditor possessing a security interest in a debtor's assets automatically satisfies the "common issues of law and fact" requirement of 24(b)(2). Although disposition of this matter may have a direct effect on Ambassador Factors, Rule 24(b)(2) states "when an applicant's claim or defense and the main action have a question of law or fact in common." Here, the applicant has only restated the debtor's claim and has not asserted any claims of its own. At the very least, for a creditor to obtain permissive intervention

after restating the claims of the debtor, he should be required to present an undisputed *first priority* security interest in the debtor. Because this Court has already held that maritime lien creditors have claims which prime Ambassador Factors' security interest and attach to the freights, the applicant may not satisfy the "common issues of law and fact" requirement by simply restating claims of the debtor.

Moreover, this Court believes that the addition of Ambassador Factors at the completion of discovery after four years of motions and extensions of the discovery period would unduly harm both of the litigants. *See In re Terex Corp.*, 53 B.R. 616, 621 (Bankr.N.D.Ohio 1985) (Motion to intervene under Rule 24(b) denied as untimely when complaint was filed January 6, 1984, and motion to intervene was filed on August 9, 1985, two months prior to trial and after extensive discovery had been done). The court must always consider the interests of judicial economy, especially when the intervenor only asserts the identical causes of action of the plaintiff. *See In re Pioneer*, 106 B.R. 510 (intervention would result in no additional claims or theories but would duplicate efforts); *In re Simetco, Inc.*, *supra*; 3B James W. Moore et al., *Moore's Federal Practice* ¶ 24.10[4], pp. 24-99 to 24-102 (2d ed. 1993).

It is easy enough to see what are the arguments against intervention where, as here, the intervenor merely underlines the issues of law already raised by the primary parties Where he presents no new questions, a third party can contribute usually most effectively and always expeditiously by a brief *amicus curiae* and not by

intervention.

Id. at p. 24-99 (*quoting Crosby Steam Gage & Valve Co., v. Manning, Maxwell & Moore, Inc.*, 51 F.Supp. 972 (D.Mass. 1943)) (citation omitted).

For the aforementioned reasons, this Court finds that introducing this creditor during the eleventh hour where it is already adequately represented to be unduly prejudicial to the actual litigants. Accordingly, the applicant has not satisfied its burden under either Rule 24(a)(2) or 24(b)(2) and the Motion to Dismiss is denied.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions, IT IS THE ORDER OF THIS COURT that the Motion to Intervene by creditor, Fleet Factors, Corp., Inc. d/b/a Ambassador Factors, is DENIED.

The clerk will issue a notice requiring counsel and the parties to appear in Savannah, Ga., for a settlement conference in this case.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ___ day of August, 1995.