

NO. 44938-2-II
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II

STEPHEN J. WILSON and TRISH WILSON, husband and wife,

Plaintiffs/Respondents,

vs.

ROBERT RADAKOVICH, SR., and MT. SOLO LANDFILL, INC.,

Defendants,

and

KEYSTONE CONTRACTING, INC.,

Intervening/Appellant.

APPEAL FROM THE SUPERIOR COURT

HONORABLE STEPHEN M. WARNING

BRIEF OF INTERVOR/APPELLANT

BEN SHAFTON
Attorney for Intervor/Appellant
Caron, Colven, Robison & Shafton
900 Washington Street, Suite 1000
Vancouver, WA 98660
(360) 699-3001

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ASSIGNMENT OF ERROR AND ISSUES PRESENTED

Assignment of Error #1: The trial court erred by denying the Motion to Intervene made by Keystone Contracting, Inc. (Keystone).

Issue Presented #1: Can Keystone intervene as a matter of right because it has a sufficient interest in the action?

Issue Presented #2: Can Keystone intervene as a matter of right in the action because it is so situated that the disposition will impair its ability to protect its interest?

Issue Presented #3: Can Keystone intervene as a matter of right because its interest is not being adequately protected by existing parties?

Issue Presented #4: Was Keystone's Motion to Intervene timely made?

STATEMENT OF FACTS

Mt. Solo Landfill, Inc. (Mt. Solo) operated the Mt. Solo landfill in Cowlitz County. Robert Radakovich has been its principal. (CP 3-4)

Trish Wilson and Jeff Wilson own property near the Mt. Solo landfill. In February of 2011, they sued Mt. Solo and Mr. Radakovich claiming that the land on which the landfill sits amounts to a nuisance. They have sought damages consisting of \$126,000.00 for reduction in the

value of their property and \$500,000.00 for emotional distress. (CP 3-6; 17)

Without counsel, Mr. Radakovich filed an Answer on March 25, 2011, for himself and Mt. Solo. (CP 30-32) Stephen Leatham, attorney at law, appeared specially for both defendants on August 5, 2011, to attempt to obtain a continuance of a trial date. (CP 33-34)

At length, plaintiffs propounded requests for admission that defendants did not timely answer. The Court ruled that these matters would be established. It subsequently granted partial summary judgment ruling that the area of the landfill amounted to a nuisance *per se*. (CP 36-40)

In December of 2011, Mt. Solo conveyed some of its real property to Keystone. Keystone believes that it paid reasonable and fair consideration for the property. (CP 8)

In January of 2012, Mr. Leatham withdrew as counsel for defendants. (CP 41-42)

In December of 2012, Mr. and Mrs. Wilson filed *Wilson v. Mt. Solo Landfill, Inc. and Keystone Contracting, Inc.*, Cowlitz County Superior Court No. 12 2 01292 1. In that suit, they alleged that the December 2011 conveyance from Mt. Solo to Keystone amounted to a fraudulent transfer.

Trial was ultimately set in this matter for November 26, 2013. (CP 8)

On May 1, 2013, Keystone filed a Motion to Intervene. (CP 7-19) The Court denied that motion on May 15, 2013. (CP 23-24) Keystone then appealed. (CP 25-28)

ARGUMENT

I. Standard of Review.

Keystone sought intervention as a matter of right pursuant to CR 24(a). The trial court's decision will be reviewed *de novo*. *DeLong v. Parmelee*, 157 Wn.App. 119, 163, 236 P.3d 936 (2010). However, the denial will be reversed only if an error of law has occurred. In this context, an error of law is an error applying the law to the facts as pleaded and as established.

In determining whether or not Keystone was entitled to intervene as a matter of right, the Court must look to the pleadings and must accept all well-pleaded allegations to be true. *Westerman v. Cary*, 125 Wn.2d 277, 302, 892 P.2d 1067 (1994). Furthermore, intervention should be granted whenever there is any doubt about whether a party should be allowed to intervene. *Columbia Gorge Audubon Society v. Klickitat County*, 98 Wn.App. 618, 630, 989 P.2d 1260 (1999).

As will be discussed below, Keystone satisfied all of the requirements for intervention. The trial court erred by denying its motion.

II. Keystone Was Entitled to Intervene.

a. Introduction.

Keystone satisfied all of the requirements for intervention as a matter of right pursuant to CR 24(a)(2). The trial court erred by ruling to the contrary.

Keystone sought intervention as a matter of right under CR 24(a)(2). That rule states in pertinent part:

Upon timely application anyone shall be permitted to intervene in an action . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The rule states the following four requirements for intervention:

1. That the applicant has an interest that is the subject of the action;
2. That the applicant is so situated that the disposition will impair or impede the applicant's ability to protect that interest;
3. That the applicant's interest is not adequately protected by the existing parties; and
4. That the application is timely made.

Westerman v. Cary, supra; Spokane County v. State, 136 Wn.2d 644, 649, 966 P.2d 305 (1998). Each of these requirements has been met.

b. Keystone Has a Sufficient Interest in the Action.

The sufficiency for intervention of an applicant's interest is construed broadly in favor of intervention. Not much of a showing is required to establish the requisite interest. *Vashon Island Committee for Self Government v. Washington State Boundary Review Board of King County*, 127 Wn.2d 759, 765, 903 P.2d 953 (1995); *Columbia Gorge Audubon Society v. Klickitat County, supra*. Conversely, insufficiency of an interest should not be used as a factor for denying intervention as a matter of right. *Columbia Gorge Audubon Society v. Klickitat County, supra*.

Keystone clearly meets this minimal test for interest. Plaintiffs are seeking a judgment against Mt. Solo. They intend to satisfy their judgment from Keystone's property by claiming that the 2011 conveyance from Mt. Solo amounted to a fraudulent transfer. They would be allowed this relief if they prevailed in the fraudulent transfer action under RCW 19.40.071(b). Keystone vigorously contends that the transaction did not amount to a fraudulent transfer because it paid reasonably equivalent value for what it received. RCW 19.40.051(a); RCW 19.40.081(a). But Keystone has no guarantee that it will prevail in

the fraudulent transfer action. If it loses the fraudulent transfer action, its property may be levied upon to satisfy the judgment that the Wilsons receive against Mt. Solo. Under these circumstances, it clearly has an interest in eliminating or reducing the amount of any such judgment.

In this way, Keystone is like anyone else who is sued for money damages — the person sued is at risk for losing property through execution or garnishment procedures if a judgment is obtained. Keystone should therefore be afforded the same opportunity to defend the underlying action so that the amount of the judgment and the resulting property exposure can be minimized or eliminated.

Plaintiffs may argue that Keystone would have no interest in their damages claim against Mt. Solo if the property conveyed to Keystone was not a fraudulent transfer. Keystone agrees. The problem, however, is that this matter may come to trial before the fraudulent transfer action and plaintiffs have not agreed to stay the trial of this matter until the fraudulent transfer action is decided and until Keystone has had time to undertake sufficient discovery.

Plaintiffs may also argue that Keystone has no cognizable interest in the property if Mt. Solo's conveyance of the property to it was in fact a fraudulent transfer. That argument is at odds with RCW 19.40, Washington's Uniform Fraudulent Transfer Act. A creditor of the

fraudulent transferor has rights against the transferred property that include avoidance, attachment, and levy of execution. RCW 19.40.071. But nothing in the statute eliminates the transferee's interest in the property. In fact, the transferee may be entitled to a lien on or a right to retain any interest in the asset transfer to the extent of value given the debtor. RCW 19.40.081(d).

Keystone clearly has an interest in the property that Mt. Solo conveyed to it. As any owner of property, it has an interest in minimizing the amount of a judgment that might be satisfied from property it owns. This amounts to an interest sufficient to support intervention as a matter of right.

c. The Disposition of This Case Will Impair Keystone's Ability to Protect Its Interest.

Keystone cannot protect its interest if it is not allowed to intervene. It will not have the opportunity to minimize the amount of the judgment that plaintiffs are seeking to obtain and levy against its property.

Not much impairment needs to be shown in order for a party to intervene. In *Wilson Sporting Goods Co. v. Pedersen*, 76 Wn.App. 300, 886 P.2d 203 (1994), a junior lien holder was permitted to intervene in an action to foreclose a judgment because the execution and sale would cloud its title even though the value of its interest would not be

affected by the proceeding. Similarly, in *CLEAN v. City of Spokane*, 133 Wn.2d 455, 947 P.2d 1169 (1997), developers were allowed to intervene in an action commenced by a citizens' group challenging an ordinance providing public support for a parking garage since the action would impair their ability to obtain funding for their project.

The impairment of Keystone's rights is much clearer than in *Wilson Sporting Goods Co. v. Pedersen, supra*, and *CLEAN v. City of Spokane, supra*. Plaintiffs intend to levy execution on its property if they obtain a judgment against Mt. Solo. Keystone will either lose the property in the execution sale or will have to pay the judgment to keep the property.

For these reasons, Keystone's rights to the property may be impaired by the judgment obtained in this matter if the transfer is found to be fraudulent. This requirement is satisfied.

d. Other Parties Do Not Adequately Represent Keystone's Interests.

A party is allowed to intervene when existing parties will not adequately represent its interests. The relevant question is whether the existing parties would make all necessary arguments and whether the intervenor will more effectively articulate any aspect of its interest. Only a minimal showing of lack of adequate representation is necessary for this

requirement to be satisfied. *Columbia Gorge Audubon Society v. Klickitat County, supra*, 98 Wn.App. at 629.

Mt. Solo has an interest in defending itself in plaintiffs' claims. It is not represented by counsel, however. Therefore, it cannot appear in its own defense because a corporation cannot appear *pro se*. *Cottringer v. Employment Security Department*, 162 Wn.App. 782, 257 P.3d 667 (2011). Furthermore, if plaintiffs' allegations are to be believed, Mt. Solo is unlikely to hire an attorney to represent it because it is impecunious. Since Mt. Solo is unrepresented, it will not make any arguments to defend itself much the less the arguments that Keystone should make to protect its own interest. It is also unlikely to undertake the necessary preparation and discovery to refute plaintiffs' claims concerning loss of property value and emotional distress. Therefore, this requirement for intervention is met.

e. Keystone's Motion Was Timely.

A motion to intervene is timely if is filed before the commencement of trial. *American Discount Corp. v. Saratoga West, Inc.*, 81 Wn.2d 34, 43, 499 P.2d 869 (1972). Trial was scheduled for November 26, 2013. The motion to intervene was filed on May 1, 2013, more than six months prior to trial. It is therefore timely. This requirement is met as well.

f. Plaintiffs Will Not Be Prejudiced.

Intervention can be denied if it will work a hardship on one of the parties. *Loveless v. Yantis*, 82 Wn.2d 754, 759 513 P.2d 1023 (1973). No hardship is presented here.

If Keystone is allowed to intervene, it will defend the plaintiffs' claims at trial. The plaintiffs cannot possibly argue that they are prejudiced simply because they will have to submit to discovery by a represented party, prove the amount of damages to which they are entitled, and try to refute the arguments that counsel may make against them. Every party who files a lawsuit has the same burdens. In short, the plaintiffs can claim no prejudice.

g. Conclusion.

The facts show that Keystone met all the requirements for intervention as a matter of right. The trial court erred by denying its motion to intervene.

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CONCLUSION

The trial court's denial of Keystone's Motion to Intervene should be reversed. The matter should be remanded with directions to allow Keystone to intervene.

DATED this 21 day of Aug., 2013.



BEN SHAFTON, WSB #6280
Of Attorneys for Keystone

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AFFIDAVIT OF MAILING

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Attorney for Intervenor/Appellant
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(360) 699-3001**

