

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

COURT OF APPEALS
2012 OCT 15 PM 1:31
STEPHEN M. WARNING
CLERK

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.,

Intervenor/Appellant.

APPEAL FROM THE SUPERIOR COURT

HONORABLE STEPHEN M. WARNING

REPLY BRIEF

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

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INTRODUCTION

This is an appeal from an Order Denying Motion to Intervene by Keystone Contracting, Inc. (Keystone). Intervention is warranted when the following four requirements are satisfied:

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.

(Brief of Intervenor/Appellant, pps. 4-5) Steven J. Wilson and Trish Wilson (the Wilsons) appear to contest all of these elements except the second. They also claim that this appeal is frivolous. Their contentions are not well-grounded.

ARGUMENT

I. The Facts Are Uncontested.

Judging from the Wilsons' brief, there appears to be no serious disagreement about the facts. It is undisputed that the Wilsons are seeking a money judgment against Mt. Solo Landfill, Inc. (Mt. Solo). It is also uncontested that Mt. Solo is not represented and likely will not obtain

counsel to protect its interests in this matter. Mt. Solo conveyed certain real property to Keystone. The Wilsons contend that the conveyance was a fraudulent transfer and have sued seeking that the conveyance be “set aside and voided to the extent necessary to satisfy (the Wilsons’) claim in this matter.” (CP 18) It is also uncontested that the Motion to Intervene in this matter was filed more than six months prior to the date set for trial.

II. Keystone Has an Interest In This Matter.

The Wilsons claim that any trial will be “damages only” as Mt. Solo’s fault has been demonstrated. They have made it clear that they intend to levy execution on real property owned by Keystone. Since the interest requirement is construed broadly in favor of intervention, Keystone’s interest is sufficient to satisfy the interest requirement. (Brief of Intervenor/Appellant, p. 5)

There can be no suggestion that Keystone does not have some sort of cause of action in this case. To interpret CR 24 as permitting intervention only by those with perfected or perfectible independent cause of action is to render the rule meaningless. *Columbia Gorge Audubon Society v. Klickitat County*, 98 Wn.App. 618, 624, 989 P.2d 1260 (1999).

The Wilsons rely on *Aguirre v. AT&T Wireless Services*, 109 Wn.App. 80, 33 P.3d 1110 (2001). In that action, a party who had opted out of a class action settlement was found to have no interest in the propriety of that settlement. That case is a far cry from what we have here. None of the opting out party's individual rights would have been affected by the class action settlement since she had opted out. She was free to pursue her individual claims against AT&T Wireless Services. By contrast, Keystone cannot "opt out" from execution on any judgment that the Wilsons might obtain against Mt. Solo if the conveyance is found to be a fraudulent transfer. It must protect itself in all ways — by denying that the transfer was fraudulent but also by minimizing the amount of any money judgment.

Keystone's position is analogous to that of a defendant in an action arising out of a motor vehicle collision where liability is hotly disputed. The defendant will claim that she was not at fault in the collision. Nonetheless, she will also defend the damage claim that the defendant wants to make. In this way she will — and must — use all tools of defense that she can.

Foster parents do not have a sufficient interest to intervene in dependency proceedings concerning children they care for because the role of foster parents is by definition transitory and statutes do not elevate

their interest. *In re Dependency of J.H.*, 117 Wn.2d 460, 469-470 815 P.2d 1380 (1991). If Keystone's property is taken to satisfy a judgment against Mt. Solo, that property will be permanently lost. This case is also not helpful.

The Wilsons suggest that the transfer from Mt. Solo may not be found to be fraudulent. If they wish to stand on that assertion, they should agree to have the fraudulent transfer matter tried first so that this "contingency" will be removed or Keystone will have no responsibility.

The Wilsons also suggest that this case "may never get to trial so long as any past, future, or contingent creditor and/or business partner of Mt. Solo Landfill may intervene at any time in this matter because they predict that their interest could hypothetically be affected by a judgment in favor of the Wilsons." (Brief of Respondents, p. 6) Keystone is not a business partner or creditor to Mt. Solo. It is a party to whom Mt. Solo conveyed real estate for good consideration. The danger to its property interests is not hypothetical. It is real and is subject of a suit to void the conveyance as a fraudulent transfer.

They also appear to be concerned that Keystone would vigorously defend their damage claim that includes \$500,000.00 for emotional distress and \$126,000.00 for reduction of the value of their property. (CP

17) That is not a relevant concern. Every plaintiff must assume that his or her claim will be defended.

In the final analysis, the Wilsons are seeking to levy on Keystone's property. Keystone has an interest in the matter to avoid or reduce the judgment in the first instance.

III. Mt. Solo Will Not Protect Keystone's Interest.

The Wilsons suggest that Mt. Solo can adequately protect itself in this matter. They ignore that it is currently without counsel and, if the trial was held now, it would not be able to appear. (Brief of Intervenor/Appellant, pps. 7-8) There is no indication that it will obtain new counsel prior to trial.

This point is critical. If Mt. Solo was represented and actually defending the case, there would be no need for Keystone to intervene. As things stand now, there would be only one side appearing at trial since Mt. Solo cannot appear *pro se*.

The Wilsons goal is clear. They want to have a trial where no one appears on behalf of the defendant because their chances of securing a large judgment under those circumstances are much greater than if a vigorous damages defense was presented.

The overriding point here is that Keystone's interest in minimizing any judgment is not being protected by Mt. Solo because it is

unrepresented and cannot appear. This factor separates this case from other perhaps more typical situations where a plaintiff may make a fraudulent transfer claim for the purpose of levying on property belonging to someone who is not a party to the suit and the defendant is represented and is defending.

IV. The Motion to Intervene Was Timely.

a. Facts.

The Wilsons brief incorrectly sets out some of the facts related to this issue.

This action was filed in February of 2011. (CP 1-6) Mt. Solo conveyed real property to Keystone in December of 2011. (CP 17) The Wilsons filed the fraudulent transfer action on December 5, 2012. (CP 15-19) The Motion to Intervene was filed on May 1, 2013. (CP 7)

There is nothing in the record to show that Keystone had notice of this suit at any time prior to being served with the complaint in the fraudulent transfer action. And there is certainly nothing in the record to suggest that Keystone knew that the Wilsons claimed that the transfer was fraudulent until it was served with the fraudulent transfer action.

///

b. Discussion.

A motion to intervene is per se timely if it is filed before the commencement of trial. This rule is black letter law in Washington. *American Discount Corp. v. Saratoga West, Inc.*, 81 Wn.2d 34, 43, 499 P.2d 869 (1972); *Columbia Gorge Audubon Society v. Klickitat County*, *supra*. The Motion to Intervene was filed more than six months prior to the scheduled trial date of November 26, 2013. It was therefore timely.

The Wilsons have cited a number of cases for the proposition that timeliness of intervention must be decided based upon a number of factors to include prior notice of the lawsuit, the circumstances contributing to the delay in moving to intervene, and the prejudice that would result if intervention were refused. *Martin v. Pickering*, 85 Wn.2d 241, 533 P.2d 380 (1975); *Kreidler v. Eikenberry*, 111 Wn.2d 828, 766 P.2d 438 (1989); *Olver v. Fowler*, 131 Wn.App. 135, 126 P.3d 69, *aff'd* 161 Wn.2d 655, 168 P.3d 348 (2007). All of these cases involved a party's attempt to intervene after judgment had already been entered. They have no applicability here.

V. The Wilsons Are Not Entitled to an Award of Attorney's Fees.

The Wilsons seek attorney's fees pursuant to RAP 18.9. Attorney's fees are allowed under that rule against a party who uses the rule for purposes of delay or files a frivolous appeal. RAP 18.9(a).

The trial courts order denying intervention should be reversed. For that reason alone, the request for attorney's fees should be denied.

In determining whether to impose sanctions pursuant to RAP 18.9, the Court considers the following factors:

1. A civil appellant has a right to appeal under RAP 2.2;
2. All doubts as to whether the appeal is frivolous should be resolved in favor of the appellant;
3. The record should be considered as a whole;
4. An appeal that is affirmed simply because the arguments are rejected is not frivolous; and
5. An appeal is frivolous only if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there is no reasonable possibility of reversing.

Green River Community College District #10 v. Higher Education Personnel Board, 107 Wn.2d 427, 442-443, 730 P.2d 653 (1986); *Tiffany Family Trust Corp. v. City of Kent*, 155 Wn.2d 225, 241, 119 P.3d 325 (2005); *Clapp v. Olympic View Publishing Co., LLC*, 137 Wn.App. 470, 480, 154 P.3d 230 (2007).

Based upon these factors, attorney's fees have been denied under RAP 18.9(a) whenever debatable issues have been presented. See e.g., *Sneed v. Barna*, 80 Wn.App. 843, 912 P.2d 1035 (1996); *Vance v. Offices of Thurston County Commissioners*, 117 Wn.App. 660, 71 P.3d 680

(2003); *Carrillo v. City of Ocean Shores*, 122 Wn.App. 592, 94 P.3d 961 (2004); *Clapp v. Olympic View Publishing Co., LLC*, *supra*.

At very least, this case presents debatable issues. Counsel has researched the matter diligently but has found no case on point in any court in the United States. That is not surprising given the unique nature of this case — both damage and fraudulent transfer cases pending at the same time and a corporate defendant in the damage action not defending and unrepresented. The issues have been well briefed and concisely presented. Attorney's fees are not warranted under RAP 18.9.

CONCLUSION

The arguments that the Wilsons present lack merit. The order denying the motion to intervene should be reversed. In any event, the Wilsons should not be awarded attorney's fees.

DATED this 11 day of Oct, 2013.



BEN SHAFTON, WSB #6280
Of Attorneys for Intervenor/Appellant

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AFFIDAVIT OF MAILING

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

STATE OF WASHINGTON)
)
County of Clark) ss.

THE UNDERSIGNED, being first duly sworn, does hereby depose and state:

1. My name is LORRIE VAUGHN. I am a citizen of the United States, over the age of eighteen (18) years, a resident of the State of Washington, and am not a party to this action.

2. On October 11, 2013, I deposited in the mails of the United States of America, first class mail with postage prepaid, a copy of the Reply Brief to the following person(s):

MR MICHAEL W FREY
FREY & BUSBY
600 ROAYAL ST STE B
KELSO WA 98626

I SWEAR UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION, AND BELIEF.

DATED this _____ day of _____, 2013.

LORRIE VAUGHN

SIGNED AND SWORN to before me this 11 day of October, 2013.



TS

NOTARY PUBLIC FOR WASHINGTON
My appointment expires: _____