

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Heller Financial Inc. : CIVIL ACTION
 :
 v. :
 :
 Presidential Associates : No. 96-4575

MEMORANDUM AND ORDER

SHAPIRO, District Judge

September 17, 1997

Heller Financial ("Heller") seeks to foreclose on the mortgage on four residential office buildings which, with an office building and parking garage, make up "Presidential City" in Philadelphia. Heller has moved for preliminary injunctive relief and for summary judgment. The motions are opposed by Defendant Presidential Associates ("Presidential"). Presidential asserts counterclaims, opposed by Heller.

Before the court is the motion of Kenneth Bogdanoff ("Bogdanoff"), to intervene to protect his interest in a note signed by Presidential. Both Heller and Presidential oppose the motion to intervene. Bogdanoff's motion to intervene will be denied.

Discussion

1. Facts

Presidential, a limited partnership, has owned Presidential City since 1985. In August, 1989, Heller loaned Presidential the principal sum of \$32,100,000, secured by the four apartment buildings at Presidential City. In 1993, Bogdanoff financed Presidential's purchase of four residential

boilers for these apartment buildings. Presidential signed a promissory note ("the Note") on October 1, 1993 for \$380,892.00; Bogdanoff claims no principal or interest (at 10% per annum) has been paid on the note. K.B. Br. at 2. Bogdanoff confessed judgment against Presidential; the judgment was entered in state court October 25, 1996, long after Heller's mortgage was recorded. The confessed judgment was subsequently opened. Presidential claims the boilers are unsuitable, the note was fraudulently induced, and Bogdanoff is an unsuitable payee under the Note. Def. Br. at 4. The dispute between Bogdanoff and Presidential is the subject of two actions in state court, Kenneth J. Bogdanoff v. P.A. City, Inc., Philadelphia C.C.P., October Term, 1996, No. 2362; P.A. City, Inc. v. Energy Partners, Inc., Philadelphia C.C.P., January Term, 1995, No. 1075. Id.

On June 25, 1996, Heller filed this action seeking the appoint of a receiver pendente lite and foreclosure on the Presidential mortgage. The court appointed a temporary receiver in August, 1996. Presidential asserted affirmative defenses to Heller's claim that Presidential had defaulted; Presidential also filed counterclaims alleging Heller breached a release clause in the Mortgage. Heller has since moved for summary judgment. On January 31, 1997, Bogdanoff filed this motion to intervene pursuant to Fed. R. Civ. P. 24(a).

2. Intervention by Right

There are four necessary pre-conditions to intervention by right. Fed. R. Civ. P. 24(a).

Under Rule 24(a)(2), a person is entitled to intervene if (1) the application for intervention is timely; (2) the applicant has a sufficient interest in the litigation; (3) the interest may be affected or impaired, as a practical matter by the disposition of the action; and (4) the interest is not adequately represented by an existing party in the litigation.

Harris v. Pernsley, 820 F.2d 592, 596 (3d Cir. 1987), cert. denied, 484 U.S. 947 (1987). Failure to satisfy any of the four requirements precludes an applicant from intervening under Rule 24(a)(2). School Dist. of Philadelphia v. Pennsylvania Milk Marketing Bd., 160 F.R.D. 66, 68 (E.D. Pa. 1995) (citation omitted).

It is doubtful the proposed intervention is timely. The action was filed in June, 1996 and extensive hearings held on the motion to appoint a receiver. On July 31, 1996 the court appointed a temporary receiver pending a final determination of plaintiff's motions. The record is closed. Motions to increase the powers of the receiver and for summary judgment are pending. But since movant claims not to have known of the order appointing a temporary receiver until late November, 1996, it will be assumed his motion is timely. However, the movant's interest in the proceedings is insufficient for intervention as of right.

Bogdanoff cites Mountain Top Condominium Ass'n v. Dave Stabbert Master Builder, Inc., 72 F.3d 361 (3d Cir. 1995) in support of his motion to intervene. In Mountain Top, condominium owners sought to intervene in litigation involving a reconstruction escrow fund established with insurance proceeds from hurricane damage. The existence of a separate fund within

the district court's power was critical in Mountain Top. The fund was established to benefit the owners of the condominium units. Only by intervening could they have access to the court controlling the fund. If they were not allowed to intervene, they could "be the beneficiaries of an empty and worthless trust." Id. at 368.

That is not the case here. The court's appointment of a temporary receiver does not establish an escrow fund. Bogdanoff presently has legal recourse against Presidential, and is pursuing an action against Presidential in state court. The resolution of Heller's foreclosure action does not leave him without legal recourse against Presidential. A decision in Heller's favor will not affect Bogdanoff's ability to recover a judgment against Presidential in state court. It will diminish the property available to satisfy a judgment, but an office building and parking garage remain unencumbered by the mortgage. The possible reduction in Presidential assets is not sufficient ground for intervention by right.

In general, a mere economic interest in the outcome of the litigation is insufficient to support a motion to intervene. . . . Thus, the mere fact that a lawsuit may impede a third party's ability to recover in a separate suit ordinarily does not give the third party a right to intervene. . . . If [the owners'] only interest in the present case was to ensure that [the condominium association] would have sufficient resources to satisfy any judgment they may be able to obtain in the territorial court action, the district court's reasoning and [decision to deny the motion to intervene] would be sound.

Mountain Top, 72 F.3d at 366.

Bogdanoff's "mere economic" interests may be affected or impaired by the outcome of this litigation only to the extent his security for Presidential's debt is inadequate, i.e., to the extent he extended credit for fixtures attached to the realty without a waiver of the prior mortgage lien. Bogdanoff is not precluded from obtaining judgment against Presidential and executing on Presidential property not subject to Heller's lien.

There is no showing that Presidential does not adequately represent Bogdanoff's interest in this litigation. While Bogdanoff and Presidential are at odds in state court, they have a common interest in opposing the receivership sought by Heller and foreclosure on the alleged mortgage default. Presidential has vigorously defended Heller's attempted foreclosure and the intervention of Bogdanoff is unnecessary to protect whatever interest it may have.

Bogdanoff has failed to show that he has sufficient interest in the litigation and that his interest is not adequately represented by Presidential. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Heller Financial Inc. : CIVIL ACTION
 :
 v. :
 :
 Presidential Associates : No. 96-4575

ORDER

AND NOW, this 17th day of September, 1997, upon consideration of the Application of Kenneth Bogdanoff to Intervene, and the Memorandum of Law in Support Thereof, it is **ORDERED** that:

Kenneth Bogdanoff's motion to intervene as a matter of right, pursuant to Fed. R. Civ. P. 24(a), is **DENIED**.

J.