

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

CREATIVE DIMENSIONS IN : CIVIL ACTION  
MANAGEMENT, INC. :  
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 v. :  
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 :  
 THOMAS GROUP, INC. : NO. 96-6318

MEMORANDUM ORDER

Plaintiff has asserted various state law claims against defendant including claims for breach of contract, fraud and conversion. Discovery is completed and trial is scheduled to commence on April 19, 1999. Presently before the court is Robert Lessack's Motion to Intervene as of right pursuant to Fed. R. Civ. P. 24(a)(2).

Movant's interest in the resolution of this lawsuit flows from his agreement with Iris Martin as plaintiff's principal and as a party to a marital property agreement to pay movant, Ms. Martin's former spouse, fifty percent of any net recovery by plaintiff in this case. Ms. Martin is the sole owner of the plaintiff corporation. The claims underlying this litigation arose prior to her separation and divorce from movant. The terms of the property agreement were incorporated in the

parties' divorce decree which was entered on June 8, 1998 by the Common Pleas Court of Montgomery County.<sup>1</sup>

Movant seeks to intervene "to protect his right to receipt of 50% of the monies received by CDM as a result of the resolution of this lawsuit." He fears that his former wife will not pay him. The court assumes to be true movant's allegation that Ms. Martin has failed to comply with other terms of their property agreement and divorce decree.

Rule 24(a)(2) provides that upon timely application, an individual may intervene in an action when he claims an interest relating to the subject of the action and is so situated that the disposition of the action may impair or impede his ability to protect that interest, unless the interest is adequately represented by an existing party. Representation is deemed adequate when the interest of the person seeking to intervene is

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<sup>1</sup> The agreement to pay Mr. Lessack is conditioned on his "continuing to provide full cooperation" with plaintiff in its prosecution of this case. In an earlier motion to disqualify Mr. Lessack as a witness, defendant questioned the propriety of this agreement and cited authority which at least arguably raises questions about its enforceability. For purposes of the present motion the court assumes, without deciding, that the agreement to pay Mr. Lessack is enforceable. This court may not make an adjudication which requires a determination that a state court order was erroneously entered or which effectively voids such an order. See FOCUS v. Allegheny County Court of Common Pleas, 75 F.3d 834, 840 (3d Cir. 1996); Charchenko v. City of Stillwater, 47 F.3d 981, 983 (8th Cir. 1995). Should it become necessary, any question of enforceability of the agreement is properly addressed by the state court which entered the order incorporating its terms.

similar to that of an existing party, in the absence of a showing of collusion between that party and an opposing party or a lack of diligence in prosecuting the litigation. See Hoots v. Commonwealth of Pennsylvania, 672 F.2d 1133, 1135 (3d Cir. 1982).

Mr. Lessack's interest in this action is identical to that of plaintiff and Ms. Martin. All have a common interest in prevailing and obtaining the largest possible recovery against defendant.<sup>2</sup> In such circumstances, there is a strong presumption that representation is adequate. See Shea v. Angulo, 19 F.3d 343, 348 (7th Cir. 1994) (intervenor adequately represented by existing plaintiff who had promised to pay intervenor half of any commission from contract upon which action was based); Bottoms v. Dresser Indus., Inc., 797 F.2d 869, 872 (10th Cir. 1986) (co-owner of patent adequately represented in infringement suit because he and plaintiff shared interest to obtain maximum royalty); Ionian Shipping Co. v. British Law Ins. Co., 426 F.2d 186, 191 (2d Cir. 1970) (mortgagee's interest adequately represented by mortgagor in action against insurer of mortgaged property); Wodecki v. Nationwide Insurance Co., 107 F.R.D. 118, 119 (W.D. Pa. 1985) (assignee of insurance benefits sought by plaintiff had no right to intervene).

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<sup>2</sup> The interest of a potential intervenor means interest in "the issues to be resolved by the litigation." Reich v. ABC/York-Estes Corp., 64 F.3d 316, 322 (7th Cir. 1995).

Mr. Lessack has made no showing that plaintiff has entered a collusive arrangement with defendant or that plaintiff is not prosecuting the case with diligence. That Ms. Martin may fail to honor a collateral agreement with Mr. Lessack does not remotely suggest that the plaintiff will fail diligently to attempt to maximize the recovery in this case against which he claims fifty percent.

Mr. Lessack does not explain how he proposes to protect his contingent interest by intervention at this juncture.<sup>3</sup> He has identified no claim against the defendant which he may assert or on which judgment could be entered in his favor.<sup>4</sup>

The possibility that Ms. Martin might withhold or divert the portion of any damage award promised to movant is insufficient to demonstrate an impairment of an interest in the subject of the instant action. See American National Bank and Trust Co. v. City of Chicago, 865 F.2d 144, 147-48 (7th Cir.

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<sup>3</sup> Interestingly, Mr. Lessack's intervention could extinguish the interest he states he seeks to intervene to protect. Should Mr. Lessack intervene against plaintiff's wish and proceed in any manner which evinces less than "full cooperation" with plaintiff, his right to half of any net recovery would be forfeited under the terms of the agreement on which he relies.

<sup>4</sup> Movant has failed to file a proposed pleading as required by Fed R. Civ. P. 24(c) and has failed to file a supporting brief as required by L. R. Civ. P. 7.1(c). This alone would warrant denial of his motion. See School Dist. of Philadelphia v. Pennsylvania Milk Marketing Board, 160 F.R.D. 66, 67 (E.D. Pa. 1995).

1989) ("impairment" contemplates foreclosure of rights of proposed intervenor in subsequent action by resolution of issues in pending action). See also Shea, 19 F.3d at 348 (possibility that plaintiff partner may dispose of proceeds before paying movant 50% he was owed under partnership agreement did not constitute impairment of interest in subject of pending litigation); Bottoms, 797 F.2d at 873-74 (that movant may have to bring action against plaintiff to obtain portion of recovery to which he is contractually entitled does not constitute impairment of interest in subject of litigation).

Ms. Martin is already subject to a court order to pay half of the proceeds of any net recovery to Mr. Lessack. There has been no showing that Ms. Martin may abscond with the proceeds of any judgment in this case or that her assets could not be attached to satisfy any judgment against her. Should Ms. Martin fail to pay Mr. Lessack what he is owed, she could be sued for breach of contract and subject to a contempt action in the Montgomery County Common Pleas Court. Upon an appropriate showing, Mr. Lessack could apply for equitable relief if and once plaintiff secures a judgment in the instant case.<sup>5</sup>

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<sup>5</sup> Mr. Lessack also has failed to move timely. Discovery is completed and this case is ready for trial. His agreement with Ms. Martin makes clear that he was aware of this case for at least the past nineteen months. See Shea, 19 F.3d at 349 (motion to intervene untimely where discovery nearly concluded and movant was long aware of pendency of suit); Bottoms, 797 F.2d at 874 (motion to intervene untimely where extensive discovery completed and case was scheduled shortly for trial).

Insofar as movant has an interest in the subject and outcome of this action, it is adequately represented by plaintiff. Insofar as plaintiff claims a contractual right to half of any net recovery, his position is not impaired by letting the parties proceed without further delay to try this case to a verdict.

**ACCORDINGLY**, this                    day of March, 1999, **IT IS**  
**HEREBY ORDERED** that Mr. Lessack's Motion to Intervene pursuant to  
Fed. R. Civ. P. 24(a) (Doc. #88) is **DENIED**.

**BY THE COURT:**

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**JAY C. WALDMAN, J.**