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Attest: Geri M. Smith, Clerk
U.S. District Court
Northern District of Ohio

Deputy Clerk

Geri M. Smith

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

BRUCE COMLY FRENCH, TRUSTEE,

Plaintiff,

Case No. 3:01 CV 7253

-vs-

JUDGMENT ENTRY

STEVEN M. FISHER, et al.,

Defendant.

KATZ, J.

For the reasons stated in the Memorandum Opinion filed contemporaneously with this entry, IT IS HEREBY ORDERED, ADJUDGED and DECREED that the State of Ohio's motion to intervene as a party plaintiff (Doc. No. 6) is granted.

S/ David A. Katz

DAVID A. KATZ
U. S. DISTRICT JUDGE

I hereby certify that this instrument
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Attest: Geri M. Smith, Clerk
U.S. District Court
Northern District of Ohio

By: Eg. Smith
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
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BRUCE COMLY FRENCH, TRUSTEE,

Plaintiff,

Case No. 3:01 CV 7253

-vs-

MEMORANDUM OPINION

STEVEN M. FISHER, et al.,

Defendant.

KATZ, J.

This matter is before the Court on the State of Ohio's Motion to Intervene as a party plaintiff (Doc. No. 6). For the following reasons, leave to intervene will be granted.

BACKGROUND¹

This action arises from the bankruptcy proceedings of Unicast, Inc., which filed for bankruptcy on May 3, 1993. On October 31, 1995, the United States Bankruptcy Court for the Northern District of Ohio, Western Division, authorized the sale of the debtor's real property to Defendant Fisher Acquisition and Development Company ("Fisher Acquisition"). The real

property (the "landfill" or "site") sold to Fisher Acquisition was designated a "residual waste landfill" as defined by O.A.C. Rule 3745-30-01(C).

On April 26, 1996, Steven Fisher ("Steve Fisher"), the sole officer of Fisher Acquisition, entered into a Consent Order in the Lucas County, Ohio, Court of Common Pleas, with the Ohio Environmental Protection Agency. In the Consent Order, Fisher Acquisition agreed, among other things, to close the landfill and provide post-closure maintenance of the site. The State alleges that Fisher Acquisition did not comply with this agreement. Instead, Steve Fisher allegedly contracted with his brother and uncle for demolition and removal of buildings on the site; the brother and uncle then retained the funds acquired through sale of the debris. As a result of Steve Fisher's actions, the Trustee of the Unicast, Inc., Bankruptcy Estate brought the current action for rescission of the sale of the real property due to fraud that Steve Fisher allegedly perpetrated on the Bankruptcy Court.

The State of Ohio has filed a motion to intervene in the instant action. It claims that pursuant to a Consent Order issued on July 21, 1999, in the Court of Common Pleas of Lucas County, the Bankruptcy Trustee agreed to place any funds obtained as a result of this action into a trust fund to be used to fund closure and post-closure care of the site. The State contends that it therefore has an interest in this litigation that entitles it to intervene in this case pursuant to either Fed. R. Civ. P. 24(a), which allows intervention as of right, or Fed. R. Civ. P. 24(b), which allows permissive intervention.

The Defendants have filed a memorandum in opposition to the State's motion to intervene. In their memorandum, the Defendants agree that the State should be allowed to intervene, but ask that the State be granted permissive intervention with the condition that it consent to a stay of

ongoing contempt proceedings in the Lucas County Court of Common Pleas, which are related to Steve Fisher's failure to comply with the 1996 Consent Order. The positions of the parties are discussed below.

DISCUSSION

I. Intervention as of Right

Intervention under the Federal Rules occurs either as of right or by permission. Fed. R.

Civ. P. 24. Intervention as of right, listed in Fed. R. Civ. P. 24(a), states as follows:

Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant 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.

The Sixth Circuit has adopted a four-part test which must be satisfied in order to establish intervention as a matter of right as follows:

(1) timeliness of the application to intervene; (2) the applicant's substantial legal interest in the case; (3) impairment of the applicant's ability to protect that interest in the absence of intervention, and (4) inadequate representation of that interest by parties already before the court.

Michigan State AFL-CIO v. Miller, 103 F.3d 1240, 1245 (6th Cir. 1997). While the applicant bears the burden of establishing the right to intervene, *United States v. Texas E. Transmission Corp.*, 923 F.2d 410, 414 (5th Cir. 1991), Rule 24 is liberally construed and doubts are resolved in favor of the proposed intervenor. *United States v. Union Elec. Co.*, 64 F.3d 1152, 1158 (8th Cir. 1995). An inquiry under Rule 24(a) requires considering balancing these factors together rather than separately and favors granting intervention where the interests in favor of intervention favor

those opposed. *See* 6 James Wm. Moore et al., MOORE'S FEDERAL PRACTICE § 24.03[1][b] (3d ed. 2000). Furthermore, a Rule 24(a) inquiry should focus on the particular facts and procedural posture of the application.

Of the four factors, only the fourth need be considered in the instant case with respect to the State's request for permissive intervention. Although the State has proposed a number of reasons that the Trustee will not adequately represent its interests, all of these reasons are merely variations on the assertion that the Trustee will not represent the State's interests as the State would itself. There is a presumption of adequacy of representation when the parties have identical interests. *See Southmark Corp. v. Cagan*, 950 F.2d 416, 419 (7th Cir. 1991); *see also* MOORE'S FEDERAL PRACTICE § 24.03[4][a][ii] (3d ed. 2001). The State has done nothing to overcome that presumption, and intervention as of right is therefore inappropriate.

II. Permissive Intervention

Intervention by permission is allowed by Fed. R. Civ. P. 24(b), which states, in pertinent part:

Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) 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.

The State's application is timely, and there is no dispute that its claim shares common questions of law and fact, since the State and the Trustee are seeking identical relief. Furthermore, there has been no indication that intervention would unduly delay or prejudice the rights of the original parties. All that remains before permissive intervention may be granted is to consider the

Defendants' request that intervention be conditioned on a stay of the contempt action pending in the state court.

Normally, as part of its exercise of discretion, a court may impose conditions when it allows permissive intervention. *See Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 378, 107 S. Ct. 1177, 1183, 94 L. Ed. 2d 389 (1987). The State contends, however, that conditioning intervention on either a stay of the contempt action or cessation of the State's prosecution of the action would violate the Anti-Injunction Act, 28 U.S.C. § 2283.

The Anti-Injunction Act is designed "to prevent needless friction between state and federal courts." *Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.*, 309 U.S. 4, 9, 60 S. Ct. 251, 218, 84 L. Ed. 537 (1940), *quoted in Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 286, 90 S. Ct. 1739, 1743, 26 L. Ed. 2d 234 (1970). The Act "is an absolute prohibition against enjoining pending state court proceedings, unless the injunction falls within one of three specifically defined exceptions." *Atlantic Coast Line*, 398 U.S. at 286, 90 S. Ct. at 1743. These exceptions include when the injunction is "expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283.

None of the exceptions applies in the instant case. An injunction has not been authorized by an Act of Congress. The "in aid of jurisdiction" exception is primarily used in removal cases and *in rem* cases, and is therefore inapplicable here. *See 1975 Salaried Retirement Plan v. Nobers*, 968 F.2d 401, 407 (3d Cir. 1992). Finally, this Court has issued no judgment that issuance of an injunction might protect or enforce. Therefore, even if this Court were convinced that a stay of the

state court contempt action would be an appropriate condition to the State's intervention, such a stay could not be issued without violating the Anti-Injunction Act.

CONCLUSION

For the foregoing reasons, the State of Ohio's motion to intervene as a party plaintiff (Doc. No. 6) will be unconditionally granted pursuant to Fed. R. Civ. P. 24(b).

IT IS SO ORDERED.

S/ David A. Katz
DAVID A. KATZ
U. S. DISTRICT JUDGE



Attorney General
Betty D. Montgomery

INTEROFFICE MEMORANDUM

PRIVILEGED AND CONFIDENTIAL/ NOT A PUBLIC RECORD: This document has been prepared by the Attorney General's Office to assist in the preparation and litigation of an enforcement or administrative action. Therefore, this document is subject to a number of nondisclosure doctrines, including, but not limited to, those pertaining to attorney-client communication, attorney work product, and documentation produced in anticipation of litigation. This document may not be shown to or provided to any person other than an employee of Ohio EPA, the local air agency (where applicable), or the Attorney General's Office.

TO: All EES Attorneys

FROM: Ann M. Wood, AAG, EES
Solid Waste Attorney Supervisor

SUBJECT: Case Law for Your Permissive Intervention and Anti-Injunction Act Files

DATE: December 18, 2001

Attached a United States District Court for the Northern District of Ohio decision granting the State permissive intervention in the French v. Fisher case. In summary, the Defendants argued that the State's intervention should be conditioned on a stay of a related contempt action pending in state court. The District Court rejected Defendants' argument, holding that to condition intervention on a stay in state court would violate the Anti-Injunction Act. The Anti-Injunction Act prohibits enjoining state court proceedings unless the injunction falls within one of the following exceptions: (1) a stay is expressly authorized by an Act of Congress, (2) where a stay is necessary in aid of the federal court's jurisdiction, or (3) where a stay is necessary to effectuate the federal court's judgments. In this case, the District Court found that none of the exceptions applied and refused to stay the state court proceedings as a condition of intervention.

If anyone would like a copy of the brief I filed, please let me know.