FILED
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
December 27, 2006
Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE JEFFERY WATSON POTTER, Debtor.	BAP Nos. NM-06-014
MARTIN S. FRIEDLANDER, Appellant, JEFFERY WATSON POTTER, Plaintiff – Appellee, and SUMMIT INVESTMENT COMPANY, LLC, and SUMMIT VALDEZ, LLC, Plaintiffs, v. ROBERT A. ENGEL and ENGEL & STERN, LLP, Defendants – Appellees, and LEGAL DEFENSE & MAINTENANCE TRUST OF CA and LOS ALAMOS NATIONAL BANK, Defendants.	Bankr. No. 11-05-14071-MS Adv. No. 05-1129-M Chapter 11 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the District of New Mexico

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

Before CLARK, CORNISH, and MICHAEL, Bankruptcy Judges.

CORNISH, Bankruptcy Judge.

After examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. The Court grants the Appellant's request for a decision on the briefs without oral argument. Fed. R. Bankr. P. 8012. The case is therefore submitted without oral argument.

Martin S. Friedlander ("Friedlander") appeals an order of the United States Bankruptcy Court for the District of New Mexico denying his motion to intervene in an adversary proceeding pending in the Chapter 11 bankruptcy case of Jeffery Watson Potter ("Debtor"). For the following reasons, we affirm the decision of the bankruptcy court.

I. BACKGROUND

Friedlander is a California attorney who previously represented Debtor in various legal matters, including litigation in New Mexico state court. One of the cases was a legal malpractice action filed against appellees, Robert A. Engel and Engel & Stern, LLP (collectively "Engel"), in January 2003. Friedlander had associated with local counsel and was permitted to represent Debtor *pro hac vice* in New Mexico. According to Friedlander, he advanced expenses and fees to local counsel in the amount of approximately $210,000 in connection with the various legal matters, which remain unreimbursed by Debtor. Local counsel then withdrew from the case and Friedlander was no longer able to represent Debtor.

Debtor filed a voluntary Chapter 11 bankruptcy petition on May 19, 2005. On June 14, 2005, the legal malpractice proceeding was removed from New Mexico state court to the bankruptcy court by Debtor. On December 26, 2005, pursuant to Federal Rule of Bankruptcy Procedure 7024, Friedlander filed a "Motion to Intervene on Behalf of the Plaintiff" ("Motion to Intervene"), claiming

he has an interest in the subject of the action that is not adequately represented by existing parties. Engel objected to the Motion to Intervene.

Friedlander contends his claims against Debtor for the $210,000 in expenses and fees are secured by two liens. First, he asserts he has a lien on the assets of a trust formed by the Debtor and known as the "Legal Defense and Maintenance Trust of California, dated August 25, 2003" ("Trust"), to which Debtor transferred all of his assets.[1] Second, Friedlander asserts he has a lien on the proceeds, if any, from the legal malpractice action against Engel, arising as a result of an attorney-client retainer agreement.[2] Friedlander also claims Debtor was ineffectively represented by special counsel Debtor had employed.[3] The bankruptcy court denied Friedlander's Motion to Intervene and he now appeals that denial to this Court.

II. JURISDICTION

This Court has jurisdiction to hear timely-filed appeals from "final judgments, orders, and decrees" of bankruptcy courts within the Tenth Circuit, unless one of the parties elects to have the district court hear the appeal. 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002. Neither party elected to have this appeal heard by the United States District Court for the

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[1] Friedlander argues that Debtor also conveyed all of his future assets to the Trust. Additionally, Friedlander contends he is a beneficiary of the Trust. Friedlander also happens to be the successor trustee of the Trust.

[2] Friedlander claims the lien on the malpractice action is a "contract lien" under California law, and that the litigation is not a Trust asset because malpractice actions are not assignable under California law. Engel argues that a lien in a chose of action based on a malpractice claim is impermissible under California law. For purposes of this appeal, we assume that Friedlander's claimed lien interest is permissible under California law.

[3] Debtor was briefly represented by special counsel in this adversary proceeding. However, special counsel was subsequently allowed to withdraw from representation. At the time of the bankruptcy court's ruling on the Motion to Intervene, Debtor was unrepresented in the adversary proceeding, as well as the bankruptcy case.

District of New Mexico. The parties have thus consented to appellate review by this Court.

The bankruptcy court's order denying the Motion to Intervene is not a final order in the ordinary sense. However, it is an adverse pretrial order that is nonetheless appealable. An order denying intervention as of right has the degree of definitiveness which supports an appeal because the adversely affected applicant cannot appeal from any subsequent order or judgment in the proceeding. *Bhd. of R.R. Trainmen v. Baltimore & O.R. Co.*, 331 U.S. 519, 524 (1947). As a result, an order denying intervention is final and subject to immediate review if it prevents the applicant from becoming a party to an action. *Coal. of Ariz./N.M. Counties for Stable Econ. Growth v. Dep't of Interior*, 100 F.3d 837, 839 (10th Cir. 1996) (citing *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 377-78 (1987). Thus, the decision of the bankruptcy court is a final order for purposes of review.

III. STANDARD OF REVIEW

The applicable standard of review for rulings on motions to intervene as of right is *de novo*. *DeJulius v. New England Health Care Employees Pension Fund*, 429 F.3d 935, 942 (10th Cir. 2005) (citing *City of Stilwelll v. Ozarks Rural Elec. Coop Corp.*, 79 F.3d 1038, 1042 (10th Cir. 1996). *De novo* review requires an independent determination of the issues, giving no special weight to the bankruptcy court's decision. *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991).

IV. ANALYSIS

Rule 24 of the Federal Rules of Civil Procedure, made applicable to bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7024, provides in pertinent part:

> (a) Intervention of Right. 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.

Fed. R. Civ. P. 24(a). Friedlander does not assert the right to intervene based on a federal statute. Rather, he asserts he has an interest in the subject matter of the adversary proceeding and that his interest is not adequately protected by existing parties. On appeal, Friedlander argues that the bankruptcy court, in denying his Motion to Intervene, "failed to liberally construe Rule 24," and erred in concluding he has no protectable interest, thereby depriving him of his right to due process of law in violation of the Fifth Amendment.

In *In re Kaiser Steel*, the United States Court of Appeals for the Tenth Circuit held:

> An intervenor under Rule 24(a)(2) must meet the following requirements: (1) submit a timely application to intervene, (2) demonstrate an interest in the property or transaction, (3) show that the intervenor's ability to protect such interest might be impaired, and (4) demonstrate that the interest is not adequately represented by the existing parties.

In re Kaiser Steel Corp., 998 F.2d 783, 790 (10th Cir. 1993). Regarding the interest claimed by the applicant, the Tenth Circuit stated that "[u]nder Bankruptcy Rule 7024, the putative intervenor must show that he has a 'significantly protectable interest' in the adversary proceeding." *Id*. at 790 (quoting *In re Thompson*, 965 F.2d 1136, 1143, n.12 (1st Cir. 1992). Further, that interest must be "direct, substantial, and legally protectable." *Kaiser Steel* at 790-91 (quoting *United States v. Perry County Bd. of Educ.*, 567 F.2d 277, 279 (5th Cir. 1978). "[T]he mere existence of a third person's contingent interest in the outcome of pending litigation is insufficient to warrant intervention of right." *Kaiser Steel* at 791 (quoting *Abney v. I.T.T. Diversified Credit Corp. (In re Envtl. Elec. Sys., Inc.)*, 11 B.R. 962, 964 (Bankr. N.D. Ga. 1981)). In *Kaiser Steel*, the

Tenth Circuit applied the above criteria and determined that surface owners of real property had no protectable interest in an adversary proceeding involving a coal mining royalty claim against the real property. *Kaiser Steel* at 791. Accordingly, the standard for intervention as of right has been set high in the Tenth Circuit.

In this case, Friedlander's interest in the adversary proceeding is contingent, not direct, and therefore insufficient to warrant intervention of right. Because his interest is contingent, the disposition of this action does not impair or impede Friedlander's ability to protect that interest. As stated by the bankruptcy court, "Friedlander's connection to this proceeding is that of a creditor asserting a right to payment from property of the [Debtor], and Friedlander's interest is not threatened or even affected by the claims in this adversary proceeding against Engel et al. . . . Friedlander's interest is not an interest in the subject of this proceeding, the legal malpractice claims, it is a claim to distribution of property of the bankruptcy estate and a voting right with respect to any proposed plan."[4] Accordingly, Friedlander's interest is protected by application of the provisions of the Bankruptcy Code.

Even if it had determined that Friedlander had a significantly protectable interest in the adversary proceeding, the bankruptcy court would still have had

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[4] Order Denying Martin S. Friedlander's Motion to Intervene on Behalf of Plaintiff ("Order") at 4, *in* Appendix to Consolidated Brief of Appellants [sic] ("App.") at 74. Additionally, the bankruptcy court ruled that Friedlander did not comply with the procedural requirements of Rule 24(c) which states:

> (c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought . . . .

Friedlander argues that the first amended complaint filed in the state court and his proof of claim (No. 15) filed in the bankruptcy proceeding satisfy Rule 24(c). For purposes of this appeal, we will assume that Friedlander complied with Rule 24(c).

grounds to deny his Motion to Intervene. This is because in order to intervene as of right, Friedlander must also show that his "interest is not adequately represented by the existing parties." As correctly pointed out by Engel, Friedlander's interest is directly aligned with Debtor's interest.[5] Friedlander himself acknowledges that if Debtor wins, he wins, and if Debtor loses, he loses.[6] Representation is presumed adequate when the ultimate objective of the applicant for intervention is the same as that of one of the parties. *Coal. of Ariz./N.M. Counties for Stable Econ. Growth v. Dep't of Interior*, 100 F.3d 837, 845 (10th Cir. 1996). Therefore, Friedlander's interest is adequately represented by an existing party– the Debtor.[7]

Friedlander also contends he should be allowed to intervene to act on behalf of Debtor because special counsel was allowed to withdraw and Debtor is now unrepresented. However, as noted by the bankruptcy court, it is the debtor-in-possession who must file an application to hire counsel. Intervention is an inappropriate avenue for seeking to represent the debtor-in-possession.[8]

V. CONCLUSION

The bankruptcy court did not err in denying the Motion to Intervene. Friedlander has no significantly protectable interest in the adversary proceeding.

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[5] Engel's Brief at 10.

[6] Consolidated Brief of Appellants [sic] at 23.

[7] At the time of the bankruptcy court's ruling on the Motion to Intervene, Debtor was unrepresented by counsel in this action. However, Debtor's status as *pro se* does not in and of itself compel the conclusion that Friedlander's interest is not adequately represented by Debtor. The burden is on Friedlander to rebut the presumption of adequacy, and he has not fulfilled that burden "by showing collusion between the representative and an opposing party, that the representative has an interest adverse the applicant, or that the representative failed in fulfilling his duty to represent the applicant's interest." *Coal. of Ariz./N.M. Counties for Stable Econ. Growth v. Dep't of Interior*, 100 F.3d 837, 844-845 (10th Cir. 1996) (quoting *Sanguine, Ltd. v. United States Dep't of Interior*, 736 F.2d 1416, 1419 (10th Cir. 1984)).

[8] Order at 4, *in* App. at 74.

Therefore, the judgment of the bankruptcy court will be affirmed.