United States Bankruptcy Court
District of New Mexico

Document Verification

Case Title: **Paul C. Vigil, et al. v. Yvette J. Gonzales**
Case Number: **03-01366**
Nature of Suit:
Judge Code: **S**
Reference Number: **03-01366 - S**

Document Information

Number: 17

Description: Memorandum Opinion re: [3-1] Motion To Intervene Re: [1-1] Complaint NOS 456 Declaratory Relief by Century Bank .

Size: 11 pages (22k)

Date Received:	04/14/2004 09:20:07 AM	**Date Filed:**	04/14/2004	**Date Entered On Docket:**	04/14/2004

Court Digital Signature View History

52 a5 a1 12 38 4d 77 db 1d 61 f9 64 9d c2 9e 77 ec 2d e3 fe 1e 47 26 98 0b d1 12 81 68 c4 21 9e cd 98 0d 16 4e 9d 8b 84 f6 a7 17 06 db 63 96 aa 07 ab 4e be 03 4e cd d8 5f d9 e3 83 46 bc 47 5c 1d 7d 62 42 79 dc 9b e1 47 0f fb c5 95 69 2f 5c 38 da 59 e9 c9 fd 01 6e 32 00 7f 47 b3 2a 82 ed ec dd 2a da 4b 23 ef 54 cc 4e 3c 3e 02 74 43 23 d7 12 c1 98 72 59 e6 67 c7 43 83 e7 2f dc f3 be

Filer Information

Submitted By: James E Burke

Comments: Memorandum Opinion on Century Bank's Motion to Intervene

Digital Signature: The Court's digital signature is a verifiable mathematical computation unique to this document and the Court's private encryption key. This signature assures that any change to the document can be detected.

Verification: This form is verification of the status of the document identified above as of *Wednesday, December 22, 2004*. If this form is attached to the document identified above, it serves as an endorsed copy of the document.

Note: Any date shown above is current as of the date of this verification. Users are urged to review the official court docket for a specific event to confirm information, such as entered on docket date for purposes of appeal. Any element of information on this form, except for the digital signature and the received date, is subject to change as changes may be entered on the Court's official docket.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
PAUL VIGIL and
PEGGY VIGIL,
Debtors. No. 7-01-17684 SS

PAUL VIGIL and
PEGGY VIGIL,
Plaintiffs,
v. Adv. No. 03-1366 S

YVETTE GONZALES, TRUSTEE,
Defendant.

MEMORANDUM OPINION ON CENTURY BANK'S
MOTION TO INTERVENE

This matter is before the Court on the Motion to Intervene filed by Century Bank, FSB ("Century"). Century is represented by Jurgens & With, P.A. (James R. Jurgens). Plaintiffs are represented by the Carter Law Firm (L. Edward Glass). Yvette Gonzales, Trustee, has not appeared or answered in this adversary[1].

This adversary proceeding seeks a declaratory judgment that an asset listed on Debtors' amended Schedules B and C as "claim for wrongful acceleration of promissory note" was both exempted by Debtors and abandoned by the Trustee upon closing of the bankruptcy case. Century seeks to intervene to file an answer to the complaint that denies most of the material

[1] The Court has determined that when the Debtors' bankruptcy case was reopened, the United States Trustee failed to reappoint a trustee. By separate order, the Court has instructed the United States Trustee to appoint a trustee.

allegations, and to file a counterclaim that seeks to deny Debtors their exemption of the cause of action. Century seeks relief both under Fed.R.Civ.P. 24(a)(2) (intervention of right) and Fed.R.Civ.P. 24(b) (permissive intervention). The Court finds that Century's motion is not well taken and should be denied.

ANALYSIS

On November 15, 2001, Debtors filed their chapter 7 petition, accompanied by statements and schedules (doc 1). Neither schedule B nor schedule C list a claim against Century Bank; schedule F lists a debt owed to Century Bank of approximately $158,000. The first meeting of creditors took place on February 13, 2002, and the Trustee (Ms. Gonzales) deferred the determination about assets; she filed her Report of No Distribution and Notice of Abandonment of Assets on April 3, 2002 (doc 14). The debtors received their discharge on April 23 (doc 15) and the final decree was entered and the case closed on April 25 (doc 16). In the meantime, on November 27, 2001, Century Bank's counsel had entered his appearance (doc 5) and on January 2, 2002, had filed a stipulated order (doc 8) for a Rule 2004 examination of the Debtors. About a month after the 341 meeting, on March 14, the Debtors filed amended schedules B and C, listing the

"Claim for wrongful acceleration of promissory note" on both schedules (doc 15). There is no certificate of service on anyone of the amended schedules. Subsequently, after the case had been reopened on August 29, 2003 (doc 20), Century Bank obtained a default order denying the exemption of the claim (doc 29). On November 6, 2003, the Debtors initiated this adversary proceeding (03-1366), and on December 10, 2003, Century Bank initiated its adversary proceeding (03-1386).

Intervention of Right:

Federal Rule of Civil Procedure 24(a)(2) provides:

> Upon timely application anyone shall be permitted to intervene in an action: ... (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.

To intervene of right a party must meet four 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 existing parties. Vermejo Park Corp. V. Kaiser Coal Corp. (In re Kaiser Steel Corp.), 998 F.2d 783, 790 (10th Cir.), cert. denied, 510 U.S. 852

(1993)(citing In re Thompson, 965 F.2d 1136, 1142 (1st Cir. 1992)).

Century has not demonstrated a sufficient interest in the property or transaction.

> "[T]he putative intervenor must show that he has a 'significantly protectable interest' in the adversary proceeding." Furthermore, intervention requires that this interest in the proceedings be "direct, substantial, and legally protectable." "[T]he mere existence of a third person's contingent interest in the outcome of pending litigation is insufficient to warrant intervention of right.

Id. at 790-91 (Citations omitted.)[2] Debtors schedules show Century as a unsecured creditor. Century's interest as an unsecured creditor is no different from that of all the other unsecured creditors.[3] Century's only interest is a contingent interest in any dividends that may be paid by the estate. Cf. Kowal v. Malkemus (In re Thompson), 965 F.2d 1136, 1148 (1st Cir. 1992):

---

[2] This disposes of Century's reliance on Coalition of Arizona/New Mexico Counties for Stable Economic Growth v. Department of the Interior, 100 F.3d 837, 841 (10th Cir. 1996). Unlike Dr. Silver in that case, here Century has no "direct interest" in the asset.

[3] Of course, Century would almost certainly not be engaging in this activity were it not for the fact that it is a potential debtor to the estate or to the Debtors. However, its stature in the capacity of itself being a debtor clearly bestows no standing whatsoever on Century to intervene in this adversary proceeding.

> Absent a compelling showing that the chapter 7 trustee failed or refused to perform a fiduciary duty imposed by the Bankruptcy Code, once the trustee arrives at an informed judgment that further prosecution of an objection to a proof of claim would be unavailing or counterproductive to the chapter 7 estate, the chapter 7 debtor and an individual unsecured creditor are without appellate standing to challenge a bankruptcy court order approving a compromise or settlement of the claim-related litigation. As appellants were not entitled to intervene in the adversary proceeding, nor participate in a contested matter in lieu of the chapter 7 trustee, they lack standing to appeal the settlement order.

(Footnote omitted.)

Furthermore, Century has not demonstrated that its ability to protect any interest it might have might be impaired. Specifically, Century has filed a motion and received an order on exemptions in the main bankruptcy case.[4] And Century has filed its own adversary proceeding against the

[4] The Debtors are asserting that the Trustee has abandoned the asset. The effect of an abandonment is a disclaimer by the Trustee of any interest of the estate in the asset. Thus the asset would be treated as if the bankruptcy petition had never been filed, leaving the Debtors free to pursue the causes of action for themselves. Whether the Debtors had exempted any or all of the claimed asset would be irrelevant, since the concept of exemptions only applies when the debtor seeks to take property out of the estate. ("Under proposed section 541, all property of the debtor becomes property of the estate, but the debtor is permitted to exempt certain property from property of the estate under this section." S. Rep. 95-989, at 75-76, reprinted in 1978 U.S.C.C.A.N. 5787, 5861-62; H.R. Rep. 95-595, at 549, reprinted in 1978 U.S.C.C.A.N. 5963, 6455. Put another way, abandonment moots any dispute about whether an asset is exempt.

Debtors, Adv. no. 03-1386, seeking among other things a declaratory judgment that Debtors' amended schedule B is void.

If the Trustee determines that there is value for the estate and accordingly responds to the complaint in this adversary proceeding (03-1366), the interests of all the unsecured creditors will be protected, and there will be no need for Century's participation. Similarly, should the Trustee not contest the relief sought in the complaint, the interests of the unsecured creditors will still have been looked out for by the Trustee.[5] In either eventuality,

---

[5] The commentary to the 1966 amendment to Rule 24(a) is instructive:

> The general purpose of original Rule 24(a)(2) was to entitle an absentee, purportedly represented by a party, to intervene in the action if he [sic] could establish with fair probability that the representation was inadequate. Thus, where an action is being prosecuted or defended by a trustee, a beneficiary of the trust should have a right to intervene if he can show that the trustee's representation of his interest is probably inadequate; similarly a member of a class should have the right to intervene in a class action if he can show the inadequacy of the representation of his interest by the representative parties before the court.

Notes of Advisory Committee on Rules, 1966 Amendment. Century has not established that the Trustee's representation of the estate in this instance is "probably inadequate"; that would likely be a particularly difficult showing to make given the deference to be accorded the Trustee's business judgment. See Kowal v. Malkemus (In re Thompson), above, 965 F.2d at 1146 (appellants failed to demonstrate nonfeasance or misfeasance by the chapter 7 trustee).

Century will have received exactly the representation that the Code contemplates, through the Trustee. 11 U.S.C. § 323(a).

Nevertheless, the foregoing discussion leaves out Century's rights, as a creditor of the estate, to object to abandonment, a right accorded it by 11 U.S.C. § 554(a) and F.R.B.P. 6007(a). Century's right to contest the abandonment can be honored simply by requiring the Trustee to comply with Rule 6007(a) if she decides not to contest the granting of the relief sought in this adversary. That will have the additional benefit of alerting the rest of the creditor body to the proposed abandonment.

Permissive Intervention:

Federal Rule of Civil Procedure 24(b)(2) provides:

> Upon timely application anyone may be permitted to intervene in an action: ... (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 Court has already ruled that Century is not being deprived of the opportunity to defend itself; indeed, just the opposite: assuming the Trustee continues effectively to not participate in this adversary proceeding, this ruling will result in Century and the Debtors being able to fully contest and resolve their controversy on the merits of all the causes

of action in state court.[6] What Century seeks by this intervention is to prevent that head-on confrontation from taking place, at least as to any more than the one identified cause of action. That is not bad faith, of course, but the invocation of the rules for that purpose compels the Court to deny Century's attempt to use the rules that way. In any event, the intervention will unduly delay or prejudice the adjudication of the rights of the original parties as they may play out in the state court litigation.

In this context, it is also useful to remember what the Constitution and the first judiciary act contemplated, which is still true today: the federal courts are courts of limited jurisdiction, and it is the state courts where it is expected that the majority of judicial disputes will be resolved. Cf. 17A Moore's Federal Practice - Civil, § 120.12[1][a] (2004):

> Concurrent jurisdiction in state and federal courts over claims arising from federal law is presumed. The Constitution does not mandate the creation of any federal courts other than the United States

---

[6] Throughout this bankruptcy case, and in the state court case, there has been an ongoing controversy about whether the Debtors' listing in their amended schedule B of a cause of action for "wrongful acceleration of promissory note" limits the causes of action they may file in state court. The procedure proposed in this decision, including the opportunity of creditors to object to the Trustee not defending this adversary proceeding, should settle that question. In any event, nothing in this opinion is intended to suggest that the debtors are so limited at this time.

> Supreme Court. Thus, the drafters of the Constitution originally contemplated that state courts would serve as trial courts for the adjudication of federal law, along with any federal courts that Congress might create.

(Footnotes omitted.) Denying the motion to intervene will merely result in conformity with the judicial scheme envisioned by the Constitution and the federal system it embodies.

And denying the motion to intervene will have another salutary effect. Century argues that the loss of these causes of action means "an asset of consequential value will be lost to the estate". Century Bank's Reply on Motion to Intervene, at 3 (doc 10). On the other hand, Century Bank's Answer and Counterclaim to the state-court complaint, attached as exhibit B to its Motion to Intervene (doc 3), seeks the dismissal of the complaint on several grounds, including several affirmative defenses, in effect asserting that the causes of action have no value. While the Tenth Circuit has been careful to preserve the right of a party to argue alternative positions, consistent with the federal rules of civil procedure, see, for example, Golfland Entertainment Centers, Inc. v. Peak Investment, Inc. (In re BCD Corporation), 119 F.3d 852, 858 (10th Cir. 1997), this Court will not encourage

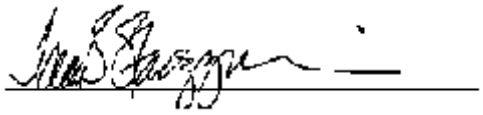
Century's simultaneous assertions of opposing factual positions before two different tribunals.

CONCLUSION

Given the foregoing considerations, Century Bank's motion to intervene will be denied. An order to that effect will accompany the entry of this memorandum opinion. In addition, the order will provide that the Trustee has 30 days following the entry of this order to answer the complaint, if she wishes, or to file in the main case a notice of abandonment pursuant to F.R.B.P. 6007(a), if she does not wish to contest the complaint. If she does not contest the complaint, any ruling on a default judgment for the Debtors will be made after, and presumably determined by, any ruling on any objection to the abandonment or by the resolution of Adv. no. 03-1386.[7] For that reason, further hearings on this adversary

[7] This time consuming and roundabout way of determining whether Debtors will be able to pursue the causes of action in state court arises solely from the Debtors' failure to disclose the causes of action in their first schedules, and then their failure to serve on the Trustee and on Century (whose counsel had entered his appearance and thereby demanded service of any papers filed in the case) the amended schedule B before the closing of their chapter 7 case. Assuming the Debtors do end up with the right to pursue their claims in state court, they will have caused needless delay and expenditure of the resources of two courts by their failure to follow common bankruptcy procedures. Century asserts that the Debtors' actions "suggest" a deliberate attempt to conceal the asset from the Trustee and thereby save it for themselves. Century Bank's Reply on Motion to Intervene, at 5. Were that

proceeding will be linked with further hearings on Adv. no. 03-1386 and with any hearing on any objection to any abandonment that may be proposed by the Trustee.



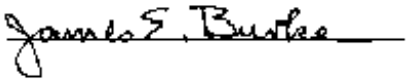
Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that on April 14, 2004, a true and correct copy of the foregoing was either electronically transmitted, faxed, delivered, or mailed to the listed counsel and parties.

L Edward Glass
2727 San Pedro NE Ste 119
Albuquerque, NM 87110-3364

James Jurgens
100 La Salle Cir Ste A
Santa Fe, NM 87505-6976

Yvette Gonzales
PO Box 1037
Placitas, NM 87043-1037



---

the case, the Debtors would probably suffer more than the mild scolding contained in this footnote. However, there is no showing, at least at this stage, that the Debtors' behavior has been other than merely inept.