5-3-1977

Barnes v. District Court In and For the City and County of Denver

IN THE SUPREME COURT OF THE STATE OF COLORADO

No. 27655

J. RICHARD BARNES, Commissioner of Insurance of the State of Colorado and Receiver of Manufacturers and Wholesalers Indemnity Exchange, Petitioner, v. District Court in and for the City and County of Denver and Robert T. Kingsley, a Judge assigned to that Court, Respondents.	Original Proceeding Error to the District Court in and for the City and County of Denver Honorable Robert T. Kingsley, Judge

BRIEF IN SUPPORT OF
PETITION FOR RELIEF IN THE NATURE OF PROHIBITION AND ORDER

Petitioner, (hereinafter "Receiver") respectfully submits this brief in support of his Petition for Relief in the Nature of Prohibition and Order.

I.

ISSUES PRESENTED FOR REVIEW

1. DID THE DISTRICT COURT EXCEED ITS JURISDICTION BY PERMITTING RICHARDSON LUMBER COMPANY TO INTERVENE IN CIVIL ACTION C-60284 WHERE THE INTERVENOR DID NOT FILE A PLEADING AS REQUIRED BY COLORADO RULES OF CIVIL PROCEDURE 24(c)?

2. DOES THE DISTRICT COURT HAVE JURISDICTON TO PERMIT THE INTERVENOR TO REMAIN IN CIVIL ACTION NO. C-60284 OVER PETITIONER'S TIMELY OBJECTION WITHOUT REQUIRING INTERVENOR TO FILE A PLEADING?

II.

STATEMENT OF THE CASE

The allegations upon which the Receiver relies in invoking the extraordinary authority of this Court pursuant to Rule 21(a) Colorado Appellate Rules, are set forth, basically in chronological order, in the Petition for Relief

in the Nature of Prohibition and Order filed with this brief.

To summarize the present situation, the District Court has issued an order authorizing and approving an assessment of the subscribers of M & W, an interinsurance exchange. That order contained findings that the assessment was necessary, valid and proper. One of the assessees, Richardson Lumber Company, moved to intervene in the Receivership proceedings in order to protest the order and findings. With its motion, Richardson Lumber Company filed a document entitled "Answer, Denial and Protest of Assessment" denying the amount, validity and propriety of the assessment and raising various defenses to the assessment, praying that the assessment be held for naught, that judgment be entered in Richardson's favor dismissing the assessment, and that it be awarded costs and such other relief as is proper.

Richardson's motion to intervene was granted by the District Court over the Receiver's objections that the motion was not accompanied by a pleading as required by C.R.C.P. 24(c). The Receiver moved for reconsideration of the granting of the motion to intervene, again arguing that the District Court did not have jurisdiction to grant the motion to intervene because it was not accompanied by a pleading. The Receiver's motion for reconsideration was denied.

III.

SUMMARY OF ARGUMENT

1. The "Answer, Denial and Protest of Assessment" filed with the motion to intervene is not a pleading within the meaning of C.R.C.P. 24(c).

2. The District Court had no jurisdiction to permit intervention of any party into the Civil Action below without the filing of a pleading as required by C.R.C.P. 24(c).

3. Even assuming the District Court had the authority to permit intervention, it does not have jurisdiction to permit a party to remain a party to the lawsuit as an intervenor without requiring that party to submit a pleading as required by Rule 24(c).

IV.

ARGUMENT

A. THE "ANSWER, DENIAL AND PROTEST OF ASSESSMENT" IS NOT A PLEADING WITHIN THE MEANING OF RULE 24(c).

Colorado Rules of Civil Procedure 7(a) provides:

> (a) Pleadings. There shall be a complaint and answer; a reply to a counterclaim denominated as such; an answer to a crossclaim, if the answer contains a crossclaim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; a third-party answer, if a third-party complaint is served; and there may be a reply to an affirmative defense. No other pleading shall be allowed, except upon order of court. (Emphasis added.)

Rule 24(c) provides:

> (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. (Emphasis added.)

The Receiver contends that Richardson Lumber Company did not comply with Rule 24(c) because the document it filed with its motion to intervene was not a "pleading" since it was not once of those pleadings enumerated in Rule 7(a). This being the case, the District Court was without jurisdiction to grant the motion to intervene and remaining without jurisdiction to permit the intervenor to continue in the action once having intervened.

The only true pleading which has been filed in the Receivership Court in the Civil Action in issue is the complaint of the Receiver filed November 26, 1975. All

subsequent proceedings in that action have been motions and orders as are normal in the administration of a Receivership.

One of those motions was the Receiver's motion for an order approving an assessment of the subscribers of M & W. That motion alleged that the subscribers of M & W had contracted for a contingent assessment liability to pay M & W's excess losses.

The Court granted the Receiver's motion and authorized the assessment, which is essentially a demand for payment. Notices of the assessment were mailed to subscribers.

The document which Richardson Lumber Company filed along with its motion to intervene was entitled "Answer, Denial and Protest of Assessment". A copy is attached to the Petition. The document purports to "answer" the assessment by alleging that the Petitioner acted improperly in his capacity as Commissioner of Insurance; that the assessment is excessive and unreasonable; and that it is barred by equitable and legal doctrines. The document prays that the assessment be "held for naught" and for judgment "dismissing the assessment" against Richardson.

Since the assessment is a mere demand for payment, it is not a complaint and is not a basis for any form of judgment against Richardson Lumber Company. The document filed with Richardson Lumber Company's motion to intervene is therefore not an "answer" within the meaning of Rule 7(a), because it does not answer a complaint. Thus, the document is not a "pleading".

This Court has recognized that Rule 24(c) definitely requires that a pleading be filed by an intervenor. In Capitol Industrial Bank v. Strain, 166 Colo. 55, 442 P.2d 187 (1968), the bank obtained a writ of garnishment in aid of execution on a judgment against Strain. The writ was served upon a garnishee, who answered,

admitting a debt but alleging that the debt had been assigned by Strain to a corporation. The corporation filed a motion to intervene and to quash garnishment. No pleading accompanied the motion and none was filed thereafter. At a hearing on the motion to intervene and to quash, the trial court proceeded to hear the merits of the intervenor's allegation that its claim was superior to that of the creditor. The trial court found for the corporation.

After noting the requirements of Rule 24 that both a motion to intervene and a pleading be filed, this Court continued:

> A motion is not a pleading. This is so although the two have similar formal parts and even though certain defenses may be raised by motion. The filing of a motion to intervene, alone, is not sufficient. The positive requirement of the Colorado Rules of Civil Procedure is that a pleading must also be filed. Parties litigant have a right to rely upon the rules as written. It is the duty of trial courts, as well as our duty, to enforce them when timely objection is made by a party to litigation. Continental Airlines, Inc. v. City and County of Denver, 129 Colo. 1, 266 P.2d 400; Smith v. Woodall, County Treasurer, 129 Colo. 435, 270 P.2d 746. The failure of the trial court to insist upon compliance with the rules in this case amounted to a denial of defenses which the creditor proposed to plead to the intervenor's claim, if and when filed. 166 Colo. 58-59.

The judgment below was reversed and the cause remanded with instructions to reinstate the writ of garnishment and the answer thereto, and allow the intervenor 20 days to file a pleading.

In Hercules v. Smith, 138 Colo. 458, 335 P.2d 255 (1959), this Court held that a wife, not a party to an action, who without leave of the Court filed a motion to restrain levy of execution on an automobile and who did not file a petition to intervene in the action under Rule 24 was a mere interloper who acquired no rights by her action. Noting that if the wife wished to intervene, she should have made timely application for permission to interevene, the

Court quoted the following with approval:

> . . . one who attempts to intervene without bringing himself within, or complying with, the provisions of the statute is a mere interloper who acquires no rights by his unauthorized interference unless objections thereto are waived . . . 138 Colo. at 462.

Also holding a pleading to be required for intervention under Rule 24(c) are Lebrecht v. O'Hagan, 96 Ariz. 288, 394 P.2d 216 (1964), and Carriage Hill, Inc. v. Lane, 249 N.Y.S.2d 455, 20 A.D.2d 914 (1964).

B. EXTRAORDINARY RELIEF AGAINST THE DISTRICT COURT'S IMPROPER EXERCISE OF JURISDICTION IS WARRANTED IN THIS CASE.

The Receiver believes that this is a case of first impression in Colorado. Although this Court held in Groendyke v. District Court, 140 Colo. 190, 343 P.2d 535 (1959) that an order granting intervention is not reviewable in an original proceeding because it is not a final order, this case does not simply seek a piecemeal review of the District Court's determinations under Rule 24(a) and (b). It does not seek to review any exercise of discretion by the District Court. It is thus distinguishable from Groendyke. Instead, the Receiver seeks review of the more fundamental questions of whether the District Court initially had any power to exercise jurisdiction over an intervenor who did not file a pleading and whether it continues to have jurisdiction to permit that intervenor to remain in the action without filing a pleading.

This Petition is timely, occurring within seven (7) days of the Order complained of. Moreover, within that time Petitioner has acted vigorously to bring the matter to the attention of the District Court so that it might correct the mistake. The Motion to Intervene was filed with the Court on Thursday, April 21, 1977, and a forthwith hearing was sought for Monday, April 25, 1977. After the hearing on April 25, 1977, Petitioner filed its Motion for Reconsideration seeking a hearing as soon as possible. Petitioner filed a Memorandum in Support of its Motion for

Reconsideration on April 26, 1977, arguing that the Trial Court had acted in excess of its jurisdiction. The hearing on Petitioner's Motion for Reconsideration was held on Thursday, April 28, 1977. The Petition was filed the following Tuesday.

Petitioner does not have an adequate remedy for this wrongful exercise of jurisdiction by writ of error taken from a final judgment. If Richardson Lumber Company could be compelled to plead in this action, Petitioner believes the pleading would show that intervenor has no protectable interest in any proceeding in the main action. Intervenor's failure to file a pleading is due in part to the fact that no proper pleading can be filed because of this lack of interest. Nevertheless, Richardson Lumber Company has been granted intervention without becoming aligned as either a plaintiff or defendant through the means of a pleading.

Placing the case in this highly irregular posture prejudices the Receiver because he is denied the benefit conferred by the Rules of Civil Procedure which permit him to know with clarity the claims and defenses asserted against him and to respond accurately. It is as if the payor of a demand note held in an estate were permitted to intervene in the estate and protest the administrator's demand on the note. Such a payor, like the intervenor here, is neither plaintiff nor defendant to such an action. No claims are asserted, nor are any defenses raised. The proceedings are in a state of limbo outside the scope of the rules of civil procedure. Is there to be a trial? Must the Receiver file some sort of responsive pleading to preserve rights?

Such an intervenor becomes a mere will'o-the-wisp as was the wife in Hercules v. Smith, supra. The fact that an appeals court may later rule that the intervenor had no place in the proceedings in no way protects the Receiver who

must proceed in the Receivership action without knowing the scope or effect of the dispute.

This Court has always been concerned with the protection of a litigant's right to require his adverse party to observe the rules of civil procedure. For example, in Farmers Insurance Group v. District Court, 181 Colo. 85, 507 P.2d 865 (1973), plaintiff failed to move for substitution of parties within 90 days of the service of notice of death of one of the defendants upon plaintiff's attorneys as required by C.R.C.P. 25(a)(1). Nevertheless, the trial court, on what it found to be a showing of excusable neglect, permitted plaintiff to move to substitute the administratrix of the deceased defendant out of time. This Court issued a rule to show cause why a motion to dismiss the deceased defendant as a party in the action was not granted and made the rule absolute after finding that excusable neglect was not shown.

This case is stronger than Farmers Insurance Group, because here there is no provision for the District Court's power to permit an exception to the rule--this case is one of inexcusable noncompliance.

Receiver is a fiduciary for the very limited assets of an insolvent insurance exchange. He is responsible to see that these assets are not expended in a proceeding irregular on its face and of uncertain scope and effect. Review of this Order by writ of error when it becomes final upon the close of the Receivership may be financially impossible, although in the meantime the Receivership will have had to spend its limited assets in dealing with the claims of the intervenor. In a real, if not theoretical sense, the Receiver will not have an adequate remedy of the District Court's error by an appeal from a final judgment and requests this Court to consider this fact in determining whether to issue a rule to show cause.

CONCLUSION

The District Court was without jurisdiction to grant the motion of Richardson Lumber Company to interevene in the Receivership proceedings and remains without jurisdiction to permit Richardson Lumber Company to remain in the proceedings without filing a pleading. Intervention is a statutory right and Richardson Lumber Company has not complied with the clear requirements of Rule 24(c).

WHEREFORE, the Receiver respectfully prays that this Court issue the writ in the nature of prohibition and an order dissolving and setting aside the Order of the District Court entered in Civil Action No. C-60284 on April 25, 1977.

Respectfully submitted,

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