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STATE OF NORTH DAKOTA

COUNTY OF GRAND FORKS

IN DISTRICT COURT

NORTHEAST JUDICIAL DISTRICT

CIVIL NO. 18-2015-cv-00240

Public Service Commission,

Petitioner,

vs.

Grand Forks Bean Company, Inc., and Auto-Owners Insurance Company

Respondents.

PUBLIC SERVICE COMMISSION'S BRIEF IN OPPOSITION TO BREMER BANK'S MOTION TO INTERVENE

*** *** ***

I. INTRODUCTION

[¶1] Bremer Bank, National Association ("Bremer") submitted a motion to intervene in the present insolvency proceeding for Grand Forks Bean Company, Inc. ("Grand Forks Bean"). The Public Service Commission ("PSC") requests Bremer's motion be denied. Any relief Bremer may have, or is requesting as it relates to the PSC or other claimants, can be appropriately addressed through the statutory proceedings available in an insolvency action rather than the intervention sought.

II. RELEVANT FACTS

[¶2] The facts as set forth in the Public Service Commission's ("PSC") *Brief in Support of Motion to Join Surety* (Doc ID# 107) describe the general background of this case and are incorporated herein. To date, eight growers have filed claims alleging Grand Forks Bean was not able to market the growers' beans or pay for the beans delivered to Grand Forks Bean's facility in Grand Forks, North Dakota. The growers assert, under N.D.C.C. § 60-02-25.1, they have a statutory first priority lien. Bremer asserts it has a perfected security interest in the grain

inventory and other assets of Grand Forks Bean that may become a part of the trust in any insolvency proceeding and also has filed a claim. Doc ID # 31-41. On March 25, 2015, the Court appointed the PSC as trustee under Chapter 60-04 of the North Dakota Century Code for the purpose of marshaling all trust assets of the insolvent Grand Forks Bean and further ordered the date of insolvency be established as on or before December 19, 2014. Doc ID# 26. The PSC is currently in the process of drafting its Report and Recommendation of Trustee as to the priority and division of the trust assets in this insolvency proceeding. The PSC anticipates filing its report on, or shortly after, September 30, 2015.

[¶3] On September 10, 2015, Bremer filed a Motion to Intervene alleging it is a first priority lienholder to all of the inventory and other categories of collateral of Grand Forks Bean Company and all proceeds therefrom. Doc ID# 121. Accompanying its motion, Bremer attached a *Bremer Bank, National Association's Answer to Application for Appointment as Trustee, Counterclaim, and Crossclaim.* Doc ID# 120. Bremer asserts it should be entitled to dismissal of the Application and denial of the Commission's request for appointment as trustee and other various relief. Id. at 120 at ¶ 24. It further alleges claims against the PSC to obtain the proceeds of the sale of Grand Forks Bean's inventory and against Grand Forks Bean for breach of contract. Id. at ¶¶ 25-54.

III. APPLICABLE LAW AND ARGUMENT

[¶4] Bremer's motion to intervene fails to satisfy the requirements of either Rule 24(a) or Rule 24(b) of the North Dakota Rules of Civil Procedure. For the reasons described below, Bremer does not have a cognizable interest in this proceeding as a secured creditor and its motion is untimely. Further, Bremer already has an opportunity to present its position through

the statutory insolvency provisions, and its attempted intervention is contrary to the applicable statutes.

A. Bremer does not have a cognizable interest in this insolvency action.

[¶5] Bremer incorrectly alleges it has a cognizable interest in the property subject to this action and should be afforded an intervention of right in this action pursuant to N.D.R.Civ.P. 24(a). Rule 24(a)(2) provides that a potential intervenor must show "(1) [it] has a cognizable interest in the subject matter of the litigation; (2) the interest may be impaired as a result of the litigation; and (3) the interest is not adequately represented by an existing party to the litigation. The proposed intervenor must satisfy all three prongs of the test." White v. T.P. Motel, L.L.C., 2015 ND 118, ¶ 21, 863 N.W.2d 915 (internal citations omitted). However, it is well-settled in North Dakota that Bremer has no cognizable interest in a warehouseman insolvency proceeding in which the PSC is a trustee. See North Dakota Public Service Com'n v. Valley Farmers Bean Ass'n, 365 N.W.2d 528 (N.D. 1985).

[¶6] In Valley Farmers, the PSC commenced insolvency proceedings against Valley Farmers Bean Association ("VFBA"). Id. at 533. The district court determined VFBA was an insolvent warehouseman and appointed the PSC to serve as trustee of a trust created for the benefit of outstanding receipt holders. Id. The PSC was directed to pay claims of persons who delivered beans to VFBA, but failed to receive payment for or redelivery of the beans. Id. The district court denied the claims of the First State Bank of Buxton, First and Farmers Bank, and Bank of North Dakota who collectively claimed an interest of $2,172,345, which represented the unpaid principal and interest due on a loan made by the Banks to VFBA. Id. at 533-34.

[¶7] The banks filed their claim with the PSC under N.D.C.C. § 60-04-04, but the PSC recommended the banks' claim be denied. Id. The district court concluded the banks had no

valid interest in the trust fund. Id. The banks had a security interest in VFBA's inventory, accounts, and contract rights. Id. at 537. The banks also came into possession of VFBA's receipts upon the disbursement of loan funds. Id. On appeal, the banks argued their interests constituted valid claims against the trust fund and warehouseman's bonds. Id. After determining a security interest is not an ownership interest in the grain described on a warehouse receipt, the Court concluded "the Banks' 'warehouse receipts' were invalid because they did not have an ownership interest in the beans." Id. at 537-38. Furthermore, the Court held the Banks did not have a valid claim to any warehouseman's bond because the warehouseman's bonds are "for the benefit of all persons *storing or selling* grain in a warehouse" and not intended for the benefits of secured creditors of the warehouseman. Id. at 539 (emphasis in original).

[¶8] The banks also contended that, as secured creditors, they were entitled to proceeds obtained through the PSC's sale of VFBA's inventory. Id. However, the Court held "[t]he Banks have no claim to that portion of VFBA's inventory which represents beans held for storage." Id. The Court reasoned:

> Likewise, we do not believe the Legislature intended that the trust provisions of § 60–04–02, N.D.C.C., could be defeated by a lender taking a security interest in an insolvent grain warehouseman's inventory. The purpose of Chapter 60–04, N.D.C.C., is to aid receipt holders in redeeming their receipts for as close to their full value as possible. Construing this legislation "with a view to effecting its objects and to promoting justice" [§ 1–02–01, N.D.C.C.], we conclude that the valid receipt holders had priority over the Banks to VFBA's inventory.

Id. at 540. In conclusion, the Court held the district court did not err in denying the banks' claim because there was no evidence the banks actually sold beans to or stored beans with VFBA. Id.

[¶9] Bremer's position is nearly identical to the position taken by the banks in Valley Farmers. Bremer's only claim to the trust is its alleged security interest in Grand Forks Bean's inventory. As explained in Valley Farmers, a security interest provides Bremer with no valid

claim with greater priority than that of a valid receiptholder to the trust fund, bond, or inventory held in storage in an insolvency action. Therefore, Bremer cannot satisfy the first prong necessary to intervene as a matter of right under N.D.R.Civ.P. 24(a). Here, any claim Bremer asserts can be protected by its ability to file a claim in the normal insolvency proceedings and exercise its right under N.D.C.C. § 60-04-09 to object to the PSC's report once it is filed. Therefore, Bremer's motion to intervene pursuant to Rule 24(a) should be denied.

B. Bremer's motion to intervene is untimely

[¶10] Bremer makes the alternative argument that it should be allowed permissive intervention pursuant to N.D.R.Civ.P. 24(b). "Whether intervention is sought permissively or as a matter of right, Rule 24 requires that the application be timely." Brigham Oil and Gas, L.P. v. Lario Oil & Gas Co., 2011 ND 154, ¶ 34, 801 N.W.2d 677. The following factors are to be considered to determine whether a motion is timely: "(1) the length of time the intervenor knew or should have known of his interest in the case; (2) the prejudice caused to the original parties by the delay; (3) the prejudice to the intervenor if the motion is denied; (4) any other unusual circumstances." Sokaogon Chippewa Community v. Babbitt, 214 F.3d 941, 949 (7th Cir. 2000). "The timeliness inquiry is inherently fact-sensitive and depends on the totality of the circumstances. In evaluating that mosaic, the status of the litigation at the time of the request for intervention is 'highly relevant.' As a case progresses toward its ultimate conclusion, the scrutiny attached to a request for intervention necessarily intensifies." R & G Mortgage Corp. v. Fed. Home Loan Mortgage Corp., 584 F.3d 1, 7 (1st Cir. 2009) (internal citations omitted). The timeliness requirement is often applied more strictly with regard to a permissive intervention than an intervention of right. Id. at 8. While there are no black and white rules governing the timeliness requirement, "[t]he passage of time is measured in relative, not absolute terms." Id.

However, the clock begins to run once a party has knowledge of a measurable risk to its rights. Id.

[¶11] Bremer asserts its motion to intervene is timely because "it is made early in this proceeding and prior to any other party being prejudiced." Doc ID# 121 at ¶ 4. Bremer relies upon Quick v. Fischer, 417 N.W.2d 843, 845 (N.D. 1988) in support of its proposition that a party can intervene even after judgment was entered. While it is true that in some situations a party can intervene at late stages of litigation, but as explained above, this is a fact sensitive analysis. In Brigham Oil and Gas, L.P., the North Dakota Supreme Court found a motion to intervene to be untimely when the intervening party did not promptly move for intervention and only sought "to simply relitigate issues resolved in the main action." Brigham Oil and Gas, L.P., 2011 ND at ¶ 42. This is exactly what Bremer appears to be doing here. Bremer's proposed Answer prays for judgment dismissing the Application and denying the PSC's request for appointment as trustee under Chapter 60-04 of the North Dakota Century Code. Doc ID# 120 at ¶ 24. This Court has already issued an order finding Grand Forks Bean to be insolvent and appointing the PSC as trustee of the trust fund provided by Chapter 60-04 for the purpose of marshalling all trust assets. Doc ID# 26 at ¶ 3. In essence, Bremer is attempting to relitigate issues that have already been resolved by intervening seven months after the *Application for Appointment as Trustee* was filed with this Court. See Doc ID# 1. Bremer was provided notice of this application in February. Doc ID# 10. Additionally, this court entered its order declaring Grand Forks Bean insolvent and appointing the PSC as trustee approximately six months ago. Bremer was served with notice of entry of that order. Doc ID # 27 and 29.

[¶12] A secured creditor who did not intervene until six months after a civil action was commenced by a government agency seeking an injunction to freeze assets and appoint a receiver

was considered untimely in U.S. v. Ritchie Special Credit Investments, Ltd., 620 F.3d 824 (8th Cir. 2010). In Ritchie, the government initiated a civil action against a group of companies seeking an injunction to freeze assets and appoint a receiver because of fraud allegations. Id. at 826. After a preliminary injunction was issued to freeze the companies' assets and an order was issued to appoint a receiver, Ritchie, a secured creditor, moved the court to intervene and vacate the injunction. Id. 826-831. The district court denied the motion to intervene finding it untimely and the issue was appealed to the Eighth Circuit Court of Appeals. Id. at 830-831.

[¶13] On appeal, much like Bremer, Ritchie contended that litigation had not progressed so far that intervention was impractical. Id. at 832. However, at the time of Ritchie's motion to intervene, an injunction had already been ordered, receivership orders had been entered by the district court, and some bankruptcy proceedings were underway. Id. The Eighth Circuit found the progress of litigation to be substantial. Id. at 833. Also, much like Bremer, Ritchie knew of the complete terms of the injunction since its inception and had been an active participant in underlying related issues. See Id. Ritchie failed to identify any change in the quality or quantity of proof supporting the issuance of the injunction and he was attempting to intervene for the sole purpose of challenging the terms, scope, and validity of the injunction. Id. The Eighth Circuit held that "[w]hen a party had knowledge of all the facts—as Ritchie did—and failed to raise the issue when first presented with an opportunity to do so, subsequent intervention is untimely." Id. Since Ritchie was aware of the full terms of the injunction at the time it was entered and chose to remain silent for six months, this delay was untimely. Id. at 834. Additionally, the Eighth Circuit noted that Ritchie was not prejudiced because he had sufficient remedies in another proceeding. Id. The court noted "[w]hile intervention is often desirable, the fact remains that a federal case is a limited affair, and not everyone with an opinion is invited to attend." Id. In sum the court held

the following:

> After weighing the four relevant factors to an analysis of the timeliness of a motion to intervene, we affirm the district court's ruling. The litigation has made substantial progress, Ritchie knew about the injunction from its inception, Ritchie's justification for delay is insufficient, and denying the motion to intervene would not significantly prejudice Ritchie, while granting it would significantly prejudice the other parties.

Id.

[¶14] While the analysis in Ritchie is under Fed.R.Civ.P. 24, and Bremer makes this motion pursuant to N.D.R.Civ.P. 24, North Dakota's version of Rule 24 is substantially identical to the federal rule. "When our procedural rules are similar to federal procedural rules, federal court interpretations are highly persuasive and we may look to them for guidance in interpreting our rules." Fisher v. Fisher, 546 N.W.2d 354, 355 (N.D. 1996). Ritchie is instructive here because Bremer is a secured creditor attempting to intervene for the purpose of challenging a prior order of the district court months after it was aware of its opportunity to do so. Furthermore, this is an insolvency proceeding authorized by statute to allocate trust funds to valid receipt holders. As explained in Valley Farmers, a secured creditor has no priority over the claims of valid receiptholders. Further, to the extent Bremer wishes to assert a claim or challenge the PSC's report, it has a statutorily provided opportunity under N.D.C.C. § 60-04-09.

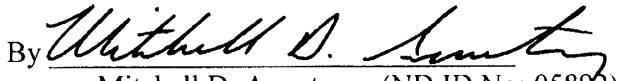
[¶15] Additionally, Bremer's only asserted claim is for breach of contract against Grand Forks Bean. This breach of contract claim does not have common facts or law to the insolvency proceeding. See N.D.R.Civ.P. 24(b) (permissive intervention is allowed to anyone who "has a claim or defense that shares with the main action a common question of law or fact."). Bremer is not prejudiced because it would be free to maintain a breach of contract action against Grand Forks Bean in a separate proceeding. However, allowing Bremer to intervene to litigate this issue would be prejudicial to the PSC and receipt holders as it would inevitably complicate and

delay this insolvency action while Bremer attempts to litigate with Grand Forks Bean. This insolvency action is a limited, statutorily authorized proceeding, not amenable to the intervention sought by Bremer. As a result, Bremer's motion to intervene should be denied and it should be required to assert any claims and/or objections per the insolvency statutes and through N.D.C.C. § 60-04-09.

IV. CONCLUSION

[¶16] For the aforementioned reasons, the PSC requests Bremer's motion to intervene be denied.

Dated this 21st day of September, 2015.

By 

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