COLORADO COURT OF APPEALS

DATE FILED: May 11, 2017
CASE NUMBER: 2016CA545

Court of Appeals No. 16CA0545
Pitkin County District Court No. 10CV177
Honorable Daniel B. Petre, Judge

First Citizens Bank and Trust Company,

Plaintiff-Appellee,

and

Leathem Stearn,

Defendant-Appellee,

v.

Stewart Title Guaranty Company,

Defendant-Appellant.

ORDER REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division II
Opinion by JUDGE BERNARD
Dailey and Fox, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced May 11, 2017

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¶ 1 This case requires us to decide whether a trial court should have permitted a title insurance company to intervene in a lawsuit between its insured, a bank, and a borrower. The trial court concluded that the title insurance company lacked a sufficient interest in the underlying lawsuit, so it rejected its motion to intervene.

¶ 2 We conclude, however, that the title insurance company satisfied each requirement of C.R.C.P. 24(a)(2). The court therefore should have permitted it to intervene as of right. We reverse and remand for further proceedings.

I. Background

¶ 3 This appeal marks the latest chapter in a decade-long saga between First Citizens Bank and Trust Company; its predecessor, United Western Bank; Stewart Title Guaranty Company; and Leathem Stearn.

A. The Deal That Went Awry

¶ 4 In 2007, United Western agreed to loan Mr. Stearn $12 million to build a home in Aspen. As security for the loan, Mr. Stearn was supposed to give United Western a deed of trust on the land where he would build the home. The deed of trust identified Mr. Stearn as

the "grantor." But he did not own the property; he had vested the title to the property in a company that he owned, Ute Mesa, LLC.

¶ 5 Before closing, both United Western and Stewart Title knew that Ute Mesa held title to the property. But employees at both companies assumed that the other would draw up a deed so that Ute Mesa would convey the title to Mr. Stearn. In this case, United Western's and Stewart Title's assumptions led to quite a bit of mischief because neither company drew up such a deed.

¶ 6 As a result, at closing, the loan documents and the deed of trust identified Mr. Stearn as the property's owner, even though Ute Mesa had not conveyed the property to him. United Western was therefore in a precarious position for a lender: Its loan was unsecured. But Stewart Title's insurance policy nonetheless guaranteed the priority and the validity of United Western's deed of trust.

¶ 7 Mr. Stearn defaulted on the loan two years later. Stewart Title discovered that Ute Mesa, not Mr. Stearn, still held title to the property. By this time, United Western had paid Mr. Stearn about $6 million on the loan. Mr. Stearn, predictably, refused all requests to convey title from Ute Mesa to himself.

B. *First Citizens v. Stewart Title*

¶ 8 Stewart Title refused to pay United Western's claim under the title insurance policy. It based its refusal on a clause that exempted Stewart Title from payment if United Western had "created, suffered, assumed or agreed to" any title defects. United Western filed a breach of contract lawsuit against Stewart Title.

¶ 9 A short time later, First Citizens assumed all of United Western's interest and claims. It then took over the litigation against Stewart Title.

¶ 10 After a bench trial in 2011, the trial court concluded that Stewart Title's "denial of coverage and [its] failure to honor its obligations under the [p]olicy constituted breach of contract." The court also concluded, however, that Stewart Title had not acted in bad faith.

¶ 11 A division of this court affirmed this portion of the trial court's decision. *See First Citizens Bank & Tr. Co. v. Stewart Title Guar. Co.*, 2014 COA 1, ¶¶ 16-19. Stewart Title posted a bond for the $7.6 million judgment, which included interest.

C. *First Citizens v. Stearn*

¶ 12 Meanwhile, United Western had also sued Mr. Stearn and Ute Mesa for, among other things, breach of contract, unjust enrichment, and fraud. First Citizens took over this case, too. The trial court stayed this case pending the resolution of the lawsuit between First Citizens and Stewart Title. Once the division affirmed the trial court's decision in that lawsuit, *see id.* at ¶ 19, the trial court took up the one between First Citizens and Mr. Stearn.

¶ 13 First Citizens claimed that the $7.6 million judgment from Stewart Title had not made it whole. It added that (1) Mr. Stearn and Ute Mesa still owed it more than $660,000 for their wrongful conduct; and (2) Mr. Stearn and a second limited liability company owed them $270,000 because they had not paid back money from a second loan from United Western.

¶ 14 Relying on C.R.C.P. 24(a)(2), Stewart Title moved to intervene as matter of right in First Citizens' lawsuit against Mr. Stearn. It claimed that it had contractual and equitable subrogation claims in that case. First Citizens and Mr. Stearn opposed Stewart Title's motion.

¶ 15 The trial court denied the motion, (1) concluding expressly that Stewart Title did not have an interest in the lawsuit under C.R.C.P. 24(a)(2); and (2) concluding implicitly that Stewart Title's interest would therefore not be impaired or impeded by the lawsuit.

¶ 16 Stewart Title then filed this appeal.

II. Intervention

A. Legal Principles

¶ 17 We review de novo the trial court's decision to deny a motion to intervene as of right. *Mauro v. State Farm Mut. Auto. Ins. Co.*, 2013 COA 117, ¶ 11. "The denial of a motion to intervene as a matter of right is a final and appealable order." *O'Hara Grp. Denver, Ltd. v. Marcor Hous. Sys., Inc.*, 197 Colo. 530, 540, 595 P.2d 679, 686 (1979).

¶ 18 Intervention permits someone who is "outside[]" litigation into it "for the purpose of presenting a claim or defense." *People v. Ham*, 734 P.2d 623, 625 (Colo. 1987). "The legal concept of intervention is based upon the natural right of a litigant to protect himself from the consequences of an action against one in whose cause he has an interest, or by the result of which he may be bound." *Mauro*, ¶ 22 (citation omitted).

¶ 19 The prospective intervenor must meet three requirements to intervene as of right. The prospective intervenor must show that (1) it "claims an interest relating to the . . . transaction which is the subject of the action"; (2) it is so situated that "disposition of the action may as a practical matter impair or impede" its ability to protect its interest; and (3) its interest is not adequately represented by the existing parties. C.R.C.P. 24(a)(2); *see also Feigin v. Alexa Grp., Ltd.*, 19 P.3d 23, 28 (Colo. 2001). A court will deny the motion of the prospective intervenor if it does not satisfy any one of these requirements. *See In re Estate of Scott*, 40 Colo. App. 343, 345, 577 P.2d 311, 312 (1978).

¶ 20 Colorado courts take a "flexible" and "liberal" approach with respect to the first requirement. *Mauro*, ¶ 13 (citing *Feigin*, 19 P.3d at 29). The interest "requirement is a prerequisite rather than a determinative criterion for intervention." *Id.* And it serves as a "practical guide" to make sure that lawsuits include as many "*apparently* concerned persons as is compatible with efficiency and due process." *Cherokee Metro. Dist. v. Meridian Serv. Metro. Dist.*, 266 P.3d 401, 404 (Colo. 2011)(emphasis added)(citations omitted).

¶ 21 Under the "impairment" requirement of C.R.C.P. 24(a)(2), an "intervenor's interest is impaired if the disposition of the action in which intervention is sought will prevent any future attempts by the [intervenor] to pursue his interest." *Feigin*, 19 P.3d at 30. So, if the intervenor has an alternative forum in which it can assert its interest, the "impairment" prong is not met. *See id.* at 30-31 (concluding that the prospective intervenors held a "private right of action," so "their interests would neither be impaired nor impeded for purposes of Rule 24(a)(2) if they were denied intervention").

¶ 22 The third requirement of C.R.C.P. 24(a)(2) asks whether the prospective intervenor's interest would be adequately represented by the existing parties. *Mauro*, ¶ 20. This requirement is met if the prospective intervenor's interest would not be represented at all, or if the existing parties are adverse to the prospective intervenor. *See id.* If the intervenor's interest "is similar to, but not identical with, that of one of the parties, a discriminating judgment is required on the circumstances of the particular case, although intervention ordinarily should be allowed unless it is clear that the party will provide adequate representation for the absentee." *Cherokee Metro. Dist.*, 266 P.3d at 407 (emphasis omitted)(quoting 7C Charles Alan

Wright, Arthur Miller, Mary Kay Kane & Richard L. Marcus, *Federal Practice and Procedure* § 1909 (3d ed. 1997)).

B. Application

1. Interest

¶ 23 When analyzing Stewart Title's interest in the case between First Citizens and Mr. Stearn, the trial court weighed the validity of Stewart Title's contractual and equitable subrogation claims. It concluded that Stewart Title did not have any viable claims, so it therefore lacked an interest under C.R.C.P. 24(a)(2)'s first requirement. Stewart Title contends that the trial court's approach was flawed because "the focus [of an intervention motion] is limited to the interest 'claimed by the intervenor, *not* whether he or she will ultimately be successful' in litigating it." (Citation omitted.) We agree.

¶ 24 We have found no Colorado case, and the parties do not cite one, that examines the question whether a trial court should assess the validity of an asserted subrogation claim when resolving a motion to intervene. Authority elsewhere is mixed. *Compare Miller v. Astleford Equip. Co.*, 332 N.W.2d 653, 654 (Minn. 1983)(deciding whether the intervenor had a valid subrogation interest would

require "resolution in its favor of complex issues," yet Minnesota's intervention rule "requires merely a claimed interest, not a certain one"), *with Alfa Mut. Ins. Co. v. Head*, 655 So. 2d 975, 977-78 (Ala. 1995)(concluding that contractual subrogation rights had not yet arisen because the insured had not been "made whole," so the intervenor lacked an "interest"), *overruled on other grounds by State Farm Fire & Cas. Co. v. Hannig*, 764 So. 2d 543 (Ala. 2000). Some cases have assessed whether a subrogation claim would be "futile" in weighing a motion to intervene. *See, e.g.*, *Monterey Homes Ariz., Inc. v. Federated Mut. Ins. Co.*, 212 P.3d 43, 47 (Ariz. Ct. App. 2009).

¶ 25 Although Colorado appellate courts have not decided that a trial court should scrutinize the validity of a subrogation claim in the course of resolving a motion to intervene, recall that appellate courts have directed trial courts to determine whether a prospective intervenor has an interest for the purposes of C.R.C.P. 24(a)(2) in a "liberal manner." *Cherokee Metro. Dist.*, 266 P.3d at 404 (citation omitted); *see also O'Hara Grp. Denver, Ltd.*, 197 Colo. at 541, 595 P.2d at 687. A prospective intervenor has met the interest requirement if it "*claims* an interest relating to the property or transaction which is the subject of the action." C.R.C.P. 24(a)(2)

(emphasis added). And a division of this court has observed that "this first element for intervention looks merely to what interest is claimed by the intervenor, *not whether he or she will ultimately be successful*." *Bruce W. Higley, D.D.S., M.S., P.A. Defined Benefit Annuity Plan v. Kidder, Peabody & Co.*, 920 P.2d 884, 890 (Colo. App. 1996)(emphasis added); *see O'Hara Grp. Denver, Ltd.*, 197 Colo. at 542, 595 P.2d at 688 ("If the intervenor's claims prove to be without foundation, then, of course, judgment may be entered against it. But that determination should be based on the merits of the claims, as tested at trial.").

¶ 26 First Citizens appears to contend that *Higley* is inapposite because the prospective intervenor's interest in that case was ironclad: He was a member to a class that was the subject of a class-action settlement, and he sought to intervene in that settlement litigation. By contrast, according to First Citizens, Stewart Title's interest arises only if its subrogation claims are valid. And First Citizens submits that those subrogation claims are invalid.

¶ 27 But we think that First Citizens misconstrues the nature of the *Higley* intervenor's interest by putting the cart of the merits of

the claims before the horse of resolving Stewart Title's motion to intervene. In *Higley*, the intervenor alleged that he had suffered a "loss" of money in a Ponzi scheme, which would have entitled him to a share of the settlement proceeds. *See* 920 P.2d at 890. The plaintiffs resisted the motion to intervene, asserting that the intervenor had not endured a loss because he had not suffered a *net* loss of money, given that he had withdrawn more money from the shoddy investment than he had contributed to it. He therefore did not have an interest in the settlement funds. *See id.* The trial court rejected the motion to intervene. *See id.* at 888.

¶ 28 The division reversed. It explained that, for purposes of intervention, the court should look "merely to what interest is claimed by the intervenor, not whether he or she will ultimately be successful." *Id.* at 890. True, the intervenor may or may not have suffered a "loss" entitling him to a piece of the settlement. But we read this case to hold that, because the intervenor *asserted* that he had suffered a loss, he therefore had a sufficient interest in the settlement proceeds to intervene under C.R.C.P. 24(a)(2).

¶ 29 In a similar vein, at least one federal circuit court has noted that resolving the merits of a prospective intervenor's claims to

decide if it has an interest "put[s] the cart before the horse." *Brennan v. N.Y.C. Bd. of Educ.*, 260 F.3d 123, 129-30 (2d Cir. 2001)("An interest that is otherwise sufficient under Rule 24(a)(2) does not become insufficient because the court deems the claim to be legally or factually weak."); *see also Turn Key Gaming, Inc. v. Oglala Sioux Tribe*, 164 F.3d 1080, 1081 (8th Cir. 1999)(noting that a claimed interest will be insufficient for intervention if the "allegations are frivolous on their face," but that "application for intervention cannot be resolved by reference to the ultimate merits of the claim," and noting that the relevant documents "purport[ed]" to give the intervenor an interest in the litigation); *cf. United States v. City of Chicago*, 798 F.2d 969, 976 n.10 (7th Cir. 1986)("We agree with the proposition that it would be error to deny intervention because of a belief that the intervenors, if put to their proof, could not prevail.").

¶ 30 Given all of this, and bearing in mind Colorado's "liberal" and "flexible" approach in determining whether a party has an interest under C.R.C.P. 24(a)(2), *Mauro*, ¶¶ 13-14, we conclude that the trial court erred because it analyzed whether Stewart Title would "ultimately be successful" in asserting its subrogation claims,

Higley, 920 P.2d at 890. We further conclude that Stewart Title's subrogation claims constitute a sufficient interest to satisfy the first requirement of C.R.C.P. 24(a)(2). *See, e.g.*, *United Airlines, Inc. v. Schwesinger*, 805 P.2d 1209, 1210 (Colo. App. 1991).

2. Impairment

¶ 31 We next assess whether the resolution of the lawsuit between First Citizens and Mr. Stearn could impair or impede Stewart Title's ability to protect its asserted subrogation claims. Neither First Citizens nor Stewart Title raised this issue on appeal, but the trial court's order encompassed it implicitly. We shall therefore address it.

¶ 32 Stewart Title's interest in the case between First Citizens and Mr. Stearn is "entirely based on subrogation." *Id.* If Stewart Title cannot intervene in this case, it could nonetheless be bound by its outcome via the application of the doctrine of issue preclusion. *See Cent. Bank Denver, N.A. v. Mehaffy, Rider, Windholz & Wilson*, 940 P.2d 1097, 1101 (Colo. App. 1997)(noting that issue preclusion — formerly referred to as collateral estoppel — bars a party from relitigating issues if four requirements are met). And the outcome of this case could therefore preclude Stewart Title from asserting its

subrogation claims in another forum. *See Mauro*, ¶¶ 17-19 (explaining that the second prong of the intervention test asks whether the intervenor has a clear alternative venue to pursue relief); *see also United Airlines*, 805 P.2d at 1210-11 (noting that, because the intervenor's interest was entirely based on subrogation, it had "*ipso facto* . . . established the second requirement of C.R.C.P. 24(a)").

¶ 33 We conclude that Stewart Title met the second requirement of C.R.C.P. 24(a)(2) because the record shows that its ability to protect its subrogation rights would be impaired or impeded if it were prevented from intervening.

3. Inadequate Representation

¶ 34 Although Stewart Title addressed the third requirement on appeal, neither First Citizens nor Mr. Stearn discussed it. But the parties addressed it in the trial court to some extent, and Stewart Title states on appeal that it satisfied this requirement. We agree, so we conclude that neither First Citizens nor Mr. Stearn would adequately represent Stewart Title's interest.

¶ 35 First, as we made clear above, First Citizens and Mr. Stearn do not think that Stewart Title has any interest at all, so neither of

them would have any motivation to represent or to protect its interest.

¶ 36 Second, Stewart Title's interest does not overlap with either First Citizens' or Mr. Stearn's interests. Stewart Title seeks to recover from Mr. Stearn, so it is adverse to him; Mr. Stearn will not adequately represent Stewart Title's interest. *See Feigin*, 19 P.3d at 31.

¶ 37 Stewart Title and First Citizens have parallel interests to an extent because they both seek to recover from Mr. Stearn for his alleged breach of loan documents, alleged unjust enrichment, and alleged fraud. But the remedies that they seek would probably diverge. Stewart Title has already paid First Citizens a $7.6 million judgment. First Citizens only seeks about $930,000 from Mr. Stearn. So "it is not unreasonable to conclude that" First Citizens might accept a settlement offer from Mr. Stearn "which does not include recovery of [the amount Stewart Title paid to First Citizens], or might not pursue, with appropriate zeal, recovery of those [full] amounts." *United Airlines*, 805 P.2d at 1211 (noting that the insured had already received medical benefits and wages from its

employer, so it was unlikely to zealously seek recoupment of those costs from the tortfeasor).

¶ 38 In summary, Mr. Stearn cannot adequately represent Stewart Title's interest, and First Citizens' representation of Stewart Title's interest might well be inadequate. *See Cherokee Metro. Dist.*, 266 P.3d at 407 (explaining that a court should allow a party to intervene "unless it is clear" that the party will provide adequate representation)(emphasis and citation omitted).

¶ 39 We reverse the trial court's order denying Stewart Title's request to intervene in the lawsuit between First Citizens and Mr. Stearn. We remand this case to the trial court to grant Stewart Title's motion to intervene and then to proceed accordingly. We make clear, however, that we take no position on the merits of Stewart Title's subrogation claims.

¶ 40 The trial court's order is reversed, and the case is remanded to the trial court for further proceedings.

JUDGE DAILEY and JUDGE FOX concur.

Court of Appeals

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CHRIS RYAN
CLERK OF THE COURT

PAULINE BROCK
CHIEF DEPUTY CLERK

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Alan M. Loeb
Chief Judge

DATED: September 22, 2016

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