

COURT OF APPEALS OF NORTH CAROLINA

State Employees' Credit Union, Inc. v. Gentry, 75 N.C. App. 260

330 S.E.2d 645 (1985) · No. 841OSC1035 · Decided June 18, 1985

SUMMARY

The North Carolina Court of Appeals held that Interstate Securities Corporation did not have a statutory right to intervene as an attaching creditor because it had not complied with the statutory attachment procedures. The court also held that Interstate's motion to intervene under North Carolina Rule of Civil Procedure 24 was untimely because it was filed after entry of default, and that the garnishee's motion to join attaching creditors was moot.

CASE DETAILS

COURT	Court of Appeals of North Carolina
WRITING FOR THE COURT	Wells, Judge; Becton; Eagles; Wells
JURISDICTION	North Carolina
DECIDED	June 18, 1985
DOCKET	841OSC1035
DISPOSITION	affirmed
PROCEDURAL POSTURE	Interstate Securities Corporation appealed orders denying its motion to intervene in an attachment and garnishment proceeding and declaring Dean Witter Reynolds's motion to join all attaching creditors moot.
STANDARD OF REVIEW	The timeliness of a motion to intervene is reviewed under the trial court's sound discretion. Statutory interpretation and the determination whether the asserted statutory intervention right applies are addressed by examining the governing statutory requirements.
PRECEDENTIAL VALUE	Published North Carolina Court of Appeals opinion
PARTIES	Interstate Securities Corporation

TOPICS

- intervention
- default
- mootness
- statutory interpretation
- civil procedure

PRACTICE AREAS

- civil procedure
- appellate procedure
- commercial litigation
- remedies

QUESTIONS PRESENTED

1. Whether Interstate Securities Corporation had a statutory right to intervene as an attaching creditor under N.C. Gen. Stat. § 1-440.33(g).
2. Whether Interstate had a right to intervene under North Carolina Rule of Civil Procedure 24(a)(2).
3. Whether Interstate's motion to intervene was timely when filed after entry of default and whether its failure to timely file the required pleading under Rule 24(c) affected intervention.
4. Whether Dean Witter Reynolds's motion to join all attaching creditors was moot and whether any lien-superiority issue remained.

HOLDINGS

1. Interstate did not have a statutory right to intervene because it was not an attaching creditor. Its notice of levy was insufficient process, and it had not complied with the statutory procedures necessary to establish an attachment lien or interest in the attached property.
2. Interstate's motion to intervene under Rule 24(a)(2) was untimely.
3. The trial court correctly determined that Dean Witter's motion to join all attaching creditors was moot because Interstate had no lien on the property and was the only attaching creditor in the action.

KEY QUOTATIONS

“Timeliness is the threshold question to be considered in any motion for intervention.” (648)

“We therefore conclude that Interstate's motion to intervene after entry of default was untimely.” (649)

FACTUAL BACKGROUND

State Employees' Credit Union pursued attachment and garnishment proceedings against William M. Gentry, with Dean Witter Reynolds holding personal property of the debtor. Interstate Securities Corporation served Dean Witter with a notice of levy but did not obtain an order of attachment, serve the required attachment process, or file a proper claim establishing an attachment lien or interest in the property. Interstate moved to intervene after entry of default against Gentry, and its required pleading was not filed until eleven days after default judgment.

PROCEDURAL HISTORY

State Employees' Credit Union obtained entry of default against William M. Gentry and pursued attachment and garnishment proceedings involving property held by Dean Witter Reynolds. Interstate Securities Corporation attempted to intervene after entry of default, asserting a statutory right and a right under North Carolina Rule of Civil Procedure 24(a)(2). The trial court denied intervention and found Dean Witter's motion to join all attaching creditors moot; the Court of Appeals affirmed.

DISPOSITION

affirmed

CASES CITED

- Corley v. Jackson Police Dept., 755 F.2d 1207 (5th Cir. 1985)
- Spring Constr. Co., Inc. v. Harris, 614 F.2d 374 (4th Cir. 1980)
- NAACP v. New York, 413 U.S. 345, 93 S. Ct. 2591, 37 L. Ed. 2d 648 (1973)
- South v. Rowe, 102 F.R.D. 152 (N.D. Ill. 1984), aff'd in part, rev'd in part, 759 F.2d 610 (7th Cir. 1985)
- U.S. v. Associated Milk Producers, Inc., 534 F.2d 113 (8th Cir.), cert. denied, National Farmers' Organization, Inc. v. U.S., 429 U.S. 940, 97 S. Ct. 355, 50 L. Ed. 2d 309 (1976)
- Black v. Central Motor Lines, Inc., 500 F.2d 407 (4th Cir. 1974)
- Berta v. Highway Comm., 36 N.C. App. 749, 245 S.E.2d 409 (1978)
- Battle v. Clanton, 27 N.C. App. 616, 220 S.E.2d 97 (1975), disc. rev. denied, 289 N.C. 613, 223 S.E.2d 391 (1976)
- Bell v. Martin, 299 N.C. 715, 264 S.E.2d 101 (1980), reh'g denied, 300 N.C. 380
- Kahan v. Longiotti, 45 N.C. App. 367, 263 S.E.2d 345 (1980)
- Love v. Moore, 305 N.C. 575, 291 S.E.2d 141 (1982)

OPINION

WELLS, J.

330 S.E.2d 645 (1985) STATE EMPLOYEES' CREDIT UNION, INC., Plaintiff, v. William M. GENTRY, Defendant, and Dean Witter Reynolds, Garnishee, and Interstate Securities Corporation, Appearing in support of its motion to intervene. No. 841OSC1035. Court of Appeals of North Carolina. June 18, 1985. *647 Bailey, Dixon, Wooten, McDonald, Fountain & Walker by John N. Fountain and J. Scott Merrell, Raleigh, for State Employees' Credit Union.

Manning, Fulton & Skinner by Charles E. Nichols, Jr., Raleigh, for Dean Witter Reynolds. Moore, Van Allen, Allen & Thigpen by William D. Dannelly and C. Steven Mason, Raleigh, for Interstate Securities Corp. WELLS, Judge.

We note at the outset that the intervenor has failed to identify the various exceptions upon which its assignments of error are based as required by Rule 28(b)(5) of the Rules of Appellate Procedure. Pursuant to Rule 2 of the Rules of Appellate Procedure, we deem it appropriate to dispose of this appeal on the merits. Interstate first contends that the trial court committed reversible error in denying its motion to intervene.

Specifically, Interstate contends that it had a mandatory right to intervene in the proceedings. We disagree. Interstate argues first that G.S. § 1-440.33(g) confers on it an unconditional right to intervene. The material portion of G.S. § 1-440.33(g) declares that: If more than one order of attachment is served on a garnishee, the court from which the first order of attachment was issued shall, upon motion of the garnishee or of any of the attaching creditors, make parties to the action all of the attaching creditors,...

Clearly, this provision applies where more than one order of attachment has been served on the garnishee and when the person making a motion under this section is either the garnishee or an attaching creditor. Generally, an attaching creditor is one who has caused an attachment to be issued and levied on the property of the debtor. Black's Law Dictionary at 332 (5th ed.1979).

N.C.Gen.Stat. § 1-440.12 (1983) governs the issuance of an order of attachment. When read in pari materia with N.C.Gen. Stat. §§ 1-440.10 and 1-440.11 (1983), this section directs the court to issue an order of attachment when the requisite affidavit and bond have been filed. Further, in order to levy on property of the debtor in the possession of a garnishee, the sheriff must deliver to the garnishee a copy of the order of attachment, the summons to garnishee, and the notice of levy.

N.C.Gen.Stat. § 1-440.25 (1983). In this case, Interstate did not comply with the statutory procedures. The "notice of levy" served upon the garnishee by Interstate was insufficient process to accord Interstate the status of attaching creditor. See N.C.Gen.Stat. § 1-440.12 (1983); G.S. § 1-440.25. It was incumbent on Interstate, if it desired to establish a lien by attachment or an interest in the attached property, to put its claim in issue by filing a proper claim in accordance with N.C.Gen.Stat. § 1-440.1, et seq. or 1-440.43(2) (1983).

That Interstate failed to employ either of these well-defined mechanisms is unquestioned. Consequently, Interstate's contention that it can intervene as an attaching creditor under G.S. § 1-440.33(g) fails. Interstate argues next that it had a right to intervene in these proceedings under *648 Rule 24(a)(2) of the Rules of Civil Procedure. Rule 24(a)(2) provides in relevant part: (a) Intervention of right.

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 he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Assuming, *arguendo*, that Interstate has met the prerequisites of Rule 24(a)(2) as to interest in the property, the dispositive consideration is timeliness. Timeliness is the threshold question to be considered in any motion for intervention. Comment to Rule 24(a) of the Rules of Civil Procedure; *Corley v. Jackson Police Dept.*, 755 F.2d 1207 (5th Cir.1985). Whether a motion to intervene is timely is an issue addressed to the sound discretion of the trial court and its resolution will depend on the circumstances of the case.

Comment to Rule 24(a) of the Rules of Civil Procedure; *Spring Constr. Co., Inc. v. Harris*, 614 F.2d 374 (4th Cir.1980). In determining whether a motion to intervene is timely, a trial court will give consideration to: the status of the case; the unfairness or prejudice to the existing parties; the

reason for the delay in moving for intervention; the resulting prejudice to the applicant if the motion is denied; and any unusual circumstances.

NAACP v. New York, 413 U.S. 345, 93 S. Ct. 2591, 37 L. Ed. 2d 648 (1973); South v. Rowe, 102 F.R.D. 152 (N.D.Ill.1984), *aff'd in part, rev'd in part*, 759 F.2d 610 (7th Cir.1985). As a general rule, motions to intervene made prior to trial are seldom denied. Conversely, motions to intervene made after judgment has been rendered are disfavored and are granted only after a finding of extraordinary and unusual circumstances or upon a strong showing of entitlement and justification.

U.S. v. Associated Milk Producers, Inc., 534 F.2d 113 (8th Cir.), *cert. denied*, National Farmers' Organization, Inc. v. U.S., 429 U.S. 940, 97 S. Ct. 355, 50 L. Ed. 2d 309 (1976); Black v. Central Motor Lines, Inc., 500 F.2d 407 (4th Cir.1974).

The situation is less clearly defined when motions to intervene are made after a trial or a hearing on the issues, and before a final judgment is rendered. Although there is a paucity of North Carolina cases defining the parameters of timeliness under Rule 24, we believe that our decision in *Berta v. Highway Comm.*, 36 N.C.App. 749, 245 S.E.2d 409 (1978) sheds some light on the issue of timeliness in this case.

In *Berta*, an applicant filed a motion to intervene in an inverse condemnation proceeding after the court had conducted a hearing to determine all issues other than damages. Trial on the single issue of damages had already been scheduled.

The court held that under these circumstances applicant's motion to intervene was not timely. *Berta v. Highway Comm.*, *supra*. In this case, Interstate filed a motion to intervene after entry of default against defendant. N.C.Gen.Stat. § 1A-1, Rule 55 of the Rules of Civil Procedure (1983) which governs the entry of default and judgment by default, contemplates a two-step procedure in order to take a judgment by default.

The entry of default, which is the first step, is interlocutory in nature and is not a final judicial action. *Battle v. Clanton*, 27 N.C.App. 616, 220 S.E.2d 97 (1975), *disc. rev. denied*, 289 N.C. 613, 223 S.E.2d 391 (1976). Nevertheless, when default was entered, the substantive allegations raised by the Credit Union complaint were no longer at issue, and for the purpose of the entry of default and default judgment, were deemed admitted.

See *Bell v. Martin*, 299 N.C. 715, 264 S.E.2d 101, *reh'g denied*, 300 N.C. 380 (1980). The entry of default therefore, conclusively established Gentry's liability to the Credit Union. The extent of that liability has *649 never been at issue.

We also note that the motion to intervene was defective in that it was not accompanied by a pleading in accordance with Rule 24(c). *Kahan v. Longiotti*, 45 N.C.App. 367, 263 S.E.2d 345 (1980), *overruled on other grounds*, *Love v. Moore*, 305 N.C. 575, 291 S.E.2d 141 (1982).

The record reveals that the requisite pleading was not filed until eleven days after judgment by default had been entered in the principal action. We therefore conclude that Interstate's motion to intervene after entry of default was untimely.

In summary, we hold that under the facts and circumstances presented by this case, Interstate did not have a statutory right to intervene under G.S. § 1-440.33(g) and that its motion to intervene under Rule 24(a) was untimely.

Accordingly, this assignment of error is overruled. Interstate contends next that the trial court erred in finding that Dean Witter's motion to join all attaching creditors was moot. We disagree. More specifically, Interstate contends that the motion to join all attaching creditors was not moot because the issue of whether its lien was superior to the lien of the Credit Union remains unresolved.

We reject this contention. For reasons already stated, Interstate did not have a lien on the personal property held by Dean Witter. Thus, there was no issue of superiority of liens as between Credit Union and Interstate. Dean Witter's motion to join all attaching creditors was inapposite and therefore was moot from the outset. Interstate, also, argues that the motion to join all attaching creditors was not moot because, the relief sought, to exonerate Dean Witter as to all claims of competing creditors, was not granted.

In our view, Interstate misconstrues the relief sought by Dean Witter's motion. The relief sought by a motion under G.S. § 1-440.33(g) is to make parties to the action all attaching creditors. As we have already stated, there was only one attaching creditor in this action. Consequently, any relief that might have been granted under this statute would have been meaningless.

Further, contrary to Interstate's contentions, delivery of personal property held by a garnishee to a sheriff, armed with the appropriate judicial process, exonerates the garnishee as to the personal property delivered. N.C.Gen.Stat. § 1-440.28(c) (1983). This argument is, likewise, rejected.

Accordingly, we hold that the trial court did not err in finding that Dean Witter's motion to join all attaching creditors was moot. For the reasons stated, the order and the amended order appealed from are Affirmed. BECTON and EAGLES, JJ., concur.