

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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| TIG INSURANCE COMPANY, | : | |
| Plaintiff | : | |
| | : | |
| | : | |
| v. | : | 3:04-CV-646 (WWE) |
| | : | |
| KEVIN HUBER, PATRICK HALL and | : | |
| THE CT BLUE JAYS-16'S, | : | |
| Defendants. | : | |

RULING ON MOTION TO INTERVENE

_____This is a declaratory judgment action concerning the obligations of plaintiff TIG Insurance Company to indemnify the defendants in a state tort action. Christopher Palmer, the plaintiff in the underlying tort action, seeks to intervene as of right pursuant to Federal Rule of Civil Procedure 24(a). Palmer has filed a memorandum in support of his joinder, which the Court construes as a motion to intervene.

For the following reasons, the Court will grant Palmer's motion to intervene.

BACKGROUND

This brief factual background is taken from the allegations of the complaint, the moving papers and the supporting affidavits.

In December, 2001, Christopher Palmer was in a baseball practice conducted and supervised by defendants Kevin Huber, Patrick Hall and the CT Blue Jays-16's at an indoor practice facility in Norwalk, Connecticut. During this practice, Palmer was hit in the right eye by a baseball, which accident resulted

in multiple facial fractures and permanent loss of vision. Palmer has sued these defendants for negligence in a state court action, and TIG Insurance Company is currently providing a defense to the defendants in that action under a full reservation of rights.

TIG maintains that defendants are not "insureds" under the TIG insurance contract that it issued to United States Specialty Sports Association, Inc. TIG asserts further that the injuries suffered by Palmer do not constitute an "occurrence" or a "covered event" under that contract.

DISCUSSION

Rule 24(a) provides, in relevant part:

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.

The proposed intervener must (1) make a timely application for intervention, (2) show an interest in the subject matter of the action, (3) show that the protection of the interest may be impaired by the disposition of the action, and (4) show that the interest is not adequately represented by an existing party.

Restor-A-Dent Dental Lab. Inc. v. Certified Alloy Products, Inc., 725 F.2d 871, 874 (2d Cir. 1984). The failure to meet any one of these requirements justifies the denial of a motion under Rule 24(a)(2). Butler, Fitzgerald & Potter v. Sequa Corp., 250

F.3d 171, 176 (2d Cir. 2001). However, the court has discretion to identify those circumstances where intervention is appropriate. See United States v. Hooker Chemicals & Plastics Corp., 749 F.2d 968, 983 (2d Cir. 1984)

Timeliness

To determine if a motion for intervention is timely, courts generally consider (1) how long the applicant had notice of the "interest" before it made the motion; (2) prejudice to existing parties; (3) prejudice to the applicant; and (4) any unusual circumstances militating for or against timeliness. See United States v. Pitney Bowes, 25 F.3d 66 (2d Cir. 1994). A Court has broad discretion in assessing the timeliness of a motion to intervene. In re Holocaust Victim Assets Litig., 225 F.3d 191, 198 (2d Cir. 2000).

Palmer had notice of the pending declaratory judgment action¹ at least as early as July, 2004, when his attorney filed a motion for joinder in this action. In October, 2004, this Court denied that motion and instructed Palmer to file a motion to intervene by November 19, 2004. Subsequently, the Court found good cause to grant extensions of time to file the motion to intervene. On December 27, 2004, Palmer filed this motion to intervene as of right. In light of Palmer's prompt, although procedurally improper, effort to become a party in this action in July 2004, and this Court's subsequent allowance of

¹This declaratory judgment action was commenced on April 19, 2004.

extensions of time for good cause, the Court finds the application to be timely.

Interest

The second factor, that Palmer show an interest in the subject matter of the action, proves more troubling. The interest must be "significantly protectable" and "direct, as opposed to remote or contingent." Restor-A-Dent Dental Lab. Inc., 725 F.2d at 874. Here, Palmer is not a party to the insurance contract, which is between the defendants and TIG. His interest in the terms of the insurance policy is contingent upon his success in the underlying state tort action. Generally, federal courts have declined to permit intervention based on an interest deriving from contingent success in an underlying tort action. See Federal Insurance Company v. Kingsbury Properties, LTD., 1992WL316163(S.D.N.Y. 1992) (collecting cases). However, some courts have found that the contingent nature of an applicant's interest does not automatically bar allowance of the proposed intervention. See, e.g., Teague v. Bakker, 931 F.2d 259, 261 (4th Cir. 1991); New Hampshire Ins. Co. v. Greaves, 110 F.R.D. 549, 552 (D.R.I. 1986). Accordingly, the Court will consider the remaining factors, although the contingent nature of Palmer's interest weighs against allowing the intervention as of right.

Impairment of Right

In this declaratory judgment action, TIG seeks a determination that TIG has no duty to defend or indemnify the

defendants Huber, Hall and the CT Blue Jay's-16's. At present, a motion for default judgment is pending against the defendants, who have not retained counsel and have made no effort to defend against the declaratory judgment action.

TIG argues that Palmer has no interest that can be impaired since he is not a party to the insurance contract. However, Palmer's interest in TIG's obligation to indemnify the defendants will vest if he succeeds in the underlying tort trial. That interest will surely be impaired if TIG prevails in the declaratory judgment action, and the defendants are thereby rendered uninsured. Palmer would then be faced with a judgment that is not recoverable from the defendants. Palmer represents that the defendants are without sufficient assets from which to satisfy any substantial judgment. TIG argues that Palmer will not be left without recourse since he is suing a number of parties, each of whom he may be able to recover from if he should prevail. At present, however, it remains uncertain which defendants in the state court action will be held liable. If the defendants named in this action are the only ones held liable, Palmer may be faced with an unrecoverable judgment. Accordingly, this factor weighs in favor of the proposed intervention, although the contingent nature of the interest compromises the strength of this factor.

Inadequate Representation

Palmer represents that defendants have not and do not intend to pose an opposition to TIG's declaratory judgment

action. The defendants may plan to file bankruptcy in the event that Palmer obtains a judgment against them, and TIG is found to have no obligation to indemnify. Thus, defendants and Palmer do not have identical objectives in defending this action to invalidate the insurance coverage. Although this third factor weighs in favor of intervention, Palmer's contingent interest in the subject matter lessens the factor's import in the balance.

Balance of the Factors

Palmer's lesser interest in the action is counterbalanced by the second and third factors, impairment of that interest and lack of adequate representation. Thus, the factors do not militate for or against the proposed intervention.

The Second Circuit has instructed courts to consider the proposed intervention with an eye to posture of the litigation. Hooker Chemicals & Plastics, 749 F.2d at 983. In this instance, the Court has requested briefing on the legal basis for granting default judgment declaring that TIG has no obligation to indemnify the named defendants in the underlying state tort action. If intervention is allowed, Palmer may file an opposing brief, thereby facilitating the Court's legal analysis of TIG's obligations under the contract at issue. TIG will not be greatly prejudiced by allowing Palmer to submit further legal briefing, since the Court has already requested that TIG provide a brief on the substantive legal basis its requested declaratory relief. Accordingly, the motion for intervention will be granted.

CONCLUSION

_____Based on the foregoing, the motion for intervention [doc.
#23] is GRANTED.

SO ORDERED

WARREN W. EGINTON
SENIOR UNITED STATES DISTRICT JUDGE

Dated at Bridgeport, Connecticut this ____ day of March,
2005.