

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF TENNESSEE  
SOUTHERN DIVISION

In re:

No. 98-15087  
Chapter 11

ISLAND COVE MARINA & RESORT, LLC

Debtor

ISLAND COVE MARINA & RESORT, LLC

Plaintiff

v

Adversary Proceeding  
No. 00-1164

JOSEPH DECOSIMO AND COMPANY, LLP,  
et. al.,

Defendants

**ORDER**

Now before the court is a motion for interpretation of a chapter 11 plan and for instructions. The movants are two limited partnerships, R & F Leasing and ICM Partners. The motion involves the question of who has the right to assert accountant malpractice claims against the defendant, Joseph Decosimo and Company.

Island Cove Marina is the debtor in a chapter 11 bankruptcy case. In this adversary proceeding, Island Cove asserts accountant malpractice claims against Joseph Decosimo and Company for work it did at the marina. The movants have filed a state court lawsuit in which they assert accountant malpractice claims against Joseph Decosimo and Company based on work it did at the marina.

The movants filed claims in Island Cove's chapter 11 case. The confirmed chapter 11 plan treats the claims as equity interests instead of debts. According to the motion, this provision of the plan has raised a question: did the plan transfer any accountant malpractice claims the movants had against Joseph Decosimo and Company to Island Cove? The motion asks the court to rule on this question.

The movants are not parties to this adversary proceeding. The motion now before the court is essentially a motion by them to intervene. The first question is whether the motion is timely as required by Rule 24 for intervention to be allowed. *Fed. R. Bankr. P. 7024*; *Fed. R. Civ. P. 24*. To determine whether a motion to intervene comes too late, the court considers the (1) the point to which the lawsuit has progressed; (2) the purpose for which intervention is sought; (3) the length of time for which the movants have known or should have known that their rights might be affected by the lawsuit; (4) the prejudice to the parties as a result of the movants failure to intervene promptly after they knew or should have known of their interest in the lawsuit; and (5) any unusual circumstances that favor or disfavor allowing the intervention. *Stupak-Thrall v. Glickman*, 226 F.3d 467, 472-473 (6th Cir. 2000).

The motion was filed on Friday, October 19, 2001, only ten days before the date the trial is set to begin (Monday, October 29, 2001).

This adversary proceeding was filed in September 2000. The court confirmed the second amended Chapter 11 plan in January 2001. The court knows from previous events in the bankruptcy case that the principals in R & F Leasing and ICM Partners are Ron Hart and Frank Brown, who were principals in Island Cove at the time of its bankruptcy. They have been extensively involved in the bankruptcy case. Each is listed as a witness or potential witness in

this adversary proceeding. The movants have had a long period of time to discover and raise the question raised by the motion.

Suppose the plan had the effect of transferring the movants' claims to Island Cove, but Island Cove fails to pursue the claims in this proceeding, and as a result, it recovers less than it could have. This will reduce the amount available for distribution under the plan. This, in turn, will affect the movants only if there will be a distribution on equity interests, which hardly ever happens in a chapter 11 case. On the other hand, Island Cove should be interested in obtaining the maximum recovery so that more will be paid on the claims of creditors.

As to the movants, the court fails to see the need for an immediate decision in this adversary proceeding. The plan either did or did not transfer the movants' claims to Island Cove. If it did, then the lack of an immediate decision can affect the movants only by affecting the amount available to distribute under the plan, as explained above. If it did not, then the movants cannot be harmed by this adversary proceeding. Suppose the court enters a judgment in this proceeding without deciding anything that indicates whether the plan transferred the movants' claims to Island Cove. Win or lose, Joseph Decosimo and Company can still argue *res judicata* in the state court suit; it can argue that the movants' claims were dealt with in this proceeding because the plan transferred the claims to Island Cove. The *res judicata* argument, however, will still require a decision by this court or the state court as to whether the plan did or did not transfer the movants' claims to Island Cove.

Suppose the question comes up in this proceeding either directly or indirectly. For example, in deciding the issue of damages, the court could be required to decide whether the plan transferred the movants' claims to Island Cove. The movants, of course, do not want

to be left out of the argument on that issue. The movants can monitor this proceeding. If the issue comes up, the movants can ask the court to be allowed to argue the point. The movants may also have the right to file a motion in the bankruptcy case asking the court to interpret the plan.

At this late point, the court sees no need to allow the movants to intervene for the purpose of obtaining an answer to the question of whether the plan transferred their claims to Island Cove. The court finds the motion is untimely. Accordingly,

It is ORDERED that the Motion of R & F Leasing Company, LP, and ICM Partners, LP for Interpretation and Instructions is DENIED.

ENTER:

BY THE COURT

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R. THOMAS STINNETT  
UNITED STATES BANKRUPTCY JUDGE

[entered 10-24-01]