

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

In re

BLEVINS ELECTRIC, INC.,

Debtor.

No. 94-21188
Chapter 11

BLEVINS ELECTRIC, INC.,

Plaintiff,

v.

Adv. Pro. No. 94-2130

FIRST AMERICAN NATIONAL BANK,

Defendant.

M E M O R A N D U M

APPEARANCES:

Fred M. Leonard
27 Sixth Street
Bristol, TN 37620
Attorney for Plaintiff
Blevins Electric, Inc.

HUNTER, SMITH & DAVIS
William C. Argabrite
Mark S. Dessauer
Post Office Box 3740
Kingsport, TN 37664
Attorneys for Defendant
First American National Bank

MANIER, HEROD, HOLLABAUGH & SMITH
John M. Gillum
John H. Rowland
2200 One Nashville Place
150 Fourth Avenue North
Nashville, TN 37219
Attorneys for Intervenor
United States Fidelity & Guaranty Co.

MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

This is an action by the debtor in possession, Blevins Electric, Inc. ("Blevins"), pursuant to 11 U.S.C. §§ 547 and 550, to avoid and recover alleged preferential transfers in the amount of \$275,923.47 made to the defendant, First American National Bank ("FANB"), within one year prior to the filing of the chapter 11 petition by Blevins on August 12, 1994. This adversary proceeding is presently before the court on the motion to intervene pursuant to 11 U.S.C. § 1109(b) and Fed. R. Bankr. P. 7024 filed by United States Fidelity & Guaranty Co. ("USF&G") on December 7, 1994. While the debtor in possession does not oppose the motion, FANB objects to the intervention by USF&G. For the following reasons, the court concludes that USF&G should be allowed to intervene and participate fully in this adversary proceeding.

I.

The pertinent facts are not in dispute. Blevins is engaged in the electrical contracting business. Prior to the bankruptcy filing, Blevins entered into several substantial construction contracts with various owners and contractors, and in connection therewith, Blevins and USF&G, as principal and surety, executed performance and payment bonds. See proof of claim of USF&G filed December 7, 1994. By virtue of a master surety agreement between Blevins and USF&G, and as a result of the alleged nonperformance by Blevins of certain contracts, USF&G has asserted a claim against

the estate in the amount of \$1.8 million. *Id.* In comparison to the amount of the other unsecured claims scheduled by Blevins, USF&G is by far the largest unsecured creditor, its claim representing approximately seventy percent of the total unsecured claims.

FANB is a partially secured creditor of Blevins. Prior to the bankruptcy filing, FANB was the primary banking lender to Blevins. Blevins is indebted to FANB under a (1) revolving line of credit in the original principal amount of \$500,000, having a principal balance of \$62,410.90; (2) term loan in the original principal amount of \$188,000, having a principal balance of \$152,089.59; and (3) irrevocable standby letter of credit in the amount of \$30,000. See proof of claim of FANB filed October 26, 1994. FANB claims that this indebtedness is secured by all of the debtor's equipment, inventory, machinery, furniture, fixtures, general intangibles and certain motor vehicles. *Id.*

Blevins alleges in the complaint that, within ninety days prior to the bankruptcy filing, the debtor transferred to FANB property with a value of \$106,803.07 in payment on the various indebtedness. In addition, Blevins alleges that property with a value of \$169,120.40 was transferred by the debtor to FANB in payment on the various indebtedness within one year prior to the bankruptcy filing, but outside the initial ninety-day reachback period. Blevins asserts that payment of the indebtedness which it

owed to FANB was guaranteed by the officers of the debtor, their wives, and the officers' mother and father (collectively, the "insiders"), and that upon FANB receiving these transfers outside the ninety-day reachback period, the insiders' contingent liability for the debt was discharged.¹ Accordingly, Blevins seeks to avoid all of these alleged preferential transfers and recover a judgment in the amount of \$275,923.47 from FANB pursuant to 11 U.S.C. §§ 547 and 550.

FANB has filed an answer to the complaint denying that any of the transfers are avoidable preferences. The answer also asserts nine affirmative defenses, including the lack of insolvency of the debtor at the time of the transfers; that certain transfers were not property of the debtor; that FANB did not receive more from the transfers than it would have otherwise received in a chapter 7 liquidation of the debtor; that certain of the transfers were the result of a contemporaneous exchange for new value given; that

¹The liability of a noninsider to disgorge transfers received from a debtor within one-year from the bankruptcy filing based on the theory that the transfers "benefited" an insider who had guaranteed repayment of the indebtedness owed by the debtor was first recognized by a circuit court of appeals in *Levit v. Ingersoll Rand Financial Corp. (In re Deprizio Const. Co.)*, 874 F.2d 1186 (7th Cir. 1989), and such liability is often referred to by the *Deprizio* name. The Sixth Circuit Court of Appeals adopted *Deprizio* in *Ray v. City Bank and Trust Co. (In re C-L Cartage Co.)*, 899 F.2d 1490 (6th Cir. 1990). The Bankruptcy Reform Act of 1994 amended 11 U.S.C. § 550 to overrule *Deprizio* and its progeny, including *C.L. Cartage Co.* This particular amendment, however, is applicable only to bankruptcy cases filed after the date of enactment, October 22, 1994. See Pub. L. No. 103-394, §§ 202 and 702(b).

certain of the transfers were made in the ordinary course of business of the debtor and FANB and made according to ordinary business terms; and that the amendment to § 550 by the Bankruptcy Reform Act of 1994 precludes the avoidability and recovery of those transfers from FANB, a noninsider, which were made outside of the ninety-day period prior to the bankruptcy filing.

After the filing of the present action by Blevins, but before FANB answered the complaint, USF&G filed its motion to intervene. As grounds, USF&G asserts that because it is by far the largest unsecured creditor, it has an extremely large stake in the outcome of this adversary proceeding. Furthermore, USF&G contends that the debtor has insufficient resources to pursue this highly contested matter, and that the debtor's pursuit of the matter may be less than adequate due to the inherent tension between the debtor's role as a quasi-trustee seeking preference recovery on behalf of the unsecured creditors and its role on behalf of all of the creditors, including FANB, to obtain plan confirmation. USF&G suggests that Blevins' role as a plaintiff in this action may be compromised by the reorganization process wherein the debtor will be required to negotiate with FANB, its largest secured creditor, to obtain FANB's cooperation in the confirmation of a plan. USF&G maintains that its intervention is necessary to counterbalance this conflict.

USF&G also argues that intervention is required to investigate the debtor's transactions with its insiders as alleged in the

complaint. USF&G asserts that Blevins will be reluctant to pursue recovery from these insiders, noting that although Blevins claims that these insiders benefited from the transfers to FANB, Blevins has not included them as defendants in this lawsuit.

II.

USF&G seeks to intervene through three alternative avenues, all arising out of Fed. R. Civ. P. 24² made applicable to adversary

²Fed. R. Civ. P. 24 provides as follows:

Rule 24. Intervention.

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (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.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

....

proceedings by Fed. R. Bankr. P. 7024. First, USF&G takes the position that it has an unconditional right to intervene pursuant to Fed. R. Civ. P. 24(a)(1) and 11 U.S.C. § 1109(b). Fed. R. Civ. P. 24(a)(1) provides for intervention as of right in an action "when a statute of the United States confers an unconditional right to intervene."

USF&G asserts that an unconditional right to intervene in this adversary is conferred by § 1109(b) of the Bankruptcy Code. Section 1109(b) states that:

A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.

USF&G's argument is supported by rulings by the Third Circuit Court of Appeals in *Phar-Mor, Inc. v. Coopers & Lybrand*, 22 F.3d 1228 (3rd Cir. 1994), *reh'g denied*, (1994), and *Official Unsecured Creditors' Committee v. Michaels (In re Marin Motor Oil, Inc.)*, 689 F.2d 445 (3rd Cir. 1982), *cert. denied*, *Michaels v. Official Unsecured Creditors' Committee*, 459 U.S. 1206, 103 S. Ct. 1196 (1983), and *cert. denied*, *Marin Motor Oil, Inc. v. Official Unsecured Creditors' Committee*, 459 U.S. 1207, 103 S. Ct. 1196 (1983), that have construed the term "case" in § 1109 broadly enough to include adversary proceedings which are related to or arise out of a case under Title 11, such as the preference proceeding *sub judice*; see *Phar-Mor*, 22 F.3d at 1228; *Marin*, 689

F.2d at 450; and by several lower courts outside the Third Circuit.³

USF&G candidly admits, however, that not all courts considering this issue are in agreement with the Third Circuit. Many, including the Fifth Circuit Court of Appeals, have declined to construe the term "case" to mean anything other than the bankruptcy case itself. See *Fuel Oil Supply and Terminaling v. Gulf Oil Corp.*, 762 F.2d 1283, 1287 (5th Cir. 1985); *Megan-Racine Associates, Inc. v. Niagara Mohawk Power Corp. (In re Megan-Racine Associates, Inc.)*, 176 B.R. 687, 693 (Bankr. N.D.N.Y. 1994); *995 Fifth Avenue Associates, L.P. v. New York State Dept. Of Taxation and Finance (In re 995 Fifth Avenue Associates, Inc.)*, 157 B.R. 942, 950 (S.D.N.Y. 1993); *Pioneer Investment Services Co. v. Valley Fidelity Bank & Trust Co. (In re Pioneer Investment Services Co.)*, 106 B.R. 507, 508 (Bankr. E.D. Tenn. 1989); *CVC, Inc. v. Conway, Patton & Bouhall, HR10 Bank One, Akron, N.A., Trustee (In re CVC, Inc.)*, 106 B.R. 478, 479 (Bankr. N.D. Ohio 1989); *Rollert v. Charter Crude Oil Co. (In re The Charter Company)*, 50 B.R. 57, 61 (Bankr. W.D. Tex. 1985); *Kenan v. Federal Deposit Ins. Corp. (In re*

³See *Gleason v. Commonwealth Continental Health Care (In re Golden Glades Regional Medical Center, Ltd.)*, 147 B.R. 813, 815 (Bankr. S.D. Fla. 1992); *Sarah R. Newman Foundation, Inc. v. Garrity (In re Neuman)*, 124 B.R. 155, 159 (S.D.N.Y. 1991); *Hadar Leasing International Co., Inc. v. D.H. Overmyer Telecasting Co., Inc. (In re D.H. Overmyer Telecasting Co., Inc.)*, 53 B.R. 963, 975 (N.D. Ohio 1984), *aff'd without op.*, 787 F.2d 589 (6th Cir. 1986), and *aff'd without op.*, 787 F.2d 590 (6th Cir. 1986).

George Rodman, Inc.), 33 B.R. 348, 350 (Bankr. W.D. Okla. 1983). The courts strictly construing this term have reasoned, based on their review of legislative history and numerous federal statutes, that Congress understood the distinction between "cases" under Title 11 and adversary proceedings and that when Congress purposely used "case" in § 1109(b) of the Code it did not mean adversary proceedings. See, e.g., *Fuel Oil Supply*, 762 F.2d at 1286; *Megan-Racine Associates*, 176 B.R. at 693.

This court agrees with the rationale of these cases that Congress was aware of the distinction between proceedings and cases when § 1109 was drafted. Accordingly, this court similarly declines to construe and extend the term "case" in § 1109 to encompass adversary proceedings, and concludes that USF&G has no unconditional right to intervene in this action pursuant to Fed. R. Civ. P. 24(a)(1).

As a second basis of its motion, USF&G asserts that it is entitled to intervene as of right under Fed. R. Civ. P. 24(a)(2), which permits intervention in an action

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 Sixth Circuit Court of Appeals has determined that the following four criteria must be met for intervention as a matter of

right under Rule 24(a)(2): (1) the motion to intervene is timely; (2) the proposed intervenor has a significant legal interest in the subject matter of the pending litigation; (3) the disposition of the action may impair or impede the proposed intervenor's ability to protect its legal interest; and (4) the parties to the litigation cannot adequately protect the proposed intervenor's interest. See *Jansen v. City of Cincinnati*, 904 F.2d 336, 340 (6th Cir. 1990); *Triax Co. v. TRW, Inc.*, 724 F.2d 1224, 1227 (6th Cir. 1986).

FANB concedes that USF&G's motion is timely, having been filed less than a month after this action was initiated, but denies that USF&G has proven the remaining three elements necessary for intervention under Rule 24(a)(2). Addressing the last of these criteria first, the court notes that the Sixth Circuit Court of Appeals places upon the party seeking intervention the burden of showing that representation by existing parties is inadequate. *Triax Co.*, 724 F.2d at 1227. Although this burden has been characterized as minimal, *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n. 10, 92 S. Ct. 630, 636 n. 10, 30 L. Ed. 2d 686 (1972), this does not mean that the burden is nonexistent. *Munford, Inc. v. TOC Retail, Inc. (Matter of Munford, Inc.)*, 115 B.R. 388, 390 (Bankr. N.D. Ga. 1990). In fact, when the proposed intervenor and a party to the suit have the same ultimate objection, there is a presumption of adequacy of representation

that can only be overcome by demonstrating adversity of interests, collusion or nonfeasance. *Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987); *Matter of Munford*, 115 B.R. at 390.

In the present case, USF&G and Blevins seek the same outcome in this proceeding, i.e., full recovery of the alleged preferences from FANB. Thus, under *Bradley*, there is a presumption that USF&G's interests are adequately protected by Blevins. USF&G has presented no evidence to overcome this presumption of adequacy of representation. Instead, USF&G argues that its interests and those of the debtor are significantly adverse. USF&G asserts that the debtor's role as a fiduciary to all creditors, including FANB, and its need to satisfy FANB in any plan of reorganization proposed by Blevins presents an inherent conflict with Blevins' recovery efforts against FANB. USF&G suggests that because of this dual role Blevins will be less than aggressive in its pursuit of this action against FANB and maintains that it is necessary for it to intervene to ensure proper prosecution of this proceeding.

Although USF&G does express legitimate concerns, this court is not convinced that the so-called "dual role" of a debtor in possession establishes that Blevins' interests are sufficiently adverse to those of USF&G to conclude that USF&G's interests are not adequately represented in this proceeding. To rule as urged by USF&G would entitle creditor intervention as of right in every preconfirmation avoidance action by a debtor in possession or a

chapter 11 trustee. This court refuses to construe Rule 24(a)(2) this broadly, and accordingly will deny USF&G intervention under Rule 24(a)(2).

As a last alternative, USF&G seeks permission to intervene under Fed. R. Civ. P. 24(b)(2). Rule 24(b)(2) allows intervention "when an applicant's claim or defense and the main action have a question of law or fact in common." This subsection is entirely discretionary with the principal consideration being "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Fed. R. Civ. P. 24(b). See, e.g., *George Rodman*, 33 B.R. at 350 (quoting CHARLES A. WRIGHT and ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1913).

In the present case, the court finds that the claims of USF&G and Blevins in this proceeding are the same for the purposes of satisfying Rule 24(b)(2), as shown by the fact that USF&G has adopted the complaint filed by Blevins in this action as its claim for which it is seeking intervention. See *Exhibit A* to motion of USF&G to intervene. And as stated above, FANB concedes that USF&G's motion is timely and there is no indication that by allowing intervention, the proceeding will be delayed in any manner or that the original parties will be prejudiced. Accordingly, the court finds that intervention by USF&G pursuant to Rule 24(b)(2) is appropriate.

The court is of the opinion that such intervention is

justified because the unsecured creditors' committee which was appointed has been inactive, and USF&G has raised valid concerns regarding the uneasiness which plaintiff's counsel most likely will experience in pursuing discovery from the insiders and investigating their financial transactions with the debtor and FANB. The intervention by USF&G, being the largest unsecured creditor, should ensure that such an investigation is thorough and fair. And although it is by no means certain that FANB would attempt to use its position as the largest secured creditor as leverage against the reorganizing debtor to compromise the litigation, the presence of USF&G will undoubtedly remove any such temptation. Further, this litigation has all the appearances of becoming an extremely time-consuming and otherwise expensive proposition to both sides, considering that expert testimony from accountants and persons familiar with the debtor's industry will no doubt be required, discovery may be taken out-of-state since some of the insiders no longer reside in Tennessee, numerous defenses have been asserted by FANB, and the amount in controversy is substantial. USF&G will bring additional resources to the estate which should ensure that ample means exist to fairly and promptly conduct the litigation through discovery and trial. Finally, the court finds it significant that Blevins has no opposition to the

intervention by USF&G.⁴

III.

In conclusion, the court, in its discretion, will allow USF&G to intervene and fully participate in this adversary proceeding pursuant to Fed. R. Civ. P. 24(b)(2), as incorporated by Fed. R. Bankr. P. 24. An order will be entered in accordance with this

⁴The decision to allow USF&G to intervene by permission, notwithstanding its failure to demonstrate that it is entitled to intervene as a matter of right under Fed. R. Civ. P. 24(a)(2) is not without authority as other courts have similarly allowed such intervention by permission. See *D'Lites of America, Inc. v. William Blair & Co. (In re D'Lites of America, Inc.)*, 100 B.R. 612, 614 (Bankr. N.D. Ga. 1989) (unsecured creditors' committee allowed permission to intervene where question was raised as to aggressiveness by which debtor-in-possession's attorney would prosecute action against insiders); *Longfellow Industries, Inc. v. Blumberg (In re Longfellow Indus., Inc.)*, 76 B.R. 338, 341 (Bankr. S.D.N.Y. 1987) (permissive intervention allowed where debtor-in-possession requested assistance of committee of unsecured creditors to prosecute action); *Charter Co.*, 50 B.R. at 63 (one of six unsecured creditors' committee allowed to intervene by permission in action brought by the debtor to defeat Texas statute which allowed committee's minority members to claim secured status); *George Rodman*, 33 B.R. at 350 (unsecured creditors' committee allowed to permissively intervene in trustee's action since trustee requested assistance of committee); *United Capital Corp. v. Sapolin Paints, Inc. (In re Sapolin Paints, Inc.)*, 6 B.R. 582, 584 (Bankr. E.D.N.Y. 1980) (permissive intervention granted to largest creditor in action against the debtors brought by purchasers of debtors' assets since money judgment against debtors would adversely impact creditor's dividend from estate).

memorandum opinion.

ENTER: March 22, 1995

BY THE COURT


MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE