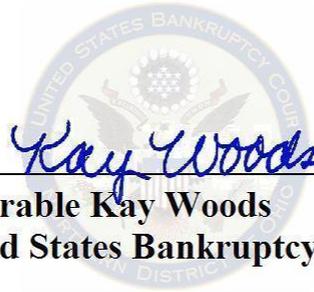


IT IS SO ORDERED.



Dated: July 16, 2007
03:43:19 PM

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

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|---------------------------|---|--------------------------|
| IN RE: | * | |
| | * | |
| Southside Community | * | |
| Development Corporation, | * | CASE NUMBER 06-40587 |
| | * | |
| Debtor. | * | |
| | * | |
| ***** | | |
| Andrew W. Suhar, Trustee, | * | |
| | * | ADVERSARY NUMBER 07-4082 |
| Plaintiff, | * | |
| | * | |
| vs. | * | |
| | * | |
| Mahoning County, Ohio, | * | |
| | * | HONORABLE KAY WOODS |
| Defendant. | * | |
| | * | |

M E M O R A N D U M O P I N I O N

Before the Court is Motion of Mahoning County Auditor, Michael V. Sciortino to Intervene (Doc. # 7) and Amended Motion of Mahoning County Auditor Michael V. Sciortino to Intervene (Doc. # 9) (collectively, "Motion to Intervene") filed by the Mahoning County Auditor, Michael V. Sciortino ("Auditor") on July 12, 2007 and July

15, 2007, respectively.¹ Plaintiff Andrew W. Suhar, Chapter 7 Trustee ("Trustee") for Southside Community Development Corporation ("Debtor"), commenced this adversary proceeding on June 29, 2007 by filing Complaint by Trustee for Turnover of Property ("Complaint") (Doc. # 1), which sought an order from this Court compelling Defendant Mahoning County, Ohio ("County") to pay Trustee the sum of \$75,000.00 ("Purchase Price"), plus pre and post-judgment interest, for real property known as Oakhill Renaissance Place, 345 Oakhill Ave., Youngstown, Ohio 44502 ("Property").²

In the Motion to Intervene, Auditor simultaneously seeks to intervene in this adversary proceeding as of right and permissively, pursuant to FED. R. CIV. P. 24(a) and (b), as incorporated by FED. R. BANKR. P. 7024. (Motion to Intervene at 3.) Rule 24 provides, in pertinent part, as follows:

(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.

¹The Amended Motion to Intervene appears to be identical to the original Motion to Intervene except that the Auditor complied with Fed. R. Civ P. 24(c) by filing his proposed Answer to Complaint with the Amended Motion to Intervene, which was not filed with the original Motion to Intervene.

²The docket reflects that the Motion to Intervene was filed at 10:26 p.m. on July 12, 2007. The Certificate of Service provides that the Motion to Intervene was served by "regular United States mail, postage prepaid" on Melissa Macejko, as counsel for Trustee, and Paul J. Gains, Esq. and Linette M. Stratford, Esq., as counsel for the County. E-mail notification of the Motion to Intervene was provided only to the Office of the United States Trustee and Auditor's counsel. This Court is informed that neither Trustee nor the County had knowledge of nor had received the Motion to Intervene when they requested the Court to "so order" a Stipulation and Agreed Judgment Entry on July 13, 2007.

(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. . . .

FED. R. CIV. P. 24 (West 2007).

Auditor acknowledges that no applicable statute confers upon him the right to intervene - unconditionally or conditionally. (Motion to Intervene at 4.) Auditor claims, however, that he meets the four-part standard set forth in *Stupak-Thrall v. Glickman*, 226 F.3d 467 (6th Cir. 2000) and, accordingly, should be granted the right to intervene. The Sixth Circuit held:

[W]e have interpreted Rule 24(a) as establishing four elements, each of which must be satisfied before intervention as of right will be granted: '(1) timeliness of the application to intervene, (2) the applicant's substantial legal interest in the case, (3) impairment of the applicant's ability to protect that interest in the absence of intervention, and (4) inadequate representation of that interest by parties already before the court.' *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997); see *Grutter v. Bollinger*, 188 F.3d 394, 397-98 (6th Cir. 1999) (same). 'Failure to meet [any] one of the [four] criteria will require that the motion to intervene be denied.' *Grubbs v. Norris*, 870 F.2d 343, 345 (6th Cir. 1989).

Id. at 471.

As set forth below, having examined each of these elements, the Court determines that Auditor has not established the right to intervene.

The first element is timeliness of the Motion to Intervene. Auditor argues that the Motion to Intervene is timely because the "suit has scarcely progressed at all." (Motion to Intervene at 4.) As Auditor points out, (i) the Complaint was filed on June 29,

2007, (ii) the time for the County to file its Answer has not yet expired, and (iii) the lawsuit is in the early stages. Auditor argues that adding an additional party to this action at this early stage will not delay the proceedings or make the action more complex. Although the Court agrees that this adversary proceeding is in its early stages and for that reason the Motion to Intervene appears timely, that is not the end of the analysis concerning timeliness. As Auditor acknowledges, timeliness depends upon the "context of all relevant circumstances." (*Id.* quoting *Jansen v. City of Cincinnati*, 904 F.2d 336, 340 (6th Cir. 1990)). As discussed *infra*, because Auditor does not have a substantial legal interest in the subject matter of this adversary proceeding, his intervention in this action would likely prejudice the other parties and result in considerable delay and additional cost to the parties.

The second element is that the applicant has a "substantial legal interest in the case." Auditor's Motion to Intervene does not provide a basis for the Court to find that Auditor has any legal interest in this adversary proceeding. Auditor argues, "The applicant's legal interest relating to the transaction which is the subject of the action is his statutory obligation to demand evidentiary materials, as well as his right to litigate the *res judicata* claim in state court." (Motion to Intervene at 9.) This argument is based on O.R.C. § 319.16, which deals with "Issuance of warrants; challenges to expenditures." Citing this Code section, Auditor claims, "If the Auditor in good faith believes that there is not proper evidentiary matter, Ohio law specifically grants him the authority, and indeed the obligation, to request proper

evidentiary matter from the County Commissioners." (*Id.* at 7.) "Evidentiary matter" is defined in O.R.C. § 319.16 to include "original invoices, receipts, bills and checks, and legible copies of contracts."³ Ohio Revised Code § 319.16 (Pages 2003).

Auditor fails to allege or explain how his "demand for evidentiary materials" (Motion to Intervene at 9) provides a substantial legal interest in the instant adversary proceeding or how his intervention in this case will either (i) protect the taxpayers' interest or (ii) further his interest in obtaining evidentiary matter. Auditor argues, "To the extent that the law authorizes him to do so, he is duty-bound to carry out the statutory functions and prerogative of the county auditor, including the statutory right - indeed, obligation - to refuse to issue a warrant until proper evidentiary material has been presented to him." (*Id.* at 10.) Auditor continues by representing that "only the County Auditor can statutorily make the demand for proper evidentiary materials[.]" (*Id.* at 11.) For purposes of this Motion to Intervene, this Court takes Auditor's arguments concerning his rights and obligations at face value. Nevertheless, Auditor has failed to set forth any substantial legal interest in this proceeding. Indeed, this Court cannot provide any relief to Auditor in this adversary proceeding to further his quest for evidentiary matter.

Auditor postulates that "[t]he gravamen of the Trustee's complaint is the claim that, on July 7, 2006, he received an offer

³Auditor refers to "evidentiary materials" throughout the Motion to Intervene, but § 319.16 deals only with "evidentiary matter." Since Auditor provides no definition or other explanation for the phrase "evidentiary materials," this Court assumes that Auditor's reference to "evidentiary materials" has the same meaning as "evidentiary matter" in the Code.

'from the defendant' to purchase the property for the sum of \$75,000.00." (*Id.* at 6.) The gravamen of the Complaint, however, is somewhat different from Auditor's limited explanation and that distinction is important. As both Trustee and Auditor acknowledge, Trustee has already transferred the Property to County. (Complaint, ¶ 10; Motion to Intervene at 11; proposed Answer of Auditor, ¶ 10.) Despite Trustee's transfer of the Property to County, County has not paid Trustee the Purchase Price. Trustee is seeking an order from this Court (i) rendering judgment in favor of the bankruptcy estate in the amount of the Purchase Price for the Property (plus interest and costs), and (ii) compelling County to turnover to Trustee the judgment amount. This Court, accordingly, is required to determine if the Purchase Price constitutes property of the bankruptcy estate and the remedy to be applied if it does.

More than a year ago, on July 10, 2006, Trustee filed Trustee's Motion for An Order, Pursuant to Sections 105, 363 and 365 of the Bankruptcy Code: (A) Approving the Sale of Property Other Than in the Ordinary Course of Business; and (B) Rejecting All Executory Contracts and Unexpired Lease ("Motion to Sell") (Doc. # 44 in Main Case). On July 27, 2006, this Court entered an order ("Order Approving Sale") (Doc. # 65 in Main Case), which, among other things, approved the sale of the Property to County and authorized Trustee to sell the Property to County. In the Order Approving Sale, this Court found that: (i) County made a good faith offer to purchase the property for the Purchase Price; (ii) County's offer to purchase the Property was the highest and best offer to purchase the Property; (iii) County was a good faith purchaser of the Property; and (iv) Trustee advanced sound and

sufficient reasons to approve the sale of the Property to County. Trustee thereafter transferred the Property to County by fiduciary deed, which "constitute[d] transfer of ownership in the Property . . . , for any and all purposes, including the risk of loss[.]" (Order Approving Sale at ¶ 5.) Based upon information and belief, County is utilizing the Property. Transfer of ownership has occurred, as provided in the Order Approving Sale. All aspects of the transaction have been completed except for County's payment of the Purchase Price.

Even if this Court were to permit Auditor to intervene in this adversary proceeding, he would not be able to "protect the interests of the taxpayers" (*Id.* at 13) as Auditor argues he needs to do through this lawsuit. Auditor cannot challenge the authority of Trustee to transfer the Property nor can he "undo" the transaction because ownership of the Property was transferred nearly a year ago, although this appears to be Auditor's unarticulated objective in seeking intervention in this lawsuit. Based upon the subject matter of the instant adversary proceeding - which is a request for turnover to Trustee of property that belongs to the bankruptcy estate - and this Court's jurisdiction over the parties, Auditor has no ability to obtain "evidentiary matter," as set forth in O.R.C. § 319.16, through this action.

Auditor has no legal interest - substantial or otherwise - that is protectible in this adversary proceeding. Auditor's rights with respect to this matter have already been adjudicated. On July 26, 2006, Auditor, in conjunction with John A. McNally, IV, one of the County Commissioners, and John Reardon, the County Treasurer (collectively, "Objectors"), filed an Objection to Trustee's Motion

to Sell (Doc. # 62 in Main Case). The County, through the Prosecutor's office, filed a motion to strike the objection and brief in support of Motion to Sell (Doc. # 63 in Main Case). On July 27, 2006, this Court entered an Order granting the Motion to Strike on the basis that the Objectors lacked standing, in both their official capacities and as taxpayers, to file the Objection. ("Order Granting Motion to Strike") (Doc. # 66 in Main Case). On August 4, 2006, Auditor filed a Notice of Appeal (Doc. # 72) of this Court's Order Approving Sale and Order Granting Motion to Strike; however, neither Auditor nor any other party sought a stay of this Court's Orders. The United States District Court (J. Boyko) dismissed the appeal pursuant to Judgment entered on December 15, 2006, based on FED. R. BANKR. P. 8001(c) (voluntary dismissal).

One of the bases for the Objectors' objection was that Trustee failed to provide at least 20 days' notice of the proposed sale to the Attorney General of Ohio, Charitable Law Section, as required by O.R.C. § 1702.39. As a consequence, Objectors argued that the Motion to Sell could not be approved because it failed to comply with 11 U.S.C. § 363(d)(1). The Attorney General had been provided timely notice of the proposed sale (although not to the Charitable Law Section). Indeed, Lucas Ward, an Assistant Attorney General, appeared at the July 26, 2006 hearing on the Motion to Sell on behalf of the Ohio Department of Development, in support of the Motion to Sell. Subsequently, the Attorney General filed a notice of appearance and request for notices on behalf of the State of Ohio. On August 8, 2006, the Attorney General filed Motion for Order Compelling Parties to Comply with Ohio Revised Code § 1702.39

and Ohio Attorney General's Investigation Regarding the Sale of Property ("Motion to Compel") (Doc. # 78 in Main Case). On September 19, 2006, the Attorney General filed Motion of Jim Petro, Attorney General of Ohio, to Vacate the July 27, 2006 Order Approving Sale of Property and Rejecting Executory Contracts and Unexpired Leases ("Motion to Vacate") (Doc. # 97 in Main Case). However, three days later, the Attorney General withdrew the Motion to Compel (Doc. # 100) and then, on October 20, 2006, the Attorney General withdrew the Motion to Vacate (Doc. # 115 in Main Case).

Thus, this Court's (i) Order Approving Sale and (ii) Order Granting Motion to Strike (Doc. ## 65 and 66) are final and no longer subject to appeal. Auditor cannot now attempt to accomplish through intervention in this adversary proceeding what was required to be done through an appeal.

Elements three and four of the test under Rule 24(a) flow from the requirement that applicant has a substantial legal interest in the case. These elements deal with impairment of applicant's ability to protect the interest in the absence of intervention (third element) and inadequate representation of that interest by the parties already before the court (fourth element). With respect to the third element, Auditor's ability to protect any legal right cannot be impaired in the absence of intervention because, as this Court has already discussed, the Auditor has no legal right that can be protected through this adversary proceeding.

The fourth element deals with inadequate representation. Trustee and County submitted Stipulation and Agreed Judgment Entry to the Court for approval mid-afternoon on Friday, July 13, 2007.

This Stipulation will resolve the instant adversary proceeding by providing for judgment in favor of Trustee and against County in the amount of \$75,000.00, plus costs of the action and interest from the date of the Stipulation, as well as closure of the adversary proceeding. This is the type of action that Auditor anticipated. (See Motion to Intervene at 12-13.) Auditor complains that because Trustee and County can resolve the subject matter of the adversary proceeding in this manner, he should be allowed to intervene because his "interest" is not adequately represented. As set forth above, however, Auditor does not have a legal interest that can be represented in this action. As a consequence, the issue of adequate or inadequate representation of the non-existent interest is irrelevant and meaningless.

Because Auditor has wholly failed to establish that he has a substantial legal interest in this case, of necessity, he fails to meet the third and fourth elements. Auditor must satisfy each of the four elements before intervention as of right will be granted. *Stupak-Thrall v. Glickman*, 226 F.3d at 471. Having failed to establish at least three of these four elements,⁴ Auditor is not entitled to intervene as of right.

Auditor also urges this Court to grant him permissive intervention in this adversary proceeding. Rule 24(b), which sets forth the basis for permissive intervention, requires that the applicant have at least one common question of law or fact with the underlying proceeding. Auditor cites five factors to consider regarding permissive intervention, as set forth in *Stotts v. Memphis Fire Dept*, 679 F.2d 579, 582 (6th Cir. 1982). These

⁴Auditor may be able to establish that the motion is timely.

factors are: 1) the purpose for which intervention is sought; 2) the length of time preceding the application for intervention during which the proposed intervener knew or reasonably should have known of his interest in the case; 3) the prejudice to the original parties due to the proposed intervener's failure after he knew of or reasonably should have known of his interest in the case to apply promptly for intervention; 4) the existence of unusual circumstances militating against or in favor of intervention; and 5) the point to which the suit has progressed. Auditor makes no specific arguments concerning permissive intervention, but rather argues that "for the reasons discussed" regarding intervention as of right, he should be permitted to intervene (Motion to Intervene at 14-15.)

The Court has addressed each of Auditor's arguments for intervention as of right and will not reiterate the analysis for each argument in the context of permissive intervention. It is worth noting, however, that with respect to the first factor, Auditor's purpose in seeking intervention is far from clear. Although he alleges that he has a statutory right and obligation to protect the taxpayers of Mahoning County, he has wholly failed to indicate how intervention in this suit permits him to protect that interest. With respect to the third factor, the timing of Auditor's request to intervene is not itself prejudicial to the parties. However, as set forth above, Auditor cannot accomplish his stated goal of obtaining "evidentiary matter" through this adversary proceeding. As a consequence, intervention by Auditor can only delay the outcome of this lawsuit and increase the cost to each party without providing anyone - including Auditor and the

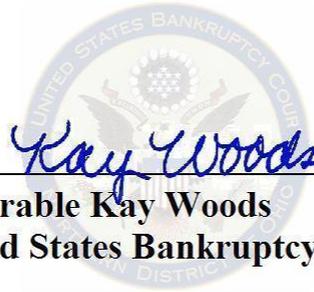
taxpayers - any benefit. Such delay and increased litigation costs are prejudicial to the parties. The fourth factor deals with unusual circumstances militating in favor or against intervention. Here, the circumstances are, indeed, unusual and they militate against intervention since no purpose would be served by permitting Auditor to intervene.

Auditor has failed to set forth any basis for permissive intervention in this adversary proceeding.

An appropriate order will follow.

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IT IS SO ORDERED.



Dated: July 16, 2007
03:43:19 PM

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

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| IN RE: | * | |
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| Southside Community | * | |
| Development Corporation, | * | CASE NUMBER 06-40587 |
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| Andrew W. Suhar, Trustee, | * | |
| | * | ADVERSARY NUMBER 07-4082 |
| Plaintiff, | * | |
| | * | |
| vs. | * | |
| | * | |
| Mahoning County, Ohio, | * | |
| | * | HONORABLE KAY WOODS |
| Defendant. | * | |
| | * | |

O R D E R

For the reasons set forth in this Court's Memorandum Opinion, the Motion of Mahoning County Auditor, Michael V. Sciortino to Intervene (Doc. # 7) and Amended Motion of Mahoning County Auditor Michael V. Sciortino to Intervene (Doc. # 9) are denied.

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