

United States District Court
Eastern District of Michigan
Southern Division

**American Atheists, Inc. and
Steve Walker,**

Plaintiffs,

v.

No: 06-11696
Hon. Avern Cohn
Magistrate Judge Mona K. Majzoub

City of Detroit, et al.

Defendants.

MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

St. John's Episcopal Church ("Church") is located in downtown Detroit and seeks to intervene as a Defendant in this case. It has a contract with the City of Detroit Downtown Development Agency ("DDA") for reimbursement of expenses to improve its facade.¹ The contract is part of the DDA's Lower Woodward Façade Improvement Program. Participation in this program by religious organizations like the Church has been challenged by the Plaintiffs, who have asked this Court to enter an injunction prohibiting such participation. *See* the Prayer for Relief in the Complaint.

The Church spent approximately \$180,000 to improve the façade of its building in reliance on its contract with the DDA. The building is designated as a historical site by the State of Michigan, and a sign indicating this designation is displayed in the front of

¹ Unless otherwise indicated, all of the facts contained herein are taken from the Declaration of Fr. Steven J. Kelly, Rector of the Church. The Declaration is attached to Intervenor's Motion to Intervene.

the Church. To date, the DDA has refused to reimburse the Church for 50% of these expenses as required by the contract. The sole reason for the DDA's refusal to comply with the contract is that this lawsuit is pending. Every day that the DDA does not comply with the contract because of this lawsuit results in the Church incurring the added cost of paying the interest on the money borrowed to finance the improvements to its façade.

The Church has a substantial legal interest in this case and meets all of the requirements for intervention as of right, and permissively. Its motion to intervene on behalf of the Defendants should therefore be granted.

I. Intervention as of Right

In this Circuit, a district court considers four factors when deciding whether to allow a movant to intervene as a matter of right:

(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) (citing *Cuyahoga Valley Ry. Co. v. Tracy*, 6 F.3d 389, 395 (6th Cir. 1993)). See also *Americans United for Separation of Church and State v. City of Grand Rapids*, 922 F.2d 303, 305 (6th Cir. 1990). All of these factors weigh in favor of granting the Church's motion to intervene as a matter of right.

A. Timeliness

The complaint in this case was filed April 7, 2006—just eight months ago. No substantive pleadings other than the answer and affirmative defenses (filed June 26, 2006) have been submitted to date. “The mere passage of time, in itself, does not render

an application untimely; rather, the important question concerns actual proceedings of substance on the merits.” 6 Moore’s Federal Practice, § 24.21 (2002). For instance, in *Mountain Top Condominium Ass’n v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 369-70 (3d Cir. 1995), the court found intervention was proper because, even though some discovery had been exchanged and settlement negotiations had taken place, no “proceedings of substance on the merits” had occurred. Although the case had been pending four years before the motion to intervene was filed, there had been “no depositions taken, dispositive motions filed, or decrees entered.” *Id.*

Where, as here, a motion to intervene is filed early in an action, the motion is timely. *See Gratz v Bollinger*, 183 F.R.D. 209 (E.D. Mich. 1998), *rev’d on other grounds*, 188 F.3d 394 (6th Cir. 1999) (motion filed four months after complaint and case in its earliest stages). *See also Jansen v. City of Cincinnati*, 904 F.2d 336, 339-40 (6th Cir. 1990) (motion filed four months after complaint and before decision on pending motion for summary judgment). Only where the intervention motion is made much later do courts consider the motion to be untimely. *See, e.g., United States v. Tennessee*, 260 F.3d 587, 593 (6th Cir. 2001) (motion to intervene untimely when filed so late that all substantive issues had been decided by the district court and all that was left was final approval of Community Development Plans entered into by the state as a consequence of the litigation).

The Church does not anticipate the need for this Court to extend any of the deadlines in the current Scheduling Order. The motion to intervene is therefore timely because no substantive issues have been taken up by the Court and allowing intervention will not delay the Court in doing so.

B. Substantial Legal Interest

The Sixth Circuit has adopted “a rather expansive notion of the interest sufficient to invoke intervention of right.” *Michigan State AFL-CIO*, 103 F.3d at 1245 (citing *Purnell v. City of Akron*, 925 F.2d 941, 948 (6th Cir. 1992)). *See also Bradley v. Milliken*, 828 F. 2d 1186, 1192 (6th Cir. 1987). The term “interest” is construed “liberally” such that the intervenor need not even have the same standing necessary to initiate a lawsuit. *Id.* In *Michigan State AFL-CIO*, the court held that the proposed intervenor, the Michigan Chamber of Commerce, had a substantial legal interest in litigation challenging Michigan’s Campaign Finance Act. 103 F.3d at 1247. The court noted that the Michigan Chamber of Commerce was:

(1) a vital participant in the political process that resulted in legislative adoption of the 1994 amendments in the first place, (2) a repeat player in Campaign Finance Act litigation, (3) a significant party which is adverse to the challenging union in the political process surrounding Michigan State government’s regulation of practical campaign financing, and (4) an entity also regulated by at least three of the four statutory provisions challenged by plaintiffs.”

Id. The court noted that although the case may be a close one, close cases should be resolved in favor of intervention. *Id.*

The Church’s interest is not a close case here. The Defendants signed a contract agreeing to reimburse the Church for expenditures it made improving the exterior of its building. The Church has already spent \$180,000 in reliance on this contract—none of which has been reimbursed. If the Plaintiffs prevail, the Defendants will be forced to breach the contract and the Church’s interests will be impaired.

The Sixth Circuit determined in *Linton v. Comm. of Health and Environment, State of TN*, 973 F.2d 1311 (6th Cir. 1992), that impairment of contract is a sufficient

interest for intervention as of right. Linton sued a Tennessee government official alleging that state regulations regarding nursing homes violated federal law. *Id.* at 1314. The plaintiff's success in the lawsuit directly affected contracts that the State of Tennessee had with nursing home providers. *Id.* at 1316-17. The nursing home providers moved to intervene to protect this impairment of their contractual interest—two and one half years after the district court entered judgment in the matter. *Id.* at 1318. The Sixth Circuit reversed the District Court's denial of the motion to intervene, finding that the nursing homes had an interest in protecting their contractual rights. *Id.* at 1319.

The Church in this case also has an interest in protecting its right to reimbursement under the contract it has with the DDA. It therefore has sufficient interest to justify intervention as of right under *Linton*. *See also Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810, 820 (9th Cir. 2001) (“Contract rights are traditionally protectable interests” sufficient to justify intervention as a matter of right).

That Plaintiffs have not sought a specific injunction prohibiting the Defendants from honoring its contract with the Church does not diminish its interest. Should the Court award the relief Plaintiffs request against the two other churches specifically mentioned in the complaint, *see* Complaint at ¶ 21, it will have a *stare decisis* effect prohibiting Defendants from honoring its contract with the Church. *See Linton*, 973 F.2d at 1319 (potential *stare decisis* affect of judgment was sufficient interest to warrant intervention as of right). *See also Jansen*, 904 F.2d at 342 (“We join other circuits in holding that the possibility of adverse stare decisis effects provides intervenors with sufficient interest to join an action.”) (citations omitted).

C. Impairment

The burden of showing that the proposed intervenor's legal interests will be impaired if litigation is allowed to continue without their intervention is minimal. *Michigan State AFL-CIO*, 103 F.3d at 1247. See also *Purnell*, 925 F.2d at 948. In *Michigan State AFL-CIO*, the Sixth Circuit held that "[t]his court has already acknowledged that potential stare decisis effects can be a sufficient basis for finding of impairment of interest." 103 F.3d at 1247 (citing *Linton v. Commissioner of Health & Env't*, 973 F.2d 1311, 1319 (6th Cir. 1992)).

In *Jansen*, the Sixth Circuit noted that if the proposed intervenors were not allowed to intervene, this would "impede [their] ability to enforce the provisions of the consent decree regarding hiring decisions, use of separate eligibility lists and maintenance of the minority composition goals." Similarly, if the Church is not able to intervene in this case, it will impede its ability to enforce its contract with the DDA.

D. Inadequate Representation

To satisfy this last prong of the intervention as of right standard, a potential intervenor must show that the existing parties to the litigation will not adequately represent its interest, see *Michigan State AFL-CIO*, 103 F.3d at 1247. "This burden of proof is minimal because it is sufficient that the movants prove that representation may be inadequate." *Linton*, 973 F.2d at 1319. This burden is met if the movant proves there are "inherent inconsistencies between movants' interests and those of the State..." *Linton*, 973 F.2d at 1319-20.

The inherent inconsistencies between the Church's interests and those of the Defendants are obvious in this case. Should the Plaintiffs prevail, the DDA will not be

able to honor its contract to reimburse the Church for \$90,000 of the expenditures it made to improve its façade. That would save the Defendants \$90,000. The Defendants will actually reap a financial benefit if they lose this case. This is sufficient to satisfy the minimal burden of demonstrating inadequate representation by the Defendants in this case.

All of the factors weigh in favor of granting the Church's motion to intervene as of right under Fed. R. Civ. P. 24(a). This Court should grant the motion.

II. Permissive Intervention

Even if a party is denied the right to intervene as of right under Fed. R. Civ. P. 24(a), it can seek permissive intervention under Fed. R. Civ. P. 24(b). To qualify for permissive intervention, a potential intervenor must, as with intervention of right, file its motion to intervene in a timely manner. *Michigan State AFL-CIO*, 103 F.3d at 1248; *Bradley*, 828 F.2d at 1193. In addition, the applicant for intervention must show that its claim shares at least one question of law or fact with the issues already under litigation. *Michigan State AFL-CIO*, 103 F.3d at 1248; *Bradley*, 828 F.2d at 1193. The Court must then decide within its discretion whether the motion to intervene will “unduly delay or prejudice the adjudication of the rights of the original parties.” *Id.* at 1194 (quoting *Meyer Goldberg, Inc. v. Goldberg*, 717 F.2d 290, 294 (6th Cir. 1983)). *See also Meyer Goldberg, Inc. v. Fisher Foods, Inc.*, 823 F.2d 159, 161 (6th Cir. 1987); *Brewer v. Republican Steel Corp.*, 513 F.2d 1222, 1224-25 (6th Cir. 1975).

The Church has already demonstrated that its motion to intervene is timely. Its interest enforcing its contract with the DDA allowing its participation in the Lower Woodward Façade Improvement Program is exactly what the legal and factual issues in

this case concern. Finally, no undue delay or prejudice will result to the current parties because none of the current deadlines for discovery of dispositive motions will need to be extended if the motion is granted. This Court should grant the Church's motion for permissive intervention should it deny its motion for intervention as of right.

Conclusion

The Church's interest in enforcing its contract and otherwise participating in the Lower Woodward Façade Improvement Program is substantial. This Court should not allow this case to go forward without the benefit of participation by a religious organization like the Church that will be most affected by the Court's ruling. Since all of the requirements for intervention as of right and permissively are met by the Church, its motion should be granted.

Respectfully submitted this 28th day of November, 2006.

s/ Kevin H. Theriot
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CERTIFICATE OF SERVICE

I hereby certify that on November 28, 2006, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will serve notification of such filing on the following:

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