UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ELLORA'S CAVE PUBLISHING, INC., et al Plaintiffs, vs. DEAR AUTHOR MEDIA NETWORK, LLC et al. Defendants.	)	CASE NO.: 5:14-CV-02331 JUDGE JOHN R. ADAMS **PLAINTIFFS' BRIEF IN OPPOSITION TO MOTION TO INTERVENE**

NOW COME Plaintiffs Ellora's Cave Publishing, Inc. and Jasmine Jade Enterprises, LLC (hereinafter collectively "Plaintiff" or "EC") and file their Brief in Opposition to Motion to Intervene by Ann Josephson. As demonstrated below, the proposed permissive intervention pursuant to Fed. R. Civ. P. 24(b)(1)(B) should be denied as it was not filed timely and because it lacks common questions of law and fact with the main action. Additionally, the claims alleged by the proposed Intervenor arise out of contract and are subject to arbitration in accordance with the agreements.

1. **Intervenor's Motion to Intervene is not Timely.**

Permissive intervention by a nonparty to a pending case is governed by Fed.R.Civ.P. 24(b). A denial of permissive intervention should not be reversed except for clear abuse of discretion by the trial judge. *Meyer Goldberg, Inc. v. Fisher Foods, Inc.*, 823 F.2d 159, 161 (6th Cir.1987)).

The first prong of analysis in determining if a permissive intervention should granted is whether the motion was made timely. Fed.R.Civ.P. 24(b)(1). Courts have used the following factors in considering timeliness: (1) the point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed Intervenor knew or should have known of their interest in the case; (4) the prejudice to the original parties due to the proposed Intervenor's failure to promptly intervene after they knew or reasonably should have known of their interest in the case; and (5) the existence of unusual circumstances militating against or in favor of intervention. *Jansen v. City of Cincinnati,* 904 F.2d 336, 340 (6th Cir.1990).

Applying each of the above 5 factors to this case militate against allowing intervention. First, the current suit has been pending for nearly a year and discovery has closed. Further each of the parties have already filed their respective motions for summary judgment seeking to dispose of each other's claim on the merits. With the case nearing a possible conclusion on the merits, intervention is not appropriate.

Second, the purpose of the Intervenor's suit has nothing to do with this defamation action or any harm flowing out of the defamation. Rather Intervenor seeks a declaration of rights under certain contracts and seeks to obtain specific performance of those rights. These objectives entail a wholly different set of legal issues and approach to discovery.

Third, the Intervenor's knowledge of any interest in this case should have prompted Intervenor to file its motion at the time this case was initiated. In its complaint the Intervenor speaks of royalty policy procedures dating back to December 2013 and breaches of the Publishing Agreements dating back to 2013, 2014 and 2015. Intervening Counterclaim, Doc. 40-1 at 23. Intervenor could have easily sought intervention in 2014 when this suit was filed.

Fourth, allowing intervention at this time would be prejudicial. The discovery cut-off has passed and dispositive motions have been filed.[1] Intervention would require a second round of unrelated discovery and dispositive motions, additional depositions, and the rescheduling of the trial date. This would delay the resolution of this case and therefore be prejudicial to both parties.

Fifth, there are no unusual circumstances militating in favor of intervention. Indeed the existence of an arbitration provision in the contract militates against intervention. The arbitration provision provides as follows: "If any dispute shall arise between the Author and Publisher regarding this Agreement, such dispute shall be referred to binding private arbitration in the State of Ohio…" Doc. 40-1, pp. 16, 27, 38 and 50. This provision is contained in each of the four agreements signed by Intervenor and is valid and enforceable. If the Intervenor is allowed to intervene in this case, we would be confronted with additional motion practice concerning the applicability of the arbitration clause.

2. **Intervenor's claims do not share a common question of law or fact with the main case.**

The second prong of analysis in deciding to grant a motion to intervene is whether there are common questions of law and fact. Fed.R.Civ.P. 24(b)(1)(B). The Intervenor states that her claims have "substantially identical questions of fact and law with the main action." Motion to Intervene, Doc. 40 p.1. However, even a cursory review of the Plaintiff's complaint and Intervenor's Counterclaim reveal the questions of law and fact to be very different. First, the Plaintiff's claims are based upon the tort of defamation. Intervenor's Counterclaim, as the attached agreements thereto attest, are contractual. Specifically, Intervenor seeks a declaration

[1] The timing of the filing is curious. Intervenor acknowledges that the discovery deadline has passed and apparently seeks to use this intervention as a way to reopen discovery. Motion to Intervene, Doc. 40, p. 2.

as to the method of calculating royalty payments under the agreements, whether Plaintiff was entitled to modify Publishing Agreements and whether those agreement were breached. Clearly the legal issues are not "substantially identical."

Nor are there common questions of fact. Plaintiff's claim of defamation against the Defendants is not solely about the payment of royalties. Rather, it involves verifiably false statements published by the Defendants concerning the alleged mismanagement of EC and the diversion of money to its principals for extravagant purposes. Moreover, assuming *arguendo* the defamation case was solely about royalty payments, the Intervenor is implicating different payments. In its Intervening Counterclaim, Intervenor addresses royalty payments from 2013 through February 2015. Doc. 40-1, para. 25, 26. The defamatory article was published on September 14, 2014 and cannot possibly reference royalty payments that had yet become due. Any questions regarding royalty payments in 2013 and 2015 do not constitute a common question of fact and do not relate to defamatory comments regarding royalty payments in 2014.

CONCLUSION

Based upon the foregoing, Plaintiff respectfully requests that the Motion to Intervene be DENIED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 3rd day of September, 2015 the foregoing was served upon all parties not in default and/or their counsel via filing with the Court's CM/ECF system.

/s/ Steven W. Mastrantonio
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