STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS.

PROVIDENCE, SC. SUPERIOR COURT

IN RE: CHARTERCARE HEALTH) CASE #: KM-2015-0035
PARTNERS FOUNDATION)

HEARD BEFORE

THE HONORABLE ASSOCIATE JUSTICE BRIAN P. STERN

ON SEPTEMBER 17, 2018

APPEARANCES:

STEPHEN DEL SESTO, ESQUIRE.....THE RECEIVER
MAX WISTOW, ESQUIRE.....SPECIAL COUNSEL
STEPHEN SHEEHAN, ESQUIRE.....FOR RECEIVER
DAVID MARZILLI, ESQUIRE.....ATTORNEY GENERAL
SCOTT BELIECKI, ESQUIRE..... FOR CHARTERCARE
ANDREW DENNINGTON, ESQUIRE.....FOR CHARTERCARE
BENJAMIN LEDSHAM, ESQUIRE.....FOR RECEIVER

GINA GIANFRANCESCO GOMES
COURT REPORTER

CERTIFICATION

I, Gina Gianfrancesco Gomes, hereby certify that the succeeding pages 1 through 14, inclusive, are a true and accurate transcript of my stenographic notes.

GINA GIANFRANCESCO GOMES
COURT REPORTER

MONDAY, SEPTEMBER 17, 2018

MORNING SESSION

THE COURT: Madam Clerk, if you would call the case.

THE CLERK: Your Honor, the matter before the Court is KM-2015-0035, In Re: CharterCARE Health Partners Foundation. This is on for a bench decision regarding the motion to intervene. Would counsel please identify themselves for the record.

MR. DEL SESTO: Stephen Del Sesto, the Receiver to the plan.

MR. WISTOW: Max Wistow, counsel for the Receiver.

MR. SHEEHAN: Steven Sheehan, counsel for the Receiver.

MR. MARZILLI: Good morning, your Honor. David Marzilli on behalf of the attorney general.

MR. BELIECKI: Good morning, your Honor. Scott Beliecki for CharterCARE Foundation.

MR. DENNINGTON: Andrew Dennington for CharterCARE Foundation.

MR. LEDSHAM: Benjamin Ledsham also for the Receiver.

THE COURT: This matter is on today for a bench decision based on the documents and memorandums filed by the parties and the oral argument last week.

This proceeding arose out of a 2014 Asset Purchase

Agreement involving the ownership and control of two hospitals, Roger Williams Medical Center and Our Lady of Fatima Hospital. Pursuant to the 2014 sale, Prospect CharterCARE, LLC and it's affiliates acquired the Heritage Hospitals from Roger Williams Hospital and St. Joseph's Health Services of Rhode Island. To complete the sale, the parties sought approval from the office of the Rhode Island Attorney General and the Rhode Island Department of Health as required under the Hospital Conversion Act. During the approval process, the attorney general determined that due to the Heritage Hospitals' outstanding liabilities certain Roger Williams and Saint Joseph's restricted assets would remain with the Heritage Hospitals during their wind-down.

In connection with the 2014 sale and to satisfy the attorney general's conditions, St. Joseph's, Roger Williams, and CharterCARE Health Partners Foundation later named CharterCARE Foundation petitioned this court for cy pres, which would permit the transfer of approximately $8,200,000 in charitable assets to the CharterCARE Foundation. Proposed intervenors allege that while cy pres Petitioners appropriately sought this Court's approval, Petitioners nevertheless failed to apprise the Court that St. Joseph was insolvent and that all of the remaining assets were needed to reduce the

unfunded pension obligations. Notwithstanding this Court granted the cy pres on April 20, 2015, subject to several conditions. The funds were then transferred to CharterCARE Foundation, which are currently under the Rhode Island Foundation's control for investment purposes. Since the cy pres order, proposed Intervenors have brought claims in federal court against CharterCARE Foundation and other Defendants arising out of the cy pres Petitioner's alleged misrepresentations to this Court. CharterCARE Foundation has agreed to preserve certain charitable assets pending resolution of such claims.

Standard of review: Under Rhode Island Superior Court Rule 24(a)2, a petitioner has a right to interview as a matter of law if the following conditions are satisfied:

1. The applicant files a timely appliation.

2. The applicant claims an interest relating to the property or transaction which is the subject matter of the action.

3. The disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, and

4. That the applicant's interest is not adequately represented by the current parties to this action, as

recently reiterated by the Supreme Court in Hines Road, LLC v. Hall, 113 A.3d 924. "A right to intervene under Rule 24(a) does not turn on whether an applicant is likely to succeed in protecting its claimed interest. Moreover, the First Circuit has held a presiding court is required to accept as true non-conclusory allegations made in support of an intervention motion." That is in B. Fernandez v. Kellogg USA, 440 F.3d 541. "Because Rhode Island precedent on intervention is sparse, this Court may refer to federal law for guidance," as our Supreme Court stated in Retirement System of City of Providence v. Corrente, 174 A.3d 1221. The Court will now address each intervention element in turn.

Timelines: To establish a right to intervention, an applicant must prove with appropriate expediency and it is well settled that the determination of timeliness is a matter committed to the sound discretion of the trial justice. Timeliness is analyzed by two criteria:

1. The length of time during which the proposed intervenor has known about this interest in the suit without action, and

2. The harm or prejudice that results to the rights of other parties by delay.

This Court is well aware that post-judgment intervention motions are rarely allowed, and the sheer

passage of time is probative to any intervention analysis. However, the mere lapse of time is not enough to present a right of intervention so long as the intervenor acts promptly after it becomes clear his or her rights have been jeopardized. In other words, the passage of time is measured in relative, not absolute terms. Thus, what may constitute a reasonably prompt action in one situation may be unreasonably dilatory in another.

Here, in framing the timeliness inquiry, it is worth noting that the cy pres order did not constitute a final judgment because no separate document entered pursuant to Superior Court Rule 58 to memorialize the order. Rule 58 provides every judgment shall be set forth on a separate document and as a practical matter this means an order remains interlocutory unless and until the order is imbued with finality of a docket entry independent of the order itself, Furtado v. Laferriere, 839 A.2d 533. For example, in the Furtado case, our Supreme Court explained that a summary judgment order remained interlocutory until the order was entered in a separate document, thereby converting the ruling into a final judgment. As such, the Supreme Court allowed the aggrieved party in Furtado to appeal an adverse summary judgment order nearly nine months after the order entered, as 20 days

had not elapsed since the summary judgment order was separately entered on the document.

Our Supreme Court rejected the argument that Rhode Island courts should apply a reasonableness standard to determine when an order converts to a final judgment. Our Supreme Court reasoned that unlike Superior Court Rule 58's federal counterpart, which provides that judgment is entered for purposes of these rules, when 150 days have run from entry of the civil docket, the Superior Court's rule provides for no such automatic entry. And although our Rule 58 might seem hyper-technical, the mechanical process produces clarity in that all parties are on notice of how much remains for a litigant to appeal an adverse ruling.

It is abundantly clear no separate document entered to memorialize the cy pres order and it, therefore, remained interlocutory from April 20, 2015, to the present. Contrary to CharterCARE Foundation's argument, an order cannot possibly memorialize itself under Rule 58. The soundness of Rule 58 as drafted, which arguably keeps an order open ad infinitum, is a question more appropriately directed to our Supreme Court for the modifications of a rule. Moreover, CharterCARE Foundation could have avoided its present dilemma by moving for an entry of final judgment. Seeking to

subvert its failure to make such a motion, CharterCARE Foundation cites McAuslan v. McAuslan for the proposition that final judgments are those that terminate the litigation on the merits, 83 A. 837, a 1912 case. We agree no magic words are necessary to make a judgment final. However, that does not change the fact the document which terminates the litigation must also, for the purposes of Rule 60, be set out of the underlying dispositive order in compliance with Rule 58. Because this Court was not requested and made no separate entry of final judgment, the cy pres order remained interlocutory and subject to modification by this Court without reference to Rule 60 governing modification of final judgments.

Turning more directly to the timeliness of the present motion, this Court is satisfied that the proposed intervenors have moved with appropriate haste because even though three years have elapsed since the cy pres order entered, the Receiver could not have known of an interest in the litigation until October, 2017, at the earliest. The Receiver was not appointed by this Court until that time and given the complex nature of this litigation, a passage of about eight months, from the time of appointment to the presentation of this motion, is not outside the bounds of reasonableness.

Neither should we assume that plan participants' knowledge of their jeopardized interest in the litigation in April of 2015 regardless of whether they knew this proceeding was ongoing. Our Supreme Court has said that the more appropriate inquiry is whether an intervenor has diligently asserted his or her rights after it became evident that such rights were in jeopardy. Therefore, if we accept as true the proposed intervenors' allegation that cy pres Petitioners mislead this Court about funding levels, which we must at this time, no cause to intervene ripened at the onset of the cy pres. And although there is no Rhode Island precedent stating this proposition, the Court looks towards Brennan v. New York City Board of Education, 269 F.3d 123, a Second Circuit case. It was only after thorough investigation by the Receiver that either the Receiver himself or the plan participants found cause to intervene. Accordingly, the proposed intervenors did not unduly delay in bringing the present motion.

In terms of prejudice, the second timeliness criteria, this Court is not convinced granting the present motion will cause appreciable harm. It is true that the present motion threatens the bedrock of the CharterCARE Foundation, as CharterCARE alleges, but perhaps appropriately so if this Court was in fact misled

into pouring the concrete onto the foundation. Given the pending federal court action and state court action arising out of the cy pres proceeding, this Court finds that CharterCARE Foundation's integrity is already in jeopardy. Furthermore, it's quite possible that reassessing the initial cy pres order will actually solidify the legitimacy of CharterCARE Foundation's charitable endeavors were this Court to deny the proposed intervenors' ultimate request to vacate the April, 2015, order. Therefore, considering both the length of time and prejudice, this Court is satisfied that the timeliness factor is in the favor of the proposed intervenor.

Interest relating to the property: The second inquiry in an intervention analysis is whether an intervenor claims an interest relating to the property or transaction. Our Supreme Court has held that an intervenor's interest in the litigation must be significantly protectable for intervention to be allowed. A protectable interest is one which bears a significantly close relationship to the dispute between the original litigants and the interest must be direct, not contingent.

While a party may seek intervention to protect a variety of interests, many of the cases in which a

sufficient interest has been found under amended Rule 24(a)(2) have been in cases in which there is a readily identifiable interest in land, funds, or some other form of property. And the Court is referring to Credit Union Central Falls v. Groff, 871 A.2d 364.

Here, the proposed intervenors claim an interest in the roughly $8 million in charitable assets that are subject to this proceeding. The proposed intervenors claim the exact funds transferred pursuant to the cy pres order should have remained with the Heritage Hospitals to pay down underfunded pension obligations. Thus, as in Credit Central Falls where a client claimed a right to monies in a limited client trust account, similarly here, multiple entities, including the proposed intervenors and CharterCARE Foundation claim a right to a limited pool of charitable assets. In other words, proposed intervenors are not merely trying to protect their right to collect; rather, they are trying to protect a specific interest in the cy pres funds. Whether proposed intervenors are legally entitled to none, some, or all of the charitable monies involves mixed questions of law and fact more appropriately answered in the subsequent stages of this proceeding. Simply stated, we cannot say that the proposed intervenors' allegation of an interest in this proceeding constitutes a sham or frivolity, thus, we must

accept the allegations as true for the purposes of the motion to intervene. Whether the intervenors ultimately persuade this Court to the cy press order is of no moment at this juncture.

Next, impair or impede an applicant's ability to protect interest: The third intervention prong considers whether the disposition of the action may as a practical matter impair or impede the applicant's ability to protect his or her claimed interest. Whether an intervenor's interest will be impaired largely turns on his or her ability to pursue an alternate remedy in a collateral proceeding. The First Circuit has held in particular that the availability of an adequate remedy softens any plausible claim of prejudice.

Here, CharterCARE Foundation contests that their willingness to hold funds pending resolution of the proposed intervenors' federal claims essentially moots the need for intervention in this proceeding. However, such an argument misses the source of proposed intervenors' potential prejudice. The need to intervene in the present case arises out of the possibility that the federal court will deny jurisdiction over the proposed intervenors' claims pursuant to principals of federalism, particularly the Rooker-Feldman Doctrine, which precludes federal action if the relief requested

would effectively reverse a state court decision or void its holding. It makes sense as a practical matter for this Court to determine whether it was misled during its own proceeding.

This Court cannot be sure whether the federal court will or will not choose to exercise jurisdiction in the federal action. However, there is a possibility the federal court will deny jurisdiction because a finding that the cy pres petitioners defrauded this Court would seriously call into question the legitimacy of this Court's cy pres order. Therefore, because of this possibility, the proposed intervenors potential has been compromised by the cy pres order.

Adequacy of representation: The fourth and final inquiry in deciding a motion to intervene is whether the intervenors are adequately represented by the current parties to the litigation. Rhode Island Superior Court Rule 24(a)(2), our Supreme Court has held hat adequate representation does not exist where a conflict or divergence of interest exists. To show an adequate representation, a party need only produce some tangible basis to support a reported claim of inadequacy.

Here, CharterCARE Foundation has not even contended in its memorandum in opposition that the cy pres petitioners adequately represent proposed intervenors'

interest. Moreover, the very crux of proposed intervenors' federal action is that the cy pres petitioners intentionally shifted funds to CharterCARE Foundation to divest plan participants of their interest in the subject funds. Setting aside the question of whether the cy pres petitioners acted with any ill-will towards plan participants, the simple fact that the petitioners sought permission to allocate the funds to a charitable purpose, whereas plan participants seek the funds to satisfy their vested pension rights, evidences a conflict of interest. In light of the low bar an intervenor needs to hurdle to show inadequate representation, this Court finds proposed intervenors have made the appropriate showing.

Finally, the Court itself has an interest in resolving the veracity of proposed intervenors allegations, as their primary contention is that cy pres petitioners defrauded this Honorable Court. For the foregoing reasons, this Court finds the proposed intervenors have satisfied the elements of 24(a)(2) and, therefore, are entitled to intervene as a right in this proceeding. Accordingly, the Court reserves judgment on argument pertaining to permissive intervention. Importantly, this Court expresses no position respecting the merits of the proposed intervenors' underlying claim,

one way or another, it's not before it at this point. So the motion to intervene as a matter of right is granted. Counsel for the movant shall prepare the appropriate order for the Court. Thank you very much, counsel. This Court is in recess.

MR. WISTOW: Your Honor.

THE COURT: Yes.

MR. WISTOW: If your Honor recalls, we still have the matter of the Court deciding whether or not to approve the proposed settlement, and your Honor was going to give us a scheduling order. It's obvious you've been busy writing that brief.

THE COURT: I want to give counsel an opportunity t respond to what may be some significant papers. Again, now that this is done, let me get it out to you. Just so the parties are aware, it's going to be the very end of this month that the papers are going to be due. I need to allow at least a week to respond. Now that we're done with this, I will get something out.

MR. WISTOW: Thank you, your Honor.

(A D J O U R N E D.)