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SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES, CENTRAL DISTRICT

CITIZENS FOR ENFORCEMENT OF PARKLAND COVENANTS and JOHN A. HARBISON,

Plaintiffs,

vs.

CITY OF PALOS VERDES ESTATES, a municipal corporation; PALOS VERDES HOMES ASSOCIATION, a California corporation; ROBERT LUGLIANI and DOLORES A. LUGLIANI, as co-trustees of THE LUGLIANI TRUST; THOMAS J. LIEB, TRUSTEE, THE VIA PANORAMA TRUST U/DO MAY 2, 2012 and DOES 1 through 20,

Defendants.

Case No.: BS142768

Assigned for all purposes to the Hon. Barbara A. Meiers, Dept. 12

COMPENDIUM OF NON-CALIFORNIA AUTHORITES IN SUPPORT OF DEFENDANTS PALOS VERDES HOMES ASSOCIATION; ROBERT LUGLIANI AND DOLORES A. LUGLIANI, AS CO-TRUSTEES OF THE LUGLIANI TRUST; AND THOMAS J. LIEB, TRUSTEE, THE VIA PANORAMA TRUST U/DO MAY 2, 2012'S OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT OR SUMMARY ADJUDICATION OR BOTH

Action Filed:	May 13, 2013
Trial Date:	None Set
Hearing Date:	May 29, 2015
Hearing Time:	10:30 a.m.
Department:	12

Pursuant to California Rule of Court 3.1113(i), Defendants, Robert Lugliani and Dolores A. Lugliani, as co-trustees of The Lugliani Trust, Thomas J. Lieb, Trustee, The Via Panorama Trust ("Via Panorama"), and Defendant Palos Verdes Homes Association ("PVHA"), (collectively the "Defense Parties") submit copies of the following non-California authorities, in support of Defense Parties Opposition to Plaintiffs' Motion for Summary Judgment or Summary Adjudication of Both.

AUTHORITIES

Dated: May 15, 2015

ARMBRUSTER GOLDSMITH & DELVAC LLP

By _____
Damon P. Mamalakis
Attorneys for Defendant

ROBERT LUGLIANI and DOLORES A. LUGLIANI, as co-trustees of THE LUGLIANI TRUST; THOMAS J. LIEB, TRUSTEE, THE VIA PANORAMA TRUST U/DO MAY 2, 2012

Dated: May 15, 2015

LEWIS BRISBOIS BISGAARD SMITH LLP

By: _____
Brant H. Dveirin
Attorneys for Defendant

PALOS VERDES HOMES ASSOCIATION

EXHIBIT 1

Crouse-Hinds Co. v. InterNorth, Inc.

United States Court of Appeals for the Second Circuit

October 30, 1980, Argued ; November 14, 1980, Decided

No. 538, Docket 80-7865

Reporter
634 F.2d 690; 1980 U.S. App. LEXIS 12249

CROUSE-HINDS COMPANY, Plaintiff-Counterclaim-Defendant-Appellant, v. INTERNORTH, INC., and IN HOLDINGS, INC., Defendants-Counterclaim-Plaintiffs-Appellees

Prior History: [**1] Appeal from an order of the United States District Court for the Northern District of New York, Howard G. Munson, Chief Judge, denying plaintiff's motion to dismiss counterclaims and granting a preliminary injunction restraining plaintiff from purchasing any shares of the Belden Corporation pursuant to an exchange offer dated October 3, 1980.

Disposition: Reversed in part, dismissed in part.

Core Terms

tender offer, merger, counterclaim, shareholders, shares, stock, injunction, merger agreement, proposed merger, district court, acquiring, recommend, preliminary injunction, consummation, merits, business judgment rule, announcement, motivation, questions, days, negotiations, compulsory, ancillary jurisdiction, acquisition, outstanding, prospectus, company's, oppose, voting, board of directors

Case Summary

Procedural Posture

Plaintiff targeted company sought review of an order of the United States District Court for the Northern District of New York, that found it had ancillary jurisdiction over defendant tender offeror's counterclaims, and granted defendant a preliminary injunction, which restrained plaintiff from purchasing any shares of a corporation pursuant to an exchange offer, as that plaintiff failed to sustain its burden under the business judgment rule.

Overview

Plaintiff targeted company brought suit against defendant tender offeror and argued that the tender offer violated federal securities laws. Plaintiff sought to restrain defendant from acquiring any of its stock. Defendant counter-claimed that the exchange offer in a proposed merger between plaintiff and another company lacked any valid business purpose and sought to enjoin plaintiff from acquiring any shares of the other company. Plaintiff sought to dismiss the counterclaim for lack of jurisdiction and its directors' actions were protected by the business judgment rule. The district court denied plaintiff's motion but granted defendant's motion for a preliminary injunction. Plaintiff sought review. The appellate court found that the claim and the counterclaim arose out of the same transaction so as to make the counterclaim compulsory. The appellate court reversed the district court's order because defendant was not entitled to injunctive relief as that defendant's proffered statements that the exchange offer lacked a valid business purpose was insufficient to show director interest under the business judgment rule so as to shift the burden of proof to plaintiff's directors.

Outcome

Although the appellate court found that the district court had jurisdiction over defendant tender offeror's counterclaim, the injunctive relief in favor of defendant tender offeror was reversed because defendant's statements that plaintiff targeted company's exchange offer lacked a valid business purpose was insufficient to demonstrate director interest under the business judgment rule so as to shift the burden of proof to plaintiff's directors.

LexisNexis® Headnotes

Mergers & Acquisitions Law > Takeovers & Tender Offers

HN1 See S.E.C. Rule 14e-2, *17 C.F.R. § 240.14e-2*.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Ancillary Jurisdiction

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

Civil Procedure > ... > Pleadings > Counterclaims > Compulsory Counterclaims

HN2 Ancillary jurisdiction is a concept which allows a federal court to adjudicate a compulsory counterclaim that does not independently meet the requirements for invocation of its jurisdiction.

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

Civil Procedure > ... > Pleadings > Counterclaims > Compulsory Counterclaims

Civil Procedure > ... > Pleadings > Crossclaims > General Overview

HN3 Fed. R. Civ. P. 13(a), provides in part that a pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action.

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Necessary Parties

Contracts Law > Types of Contracts > Lease Agreements > General Overview

HN4 In an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN5 The standard for the granting of a preliminary injunction requires the moving party to show (a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN6 If there is no evidentiary hearing in the district court and an injunction is granted on the basis of documents, deposition excerpts, and affidavits, the appellate court is not limited to reviewing the district court's exercise of discretion but have the power to make a full review.

Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > General Overview

Business & Corporate Law > ... > Management Duties & Liabilities > Fiduciary Duties > Business Judgment Rule

Contracts Law > Formation of Contracts > Consideration > General Overview

Contracts Law > Formation of Contracts > Consideration > Adequate Consideration

HN7 The business judgment rule bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes.

Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > General Overview

Business & Corporate Law > ... > Management Duties & Liabilities > Causes of Action > General Overview

Business & Corporate Law > ... > Management Duties & Liabilities > Causes of Action > Self-Dealing

Business & Corporate Law > ... > Management Duties & Liabilities > Defenses > General Overview

Business & Corporate Law > ... > Management Duties & Liabilities > Fiduciary Duties > Business Judgment Rule

Evidence > Burdens of Proof > Initial Burden of Persuasion

HN8 Under the business judgment rule, directors are presumed to have acted properly and in good faith, and are called to account for their actions only when they are shown to have engaged in self-dealing or fraud, or to have acted in bad faith. Once a plaintiff demonstrates that a director had an interest in the transaction at issue, the burden shifts to the director to prove that the transaction was fair and reasonable to the corporation. Only if the director carries this burden will the transaction be upheld. The initial burden of proving the director's interest or bad faith, however, always rests with the plaintiff.

Counsel: Edwin E. McAmis, New York City (Skadden, Arps, Slate, Meagher & Flom, New York City, Bond, Schoeneck & King, Syracuse, N. Y., of counsel), for plaintiff-counterclaim-defendant-appellant.

John L. Warden, New York City (Robert J. Katz, D. Stuart Meiklejohn, William L. Farris, Sullivan & Cromwell, New York City, Donald J. Kemple, Hancock, Estabrook, Ryan, Shove & Hurst, Syracuse, N. Y., of counsel), for defendants-counterclaim-plaintiffs-appellees.

Judges: Before MOORE and KEARSE, Circuit Judges, and TENNEY, *

Opinion by: KEARSE

Opinion

|*692| This is an expedited appeal by Plaintiff-Counterclaim-Defendant Crouse-Hinds Company |**2| ("Crouse-Hinds") from an order of the United States District Court for the Northern District of New York, Howard G. Munson, Chief Judge, which, inter alia, granted the motion of Defendants-Counterclaim-Plaintiffs InterNorth, Inc. and IN Holdings, Inc. (collectively "InterNorth"), for a preliminary injunction preventing Crouse-Hinds from performing an agreement with the Belden Corporation ("Belden") pursuant to which Crouse-Hinds was to offer to purchase a portion of Belden's outstanding stock in exchange for stock of Crouse-Hinds. We find that in assessing the likely merits of InterNorth's counterclaim the district court improperly allocated the burden of proof. Accordingly, we reverse so much of the order as granted the preliminary injunction. [1]

|**3| I

Plaintiff Crouse-Hinds is a New York corporation with headquarters in Syracuse, New York. It is the largest United States manufacturer of high quality electrical products designed for heavy-duty use. Defendant-Counterclaimant InterNorth is a Delaware corporation with its principal office in Omaha, Nebraska. It is engaged in the exploration for and the production, transmission and sale of natural gas and other energy products. Belden is a Delaware corporation with its executive offices in Geneva, Illinois. It is engaged in the production and sale of wires, cables and cords, and the distribution of electrical equipment. It is not a party to this lawsuit.

This appeal is part of a fast-moving series of events relating to the announcement on September 9, 1980, of a proposed merger between Crouse-Hinds and Belden; the announcement by InterNorth on September 12, 1980, of a tender offer for a majority of the stock of Crouse-Hinds ("Tender Offer"); and the announcement by Crouse-Hinds and Belden on September 23, 1980, of a modification of the merger agreement, pursuant to which Crouse-Hinds offered to acquire a portion of Belden's outstanding stock in exchange for Crouse-Hinds stock ("Exchange |**4| Offer"). InterNorth contends that the Exchange Offer violates various provisions of state law. The major events do not appear to be in dispute.

A. The Proposed Merger Between Crouse-Hinds and Belden

During the summer of 1980, Crouse-Hinds and Belden entered into negotiations for a merger. [2] As a result of the negotiations, on September 8, 1980, the boards of directors of Crouse-Hinds and Belden approved an agreement by which Belden would be merged into a Crouse-Hinds subsidiary; the exchange ratio was to be 1.24 shares of Crouse-Hinds stock for each share of Belden stock. The merger required the approval of a majority of the shareholders of Crouse-Hinds, *N.Y.Bus.Corp.Law §§ 801, 803* (McKinney's Supp.1979), and a majority of the stockholders of Belden, *8 Del.Code Ann. §§ 251, 252*. See New York Stock |*693| Exchange Company Manual, A 283-84. Stockholder meetings to vote on the merger were to be scheduled at a future date and the agreement required both boards to recommend to their respective stockholders "that they consider and approve" the merger. The merger agreement was announced to the public on September 9.

|**5| InterNorth does not assert any challenge to the bona fides of the negotiations that led to the proposed merger.

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* The Honorable Charles H. Tenney, Senior Judge of the United States District Court for the Southern District of New York, sitting by designation.

1 Judge Munson's order also denied a motion by Crouse-Hinds to dismiss the InterNorth counterclaims, and Crouse-Hinds purports to appeal from that portion of the order as well. The denial of a motion to dismiss is not normally appealable, Catlin v. United States, 324 U.S. 229, 236, 65 S. Ct. 631, 635, 89 L. Ed. 911 (1945); E.E.O.C. v. American Express Co., 558 F.2d 102, 103 (2d Cir. 1977), and we decline to exercise pendent appellate jurisdiction over that part of the order.

2 During the spring of 1980 Belden had been invited to enter into merger negotiations by Ampco-Pittsburgh Corporation. Belden declined, and shortly commenced serious negotiations with Crouse-Hinds. Chris J. Witting, Crouse-Hinds's Chairman and Chief Executive Officer, had been a Belden director for seven years, and similar but "less serious" discussions had taken place between the companies in the past.

Nor would it have standing to mount such a challenge; it did not become a shareholder of Crouse-Hinds until September 11, 1980. [3]

B. The Tender Offer by InterNorth

Unknown to Crouse-Hinds and Belden, InterNorth, for more than a year prior to September 9, had been conducting studies of candidates for possible acquisition. According to the deposition testimony of an InterNorth official, during the week of September 2, InterNorth's Management Committee had decided to recommend the acquisition of Crouse-Hinds to the board of directors for consideration at its September 9 meeting.

Notwithstanding the announcement on September 9 by Crouse-Hinds and Belden of their proposed merger, the InterNorth board decided to accept the recommendation of the Management Committee and to commence a tender offer for Crouse-Hinds stock. Belden, [**6] however, had not been the object of any previous InterNorth acquisition study, and InterNorth was not interested in acquiring Belden. (After learning of the intended merger, InterNorth consulted Standard & Poor's and Moody's to ascertain Belden's line of business, but made no further investigation.) Thus, InterNorth decided to make its tender offer conditional on the abandonment or rejection of the proposed merger.

On September 12, InterNorth announced its offer to purchase 6,700,000 shares (approximately 54%) of Crouse-Hinds's stock at $ 40 a share. This purchase was to be followed by a second-step merger, in which the remaining Crouse-Hinds shareholders would receive InterNorth preferred stock for their Crouse-Hinds common stock. The Tender Offer included the following clause, which has come to be called the "Belden Condition":

> The Offer is conditioned upon (the Belden merger's) being rejected by the shareholders of either (Crouse-Hinds) or Belden or the termination of such merger agreement by the parties thereto.

C. The Initial Reactions to the Tender Offer

Crouse-Hinds first learned of the Tender Offer in a telephone call at 6:30 a.m. on September 12 from Samuel F. Segnar, [**7] President and Chief Executive Officer of InterNorth, to Chris J. Witting, Crouse-Hinds's Chairman and Chief Executive Officer. Segnar identified himself, explained InterNorth's organizational structure, and informed Witting that InterNorth's board had authorized the Tender Offer for Crouse-Hinds. Segnar told Witting that the offer would appear in that morning's edition of the Wall Street Journal. Witting asked some questions about InterNorth, and indicated, according to Segnar, that Crouse-Hinds would resist the Tender Offer.

Resistance was forthcoming on all fronts. The first formal step was taken by Belden. On September 15, Belden filed suit against InterNorth in an Illinois state court, alleging that InterNorth had tortiously interfered with Belden's business opportunities (the "Illinois action"). On September 16, the Illinois Court issued a temporary restraining order against the Tender Offer. On September 30, after four days of evidentiary hearings, the court issued a preliminary injunction enjoining InterNorth from taking any further action to proceed with the Tender Offer or with any other tender offer for Crouse-Hinds stock, and from interfering with "the Plan and Agreement [**8] of Merger ... dated September 8, 1980 and amended September 23, 1980." The injunction was to remain in effect until the [*694] Crouse-Hinds and Belden shareholders had voted on the proposed merger, provided that the voting took place and the results were announced prior to December 1, 1980. Belden Corp. v. InterNorth, Inc., No. 80 Ch. 6465 (Ill.Cir.Ct. Cook Co., October 1, 1980). [4] InterNorth has appealed from the granting of the injunction; the appellate court has refused to stay the injunction pending appeal.

In the meantime, on September 12, after receiving and reading the Tender Offer, Witting consulted two law firms which had been counsel to Crouse-Hinds over [**9] the years; and he instructed Lazard Freres, its long-standing financial adviser which had worked with Crouse-Hinds on the merger agreement, to analyze the Tender Offer from a financial point of view. Other directors of Crouse-Hinds were contacted, notified of a special meeting to be held on September 16, and advised not to formulate conclusions as to the adequacy of the Tender Offer until all of the pending analyses were completed. The collection and analysis of data with respect to InterNorth and its Tender Offer proceeded over the weekend of September 13-14, and on September 15 Lazard reported to Witting that the Tender Offer was inadequate from a financial point of view. On

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[3] On September 11, 1980, InterNorth purchased 100 shares of Crouse-Hinds stock.

[4] The Illinois court found, inter alia, that InterNorth had determined as early as April 1980 that it would attempt to acquire Crouse-Hinds, and that InterNorth's President had attempted to induce Crouse-Hinds's President to breach the merger agreement, in part by assuring him that if the Tender Offer were successful he would retain his job.

September 16 Crouse-Hinds's board met with the company's legal and financial advisers. On the advice of counsel, the board first considered the merits of InterNorth's offer, independent of its effect on the merger to which the board was already committed. Based in part on the opinion of Lazard, the board decided to recommend that Crouse-Hinds shareholders reject the Tender Offer.

At that meeting Lazard also reaffirmed its previous advice that the Belden merger would benefit and enhance the value of Crouse-Hinds, |**10| and advised the board that the Tender Offer's goal of preventing that merger confirmed the view that the Tender Offer itself was financially inadequate. The board concurred in this judgment, reaffirming its belief that consummation of the proposed merger would strengthen Crouse-Hinds financially and offer it the opportunity to establish itself in new markets. The board therefore commenced to discuss ways to facilitate the consummation of the merger in light of InterNorth's opposition, and instructed management and counsel to explore, if appropriate, possible modifications to the merger agreement. No modifications were approved at that time, although the possibility of an exchange offer for Belden shares was discussed.

The board's reasons for its determination that the Tender Offer was not in Crouse-Hinds's best interests were set out in a Schedule 14D-9 statement filed with the Securities and Exchange Commission ("SEC"). [5] In conformity with SEC rules that a target company report to its shareholders within 10 days the company's position, if any, with respect to a tender offer, [6] |**12| |*695| Crouse-Hinds management on September 17 sent a letter to Crouse-Hinds shareholders recommending |**11| that they reject the InterNorth offer. [7]

|**13| D. The Exchange Offer

Following the announcement of the Tender Offer, Crouse-Hinds and Belden entered into a new round of negotiations, and on September 23, the two companies

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5 The reasons set out in the Schedule 14D-9 for Crouse-Hinds's negative recommendation included: Lazard Freres' conclusion that the $ 40 per share offering price was inadequate (the closing price on September 11, the day before the InterNorth announcement had been $ 38 per share; since the Tender Offer the market price has been above S 40 per share); the board's determination that the company and its shareholders would be better served by the company's remaining independent; that, based on past performance, earning projections, and the state of the national economy, the present is an inopportune time to sell the company; that the intended acquisition by InterNorth was subject to a number of conditions and that projected future returns on InterNorth preferred shares compared unfavorably to that on Crouse-Hinds shares; that the merger with Belden, which would be precluded under "the Belden Condition" is in Crouse-Hinds's best interests; and uncertainty over whether ultimate consummation of the acquisition should be resolved by appropriate litigation.

6 *HN1* SEC Rule 14e-2, 17 C.F.R. § 240.14e-2 (1980), provides in pertinent part:

Rule 14e-2. Position of Subject Company with Respect to a Tender Offer.

(a) Position of subject company. As a means reasonably designed to prevent fraudulent, deceptive or manipulative acts or practices withing (sic) the meaning of Section 14(e) of the Act, the subject company, no later than 10 business days from the date the tender offer is first published or sent or given, shall publish, send or give to security holders a statement disclosing that the subject company:

(1) Recommends acceptance or rejection of the bidder's tender offer;

(2) Expresses no opinion and is remaining neutral toward the bidder's tender offer; or

(3) Is unable to take a position with respect to the bidder's tender offer.

Such statement shall also include the reason(s) for the position (including the inability to take a position) disclosed therein.

7 In addition to the actions described in the text, on September 19, Crouse-Hinds asked the Attorney General of the State of New York to investigate the Tender Offer under the New York Security Takeover Disclosure Act. Crouse-Hinds alleged that in June 1980 InterNorth had made an offering of debentures in order to raise funds for the Tender Offer and had improperly failed to mention Crouse-Hinds as target. (See note 4 supra.) On September 26 the Attorney General issued a temporary injunctive order against the Tender Offer; he has held two days of hearings and currently has the matter under consideration.

In addition, on September 23, Crouse-Hinds asked the Federal Energy Regulatory Commission to investigate the Tender Offer. Its petition to that agency alleges that the Tender Offer seeks to divert nearly S 500 million from InterNorth's regulated energy business into an unrelated enterprise and thus constitutes an unreasonable practice proscribed by § 5 of the Natural Gas Act.

Finally, Crouse-Hinds refused to make a list of its shareholders available to InterNorth, a refusal that has led to litigation in the New York State courts. See note 11 infra.

agreed to a modification of their original merger agreement ("Exchange Agreement"). The preamble to the Exchange Agreement recited that the InterNorth Tender Offer sought rejection of the proposed merger and that the boards of directors of Belden and Crouse-Hinds continued to believe that the merger was in the best interests of their respective stockholders and therefore desired to take action in furtherance of the merger agreement.

The Exchange Agreement divided the originally planned one-step merger transaction into two parts. First, the Exchange Agreement required Crouse-Hinds to offer to exchange shares of its common stock for up to 7,733,871 shares (approximately 49%) [8] of Belden common stock, at the 1.24 to 1 ratio contemplated by the original merger agreement. The exchange was to be followed by a second-step merger on the same terms. Crouse-Hinds and Belden covenanted to use their best efforts to consummate the merger, and Crouse-Hinds agreed to vote its newly-acquired Belden shares for the merger. [**14] The Crouse-Hinds shares issued in exchange for the tendered Belden shares would not be entitled to vote on the proposed merger. [9]

The offer was to become effective on October 3 and remain open until October 31. Belden stockholders who tendered before October 21 would have the right to have their shares accepted on a pro rata basis. The right to withdraw previously tendered shares would expire on October 24. [10] The shareholder votes on the merger would be conducted at special shareholders' meetings called for November 13 (for Crouse-Hinds) [*696] [11] and for November 26 (for Belden).

[**15] Crouse-Hinds would be relieved of its contractual obligation to purchase the Belden shares if it is enjoined from doing so for 45 days.

The Exchange Agreement would place several restrictions (commonly called "standstill provisions") on Crouse-Hinds's use and disposition of its newly-acquired Belden shares in the events that (a) it acquired more than 350,000 Belden shares and (b) the merger was rejected by shareholders or opposed by anyone who owned 40% or more of the common stock of either company. The [**16] restrictions included barring Crouse-Hinds from purchasing additional Belden shares and from seeking additional representation on Belden's board; requiring Crouse-Hinds to vote its Belden shares in the same manner as the majority of the remaining Belden stockholders; and giving Belden a right of first refusal, for nine months after the restrictions took effect, on any Belden shares that Crouse-Hinds wished to sell.

Although the Belden board approved the Exchange Agreement with Crouse-Hinds and viewed it as a step to facilitate the proposed merger, it refrained from recommending that Belden stockholders exchange their shares with Crouse-Hinds. [12] In part at least, Belden's decision not to recommend the exchange rested on the inability of its investment banker, Goldman Sachs, to render a fairness opinion on the Exchange Offer because InterNorth's opposition had threatened the planned merger.

[**17] Pursuant to the Exchange Agreement, Crouse-Hinds commenced the Exchange Offer on October 3. Its prospectus in connection with the Exchange Offer summarized the purpose of the offer as follows:

> The Boards of Directors of Crouse-Hinds and Belden approved the execution of the Exchange

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[8] This figure could be reduced to approximately 39% because Belden planned to call all of its outstanding 8% convertible subordinated debentures.

[9] In order to accomplish the Exchange Offer and subsequent merger, Crouse-Hinds shareholders would have to vote to amend the certificate of incorporation to increase the number of authorized shares. A vote on this authorization was scheduled for the next shareholders' meeting.

[10] We are informed that by October 23 the Exchange Offer had already been oversubscribed.

[11] On October 30, 1980, a New York appellate court stayed the November 13 meeting pending decision of InterNorth's appeal of a lower court's denial of access to Crouse-Hinds's shareholders' list. The list apparently was made available to InterNorth on October 31, and on November 7 the order staying the November 13 shareholders' meeting was vacated. See In re IN Holdings, Inc., Index No. 19464/80 (Sup.Ct.N.Y.Co.).

[12] The Crouse-Hinds Prospectus in connection with the Exchange Offer stated as follows:

> The Board of Directors of Belden recognizes that there is uncertainty as to whether the Merger will be effected in accordance with its terms because, among other things, of the opposition of IN. Accordingly, the Belden Board has made no recommendation as to whether or not its shareholders should tender their shares for exchange and each shareholder is advised to review this Prospectus carefully to make his or her own decision. The Belden Board, however, approved the Exchange Agreement because in its judgment the Offer facilitates the Merger and gives those shareholders desiring to exchange Belden Shares for Crouse-Hinds Shares the opportunity to do so.

> Agreement in order to facilitate consummation of the Merger in light of the IN Offer and to discourage IN from continuing with the IN Offer. Since Crouse-Hinds will vote all Belden Shares it acquires pursuant to the Offer in favor of the Merger, the acquisition of a substantial number of Belden Shares pursuant to the Offer will increase the likelihood of approval of the Merger by Belden's shareholders. The issuance of a substantial number of Crouse-Hinds Shares pursuant to the Offer would also facilitate the Merger in that it would increase the amount of cash which IN would have to pay and the amount of IN securities it would have to issue in order to achieve its stated purpose of acquiring Crouse-Hinds, which in turn may have the effect of dissuading IN from renewing the IN Offer. [13]

[**18]

Again, in describing its purpose and its plans for Belden, Crouse-Hinds stated that the purpose of the offer was to acquire Belden shares

> [*697] as a first step in acquiring the entire equity interest in Belden pursuant to the Merger Agreement. Under Delaware law, approval of a majority of all outstanding Belden Shares will be required to effect the Merger. Since Crouse-Hinds will vote all Belden Shares it acquires pursuant to the Offer in favor of the Merger, the acquisition of a substantial number of Belden Shares pursuant to the Offer will increase the likelihood of approval of the Merger by Belden shareholders. The issuance of a substantial number of Crouse-Hinds Shares pursuant to the Offer would also facilitate the Merger in that it would increase the amount of cash which IN would have to pay and the amount of IN securities it would have to issue in order to achieve its stated purpose of acquiring Crouse-Hinds, which in turn may have the effect of dissuading IN from continuing with the IN Offer.

E. The Present Litigation

The present lawsuit was commenced by Crouse-Hinds against InterNorth on September 22 in the United States District Court for the Northern District [**19] of New York. The complaint alleged that the Tender Offer violated various provisions of the federal securities laws and the New York Business Corporation Law. [14] Crouse-Hinds sought an injunction restraining InterNorth from, inter alia, acquiring any Crouse-Hinds stock and soliciting or obtaining any proxies for the voting of Crouse-Hinds stock. Its motion for preliminary injunctive relief is presently sub judice.

On October 3, the day the Exchange Offer became effective, InterNorth filed its answer and the first [**20] of two counterclaims, alleging that the Exchange Offer lacked any valid business purpose, and that it was unfair to Crouse-Hinds shareholders because the "standstill" provisions that would become effective if the merger were not approved would inflict such substantial losses on Crouse-Hinds that any rational shareholder would vote to approve the merger. [15] This counterclaim seeks an injunction enjoining Crouse-Hinds from purchasing any shares of Belden stock, by its Exchange Offer or otherwise. Jurisdiction of the counterclaim is predicated on diversity of

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[13] The Prospectus also disclosed the statistics underlying these statements. As of September 16, 1980, there were 12,233,733 Crouse-Hinds shares outstanding, 363,376 reserved for conversion of preferred stock, and 331,302 reserved for stock options. 6,700,000 shares (the number sought by InterNorth's Tender Offer) represents approximately 52% of these outstanding or reserved shares. If 2,150,000 shares were issued pursuant to the Exchange Offer, 6,700,000 shares would amount to approximately 44%.

[14] The original complaint alleged violations of §§ 14(a), 14(d), and 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78n(a), 78n(d) and 78n(e) and § 5 of the Securities Act of 1933, 15 U.S.C. § 77e, as well as the S.E.C. rules and regulations promulgated thereunder. It also alleged violations of New York General Business Law, Article 23-A (the Martin Act). An amended complaint, dated September 24, added allegations under §§ 7, 8, and 16 of the Clayton Act, 15 U.S.C. §§ 18, 19 and 26.

[15] On October 8, InterNorth filed a second counterclaim, which alleged that Crouse-Hinds had violated the Delaware Tender Offers Act, 8 Del.Code Ann. § 203, which requires that a Delaware corporation that is the target of a tender offer be given written notice of the intended offer "not less than 20 nor more than 60 days" before the date the offer is to be made. Crouse-Hinds had given Belden formal written notice on September 22, eleven days prior to the effective date of the Exchange Offer, noting that it did not concede the constitutionality of the Delaware provision, and stating that the notice merely confirmed prior discussions between the parties (and hence notice of the possibility of the Exchange Offer) on September 13, 1980. InterNorth alleged that

(t)he sole purpose of such violation of law is to destroy defendants' opportunity to have the (InterNorth) Offer considered by the Crouse-Hinds shareholders before they are effectively committed, by virtue of the consummation of the Exchange Offer, to the Belden proposal.

citizenship and principles of ancillary jurisdiction.
[**21]

InterNorth immediately sought a preliminary injunction against Crouse-Hinds's purchasing any shares pursuant to the Exchange Offer, and the district court ordered Crouse-Hinds to show cause on October 7 why such a preliminary injunction should not be entered on October 24, the date on which Belden stock tenders would become irrevocable. Crouse-Hinds opposed the injunction and cross-moved to dismiss the counterclaims on jurisdictional, procedural and substantive grounds. Crouse-Hinds argued (a) that the court did not have ancillary jurisdiction over the counterclaims because the counterclaims were permissive
[*698] rather than compulsory; (b) that the court lacked diversity jurisdiction because Belden, a Delaware corporation, was an indispensable party to the counterclaims, and if it were present there would be no diversity since InterNorth is also a Delaware corporation; (c) that InterNorth lacked standing to prosecute its counterclaims in its own right as a shareholder, or derivatively, or as a tender offeror; and (d) that the counterclaim should be dismissed as a matter of law because Crouse-Hinds's directors' actions in
authorizing the Exchange Offer were protected by the [**22] business judgment rule.

F. The District Court's Decision

In connection with InterNorth's injunction motion, the district court received several affidavits, excerpts from depositions, and a number of documents, including the merger agreement, the Exchange Agreement, the Exchange Offer prospectus and Crouse-Hinds's Schedule 14D-9. Two of the affidavits were submitted by investment bankers, one on each side, assessing the financial worth of the Exchange Offer. One affidavit was submitted by an attorney for Crouse-Hinds. Three affidavits were submitted by attorneys for InterNorth, principally stating InterNorth's contentions that the motivation of Crouse-Hinds's board for the Exchange Offer was solely to perpetuate its own control of the company, and that InterNorth would suffer irreparable injury if the Exchange Offer were consummated; one of these affidavits set forth a deposition answer by InterNorth Chairman Segnar quoting Witting as having stated in the September 12 telephone conversation that Crouse-Hinds was "prepared to give (InterNorth) a handful" on its Tender Offer. And an affidavit was submitted by Witting, describing
the consideration given by the Crouse-Hinds board to the [**23] Tender Offer and the reasons it decided to oppose that offer. No other affidavits were submitted. No live testimony was offered.

In an order entered on October 23, with a detailed opinion filed on October 25, the district court denied Crouse-Hinds's motion to dismiss, and granted InterNorth's motion for a preliminary injunction barring Crouse-Hinds from acquiring any shares of Belden pursuant to the Exchange Offer.

The court rejected Crouse-Hinds's jurisdiction arguments on the ground that it had ancillary jurisdiction over the counterclaims because both the original claims and the counterclaims grew out of the same transaction, i. e., "the fight for the corporate control of Crouse-Hinds." (Opinion at 16). In light of this holding the court found it unnecessary to determine whether it also had diversity jurisdiction. Nevertheless, it indicated that it disagreed with Crouse-Hinds's contention that Belden was an indispensable party, because it saw a threshold question as to whether or not Crouse-Hinds had "authority" to enter into the Exchange Agreement; if it did not, Belden would have no contractual rights. (Id. at n.14.) The court also held that InterNorth had
standing as a Crouse-Hinds [**24] shareholder to challenge alleged improper acts by the Crouse-Hinds board of directors. (Id. at 23).

Turning to the merits of InterNorth's counterclaims, the district court found that there was "certainly" evidence that in entering into the Exchange Agreement, the Crouse-Hinds board had acted to preserve its own control, because the board was to remain in office following consummation of the Belden merger. (Id. at 36.) Interpreting this Court's recent decision in *Treadway Companies v. Care Corporation, 638 F.2d 357 (2d Cir. 1980)*, to mean that a director is "interested" in a merger for purposes of the business judgment rule if he will remain in office after consummation of the merger, the court concluded that the Crouse-Hinds board was "interested" in the Exchange Offer (Opinion at 36, 38), and ruled that the burden therefore shifted to the Crouse-Hinds directors to prove that the Exchange Agreement was fair and reasonable (id.). The court ruled that the business judgment rule and principles of negligence required Crouse-Hinds to "reconsider" the proposed Belden
merger in light of the InterNorth [*699] Tender Offer, and concluded that Crouse-Hinds had not met its burden,
because [**25] it relied merely on the pre-Tender Offer evaluation of the Belden merger as reasonable. (Id. at 37). The court found that

> although the independent investment advice sought and proffered by Crouse-Hinds is certainly some proof of its effort to reach an objective determination about the merits of InterNorth's tender offer, in view of the strength of the evidence to the contrary, and of applicable case law, the Court does not believe that (Crouse-Hinds) has sustained its burden of proof under the business judgment (rule).

(Id. at 38.) The court concluded "that in the present case there is no legitimate business purpose served by the exchange of stock between Crouse-Hinds and Belden." (Id. at 39.)

As to irreparable injury, the court stated as follows:

> While this Court does not believe that the Crouse-Hinds-Belden exchange offer would amount to a waste of Crouse-Hinds corporate assets it does believe that the offer, if allowed to proceed to fruition, would have resulted in a dilution of shareholders' equity and a disenfranchisement of the present Crouse-Hinds shareholders. According to both parties, the fruition of the exchange offer
> would also have resulted in rendering [**26] the present InterNorth tender offer moot. Such a deprivation of opportunity to the shareholders of both Crouse-Hinds and InterNorth constitutes irreparable injury to both.

(Id. at 41.)

The court concluded that InterNorth had satisfied the requirements for a preliminary injunction by showing irreparable injury, sufficiently serious questions going to the merits of its first counterclaim [16] to make them a fair ground for litigation, and the balance of hardships tipping decidedly to InterNorth. (Id.) E. g., *Seaboard World Airlines, Inc. v. Tiger International, Inc., 600 F.2d 355, 359-60 (2d Cir. 1979)*.

II

On this appeal Crouse-Hinds renews its challenges to the district court's jurisdiction and to InterNorth's [**27] standing to maintain its counterclaims, and contends that the district court erred in each of its conclusions as to InterNorth's satisfaction of the requirements for a preliminary injunction. We deal here principally with the questions of the court's jurisdiction and its assessment of the merits of InterNorth's counterclaim.

A. Federal Jurisdiction of the Counterclaims

InterNorth asserts that the district court has ancillary jurisdiction over the subject matter of its counterclaims on the ground that those counterclaims are compulsory because they arise out of the transaction that is the subject matter of Crouse-Hinds's complaint. The district court properly accepted this contention.

HN2 Ancillary jurisdiction is a concept which, inter alia, allows a federal court to adjudicate a compulsory counterclaim that does not independently meet the requirements for invocation of its jurisdiction. Crouse-Hinds contends that the court has no ancillary jurisdiction here because the counterclaims are not compulsory within the meaning of ***HN3*** *Fed.R.Civ.P. 13(a)*, which provides in relevant part as follows:

> Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time [**28] of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time
> the action was commenced [*700] the claim was the subject of another pending action ....

Crouse-Hinds relies chiefly on two theories to support this contention. First, it contends that since the complaint challenges the Tender Offer for Crouse-Hinds stock and the counterclaim challenges the Exchange Agreement relating to Belden stock, the transactions at issue are not the same. Second, it argues that the InterNorth attack on the Exchange Agreement need not be asserted as a counterclaim here because its adjudication would require the presence of a party over which the court cannot assert jurisdiction. [17]
[**29]

We agree with the district court's conclusion that the claim and the counterclaim arise out of the same transaction. The leading case on ancillary jurisdiction is *Moore v. New York Cotton Exchange, 270 U.S. 593, 46 S. Ct. 367, 70 L. Ed. 750 (1926)*, in which the plaintiff sued the Cotton Exchange, contending that it had wrongfully refused to provide plaintiff with quotations; the Cotton Exchange asserted a counterclaim, seeking an injunction against the plaintiff's

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16 The court found InterNorth's other contentions, including its claim of waste and its claim that the amount of notice given to Belden violated Delaware law, were either unsupported or too speculative to warrant preliminary injunctive relief. (Id. at 40.) We see no reason to disturb these conclusions.

17 Crouse-Hinds also argues that the counterclaim is the subject of the Illinois action and hence need not be pleaded here. While the Illinois court's order described the merger agreement as "dated September 8, 1980 and amended September 23, 1980" we see no indication that propriety of the amendment, i. e., the Exchange Agreement, was the "subject of" that action.

purloining quotations from it. Obviously the refusal to deal and the alleged theft were not the same transaction in the routine sense of the word. But the Supreme Court held the counterclaim compulsory, stating as follows:

> "Transaction" is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship. The refusal to furnish the quotations is one of the links in the chain which constitutes the transaction upon which appellant here bases its cause of action. It is an important part of the transaction constituting the subject-matter of the counterclaim. It is the one circumstance without which neither
>
> party [**30] would have found it necessary to seek relief. Essential facts alleged by appellant enter into and constitute in part the cause of action set forth in the counterclaim. That they are not precisely identical, or that the counterclaim embraces additional allegations, as, for example, that appellant is unlawfully getting the quotations, does not matter. To hold otherwise would be to rob this branch of the rule of all serviceable meaning, since the facts relied upon by the plaintiff rarely, if ever, are, in all particulars, the same as those constituting the defendant's counterclaim.

270 U.S. at 610, 46 S. Ct. at 371.

The logical relationship between the Exchange Offer and the Tender Offer is plain. Both Offers seek to affect consummation of the proposed merger between Crouse-Hinds and Belden: one seeks to further it, and the other seeks to thwart it. Crouse-Hinds concedes that the Exchange Offer was conceived as a response to the Tender Offer's threat to the merger. The "Belden Condition" imposed by the Tender Offer is the subject of several counts of Crouse-Hinds's complaint; at the same time it is a highly relevant factor in Crouse-Hinds's defense to the

counterclaims' attack [**31] on the decision to make the Exchange Offer. We find no error in the district court's conclusion that the two claims have a clear logical relationship and an adequate factual overlap to warrant classification of the counterclaim as compulsory. See *Federman v. Empire Fire & Marine Insur. Co., 597 F.2d 798, 811-12 (2d Cir. 1979)*.

On the basis of the record as it now stands, we also reject Crouse-Hinds's argument that InterNorth's counterclaims are not compulsory because of the absence of Belden. We see no indication in the record that the court "cannot" acquire personal jurisdiction over Belden. We cannot leave this subject, however, without noting our disagreement with the district court's conclusion that the presence of Belden is

not necessary for the adjudication of InterNorth's [*701] counterclaims. The counterclaims seek to enjoin Crouse-Hinds's performance of the Exchange Agreement, to which Belden is a party and in reliance on which, we are informed, Belden has materially altered its financial structure. [18] The district court's view that the existence of Belden's contractual rights is dependent on a determination of Crouse-Hinds's "authority" to enter into the Exchange

Agreement [**32] appears to misconstrue the nature of the claim actually asserted by InterNorth. The basis for the challenge to the Exchange Agreement is not that the Agreement was beyond the power or corporate authority of Crouse-Hinds or its directors; there is no question that a contract was entered into. Rather, InterNorth's substantive contention is that the contract is unfair; and its procedural contention is that under the business judgment rule the burden has shifted to the directors to prove the contract fair. (It should be noted that the business judgment rule has no application to contracts that are beyond the corporation's authority. See 2 Fletcher, Cyclopedia of the Law of Private Corporations § 505 (perm. ed. 1969).) Since there is no question that the Exchange Agreement is a contract that was within the powers of the corporation, and since Belden's rights thereunder would clearly be prejudiced if the relief sought by InterNorth were to be granted, Belden's presence is required. *Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 110, 88 S. Ct. 733, 19 L. Ed. 2d 936 (1968)*; *Shields v. Barrow, 58 U.S. 130, 139-40, 17 How. Pr. 130, 139-40, 15 L. Ed. 158 (1854)*; *Lomayaktewa* [**33] *v. Hathaway, 520 F.2d 1324, 1325 (9th Cir. 1975)*, cert. denied, *425 U.S. 903, 96 S. Ct. 1492, 47 L. Ed. 2d 752 (1976)* ("No procedural principle is more deeply imbedded in the common law than that, ***HN4*** in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable").

B. The Likely Merits of the Counterclaim

HN5 The standard in this Circuit for the granting of a preliminary injunction requires the moving party to show

> "(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair

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[18] In partial performance of its obligations under the Exchange Agreement, Belden has commenced the redemption of its outstanding convertible debentures.

ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief."

Seaboard World Airlines, Inc. v. Tiger International, Inc., supra, 600 F.2d at 359, quoting *Jackson* [**34] Dairy Inc. v. H. P. Hood & Sons, 596 F.2d 70, 72 (2d Cir. 1979). Putting aside questions of injury and hardship, which we need not reach here, it is clear that under this test a party is not entitled to injunctive relief if he does not show either a likelihood of success on the merits of his claim or such substantial questions going to the merits as to make them fair ground for litigation. Our review of the record convinces us that InterNorth made neither showing, and that the granting of injunctive relief was an abuse of the district court's discretion. [19]

[**35]

The InterNorth claim that the district court found presented substantial questions for litigation is the contention that the Exchange Offer has no valid business purpose and is designed merely to perpetuate Crouse-Hinds's management in office. The starting point for analysis of an attack by a shareholder on a transaction of the corporation is the business judgment rule. The New York Court of Appeals has recently stated the rule as follows:

> [*702] *HN7* (The business judgment rule) bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes. "Questions of policy of management, expediency of contracts or action, adequacy of consideration, lawful appropriation of corporate funds to advance corporate interests, are left solely to their honest and unselfish decision, for their powers therein are without limitation and free from restraint, and the exercise of them for the common and general interests of the corporation may not be questioned, although the results show that what they did was unwise or inexpedient." (*Pollitz v. Wabash R.R. Co., 207 N.Y. 113, 124, 100* [**36] N.E. 721.)
>
> It appears to us that the business judgment doctrine, at least in part, is grounded in the prudent recognition that courts are ill equipped and infrequently called on to evaluate what are and must be essentially business judgments. The authority and responsibilities vested in corporate directors both by statute and decisional law proceed on the assumption that inescapably there can be no available objective standard by which the correctness of every corporate decision may be measured, by the courts or otherwise. Even if that were not the case, by definition the responsibility for business judgments must rest with the corporate directors; their individual capabilities and experience peculiarly qualify them for the discharge of that responsibility. Thus, absent evidence of bad faith or fraud (of which there is none here) the courts must and properly should respect their determinations.

Auerbach v. Bennett, 47 N.Y.2d 619, 629-31, 419 N.Y.S.2d 920, 926-27, 393 N.E.2d 994 (1979); compare *Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del.1971)*. In *Treadway Companies v. Care Corp., supra*, this Court summarized the workings of the business judgment rule as follows: [**37]

> *HN8* Under the business judgment rule, directors are presumed to have acted properly and in good faith, and are called to account for their actions only when they are shown to have engaged in self-dealing or fraud, or to have acted in bad faith. Once a plaintiff demonstrates that a director had an interest in the transaction at issue, the burden shifts to the director to prove that the transaction was fair and reasonable to the corporation. Daloisio v. Peninsula Land Co., supra, 127 A.2d at 893; *Geddes v. Anaconda Copper Co., 254 U.S. 590, 599, 41 S. Ct. 209, 212, 65 L. Ed. 425 (1921)*. Only if the director carries this burden will the transaction be upheld. The initial burden of proving the director's interest or bad faith, however, always rests with the plaintiff.

At 382 (emphasis added).

We find no basis in the present case for the district court's conclusion that InterNorth carried its burden of demonstrating self-interest or bad faith on the part of the Crouse-Hinds directors. As his starting point, the district judge gave extended consideration to the decision in Treadway, in which we found that because the Treadway

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[19] *HN6* As there was no evidentiary hearing in the district court and the injunction was granted on the basis of documents, deposition excerpts and affidavits, we are not limited to reviewing the district court's exercise of discretion but have the power to make a "full review." Jack Kahn Music Co. v. Baldwin Piano & Organ Co., 604 F.2d 755, 758 (2d Cir. 1979). Given the record on which the decision was based, however, we have no doubt that the court's discretion was abused.

directors, other than the chairman, were not to remain [**38] in office after the merger, perpetuation of their control could hardly have been their motivation for actions in furtherance of the merger. (See *id. at 383*.) Unfortunately, the district judge inferred from this that a quite different proposition must also be true-i.e., that if the directors are to remain on the board after the merger, perpetuation of their control must be presumed to be their motivation. This inference has no basis in either law or logic. [20] Treadway did not disturb the normal requirement that a complaining
shareholder present evidence of the directors' [*703] interest in order to shift the burden of proof to them. [21]
[**39]

Such evidence as was offered by InterNorth to support the contention that the Exchange Agreement was intended solely to perpetuate the Crouse-Hinds directors' control must be viewed in the context of the two most striking aspects of this controversy. First, the Crouse-Hinds directors had negotiated the proposed merger with Belden in the belief that the merger was in the best interests of Crouse-Hinds. They had no indication at that time that InterNorth had any interest in Crouse-Hinds. Their good faith and lack of "interest" in entering into the merger agreement are unchallenged. (Indeed, their bona fides could not be attacked by InterNorth, because it was not a Crouse-Hinds shareholder when the proposed merger agreement was entered into. *Fed.R.Civ.P. 23.1(1)*; *N.Y.Bus.Corp.Law § 626* (McKinney's 1963); *Wolf v. Frank, 477 F.2d 467, 476* (5th Cir.), cert. denied, *414 U.S. 975, 94 S. Ct. 287, 38 L. Ed. 2d 218 (1973)*; *Kauffman v. Dreyfus Fund, Inc., 434 F.2d 727, 734-36 (3d Cir. 1970)*, cert. denied, *401 U.S. 974, 91 S. Ct. 1190, 28 L. Ed. 2d 323 (1971)*). And the merger agreement required the Crouse-Hinds board to recommend approval by the
shareholders. [22] Second, the InterNorth Tender [**40] Offer was expressly conditioned on the rejection or abandonment of the agreed-upon merger. There can be no genuine question that the Exchange Offer would increase the likelihood of consummation of the merger, since the Exchange Agreement requires Crouse-Hinds to vote all Belden shares acquired pursuant to the Exchange Offer in favor of the merger. In these circumstances, Crouse-Hinds's directors' attribution of the Exchange Offer to the facilitation of the merger they had negotiated is patently credible, at least in the absence of substantial evidence that their

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[20] The proposition that "A implies B" is not the equivalent of "non-A implies non-B," and neither proposition follows logically from the other. The process of inferring one from the other is known as "the fallacy of denying the antecedent." J. Cooley, A Primer of Formal Logic 7 (1942).

[21] In Treadway, for example, the conclusion that Treadway's chairman was "interested," was not based simply on the fact that he would remain in office following the merger. Rather, we noted that

(t)here was ample evidence to support a finding that Lieblich acted improperly, and determined, for his own selfish reasons and without giving the matter fair consideration, to oppose a Care takeover at all costs. 50

50 Most notable was the fact that Lieblich's view of the dollar value of the Fair Lanes merger proposal was apparently not affected in any way by his learning that, contrary to his prior assumption, certain Fair Lanes assets were to be excluded from the deal.

At --.

Further, it must be recognized that the focus on control motivation in Treadway and other authorities cited by InterNorth was necessitated by the special circumstances of a sale of corporate stock that would alter the voting power of the stockholders. InterNorth relies on these cases, involving sales similar to that in Treadway, or selective redemption of stock, or use of corporate funds to buy out an insurgent, and argues that the Crouse-Hinds Exchange Offer is "functionally identical." In fact it is not. In the cases relied on by InterNorth the actual voting percentages of "friendly" stockholders were increased and the voting percentages of "unfriendly" stockholders were reduced or eliminated. The present case is materially different. The Crouse-Hinds Exchange Offer neither increases nor decreases the voting power of any Crouse-Hinds shareholder in any relevant respect, since the Crouse-Hinds shares issued for the exchange will not be entitled to vote on the proposed merger. To the extent that the consummation of both the exchange and the merger will require an increase in Crouse-Hinds's authorized stock, such an increase is to be voted on by Crouse-Hinds shareholders.

InterNorth argues also that even if Crouse-Hinds shareholders are not actually disenfranchised, they will be coerced to vote for the merger because if they reject the merger the "standstill provisions" of the Exchange Agreement will result in a waste of Crouse-Hinds's assets. The district court refused to base the injunction on this theory, rejecting the contention that the Exchange Offer would amount to waste. See Opinion at 40-41. There is adequate evidence in the record to support its rejection.

[22] We know of no support for the district court's view (Opinion at 37) that the Crouse-Hinds directors were required to "reconsider" the merger agreement that had been entered into and that they were contractually bound to recommend to shareholders. See Casey v. Woodruff, 49 N.Y.S.2d 625, 646 (Sup.Ct.N.Y.Co.1944).

motives lie elsewhere.

The record support here for the contention and conclusion that the motivation for [*704] the Exchange Agreement [**41] was retention of control is unusually sparse, if not nonexistent. No live testimony whatever was offered below, even though subjective issues such as motivation are particularly inappropriate for decision on the basis of a documentary presentation. *S.E.C. v. Frank, 388 F.2d 486, 492 (2d Cir. 1968)*; cf. *Robertson v. Seidman & Seidman, 609 F.2d 583, 591 (2d Cir. 1979)*. No depositions were taken by InterNorth of Crouse-Hinds officials on the subject of motivation. Witting's affidavit-the only affidavit of anyone other than an attorney or an investment banker-contains no support for a finding of control motivation. What InterNorth relies on is (a) Witting's statement, upon hearing about the Tender Offer and the "Belden Condition," that Crouse-Hinds would resist the Tender Offer, [23] and (b) the statements in the Exchange Offer prospectus as to the goal of the Exchange Offer. [24] What Witting said, according to InterNorth's Chairman, was, "We are prepared to give you a handful." This statement plainly says nothing about retention of control. What the prospectus said is that the Exchange Offer seeks (1) to facilitate the merger with Belden and (2) to discourage the InterNorth Tender Offer.

[**42] But it must be recognized that InterNorth's imposition of the "Belden Condition" had made these purposes merely opposite sides of the same coin.

[**43]

Thus, none of the proffered statements is sufficient to show director "interest" of the sort that is needed under the business judgment rule to shift the burden of proof to the directors. In short, when the tender offeror has presented the target company with an obvious reason to oppose the tender offer, the offeror cannot, on the theory that the target's management opposes the offer for some other, unstated, improper purpose, obtain an injunction against the opposition without presenting strong evidence to support its theory. We find no such evidence here.

We reverse so much of the district court's order as granted InterNorth's motion for a preliminary injunction and dismiss the appeal from the remainder of that order for want of appellate jurisdiction.

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[23] There is no statement in the Tender Offer that InterNorth would install a new Crouse-Hinds management; indeed, the Tender Offer states InterNorth has no such plans. InterNorth argues that if all its plans proceed to their intended conclusion, Crouse-Hinds will be a subsidiary company, with its board having to report to InterNorth, and that the Crouse-Hinds board would not be happy running a mere subsidiary company. This is far too meager a basis for a shifting of the burden of proof or the granting of a preliminary injunction.

[24] The fact that the initial decision to oppose the Tender Offer was made in four days does not prove that either that decision or the subsequent Exchange Agreement stemmed from a control motivation. Such decisions are required to be made promptly, see SEC Rule 14e-2, 17 C.F.R. § 240.14e-2 (1980), and are normally made quickly; and the district court recognized that this decision was not made without Crouse-Hinds's having consulted its expert advisers in an effort to be objective. We note further that the Exchange Agreement, which is of course the precise target of the counterclaims, was not entered into until eleven days after announcement of the Tender Offer.

EXHIBIT 2

Farquhar v. United States

United States Court of Appeals for the Ninth Circuit

August 10, 1990, **Submitted, Pasadena, California; August 21, 1990, Filed

No.88-6258

Reporter
1990 U.S. App. LEXIS 27758

JOHN P. FARQUHAR; PETER MEL, Plaintiffs-Appellants, vs. UNITED STATES OF AMERICA, Defendant-Appellee, and 1401 SEPULVEDA CORP., Defendant-Intervenor-Appellee.

Notice: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: [*1] Appeal from the United States District Court for the Central District of California. D.C. No. CV-86-3256-Kn. David V. Kenyon, District Judge, Presiding.

Disposition: AFFIRMED.

Core Terms

deed, condition subsequent, Disabled, Volunteer, Soldiers, parties, extrinsic evidence, permanently, construct, heirs, district court, second part, conditions, Veterans, covenant, grantor, acres, words

Case Summary

Overview

HOLDINGS: [1]-A deed of a parcel of land to the government, which provided that a home for disabled veterans would be built and maintained there, did not create a condition subsequent but instead created a covenant or statement of purpose. Therefore, the heirs of the grantors had no right of reversion as to a portion of the parcel that was cut off from the rest of the parcel and sold as surplus property.

Outcome

Judgment affirmed.

LexisNexis® Headnotes

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN1 A court of appeals reviews a grant of summary judgment de novo. Viewing the evidence in the light most favorable to the nonmoving party, the court determines whether the substantive law was correctly applied and whether there is any issue of material fact.

Real Property Law > Deeds > Construction & Interpretation

Real Property Law > Estates > Future Interests > Right of Entry

Real Property Law > Deeds > Construction & Interpretation

Real Property Law > Estates > Future Interests > Right of Entry

HN2 A condition subsequent gives the grantor a right of reentry and the estate terminates if the right is exercised. Generally, in the construction of deeds, as in construing other writings, courts seek to ascertain and give effect to the real intention of the parties, as such intention may be gathered from the language of the whole instrument. The

** The panel unanimously finds this case suitable for disposition without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

court must bear in mind, however, that the issue before it is the intention of the parties as expressed by the language of the instrument, i.e., what was intended by what was said—not what a party intended to say.

Real Property Law > Estates > Future Interests > Right of Entry

Real Property Law > Deeds > Construction & Interpretation

Real Property Law > Estates > Future Interests > Right of Entry

Real Property Law > Deeds > Construction & Interpretation

HN3 A court's consideration of the question whether the language in a deed creates a condition subsequent is guided by several factors. Such conditions are not favored in law because they tend to destroy estates, and no provision in a deed relied on to create a condition subsequent will be so interpreted if the language of the provision will bear any other reasonable construction. While no precise form of words is necessary to create a condition subsequent, still it must be created by express terms or by clear implication. Merely reciting in a deed that it is in consideration of a certain sum, and that the grantee shall do other things specified therein, does not create an estate upon condition. There must be language used which is so clear as to leave no doubt that the grantor intended that an estate upon condition subsequent should be created — language which ex proprio vigore imports such a condition.

Real Property Law > Deeds > Construction & Interpretation

Real Property Law > Estates > Future Interests > Right of Entry

Real Property Law > Deeds > Construction & Interpretation

Real Property Law > Estates > Future Interests > Right of Entry

HN4 California courts have also noted that when a deed is found to contain a condition subsequent, generally speaking, the apt and appropriate words evidencing that the grant is on condition subsequent are found in (1) a provision for forfeiture and (2) right of re-entry. That a deed contains neither provision, however, by itself is not determinative.

Real Property Law > Deeds > Construction & Interpretation

Real Property Law > Estates > Future Interests > Right of Entry

Real Property Law > Deeds > Construction & Interpretation

Real Property Law > Estates > Future Interests > Right of Entry

HN5 In deciding whether a condition subsequent has been created in a deed, a court looks for language declaring a condition or which necessarily implies a condition, e.g., "provided, however," "in the event that," "upon express condition." The use of the words such as "upon the express condition that" are appropriate to create a condition subsequent. While no particular words need be used, nor need there be any clause of reentry, something in the deed must say that the estate granted is conditioned upon a certain use, or that the estate is subject to termination for breach of the condition.

Real Property Law > Deeds > Construction & Interpretation

Real Property Law > Estates > Future Interests > Reversions & Reverter

Real Property Law > Estates > Future Interests > Right of Entry

Real Property Law > Encumbrances > Restrictive Covenants > Creation of Restrictive Covenants

Real Property Law > Deeds > Construction & Interpretation

Real Property Law > Estates > Future Interests > Reversions & Reverter

Real Property Law > Estates > Future Interests > Right of Entry

Real Property Law > Encumbrances > Restrictive Covenants > Creation of Restrictive Covenants

HN6 If the language in a deed will bear a reasonable construction which avoids a reversion, that construction must be adopted. For example, a clause in a deed imposing obligations or restrictions on the grantee, will be construed as a covenant rather than a condition subsequent when that can reasonably be done. The policy of the law is to construe language limiting the use of land as creating covenants personal to the grantor, and not assignable, rather than as creating conditions subsequent.

Real Property Law > Encumbrances > Restrictive Covenants > Creation of Restrictive Covenants

Real Property Law > Deeds > Construction & Interpretation

Real Property Law > Encumbrances > Restrictive Covenants > Creation of Restrictive Covenants

Real Property Law > Deeds > Construction & Interpretation

HN7 The phrase "further consideration" in a deed has been held to imply a promise or covenant on the part of the grantor to use the property in the prescribed manner, rather than as a mere condition having no promissory force notwithstanding the use in the deed of the words "upon the expressed condition."

Counsel: FRED G BENNET, GIBSON, DUNN & CRUTCHER, LOS ANGELES CA; Irell & Manella, Steven L. Sloca, Barbara E. Arnold, LA, CA, applicant for intervention.

WILLIAM B. SPIVAK, JR, for defendant USA.

Judges: Before: POOLE and THOMPSON, Circuit Judges, and PRO, District Judge.***

Opinion

MEMORANDUM *

Plaintiffs, on behalf of themselves and all other heirs of Arcadia Bandini de Baker and John P. Jones, sued the United States to quiet title to approximately 2.13 acres of land they contend reverted to them pursuant to a condition subsequent in an 1888 deed. By this deed, Bandini and Jones conveyed 300 acres of land to the National Home for Disabled Volunteer Soldiers (now the Veterans Administration). The deed provided that a branch home for disabled veterans would be constructed and permanently maintained on the property. When the [*2] San Diego Freeway was built, the 2.13 acres in dispute in this case was sliced off from what remained of the original 300-acre grant. The government declared the 2.13 acres to be surplus property. The property was put up for sale, and the intervenor, 1401 Sepulveda Corp., was the high bidder.

The district court concluded from the face of the deed that no condition subsequent had been created. Summary judgment and judgment on the pleadings was granted in favor of the United States and the intervenor. The heirs appeal. We affirm.

ANALYSIS

HN1 We review a grant of summary judgment de novo. *Darring v. Kincheloe, 783 F.2d 874, 876 (9th Cir. 1986)*. Viewing the evidence [1] in the light most favorable to the nonmoving party, we determine whether the substantive law was correctly applied and whether there is any issue of material fact. Id. The parties agree that the law of California is applicable to this case. See, e.g., *Los Angeles & Salt Lake R. Co. v. United States, 140 F.2d 436, 437 (9th Cir.)*, cert. denied, *322 U.S. 757, 64 S. Ct. 1264, 88 L. Ed. 1586 (1944)*.

The 1888 deed reads in part as follows:

This Indenture made . . . .

> WITNESSETH: That whereas by an act of Congress approved March 2nd, 1887, to provide for the location and erection of a branch home for disabled volunteer soldiers West of the Rocky Mountains, the Board of Managers of the National Home for Disabled Volunteer Soldiers, were
> authorized, empowered [*4] and directed to locate, establish, construct and permanently maintain a branch of said National Home for Disabled Volunteer Soldiers, to be by such Board, located at such place in the States West of the Rocky Mountains as to said Board should appear most desirable and advantageous.
>
> And whereas, the parties hereto of the first part [Jones and Baker] in consideration that the party hereto of the second part should locate, establish, construct and permanently maintain a branch of said National Home for Disabled Volunteer Soldiers on a site to be selected by its Board of Managers along the dividing line between the Ranchos San Jose de Buenos Ayres and San Vicente y Santa Monica offered to donate to the said party of the second part, three hundred acres of land, being a portion of said Rancho San Vicente y Santa Monica, belonging to them, the said parties of the first part,

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*** Honorable Philip M. Pro, United States District Judge for the District of Nevada, sitting by designation.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

[1] The heirs argue that the district court should have considered two items of extrinsic evidence: the 1924 minutes and records of the Board of Managers of the National Home allegedly stating that the Board sought the approval of the Jones heirs prior to a sale of land, and the 1896 modification deed.

Under California law, [*3] extrinsic evidence is virtually always to be considered. See Trident Center v. Connecticut Gen. Life Ins. Co., 847 F.2d 564, 569 (9th Cir. 1988). Here, however, the extrinsic evidence sheds no further light on the terms of the deed. Because the extrinsic evidence is insufficient to render the deed reasonably susceptible to the heirs' interpretation, no genuine issue of material fact would be created even if the court were to consider this evidence. Thus, the district court did not err in refusing to consider the proffered extrinsic evidence. Given these circumstances, we decline to resolve what may be a conflict in the California cases as to the admissibility of extrinsic evidence in a case such as this. See Mason v. Superior Court, 163 Cal. App. 3d 989, 998-90, 210 Cal. Rptr. 63 (1985); compare Continental Baking Co. v. Katz, 68 Cal. 2d 512, 521-22, 439 P.2d 889, 67 Cal. Rptr. 761 (1968) (extrinsic evidence admissible to explain terms of deed, but not to give it a meaning to which the terms are not reasonably susceptible); with Springmeyer v. City of S. Lake Tahoe, 132 Cal. App. 3d 375, 379-80, 183 Cal. Rptr. 43 (1982) (general rules not applicable where forfeiture involved).

on which to locate, establish, construct and permanently maintain such branch of said National Home for Disabled Volunteer Soldiers:

. . .

Now therefore, in consideration of the premises and of the location, establishment, construction and permanent maintenance of a branch of said
National Home for Disabled Volunteer Soldiers [*5] on such tract of land so selected and of the benefits to accrue to the said parties of the first part, owners of the said Rancho San Vicente y Santa Monica, by such location have given and granted and by these presents do give and grant unto the said party of the second part, all the following described land and premises, situate lying and being in the County of Los Angeles, State of California and particularly bounded and described as follows:

. . . .

. . . for the purpose of such branch Home for Disabled Volunteer Soldiers to be thereon so located, established, constructed and permanently maintained.

The 1896 modification deed corrects an error in the 1888 deed:

. . .

Witnesseth That Whereas the parties hereto of the first part [Baker & Jones], by deed dated the 3rd day of March 1888, which land deed is recorded . . ., conveyed to the parties of the second part, a tract of land containing . . . , on which to locate, establish, construct and permanently maintain buildings for a branch of the National Home for Disabled Volunteer Soldiers, upon the terms and conditions in said deed mentioned.

[The boundaries of the parcel are corrected.]

. . . unto the said party of the second part, its
successors [*6] and assigns forever for the purpose and objects and upon the terms and conditions mentioned and contained in said deed of March 3rd 1888, heretofore referred to . . . .

The heirs contend that the 1888 deed created a condition subsequent.[2] ***HN2*** A condition subsequent gives the grantor a right of reentry and the estate terminates if the right is exercised. *Alamo School Dist. v. Jones, 182 Cal. App. 2d 180, 185, 6 Cal. Rptr. 272 (1960)*. Generally, "[i]n the construction of deeds, as in construing other writings, courts seek to ascertain and give effect to the real intention of the parties, as such intention may be gathered from the language of the whole instrument." *Downing v. Rademacher, 133 Cal. 220, 226 (1901), 65 P. 385*; see *Los Angeles City Employees Union, Local 347 v. City of El Monte ("LACEU"), 177 Cal. App. 3d 615, 622, 220 Cal. Rptr. 411 (1985)*. "The court must bear in mind, however, that the issue before us is the intention of the parties as expressed by the language of the instrument, i.e., what was intended by what was said—not what a party intended to say." *LACEU, 177 Cal. App. 3d at 622*.

HN3 Our consideration of the question whether the language in [*7] the 1888 deed creates a condition subsequent is guided by several factors.

> Such conditions are not favored in law because they tend to destroy estates, and no provision in a deed relied on to create a condition subsequent will be so interpreted if the language of the provision will bear any other reasonable construction. While no precise form of words is necessary to create a condition subsequent, still it must be created by express terms or by clear implication. Merely reciting in a deed that it is in consideration of a certain sum, and that the grantee shall do other things specified therein, does not create an estate upon condition. There must be language used which is so clear as to leave no doubt that the grantor intended that an estate upon condition subsequent should be created — language which ex proprio vigore imports such a condition.

Hawley v. Kaflitz, 148 Cal. 393, 394-95, 83 P. 248 (1905).

HN4 California courts have also noted that when a deed is found to contain a condition subsequent, "[g]enerally speaking, the apt and appropriate words evidencing that the grant is on condition subsequent are found in [1] a provision for forfeiture and [2] right of re-entry." *Fitzgerald v. County of Modoc, 164 Cal. 493, 495, 129 P. 794 (1913)*; see *Hawley, 148 Cal. at 395*; *Cullen v. Sprigg, 83 Cal. 56, 64, 23 P. 222 (1890)*; *Rosecrans v. Pacific Elec. Ry., 21 Cal. 2d 602, 605, 134 P.2d 245 (1943)*. The 1888 deed contains

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[2] The heirs contend in the alternative that the restrictive language in the deed constitutes a covenant enforceable in equity. This issue was not presented to the district court. It is raised for the first time on appeal. We refuse to consider it. See, e.g., Telco Leasing, Inc. v. Transwestern Title Co., 630 F.2d 691, 693 (9th Cir. 1980).

neither provision. This, however, by itself is [*8] not determinative.

HN5 In deciding whether a condition subsequent has been created, we also look for language declaring a condition or which necessarily implies a condition, e.g., "provided, however," "in the event that," "upon express condition." *Hawley, 148 Cal. at 395*. "The use of the words such as 'upon the express condition that' are appropriate to create a condition subsequent." *Rosecrans, 21 Cal. 2d at 605*; see also *McDougall v. Palo Alto Unified School Dist., 212 Cal. App. 2d 422, 435, 28 Cal. Rptr. 37 (1963)*. While "[n]o particular words need be used, nor need there be any clause of reentry," something in the deed must say that the estate granted is conditioned upon a certain use, or that the estate is subject to termination for breach of the condition. *Alamo, 182 Cal. App. 2d at 185-86*. None of this language is found in the 1988 deed.

HN6 "If the language in the deed will bear a reasonable construction which avoids a reversion, that construction must be adopted." *Springmeyer, 132 Cal. App. 3d at 382*; see *Cullen, 83 Cal. at 64*. For example, "a clause in a deed imposing obligations or restrictions on the grantee, will be construed as a covenant rather than a condition subsequent when that can reasonably be done." *Rosecrans, 21 Cal. 2d at 605*; see *Savanna School Dist. of Orange Co. v. McLeod, 137 Cal. App. 2d 491, 494, 290 P.2d 593 (1955)*. "The policy of the law is to construe language limiting the use of land as creating covenants personal to the grantor, and not assignable, rather than as creating conditions subsequent." *Alamo, 182 Cal. App. 2d at 190*.

Construing the [*9] language of the 1888 deed as creating a covenant or statement of purpose, rather than a condition, is consistent with the deed's stated purpose. In the deed, the establishment and maintenance of the home is referred to as "consideration" for the "donation" of the land, and as the "purpose" of the grant. *HN7* The phrase "further consideration" has been held to imply a promise or covenant on the part of the grantor to use the property in the prescribed manner, rather than as a "mere condition having no promissory force" notwithstanding the use in the deed of the words "upon the expressed condition." *Victoria Hosp. Ass'n v. All Persons, 169 Cal. 455, 462-63, 147 P. 124 (1915)*. Although the Veterans Administration did not pay money for the land, a circumstance which could be a factor in finding that a condition subsequent was originally intended, see *Biescar v. Czechoslovak-Patronat, 145 Cal. App. 2d 133, 145, 302 P.2d 104 (1956)*, the grantors received the benefit they sought by donating the land. A branch home for veterans was constructed on the property. Indeed, the Veterans Administration continues to operate and maintain a branch home on the remainder of the property to this day.

CONCLUSION

Having considered the various factors which bear upon the construction of the language of the 1888 deed, we conclude that the district court correctly determined [*10] that a condition subsequent was not created, and that the proffered parol evidence would not have created any genuine issue of material fact to the contrary.

AFFIRMED.

EXHIBIT 3

In re Application of Mareck

Supreme Court of Minnesota

January 22, 1960

No. 37,787

Reporter
257 Minn. 222; 100 N.W.2d 758; 1960 Minn. LEXIS 522

In re Application of Waldo T. Mareck to Register Title. Waldo T. Mareck v. Frederick A. Hoffman and Others. Miles Lord, Attorney General, Appellant

Prior History: [***1] Appeal by Miles Lord, Attorney General, as representative of the beneficiaries of certain trusts, from the order and decree of registration entered in the Hennepin County District Court, D. E. LaBelle, Judge, in a proceeding by Waldo T. Mareck to register title to certain land in said county.

Disposition: Affirmed.

Core Terms

village, deed, charitable trust, attorney general, right-of-way, conditional, quitclaim deed, Block, purposes, Street, conveyed, strip, possibility of reverter, conveyance, streetcar, grantor, revert, assigns, heirs, intention of the parties, public park, residential, platted, words, determinable, filling, feet

Case Summary

Procedural Posture

Appellant attorney general, as representative of the beneficiaries of certain trusts, appealed from an order and decree of the District Court of Hennepin County (Minnesota), in a proceeding by appellee register of titles to register title to certain land in the county. The property had been conveyed by the village to the applicant, who then attempted to perfect title to the property by recording the deed.

Overview

The attorney general, who represented the beneficiaries of certain trusts, challenged an order and a decree of registration entered by the trial court for the register of titles, in a proceeding to register title to land in the county. The attorney general asserted that a trust existed as to the land in favor of the public and that the village was without authority to convey the property. The county title examiner, acting as referee, found that the applicant was the owner in fee of the property and recommended registering title to the property in his name. The findings of the referee were adopted by the trial court. An order and decree of registration were issued. The court affirmed the judgment of the trial court. The court determined that the evidence amply sustained the findings of the referee and the trial court that the conveyance did not create a charitable trust but that the tile conveyed to the village was a fee subject to a condition subsequent or a determinable fee. The court concluded that the quitclaim deeds from the heirs of the holder of the possibility of reverter to the village released the right of reverter and vested fee simple absolute title in the village.

Outcome

The court affirmed the order and decree of the trial court, entered in favor of the register of titles, which adopted the referee's decision that the applicant was the owner in fee of the disputed property and recommendation that title to the property be registered in his name, over the objection of the attorney general, who represented the beneficiaries of certain trusts.

LexisNexis® Headnotes

Contracts Law > Contract Interpretation > Intent

Real Property Law > Deeds > Construction & Interpretation

HN1 Rules of construction are brought into requisition only for the purpose of ascertaining the intention of the parties, where that intention is not made clear by their written contract.

Real Property Law > Deeds > Construction & Interpretation

HN2 Technical rules of construction are not favored, and are not to be so applied as to defeat the intention of the parties; for, such rules of construction, in modern times,

have given way to the more sensible rule, which is, in all cases, to give effect to the intention of the parties, if practicable, when no principle of law is thereby violated. Too much stress is not to be laid on the grammatical construction or forms of expression used. The cardinal rule of construction is to ascertain and give effect to the intention of the parties to the instrument; and, to this end, the court must consider all parts of it, and the construction must be upon the entire deed, and not upon disjointed parts. And, if the language is ambiguous, resort may be had to evidence of the surrounding circumstances, and the situation of the parties, if necessary, in order to throw light upon their intention.

Estate, Gift & Trust Law > Trusts > General Overview

Estate, Gift & Trust Law > Trusts > Creation of Trusts

HN3 It is axiomatic that no particular form of words or conduct is necessary to create a trust. Neither the word trust nor trustee is required.

Estate, Gift & Trust Law > Trusts > General Overview

Estate, Gift & Trust Law > Trusts > Creation of Trusts

HN4 Use of the words trust or trustee does not necessarily create a trust.

Estate, Gift & Trust Law > Gifts > Personal Gifts > General Overview

Estate, Gift & Trust Law > Trusts > Charitable Trusts

HN5 A gift may have a charitable purpose and yet not constitute a charitable trust.

Estate, Gift & Trust Law > Gifts > Personal Gifts > General Overview

Estate, Gift & Trust Law > Trusts > General Overview

Estate, Gift & Trust Law > Trusts > Charitable Trusts

Estate, Gift & Trust Law > Trusts > Trust Administration > Construction & Interpretation of Trusts

Estate, Gift & Trust Law > Trusts > Testamentary Trusts

Real Property Law > Ownership & Transfer > Death & Incapacity > General Overview

Real Property Law > Trusts > Holding Trusts

HN6 A gift may have a charitable purpose and yet not constitute a charitable trust. To create a charitable trust of realty by will, it is also necessary that the testator manifest an intention that the transferee shall hold the gift subject to an equitable duty to serve the charitable purpose. Thus, a breach of trust does not result in destruction of the devise, but instead gives rise to an action against the trustee, which in the State of Minnesota is enforced by the attorney general. On the other hand, where it clearly appears that the testator intends that the res shall revert to himself or his heirs if the charitable purpose is not served, the devise is not a charitable trust, but is construed as some type of absolute or conditional gift.

Estate, Gift & Trust Law > Estate Interests > Estates in Fee Simple

Estate, Gift & Trust Law > Estate Interests > Future Interests > General Overview

Estate, Gift & Trust Law > Trusts > General Overview

HN7 A possibility of reverter is one of the common characteristics of a terminable fee.

Estate, Gift & Trust Law > Estate Interests > Estates in Fee Simple

Estate, Gift & Trust Law > Trusts > Charitable Trusts

Estate, Gift & Trust Law > ... > Private Trusts Characteristics > Trustees > General Overview

Estate, Gift & Trust Law > ... > Trustees > Duties & Powers > General Overview

Real Property Law > Estates > Present Estates > Fee Simple Estates

HN8 It would seem that the distinction between a charitable trust and a conveyance on a conditional fee lies mainly in the duties of the trustee or the grantee. In the case of a charitable trust, the trustee assumes an affirmative duty to use the property in accordance with the trust. In the case of a conditional fee, the grantee has permissive right to use as directed and he may lose the title if he departs from such use.

Real Property Law > Deeds > Construction & Interpretation

Real Property Law > Deeds > Validity Requirements > Enforceability

HN9 While the use to which property is put may not be conclusive as to the nature of the conveyance, it is a factor which the court can take into consideration in determining the intention of the parties at the time the conveyance was made.

Real Property Law > Deeds > Construction & Interpretation

HN10 The court recognizes the rule that a deed which is ambiguous on its face, the intent of the grantor should be

determined from the deed and in light of the surrounding circumstances.

Estate, Gift & Trust Law > Estate Interests > Estates in Fee Simple

Estate, Gift & Trust Law > Estate Interests > Future Interests > General Overview

Real Property Law > Estates > Future Interests > Reversions & Reverter

HN11 Minn. Stat. § 500.16 now states that expectant estates are descendible, devisable, and alienable in the same manner as estates in possession; and hereafter contingent rights of reentry for breach of conditions subsequent, and rights to possession for breach of conditions subsequent after breach but before entry made, and possibilities of reverter, shall be descendible, devisable, and alienable in the same manner as estate in possession.

Estate, Gift & Trust Law > Estate Interests > Estates in Fee Simple

Estate, Gift & Trust Law > Estate Interests > Future Interests > General Overview

Real Property Law > Deeds > Types of Deeds > General Overview

Real Property Law > Deeds > Types of Deeds > Quit Claim Deeds

Real Property Law > Deeds > Validity Requirements > Enforceability

Real Property Law > Estates > Future Interests > Reversions & Reverter

Real Property Law > Estates > Present Estates > Fee Simple Estates

HN12 A quitclaim deed by the heirs at law of a grantor to a holder of a fee conditional or determinable releases the right of reverter and vests the absolute title in the holder of the conditional or determinable fee.

Estate, Gift & Trust Law > Estate Interests > Estates in Fee Simple

Estate, Gift & Trust Law > Estate Interests > Future Interests > General Overview

Real Property Law > Deeds > Types of Deeds > General Overview

Real Property Law > Deeds > Types of Deeds > Quit Claim Deeds

Real Property Law > Estates > Present Estates > Fee Simple Estates

HN13 A quitclaim deeds from the heirs of a holder of the possibility of reverter to a village releases such rights of reverter and vests fee simple absolute title in the village.

Headnotes/Syllabus

Headnotes

Deeds -- construction -- ambiguity -- intention of parties.

1. Where the language of a deed is ambiguous, rules of construction are brought into play for the purpose of determining the intention of the parties.

Deeds -- construction -- ambiguity -- intention of parties.

2. If the language of a deed is ambiguous, the intention of the parties is to be determined from the deed and the surrounding circumstances of the parties at the time of the execution of the deed.

Trusts -- creation.

3. No particular form of words or conduct is necessary to create a trust. Use of the words "trust" or "trustee" is not necessary, but it is also true that use of the words "trust" or "trustee" does not necessarily create a trust.

Trusts -- charitable trust -- creation.

4. A gift may have a charitable purpose and yet not create a charitable trust.

[***2] **Trusts -- charitable trust -- creation.**

5. The evidence in this case sustains a finding of the referee and trial court that a deed using language consistent with the creation of either a charitable trust or a conditional fee was intended to create a conditional fee.

Deeds -- possibility of reverter -- whether alienable.

6. A possibility of reverter, prior to the enactment of L. 1937, c. 487, § 2, was inalienable but could be released to the holder of the fee simple conditional.

Deeds -- possibility of reverter -- release by quitclaim.

7. A quitclaim deed from the heirs of the grantor holding a possibility of reverter to the holder of a fee simple conditional constituted a release of the possibility of reverter.

Counsel: *Miles Lord*, Attorney General, and *William M. Serbine*, Assistant Attorney General, for appellant.

Van Valkenburg, Blaisdell & Moss, for respondent.

Judges: Knutson, Justice.

Opinion by: KNUTSON

Opinion

[*223] [**759] This is an appeal from an order and decree of registration of title to certain land.

The land involved in this title registration proceeding consists of a part of what is now platted as Lots 3 to 10, inclusive, [***3] of Block 1, Arden Park Second Addition in the village of Edina. In an earlier plat, the land involved in this proceeding was designated as Block 14, Browndale Park. Lots 3 to 10 of Block 1 of Arden Park Second Addition are now platted as residential lots but are as yet undeveloped. The lots vary in depth from approximately 100 feet to approximately 120 feet and extend southerly from West Forty-fourth Street in the village of Edina. They abut on the southerly end upon residential lots in the Country Club District, Brown Section. [**760] There is no street or alley between the southerly end of these lots and the lots upon which they abut. For many years the southerly 100 feet of Lots 3 to 10 comprised the right-of-way of the Minneapolis & St. Paul Suburban Railway Company running westerly from the city of Minneapolis to the city of Hopkins. The tract of land involved in this proceeding, then platted as Block 14, Browndale Park, is a strip of land about 1,000 feet in length, having a maximum width of 18 to 20 feet near the center and tapering to a point at each end. This narrow strip of land lay between the streetcar right-of-way and West Forty-fourth Street in the village.

[***4] [*224] Browndale Park was platted in 1909. At that time both the streetcar right-of-way and West Forty-fourth Street (which was formerly a county road) were laid out and in use. The strip involved here, lying between the streetcar right-of-way and West Forty-fourth Street, was not of an appropriate size or shape to be used as a residential lot, as was the rest of the addition. It was given a block designation, number 14, but was without lot separation or designation. The plat contains no dedication or designation of any sort as to any public character or restricted use of Block 14, nor does any such limitation appear in subsequent conveyances until the year 1919.

On June 24, 1919, Frank R. Hubachek, the then owner, conveyed Block 14 to Duncan R. McNaught and Frank M. Nye by deed. This deed contained the following provision: "This conveyance is made upon the express condition and covenant that no building or structure of any nature or kind, except it be used for public park purposes, shall ever be erected upon the land and premises above described and in the event of a breach of this condition and covenant, the said land and premises are to revert to the parties of the [***5] first part, their heirs and assigns."

Frank M. Nye later conveyed his interest to McNaught, so he is no longer involved in this proceeding and will not be mentioned herein.

On July 15, 1929, Duncan R. McNaught and his wife, by quitclaim deed, conveyed Block 14, Browndale Park, to the village of Edina, its successors and assigns. This deed contained the following provision:

"* * * in trust, nevertheless, to have, hold, administer and maintain the same as a public park; and the grantee will not use the said land or suffer it to be used for storage or dumping purposes or for a filling station or for the sale of merchandise or other thing; and if said land shall cease to be a public park or shall be used for storage or dumping purposes or for a filling station or for the sale of merchandise or other thing, the title thereto shall revert to the above named grantor, Duncan R. McNaught, his heirs or assigns."

No formal acceptance of such conveyance by the village has been [*225] shown in the record, but thereafter until 1956 the property was carried on the tax rolls as "exempt."

It was stipulated at the trial that the village intermittently cut the grass on said tract in accordance [***6] with its normal practice with reference to other lands owned by the village. There is no record of expenditures made with respect to the tract other than that involved in the labor of intermittently cutting the grass. Some native shrubbery and a few lilac bushes were allowed to grow upon the property along a fence line separating this strip from the streetcar right-of-way, but no witness could recollect any cultivation thereof or the planting of any flowers on the property. In later years, rubbish occasionally accumulated on this strip of land.

[**761] Following the conversion of the Twin Cities transportation system to buses, the streetcar right-of-way was abandoned and was acquired by one W. N. Carlson, applicant's predecessor in title. Early in 1955 applicant commenced negotiations for the purchase of the former right-of-way for residential development. Since Block 14 blocked access to West Forty-fourth Street from the right-of-way, its acquisition became necessary in order to develop the rest of the land for residential purposes.

On December 27, 1955, Emma McNaught, widow of Duncan R. McNaught and one of the grantors in the 1929

deed to the village of Edina, for a [***7] consideration of $ 1,000 paid by applicant, executed a quitclaim deed to the village of Edina covering the land here involved.

On March 14, 1956, Frank B. Hubachek, as successor in title to Frank R. Hubachek and Nellie A. Hubachek, his wife, the grantors in the 1919 deed to McNaught, for a consideration of $ 1,000 paid by applicant, executed with his wife a quitclaim deed to said land running also to the village of Edina.

On April 23, 1956, the village of Edina, by quitclaim deed, for a consideration of $ 250, conveyed its interest in said property to applicant, subject to the alleged defects hereinafter discussed.

The present registration proceedings were commenced on May 3, 1956. The attorney general, acting under M.S.A. 501.12, answered [*226] asserting that a trust existed as to Block 14 in favor of the public and that the village was without authority to convey said property. The issue came before the title examiner of Hennepin County, acting as referee, and, after hearings thereon, he found that applicant was the owner in fee of the property and recommended that the title to the property be registered in his name. The findings of the referee were adopted by the [***8] trial court, and an order and decree of registration were issued, from which this appeal is perfected.

It is the principal contention of the attorney general that the deed executed by McNaught and his wife to the village of Edina in 1929 created a charitable trust under § 501.11 and that the village was without authority to convey this property in the manner in which it was conveyed. Other questions incidental to this principal question will be discussed hereinafter.

1-2. The referee and the trial court found that the deed from McNaught to the village of Edina in 1929 created either a determinable fee with a right of reversion reserved in Duncan R. McNaught in the event that the grantee ceased to use the land embraced therein as a public park or permitted the land to be used for storage or dumping purposes or for a filling station or for the sale of merchandise thereon, or a fee simple on condition subsequent that the title thereto would revert to Duncan R. McNaught upon his exercise of a right of reentry in the event of a violation of any of the conditions therein enumerated. The distinction between the two is not material in this case. [1] It is this finding that is principally [***9] assailed by the attorney general.

At the outset, it is clear that the deed from McNaught to the village contains language consistent with the creation of either a charitable trust or a determinable fee or a fee simple upon a condition subsequent. Thus, it follows that an ambiguity exists in the deed giving rise to the application of rules of construction in the proper interpretation thereof for the purpose of ascertaining the intent of the parties.

[*227] In *Lawton v. Joesting, 96 Minn. 163, 166, 104 N.W. 830, 831*, we said:

"The language of this deed is ambiguous to such an extent as to call [**762] for the construction and interpretation of the court. * * * ***HN1*** Rules of construction are brought into requisition only for the purpose of ascertaining the intention of the parties, where that intention [***10] is not made clear by their written contract."

We followed with approval the expression of the applicable rules found in *Grueber v. Lindenmeier, 42 Minn. 99, 100, 43 N.W. 964, 965*, where we said:

HN2 "* * * Technical rules of construction are not favored, and are not to be so applied as to defeat the intention of the parties; for, as was said in *Witt v. St. Paul & N.P. Ry. Co., 38 Minn. 122, (35 N.W. Rep. 862,)* such rules of construction, in modern times, have given way to the more sensible rule, which is, in all cases, to give effect to the intention of the parties, if practicable, when no principle of law is thereby violated. Too much stress is not to be laid on the grammatical construction or forms of expression used. The cardinal rule of construction is to ascertain and give effect to the intention of the parties to the instrument; and, to this end, the court must consider all parts of it, and the construction must be upon the entire deed, and not upon disjointed parts. And, if the language is ambiguous, resort may be had to evidence of the surrounding circumstances, and the situation of the parties, if necessary, in order to throw light upon their intention."

3. It is true [***11] that the deed now under consideration uses language consistent with the creation of a trust. In *Schaeffer v. Newberry, 235 Minn. 282, 288, 50 N.W. (2d) 477, 481*, we said:

HN3 "* * * It is axiomatic that no particular form of words or conduct is necessary to create a trust. Neither the word 'trust' nor 'trustee' is required."

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[1] The practical distinction between the two rests largely in their manner of termination." Consolidated School Dist. No. 102 v. Walter, 243 Minn. 159, 162, 66 N.W. (2d) 881, 884, 53 A.L.R. (2d) 218, 222.

HN4 It is also true that use of the words "trust" or "trustee" does not necessarily create a trust. [2]

[*228] 4. *HN5* A gift may have a charitable purpose and yet not constitute a charitable trust. In the Schaeffer case we said (*235 Minn. 286, 50 N. W. [2d] 480*):

HN6 "* * * a gift may have a charitable purpose and yet not constitute a charitable trust. To create a charitable trust of realty by will, it is also necessary that the testator manifest an intention that the transferee shall hold the gift subject to [***12] an equitable duty to serve the charitable purpose. Thus, a breach of trust does not result in destruction of the devise, but instead gives rise to an action against the trustee, which in Minnesota is enforced by the attorney general. On the other hand, where it clearly appears that the testator intends that the *res* shall revert to himself or his heirs if the charitable purpose is not served, the devise is not a charitable trust, but is construed as some type of absolute or conditional gift."

In Restatement, Trusts (2 ed.) § 11, comment *a*, we find the following:

"The owner of property may transfer it, inter vivos or by will, to another person and provide that if the latter should fail to perform a specified act his interest should be forfeited. In such a case the interest of the transferee is subject to a condition subsequent and is not held in trust."

The referee said in his memorandum:

"* * * It appears to your Referee that although McNaught used the words 'in trust' and 'public park' in his deed, he did not thereby intend [**763] that such land was to vest in accordance with the strict legal meaning of such words, but used them in a loose sense with the idea [***13] that the Village might, if such land ceased to be useful as a barrier between the street car right-of-way and the homes to the north thereof, dispose of said land to 'its *assigns*' if the disposition thereof would inure to the betterment of the neighborhood and the Village."

5. So it is readily seen that, while the grantor did use language consistent with the creation of a charitable trust, he also provided that the title should revert to him if the property ceased to be used [*229] for a public park or if it was "used for storage or dumping purposes or for a filling station or for the sale of merchandise or other thing." It is thus apparent that the reversion clause came into being for reasons other than mere abandonment of the property for park purposes. The habendum clause runs to the village, "its successors and assigns." Use of the work "assigns" is inconsistent with the creation of a charitable trust inalienable by the village. *HN7* A possibility of reverter is one of the common characteristics of a terminable fee. [3]

[***14] *HN8* It would seem that the distinction between a charitable trust and a conveyance on a conditional fee lies mainly in the duties of the trustee or the grantee. In the case of a charitable trust, the trustee assumes an affirmative duty to use the property in accordance with the trust. In the case of a conditional fee, the grantee has permissive right to use as directed and he may lose the title if he departs from such use. Aside from intermittent cutting of grass on this strip of land by the village, the evidence fails to show that the village used it for park purposes at any time. Some shrubbery, including a few lilac bushes, were permitted to grow on the strip, but there is no showing that any of such shrubbery was ever planted by the village. No effort was made to beautify the strip in any way, and in later years some refuse was permitted to accumulate thereon. Rather, it was used only as a buffer between the streetcar right-of-way and the street.

HN9 While the use to which the property was put may not be conclusive as to the nature of the conveyance, it is a factor which the court could take into consideration in determining the intention of the parties at the time the conveyance [***15] was made. The property then was not suitable for use for residential purposes because of its size and shape and its close proximity to the street and streetcar right-of-way. However, it is reasonable to assume that when the strip was conveyed to the village the grantor reserved the right to have it back in the future in the event that it became usable by virtue of abandonment of the streetcar right-of-way, if the village did not then make use of it as a park or violated [*230] the other restrictions contained in the deed, and that the village accepted the property on such conditions. We think that the evidence amply sustains the findings of the referee and court that the conveyance did not create a charitable trust but that the title conveyed to the village was a fee subject to a condition subsequent or a determinable fee.

The attorney general relies for the most part on *Consolidated School Dist. No. 102 v. Walter, 243 Minn. 159, 66 N.W. (2d)*

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[2] Connecticut Junior Republic Assn. Inc. v. Town of Litchfield, 119 Conn. 106, 174 A. 304, 95 A.L.R. 56; Fayette County Board of Education v. Bryan, 263 Ky. 61, 91 S.W. (2d) 990.

[3] Schaeffer v. Newberry, 235 Minn. 282, 50 N.W. (2d) 477; Longcor v. City of Red Wing, 206 Minn. 627, 289 N.W. 570.

881, 53 A.L.R. (2d) 218. The language used in the deed in that case is not distinguishable from that used in the present case. ***HN10*** However, there, as here, we did recognize the rule that in a deed of such nature, which is ambiguous on its [***16] face, the intent of the grantor should be determined from the deed (243 Minn. 162, 66 N.W. [2d] 883, 53 [**764] A.L.R. [2d] 222) "and in light of the surrounding circumstances." The evidence in that case pertaining to the size and nature of the land, its intended use, and the circumstances under which the conveyance was made is distinguishable from that involved in this case. In a case involving a determination of the intent of a grantor, each case must rest on its own facts.

6. The attorney general has raised other questions of some importance to the bench and bar which involve issues not pertinent to the purpose for which he appears in this litigation. The attorney general appears here by virtue of § 501.12 [4] solely for the purpose of enforcing a charitable trust as the representative of the beneficiaries thereof, which in this case are the members of the public. If there is no charitable trust, there is nothing for the attorney general to enforce, and other defects in the title proceeding are no concern of his. However, one of the questions raised has been argued without objection, and it is of sufficient importance so that we shall briefly dispose of it.

[***17] [*231] It is the contention of the attorney general that prior to the enactment of L. 1937, c. 487, § 2, which amended M.S.A. 500.16, [5] possibilities of reverter were inalienable under the laws of this state; hence that the deeds from Emma McNaught and Frank B. Hubachek and his wife passed nothing to the village. We have heretofore held that prior to the 1937 amendment of § 500.16 possibilities of reverter were inalienable under the laws of this state. [6] Under the common law, however, such possibilities of reverter could always be released to the holder of the fee simple conditional. [***18] [7]

7. Here the quitclaim deeds from Emma McNaught and Frank B. Hubachek and wife ran to the village, the tenant of the fee simple conditional. The quitclaim deeds operated as a release of the possibility of reverter. The common-law form of release often included the terms common in modern times to a quitclaim deed. In 2 Reeves, Real Property, § 1045, we find the following:

"* * * the quit-claim deed of to-day is an outgrowth of the common-law release, and quite generally fills its office in modern transactions."

It is undoubtedly true that the quitclaim deed of today is used for purposes other than that of releasing such interests, but that does not prevent its use also as a release. Even as far back as Coke upon Littleton, Lib. 3, c. 8, § 445, we find the following definition of words used in a release:

[*232] "Know all men by [***19] these Presents, That I A. of B. have remised, released, [**765] and altogether from me and my Heires *quiet claimed*: or thus, For mee and my Heires *quiet claimed* to C. of D. all the right, title, and claim which I have, or by any meanes may have, of & in one messuage, * * *. And it is to be understood, that these words, Remisisse & quietum clamasse, are of the same effect as these words, Relaxasse." (Italics supplied.)

For an exhaustive discussion of the subject, see In re Vine Street Congregational Church, 20 Ohio Dec. 573, holding that an ordinary quitclaim deed is effective to release such interest. See, also, Atkins v. Gillespie, 156 Tenn. 137, 299 S.W. 776, ***HN12*** holding that a quitclaim deed by the heirs at law of the grantor to the holder of a fee conditional or determinable releases the right of reverter and vests the

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[4] The portion of § 501.12, subd. 3, giving the attorney general the right to appear in a proceeding of this kind, reads:

"* * * The attorney general shall represent the beneficiaries in all cases arising under this section and it shall be his duty to enforce such trusts by proper proceedings in the courts." See, Schaeffer v. Newberry, 227 Minn. 259, 35 N.W. (2d) 287; In re Estate of Quinlan, 233 Minn. 35, 45 N.W. (2d) 807.

[5] ***HN11*** Section 500.16 now reads:

"Expectant estates are descendible, devisable, and alienable in the same manner as estates in possession; *and hereafter contingent rights of reentry for breach of conditions subsequent, and rights to possession for breach of conditions subsequent after breach but before entry made, and possibilities of reverter, shall be descendible, devisable, and alienable in the same manner as estate in possession.*" (The italicized portion was added by L. 1937, c. 487, § 2.)

[6] Consolidated School Dist. No. 102 v. Walter, 243 Minn. 159, 66 N.W. (2d) 881, 53 A.L.R. (2d) 218; see, Fraser, *Future Interests, Uses and Trusts in Minnesota*, 28 M.S.A. pp. 53, 56.

[7] Fraser, *Future Interests, Uses and Trusts in Minnesota*, 28 M.S.A. pp. 53, 56; Gray, The Rule Against Perpetuities (4 ed.) § 14: "This possibility of reverter was inalienable; but it could be released to the tenant of the fee simple conditional."

absolute title in the holder of the conditional or determinable fee. [8]

HN13 We therefore [***20] hold that the quitclaim deeds from the heirs of the holder of the possibility of reverter to the village released such rights of reverter and vested fee simple absolute title in the village. In view of such holding it is unnecessary for us to determine whether L. 1937, c. 487, permits assignment of rights of reverter created prior to the enactment of this act.

Other assignments of error, more technical than meritorious, not argued in appellant's brief, are deemed to be waived. They relate largely to procedural matters not involved in a determination of the question of whether a charitable trust was created or not. It is difficult to see how the attorney general could have been prejudiced in the trial of the only issue in which he was concerned on account of matters which do not affect the trial or determination of such issue.

We find no reversible error.

Affirmed.

[8] See, also, Brill v. Lynn, 207 Ky. 757, 270 S.W. 20, 38 A.L.R. 1109, with Annotation at 1111.

EXHIBIT 4

Lomayaktewa v. Hathaway

United States Court of Appeals for the Ninth Circuit

July 25, 1975

No. 73-2132

Reporter
520 F.2d 1324; 1975 U.S. App. LEXIS 13489; 75-2 U.S. Tax Cas. (CCH) P9605; 20 Fed. R. Serv. 2d (Callaghan) 843

STARLIE LOMAYAKTEWA, et al., Plaintiffs-Appellants, v. STANLEY K. HATHAWAY, et al., Defendants-Appellees, and ARIZONA PUBLIC SERVICE COMPANY, et al., Intervenors-Appellees

Subsequent History: [**1] Rehearing Denied September 18, 1975.

Prior History: Appeal from the United States District Court for the District of Arizona.

Disposition: Affirmed.

Core Terms

Tribe, lease, joined, indispensable party, judgment rendered, parties

Case Summary

Procedural Posture

Appellants, traditional Hopi leaders, sought review of an order by the United States District Court for the District of Arizona, which dismissed its action to void a lease between the Hopi Tribe and appellee lessees because the Hopi Tribe was an indispensable party that could not be joined due to its sovereign immunity.

Overview

Appellants, traditional Hopi leaders, brought an action to void a lease between the Hopi Tribe and appellee lessees for a strip of land. The action was dismissed by the district court because the tribe as lessor was an indispensable party under *Fed. R. Civ. P. 19* and could not be joined without its consent based on its sovereign immunity. On appeal, the court held that a lessor of a lease sought to be set aside was an indispensable party. It further noted that the Hopi Tribe could not be sued without its or congressional consent. The court affirmed the order dismissing the action under *Fed. R. Civ. P. 19(b)* because the tribe's absence from the action would be prejudicial to it, could not be lessened by protective measures, and any judgment would be inadequate. The court held that although a dismissal left appellants without recourse, the adverse effects on the indispensable party of a judgment invalidating the lease far-outweighed appellants' inadequate remedy.

Outcome

The court affirmed the dismissal of an action by appellants, traditional Hopi leaders, to set aside a lease between the Hopi Tribe and appellee lessees for a strip of land. The court found that the tribe as lessor was an indispensable party that could not be joined because of its sovereign immunity and any judgment invalidating its lease would have greater adverse effects on the tribe than dismissal would on appellants.

LexisNexis® Headnotes

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Necessary Parties

Contracts Law > Types of Contracts > Lease Agreements > General Overview

HN1 No procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > Preliminary Considerations > Venue > General Overview

Civil Procedure > Parties > General Overview

Civil Procedure > Parties > Joinder of Parties > General Overview

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Necessary Parties

HN2 Fed. R. Civ. P. 19(a) states that a person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party.

Civil Procedure > Parties > Joinder of Parties > General Overview

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Necessary Parties

HN3 Fed. R. Civ. P. 19(b) states that if a person as described in subdivision (a) (1)-(2) cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Civil Procedure > Parties > Joinder of Parties > General Overview

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Necessary Parties

HN4 Fed. R. Civ. P. 19(c) provides that a pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a) (1)-(2) who are not joined, and the reasons why they are not joined.

Governments > Native Americans > Authority & Jurisdiction

HN5 The Hopi Tribe, as a dependent, political, quasi-sovereign nation enjoys sovereign immunity and cannot be sued without its consent or the consent of the congress.

Judges: Browning and Duniway, Circuit Judges, and William H. Orrick, Jr., *

Opinion by: ORRICK

Opinion

[*1324] ORRICK, District Judge:

On June 6, 1966, the Hopi Tribe of Arizona leased to the Peabody Coal Company's [*1325] predecessor in interest a strip of land for a term of ten years. The land, known as the Black Mesa, was owned jointly with the Navajo Indian Tribe. [1]

Appellants, "Kikmongwis" or village leaders of the "traditional Hopi" [2] (i.e., spiritualistic) faction, who brought this action in 1971 to void the lease, appeal from an order of the District Court of Arizona dismissing the action for the failure of [**2] appellants to join either the Hopi Tribe, the Navajo Tribe, or the United States as indispensable parties. For the reasons hereinbelow set forth, we affirm the order of the District Court dismissing the action.

At the heart of the controversy is the question whether the Hopi Tribe, the Navajo Tribe and the United States, or any of them, is an indispensable party to this action to cancel the lease under *Rule 19(b) of the Federal Rules of Civil Procedure*. Inasmuch as we hold that the Hopi Tribe, as lessor, is an indispensable party to the action and cannot be joined because of its sovereign immunity, we need not reach the question whether the Navajo Tribe and/or the United States are indispensable parties, nor whether their sovereign immunity attaches and prevents them from being joined in the event that they are determined to be indispensable parties to the lawsuit.

I.

HN1 No procedural [**3] principle is more deeply imbedded

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* Honorable William H. Orrick, Jr., United States District Judge, Northern District of California, sitting by designation.

1 Peabody's predecessor in interest executed a similar lease in June, 1966, with the Navajo Indian Tribe.

2 They number 62 of a tribe of more than 5,000 Hopi Indians. Prior to oral argument Starlie Lomayaktewa dismissed his appeal.

in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable. *Broussard v. Columbia Gulf Transmission Company, 398 F.2d 885 (5th Cir. 1968)*; *Keegan v. Humble Oil & Refining Co., 155 F.2d 971 (5th Cir. 1946)*; *Tucker v. National Linen Service Corp., 200 F.2d 858 (5th Cir. 1953)*.

This principle declared by the Supreme Court more than a century ago in *Shields v. Barrow, 17 How. 129 (1854)*, is codified in *Rule 19 of the Federal Rules of Civil Procedure* in pertinent part as follows:

> ***HN2*** "(a) *Persons to be Joined if Feasible.* A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability [**4] to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.
>
> ***HN3*** (b) *Determination by Court Whenever Joinder not Feasible.* If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice [**5] can be lessened or avoided; third, whether a judgment rendered in the person's absence will be [*1326] adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.
>
> ***HN4*** (c) *Pleading Reasons for Nonjoinder.* A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a) (1)-(2) hereof who are not joined, and the reasons why they are not joined."

Thus, under *Rule 19(a)*, we determine whether or not it is feasible to join the Hopi Indian Tribe, and under *Rule 19(b)* we apply the standards as to whether or not the Tribe is an indispensable party.

At the outset it should be noted that ***HN5*** the Hopi Tribe, as a dependent, political, quasi-sovereign nation (*Groundhog v. Keeler, 442 F.2d 674, 678 (10th Cir. 1971)*), enjoys sovereign immunity and cannot be sued without its consent or the consent of the Congress. *Turner v. United States, 248 U.S. 354, 358, 63 L. Ed. 291, 39 S. Ct. 109 (1919)*; *United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 512, 84 L. Ed. 894, 60 S. Ct. 653 (1940)*. In the case [**6] at bar, the plaintiffs, the traditional Hopis, have never suggested that Congress or the Hopi Tribe has consented to this suit against the Tribe. So, if it is determined that the Hopi Tribe is an indispensable party, the suit terminates because it cannot be sued without its consent, which it has not given.

We turn now to a consideration of the standards set forth in *Rule 19(b)* as to whether the Hopi Tribe is an indispensable party.

The first three factors to be considered by the Court in the application of *Rule 19* all relate to the nature of the judgment which would be granted in the absence of the alleged indispensable party. The Court must consider first whether a person's absence might be prejudicial to him; second, the extent to which such prejudice can be lessened or avoided; and, third, whether a judgment rendered in the person's absence will be adequate. It seems perfectly obvious that a judgment rendered in the absence of the Hopi Tribe most surely would be prejudicial to it, for the royalties to be paid under the lease still amount to more than $20 million and cancellation of the lease would eliminate the employment of many of the Hopis. Furthermore, those who are already [**7] parties to this litigation will find themselves saddled with an obligation to make royalty payments under the lease notwithstanding the fact that as to them the lease has been held invalid so that they are not entitled to any benefits under it.

The second factor, "the extent to which, by protective provisions in the judgment, by the shaping of relief, or other

measures, the prejudice can be lessened or avoided", is simply not present in this case. The traditional Hopi are attempting to deprive the Hopi Tribe of benefits under the lease on the order of tens of millions of dollars. They are attempting to do so in the absence of the Tribe. There is, thus, no way that the prejudice to the Tribe "can be lessened or avoided" by protective provisions in the judgment shaping relief or, indeed, any other measure.

The third factor is "whether a judgment rendered in the person's absence will be adequate". It is perfectly apparent that any judgment rendered in the Tribe's absence would not be adequate. The lease under attack is between the Hopi Tribe, as lessor, and the Peabody Coal Company, as assignee of the original lease. The Peabody Coal Company has been
joined as a party defendant whereas [**8] the Hopi Tribe has not. The adverse effects of the invalidation of the lease will be visited upon the Hopi Tribe.

Finally, the fourth factor, "whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder" is a factor weighing in the favor of the plaintiffs. If the Tribe is held to be an indispensable party, it still cannot be brought into the action by reason of its sovereign immunity, and the plaintiff thus does not have any forum to which it can resort in such event.

Thus, it becomes the duty of the Court to weigh the four prescribed factors and to make a judgment balancing the
respective [*1327] interests. Here, it seems to us, that the adverse effects of a cancellation of the lease on the Hopi Tribe far outweigh the adverse effects visited upon the 62 dissident traditional Hopis by reason of the failure to provide another forum for them.

The judgment of the District Court is *affirmed*.

EXHIBIT 5

Mastercard Int'l, Inc. v. Visa Int'l Serv. Ass'n

United States Court of Appeals for the Second Circuit

November 3, 2006, Argued ; December 18, 2006, Decided

Docket Nos. 06-4433-cv (L), 06-4947-cv(CON)

Reporter
471 F.3d 377; 2006 U.S. App. LEXIS 31248

MASTERCARD INTERNATIONAL INCORPORATED, Plaintiff-Appellee, FEDERATION INTERNATIONALE DE FOOTBALL ASSOCIATION, Defendant-Appellee, v. VISA INTERNATIONAL SERVICE ASSOCIATION, INC., Non-Party-Appellant.

Subsequent History: Injunction granted at *Mastercard Int'l, Inc. v. Fed'n Internationale De Football Ass'n, 2007 U.S. Dist. LEXIS 14208 (S.D.N.Y., Feb. 28, 2007)*

Prior History: [**1] Non-party movant-appellant Visa International Service Association ("Visa") appeals the September 21, 2006, order of the United States District Court for the Southern District of New York (Preska, J.) denying Visa's motion to dismiss for failure to join a necessary and indispensable party under Federal Rule of Civil Procedure 19. Visa further appeals the district court's September 25, 2006, order denying Visa's motion to intervene in the underlying action under Federal Rule of Civil Procedure 24. We previously ordered consolidation of these appeals. As announced in our November 6, 2006, order stating our disposition of this matter, the appeal originally filed by Visa in Docket No. 06-4433 is dismissed for lack of jurisdiction and the order of the district court is otherwise affirmed. Accordingly, we vacated the stay previously granted by this court and remanded the matter to the district court to proceed with the merits of the underlying action.
Mastercard Int'l Inc. v. Fed'n Internationale de Football Ass'n, 2006 U.S. Dist. LEXIS 80663 (S.D.N.Y., Sept. 25, 2006)

Core Terms

district court, rights, parties, necessary party, sponsorship, motion to intervene, impair, injunction, indispensable party, non-party, prevails, subject matter jurisdiction, ability to protect, joinder, impede, underlying lawsuit, motion to dismiss, interlocutory, contractual, situated, lawsuit, under federal rule, court's decision, practical matter, sua sponte, obligations, collateral order doctrine, inconsistent obligations, right of first refusal, denial of motion

Case Summary

Procedural Posture

In a breach of contract action filed against defendant tournament organizer, plaintiff sponsor sought enforcement of an alleged provision giving plaintiff exclusive sponsorship rights in its product category. Appellant sponsor sought review of orders of the United States District Court for the Southern District of New York denying appellant's motion to dismiss pursuant to *Fed. R. Civ. P. 19* and appellant's *Fed. R. Civ. P. 24* motion to intervene.

Overview

Plaintiff alleged that defendant breached the parties' contract when defendant entered into a contract granting exclusive sponsorship rights to appellant. Appellant claimed that it was an indispensable party and that the case had to be dismissed for lack of subject matter jurisdiction. Appellant's joinder would have destroyed diversity jurisdiction, the sole basis for federal jurisdiction. The district court found that appellant was not a necessary and indispensable party under *Fed. R. Civ. P. 19(a)* and *(b)*. On appeal, the court held that the district court's *Rule 19* order was not appealable under the collateral order doctrine because the substance of the *Rule 19* order was reviewable on appeal of the denial of appellant's *Fed. R. Civ. P. 24* motion to intervene. The court held that appellant was not a necessary party because appellant's absence did not (1) prevent the district court from granting complete relief between plaintiff and defendant, (2) impair appellant's ability to protect its interest under its contract with defendant, or (3) cause a substantial risk of inconsistent obligations. The district court properly found that appellant's motion to intervene was untimely.

Outcome

The court dismissed the appeal form the district court's *Fed. R. Civ. P. 19* order, affirmed the district court's *Fed. R. Civ. P. 24* order, and remanded the matter to the district court.

LexisNexis® Headnotes

Civil Procedure > Preliminary Considerations > Jurisdiction > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > General Overview

HN1 On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of the reviewing court, and then of the court from which the record comes.

Civil Procedure > Parties > Intervention > Motions to Intervene

HN2 *Fed. R. Civ. P. 24* provides the mechanism by which non-parties who believe they have a valid and sufficient interest in a litigation can assert their rights. *Fed. R. Civ. P. 24(a)-(b)*. *Rule 24* explicitly contemplates motions by non-parties. *Fed. R. Civ. P. 24(c)*.

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Indispensable Parties

HN3 Because *Fed. R. Civ. P. 19* protects the rights of an absentee party, both trial courts and appellate courts may consider the issue of whether a absentee party is an indispensable party sua sponte even if it is not raised by the parties to the action.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > Appeals > Appellate Jurisdiction > Collateral Order Doctrine

HN4 The denial of a motion to dismiss is not a final order and is therefore only appealable under the collateral order doctrine.

Civil Procedure > Appeals > Appellate Jurisdiction > Collateral Order Doctrine

HN5 The collateral order doctrine is a narrow exception to the general rule that interlocutory orders are not appealable as a matter of right. An interlocutory order is appealable under the collateral order doctrine only if it satisfies all of the following conditions: (1) it conclusively determines the disputed question; (2) it resolves an important issue completely separate from the merits of the action; and (3) it is effectively unreviewable on appeal from a final judgment.

Civil Procedure > Parties > Intervention > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

HN6 The court of appeals has jurisdiction over an order denying intervention. Because a district court's order denying intervention is a final order, the court of appeals has appellate jurisdiction.

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > General Overview

HN7 Once appellate jurisdiction is established, the court of appeals may simultaneously consider another issue not itself entitled to interlocutory review if the otherwise unappealable issue is inextricably intertwined with the appealable one, or if review of the otherwise unappealable issue is necessary to ensure meaningful review of the appealable one.

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > General Overview

HN8 Where there is an appeal otherwise properly before the court of appeals, and the absence of subject matter jurisdiction is suggested, that issue may be reviewed. The appellate court is duty-bound, as is the district court, to address the issue of subject matter jurisdiction at the outset. The court has the duty to determine whether subject matter jurisdiction exists even if the issue is not presented by the parties.

Civil Procedure > Parties > Joinder of Parties > General Overview

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

HN9 The court of appeals reviews the district court's failure to join a party under *Fed. R. Civ. P. 19* only for abuse of discretion.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

HN10 A district court abuses or exceeds the discretion accorded to it when (1) its decision rests on an error of law (such as application of the wrong legal principle) or a clearly erroneous factual finding, or (2) its decision-though not necessarily the product of a legal error or clearly

erroneous factual finding-cannot be located within the range of permissible decisions.

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Necessary Parties

HN11 A party is necessary under *Fed. R. Civ. P. 19(a)* if: (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Necessary Parties

HN12 It is not enough under *Fed. R. Civ. P. 19(a)(2)(i)* for a third party to have an interest, even a very strong interest, in the litigation. Nor is it enough for a third party to be adversely affected by the outcome of the litigation. Rather, necessary parties under *Rule 19(a)(2)(i)* are only those parties whose ability to protect their interests would be impaired because of that party's absence from the litigation.

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Indispensable Parties

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Necessary Parties

HN13 If a party does not qualify as necessary under *Fed. R. Civ. P. 19(a)*, then the court need not decide whether its absence warrants dismissal under *Fed. R. Civ. P. 19(b)*. A party cannot be indispensable unless it is a necessary party under *Rule 19(a)*.

Civil Procedure > Parties > Intervention > Intervention of Right

HN14 Intervention as of right under *Fed. R. Civ. P. 24(a)(2)* is granted when all four of the following conditions are met: (1) the motion is timely; (2) the applicant asserts an interest relating to the property or transaction that is the subject of the action; (3) the applicant is so situated that without intervention, disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the applicant's interest is not adequately represented by the other parties.

Civil Procedure > Parties > Intervention > Motions to Intervene

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

HN15 The court of appeals will reverse a district court's denial of a motion to intervene only for abuse of discretion. Deferential review is appropriate since motions to intervene are fact-intensive inquiries and a district court has the advantage of having a better sense of the case than the reviewing court does on appeal.

Civil Procedure > Parties > Intervention > Intervention of Right

Civil Procedure > ... > Joinder of Parties > Compulsory Joinder > Necessary Parties

HN16 If a party is not "necessary" under *fed. R. Civ. P. 19(a)*, then it cannot satisfy the test for intervention as of right under *Fed. R. Civ. P. 24(a)(2)*.

Civil Procedure > Parties > Intervention > Motions to Intervene

Civil Procedure > Parties > Intervention > Time Limitations

HN17 Factors to consider in determining the timeliness of a motion to intervene include: (a) the length of time the applicant knew or should have known of its interest before making the motion; (b) prejudice to existing parties resulting from the applicant's delay; (c) prejudice to the applicant if the motion is denied; and (d) the presence of unusual circumstances militating for or against a finding of timeliness.

Civil Procedure > Parties > Intervention > Motions to Intervene

Civil Procedure > Parties > Intervention > Permissive Intervention

Civil Procedure > Parties > Intervention > Intervention of Right

Civil Procedure > Parties > Intervention > Time Limitations

HN18 A motion for permissive intervention, like one for intervention of right, must be timely. Whether intervention be claimed of right or as permissive, it is at once apparent, from the initial words of both *Fed. R. Civ. P. 24(a)* and *Fed. R. Civ. P. 24(b)*, that the application must be timely. If it is untimely, intervention must be denied.

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[**2] MARTIN S. HYMAN, Golenbock Eiseman Assor Bell & Peskoe LLP, New York, NY (Adam C. Silverstein, Elizabeth A. Jaffe, Shira Franco, Golenbock Eiseman Assor

Bell & Peskoe LLP, New York, NY and Noah Hanft, Eileen Simon, Cheryl Givner, Mastercard International Incorporated, Purchase, NY, on the brief) for Plaintiff-Appellee.

Judges: Before: MINER, POOLER, and KATZMANN, Circuit Judges.

Opinion by: POOLER

Opinion

|*379| POOLER, Circuit Judge:

Non-party movant-appellant Visa International Service Association ("Visa") moved to dismiss the underlying action contending that it is a necessary and indispensable party under *Federal Rule of Civil Procedure 19*. Visa also moved to intervene in the action under *Federal Rule of Civil Procedure 24*. Both motions were denied by the United States District Court for the Southern District of New York (Preska, J.). The district court concluded that Visa was neither necessary nor indispensable to the underlying breach of contract action between plaintiff-appellee MasterCard
International Incorporated |*380| ("MasterCard") and
defendant [1] Federation Internationale de Football Association |**3| ("FIFA"). The district court further concluded that Visa failed to satisfy the conditions for intervention under *Rule 24*. Due to the expedited nature of these proceedings, this court issued an order indicating its disposition in this case on November 6, 2006. As we stated in our order, the appeal originally filed by Visa in docket no. 06-4433 is dismissed for lack of jurisdiction and the district court's decision is otherwise affirmed. We now issue this opinion explaining our disposition.

BACKGROUND

FIFA is the worldwide governing body of soccer (or football, as it is known outside the United States), and the organizer of the World Cup soccer tournament held every four years. The underlying lawsuit is a breach of contract action brought by MasterCard against FIFA seeking enforcement of an alleged contractual provision giving
MasterCard "first |**4| right to acquire" exclusive sponsorship rights in its product category for the FIFA
World Cup event in 2010 and 2014. MasterCard's complaint alleges as follows. [2] For the past sixteen years, MasterCard has had a contractual relationship with FIFA to act as a sponsor for the World Cup. MasterCard served as an official sponsor of the World Cup event in 1994, 1998, 2002, and 2006. Although soccer is still catching on among American television audiences, the World Cup is the most-viewed sporting event in the world. The 2002 World Cup drew a cumulative television audience of 28.8 billion viewers from over 200 countries.

In 2002, MasterCard and FIFA entered into a contract by which MasterCard acquired exclusive sponsorship rights in its product category for FIFA competitions between 2003
and 2006, including |**5| the 2006 World Cup ("the MasterCard Contract"). This contract also allegedly contained a "first right to acquire" provision that gave MasterCard a right of first refusal to sponsorship rights during the next FIFA sponsorship cycle, covering FIFA competitions from 2007-2010. According to MasterCard, under this provision, FIFA may not offer these sponsorship rights to another entity within MasterCard's product category without first providing MasterCard the opportunity to purchase these rights on comparable terms. Pursuant to this provision, FIFA allegedly offered MasterCard exclusive sponsorship rights for all FIFA competitions between 2007 and 2014, including the 2010 and 2014 World Cups. Negotiations between the parties continued over several months and allegedly culminated with FIFA sending MasterCard a 96-page "final" agreement on March 3, 2006, which MasterCard signed and returned to FIFA.

Meanwhile, FIFA was also in negotiations with Visa regarding these sponsorship rights. On March 30, 2006, MasterCard learned that FIFA had decided to finalize an agreement with Visa. On April 5, 2006, MasterCard received a letter from FIFA's president stating that FIFA had entered
into a contract |**6| with Visa granting Visa the exclusive sponsorship rights to FIFA competitions, including the World Cup, through 2014 ("the Visa Contract"). The Visa Contract becomes effective January 1, 2007. Upon learning
of the FIFA-Visa |*381| deal, MasterCard notified both FIFA and Visa that it considered FIFA's actions a violation of the right of first refusal provision in the MasterCard Contract and MasterCard would seek legal redress if FIFA went forward with the Visa Contract.

On April 10, 2006, Visa issued a press release announcing its contract with FIFA for exclusive sponsorship rights in the

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[1] Although listed in the official caption as an "appellee," defendant FIFA did not oppose or join in the motions below, nor did it participate in this appeal.

[2] Since Visa's concerns only arise if MasterCard prevails in the underlying lawsuit, we recite the facts as alleged in MasterCard's complaint. We, of course, express no opinion as to the merit of these allegations.

World Cup through 2014. On April 20, 2006, MasterCard filed suit in the Southern District of New York for breach of contract and sought injunctive relief "enjoining FIFA from consummating, effectuating or performing" any terms of the Visa Contract and ordering FIFA to perform its obligations under the alleged contract granting MasterCard exclusive rights through 2014. Federal jurisdiction is premised solely on diversity of citizenship.

On June 15, 2006, MasterCard filed a motion for a preliminary injunction. After FIFA's motion to dismiss for lack of personal jurisdiction and motion to compel arbitration [**7] were both denied, the district court scheduled the preliminary injunction hearing for September 18, 2006, and later adjourned it to September 26, 2006. Email communication produced in this case indicates that Visa has been in contact with FIFA regarding this litigation since the time it was filed. On September 11, 2006, two weeks before the preliminary injunction hearing, Visa sent a letter to the district court stating that it was a necessary and indispensable party to the litigation because of its contractual entitlement to the FIFA sponsorship rights. Visa claimed that because it was an indispensable party, the case must be dismissed for lack of subject matter jurisdiction. Since MasterCard and Visa are both incorporated under the laws of Delaware, Visa's joinder would destroy diversity jurisdiction-the sole basis for federal jurisdiction.

The district court construed Visa's letter submission as a motion to dismiss under *Federal Rule of Civil Procedure 19* and scheduled a hearing for September 21, 2006. At the conclusion of that hearing, the district court denied Visa's motion, finding that Visa was not a necessary party under *Rule 19(a)*, [**8] and even assuming that it were, Visa was not an indispensable party under *Rule 19(b)* requiring dismissal of the action ("Rule 19 Order"). The district court reasoned that because the underlying litigation involved the MasterCard Contract and whether FIFA had breached that contract, Visa's presence was unnecessary to decide the dispute between MasterCard and FIFA. Moreover, even if MasterCard prevailed in this lawsuit, Visa's right to sue FIFA for breach of the warranty provision in the Visa Contract would not be prejudiced. Finally, since Visa conceded that it had no knowledge of the negotiations between MasterCard and FIFA or the MasterCard Contract, it would have nothing to contribute to the outcome of that lawsuit. Thus, the district court found that the case could proceed without Visa.

On September 25, 2006, Visa filed a notice of appeal of the district court's Rule 19 Order. Visa also filed a motion to stay the district court proceedings and a motion for expedited appeal with this court. In addition, Visa filed in the district court a motion to stay and a motion to intervene in the MasterCard-FIFA litigation under *Federal Rule of Civil Procedure 24* [**9] . Visa apparently hand-delivered these papers on Friday, September 22, 2006, but they were not received by the district court until Monday, September 25th. On September 25th, the district court denied Visa's motion to stay. That same day, the district court held a telephonic hearing on Visa's motion to intervene, and denied that motion as well. The district court also [*382] promptly issued a written decision regarding Visa's motion to intervene ("Rule 24 Order"). See *Mastercard Int'l Inc. v. FIFA, No. 06 Civ. 3036, 2006 U.S. Dist. LEXIS 80663, 2006 WL 3065598 (S.D.N.Y. Sept. 26, 2006)*.

Meanwhile, also on September 25th, this court in response to Visa's emergency motion temporarily stayed the proceedings in the district court pending hearing of Visa's motion. After hearing oral argument, this court granted Visa's motion to stay the proceedings for the remainder of the appeal, set an expedited briefing schedule, and placed the appeal on the court's calendar for November 3, 2006. Approximately ten days before this court was scheduled to hear Visa's appeal of the Rule 19 Order, Visa filed its notice of appeal of the district court's Rule 24 Order. [3] Recognizing the overlap of issues presented by these [**10] appeals, we ordered consolidation and heard oral argument as scheduled on November 3rd. [4] Cognizant of the impending January 1, 2007 trigger date for the Visa Contract and the need for expeditious resolution of the underlying lawsuit, this court issued an order on November 6, 2006, indicating its disposition in this case, vacating the stay previously granted by this court, and remanding the matter to the district court. We now explain the basis of our decision.

DISCUSSION

I. Jurisdiction

Before we can discuss the merits of Visa's appeal, we must first establish that we have jurisdiction to do so. See *Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)* [**11] (***HN1*** "On every writ

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[3] Although Visa had stressed the need for speedy resolution of these matters when it requested expedited review from this court, it then chose to wait until the last possible day to file its appeal of the Rule 24 Order.

[4] Both parties stated during oral argument that additional briefing on the appeal of the Rule 24 Order was not needed.

of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes.") (internal quotation marks omitted). MasterCard contends that we lack jurisdiction to entertain Visa's original appeal of the Rule 19 Order because it is an uncertified interlocutory appeal. Visa asserts that we have jurisdiction under the collateral order doctrine. Visa cites no case in which this court has entertained an interlocutory appeal of a denial of a motion to dismiss under *Rule 19*. We too have found no such authority. We attribute the absence of prior case law on this issue to the fact that Visa, as a non-party to the underlying action, should not have been allowed to file a motion to dismiss in the district court. The proper procedure would have been for the district court to construe Visa's letter submissions as a motion to intervene under *Federal Rule of Civil Procedure 24*. ***HN2*** This rule provides the mechanism by which non-parties who believe they have a valid and sufficient interest in a litigation can assert their rights. See *Fed. R. Civ. P. 24(a)-(b)* [**12] . *Rule 24* explicitly contemplates motions by non-parties. See *Fed. R. Civ. P. 24(c)* (setting forth procedural requirements for persons seeking to file motions to intervene). We find nothing in the text or notes to *Rule 19* that would indicate strangers to an action may file motions to dismiss under that rule.

This is not to say, however, that the district court was prohibited from considering the issue of whether Visa was an indispensable party to the underlying litigation. ***HN3*** Because *Rule 19* protects the rights of an absentee party, both trial courts and appellate courts may consider this issue sua sponte even if it is not raised [*383] by the parties to the action. See, e.g., *Manning v. Energy Conversion Devices, Inc., 13 F.3d 606, 609 (2d Cir. 1994)* ("[E]ven in the absence of an objection under *Rule 19(a)*, we are obliged to consider whether M&N and OSMC are indispensable parties under *Federal Rule of Civil Procedure 19(b)*."); *Havana Club Holding, S.A. v. Galleon, S.A., 974 F. Supp. 302, 311 (S.D.N.Y. 1997)* ("[W]hen a court believes that an absentee may be needed [**13] for a just adjudication, it may raise compulsory party joinder on its own motion."); 7 Charles Alan Wright et al., Federal Practice and Procedure § 1609 (3d ed. 2006) ("[B]oth the trial court and the appellate court may take note of the nonjoinder of an indispensable party sua sponte."); 4 James Wm. Moore et al., *Moore's Federal Practice - Civil, § 19.02[4][a]* (3d ed. 2006) ("The district court may raise compulsory party joinder on its own motion."); see also *Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 111, 88 S. Ct. 733, 19 L. Ed. 2d 936 (1968)* (instructing courts to take steps on their own initiative to protect an absentee party); *Delgado v. Plaza Las Ams., Inc. 139 F.3d 1, 2 (1st Cir. 1998)* (rejecting argument that district court lacked jurisdiction to consider *Rule 19* issue because "[w]e have squarely held that a district court may raise the issue of nonjoinder sua sponte"); *Pickle v. Int'l Oilfield Divers, Inc., 791 F.2d 1237, 1242 (5th Cir. 1986)* ("[A] Rule 19 objection can even be noticed on appeal by the reviewing court sua sponte."); *McCowen v. Jamieson, 724 F.2d 1421, 1424 (9th Cir. 1984)* [**14] (Rule 19 issue "is sufficiently important that it can be raised at any stage of the proceedings-even sua sponte."); *Finberg v. Sullivan, 634 F.2d 50, 55 (3d Cir. 1980)* (en banc) ("[A]n appellate court should consider, on its own motion, any plausible argument that the interest of an absent party requires that party's joinder."). Therefore, although the district court erroneously permitted non-party Visa to file a motion to dismiss under *Rule 19*, the district court was not precluded from considering the issue on its own accord. Since appellate courts have an equal duty to consider compulsory joinder issues sua sponte and ensure that indispensable parties are adequately protected, we will interpret the district court's decision to entertain Visa's "motion" as an exercise of its duty to examine Rule 19 issues on its own initiative and will reach the merits of the Rule 19 Order *if* appellate jurisdiction exists to review that Order.

We agree with MasterCard that the appeal of the Rule 19 Order originally filed by Visa is an uncertified interlocutory appeal that does not fit within the exception created by the collateral order doctrine. ***HN4*** The denial of a motion [**15] to dismiss is not a final order and is therefore only appealable under the collateral order doctrine. See *Bernard v. County of Suffolk, 356 F.3d 495, 501 (2d Cir. 2004)*; see also *Merritt v. Shuttle, Inc., 187 F.3d 263, 267 (2d Cir. 1999)* ("Generally speaking, an order denying a motion to dismiss is interlocutory and hence nonappealable."); *Catlin v. United States, 324 U.S. 229, 236, 65 S. Ct. 631, 89 L. Ed. 911 (1945)* ("[D]enial of a motion to dismiss, even when the motion is based upon jurisdictional grounds, is not immediately reviewable."), superseded by statute on other grounds.

HN5 The collateral order doctrine is a "narrow exception to the general rule that interlocutory orders are not appealable as a matter of right." *Schwartz v. City of New York, 57 F.3d 236, 237 (2d Cir. 1995)*. An interlocutory order is appealable under the collateral order doctrine only if it satisfies all of the following conditions: (1) it "conclusively determine[s] the disputed question"; (2) it "resolve[s] an important issue completely separate from the merits of the action;" [*384] and (3) it is "effectively unreviewable on appeal from [**16] a final judgment." *Whiting v. Lacara, 187 F.3d 317, 320 (2d Cir. 1999)* (quoting *Coopers & Lybrand v. Livesay, 437 U.S. 463, 468, 98 S. Ct. 2454, 57 L. Ed. 2d 351*

(1978)). The appeal of the Rule 19 Order originally filed by Visa fails the third prong of this test. As Visa has amply demonstrated by its filing of a second appeal, the Rule 19 Order is not "effectively unreviewable on appeal from a final judgment." The second appeal challenges the district court's denial of Visa's motion to intervene. "It is settled law that ***HN6*** this Court has jurisdiction over an order denying intervention." United States v. Peoples Benefit Life Ins. Co., 271 F.3d 411, 413 (2d Cir. 2001) (citing N.Y. News, Inc. v. Kheel, 972 F.2d 482, 485 (2d Cir. 1992) ("Because a district court's order denying intervention is a final order, we have appellate jurisdiction.")); see also Ionian Shipping Co. v. British Law Ins. Co., 426 F.2d 186, 189 (2d Cir. 1970) ("[T]he proper and sensible course is to assume that an order denying intervention is final for the purposes of appeal..."). Since the substance of the Rule 19 Order is reviewable on appeal [**17] of the Rule 24 Order, Visa's original appeal of the Rule 19 Order does not satisfy the collateral order exception and is accordingly dismissed for lack of jurisdiction.

We therefore turn our attention to the second appeal filed by Visa. As indicated above, we have jurisdiction to review the denial of a motion to intervene. See Peoples Benefit Life Ins., 271 F.3d at 413; Kheel, 972 F.2d at 485. ***HN7*** Once appellate jurisdiction is established, "we may simultaneously consider another issue not itself entitled to interlocutory review if the otherwise unappealable issue is inextricably intertwined with the appealable one, or if review of the otherwise unappealable issue is necessary to ensure meaningful review of the appealable one." Merritt, 187 F.3d at 268-69 (internal quotation marks omitted). We find review of the district court's Rule 19 Order is necessary to ensure meaningful review of the Rule 24 Order. As we explained in Merritt, "[t]he existence of subject matter jurisdiction goes to the very power of the district court to issue the rulings now under consideration . . . [O]ur review of the district court's order . . . [**18] would be meaningless if the district court was without jurisdiction over that claim in the first instance." Id. at 269 (citing U.S. Catholic Conference v. Abortion Rights Mobilization, 487 U.S. 72, 77, 108 S. Ct. 2268, 101 L. Ed. 2d 69 (1988)); see also San Filippo v. United Bhd. of Carpenters and Joiners of Am., 525 F.2d 508, 513 (2d Cir. 1975) ("***HN8*** Where . . . there is an appeal otherwise properly before this Court, and the absence of subject matter jurisdiction is suggested, that issue may be reviewed."), superseded by statute on other grounds. Thus, in Merritt, we first reviewed the otherwise unappealable denial of the defendant's motion to dismiss for lack of subject matter jurisdiction because it was necessary to ensure meaningful review of the order that was properly before the court. 187 F.3d at 269. The same situation is before us. If the district court's ruling that Visa is not a necessary and indispensable party is erroneous, then, because Visa's joinder would destroy diversity jurisdiction, the underlying action must be dismissed for lack of subject matter jurisdiction. Thus, because the Rule 19 Order implicates [**19] the district court's subject matter jurisdiction over this litigation, we must first examine the correctness of this ruling before we turn to the merits of the Rule 24 Order. See, e.g., Filetech S.A. v. Fr. Telecom S.A., 157 F.3d 922, 929 (2d Cir. 1998) ("We are duty-bound, as was the district court, to address the issue of subject matter jurisdiction at the outset."); [*385] Saint John Marine Co. v. United States, 92 F.3d 39, 43 (2d Cir. 1996) ("We have the duty to determine whether subject matter jurisdiction exists even if the issue is not presented by the parties.").

II. Rule 19 Order

HN9 We review the district court's failure to join a party under Rule 19 only for abuse of discretion. See ConnTech Dev. Co. v. Univ. of Conn. Educ. Props., Inc., 102 F.3d 677, 682 (2d Cir. 1996). "***HN10*** A district court 'abuses' or 'exceeds' the discretion accorded to it when (1) its decision rests on an error of law (such as application of the wrong legal principle) or a clearly erroneous factual finding, or (2) its decision-though not necessarily the product of a legal error or clearly erroneous factual finding-cannot be located within [**20] the range of permissible decisions." Jonesfilm v. Lion Gate Int'l, 299 F.3d 134, 139 (2d Cir. 2002) (internal quotation marks omitted) (quoting Zervos v. Verizon New York, Inc., 252 F.3d 163, 169 (2d Cir. 2001)). ***HN11*** A party is "necessary" under Rule 19 if:

> (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Fed. R. Civ. P. 19(a). Visa contends that it fits within all three of these categories. We disagree.

A. Rule 19(a)(1)

A party is necessary under Rule 19(a)(1) only if in that party's absence "complete relief cannot be accorded among those already parties." Fed. R. Civ. P. 19(a)(1) [**21]

(emphasis added). Visa's absence will not prevent the district court from granting complete relief between MasterCard and FIFA. Visa argues that without it in the case, MasterCard can receive only partial relief because Visa still holds contractual rights to the sponsorship rights and will file suit against FIFA to enforce the Visa Contract.

5 [**22] While there is no question that further litigation between Visa and FIFA, and perhaps MasterCard and Visa, is inevitable if MasterCard prevails in this lawsuit, *Rule 19(a)(1)* is concerned only with those who are already parties. MasterCard can obtain complete relief *as to FIFA* without Visa's presence in the case. If MasterCard prevails and is granted its requested relief, FIFA will be enjoined from awarding the sponsorship rights to another party, including Visa. This will resolve the dispute between MasterCard and FIFA, and Visa's presence is unnecessary to decide those questions. Thus, Visa is not a necessary party under *Rule 19(a)(1)*. [6]

B. Rule 19(a)(2)(i)

We find no abuse of discretion in the district court's conclusion that Visa was not a necessary party under *Rule 19(a)(2)(i)*. [*386] Visa claims that because MasterCard seeks to enjoin FIFA from performing the Visa Contract, its interests are clearly implicated and it is therefore entitled to appear in this litigation. Visa relies primarily on this court's decision in *Crouse-Hinds Co. v. InterNorth, Inc., 634 F.2d 690 (2d Cir. 1980)*, which it characterizes as controlling here. [7] In Crouse-Hinds, the defendant asserted a counterclaim alleging that a proposed merger between the plaintiff and a third party, Belden, was unfair under the business judgment rule because it lacked any legitimate business purpose and was entered into solely to defeat the defendant's tender offer. *Id. at 697* & n.15. The counterclaim sought to enjoin the merger. Id. On appeal of the district court's grant of a preliminary [**23] injunction, this court noted its disagreement with the district court's conclusion that Belden was not a necessary party to the action because "Belden's rights [under the merger agreement] would clearly be prejudiced if the relief sought by InterNorth were to be granted." *Id. at 700-01* (citing *Lomayaktewa v. Hathaway, 520 F.2d 1324, 1325 (9th Cir. 1975)* ("No procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable.")).

[**24] Visa's reliance on this case is misplaced. In *Crouse-Hinds*, the actual contract involving the absent third party was the basis of the claim. The counterclaim specifically challenged the validity of the merger agreement and sought to set aside that agreement. If the defendant prevailed on this counterclaim, the merger agreement would be deemed invalid, which would presumably affect Belden's ability to then sue for breach of that agreement or invoke any of the protections in that agreement. Thus, non-party Belden was faced with the possibility of having its contract terminated in its absence. In contrast, in this case, while the Visa Contract may be affected by this litigation, it is not the contract at issue in MasterCard's lawsuit. The underlying litigation involves the MasterCard Contract and whether MasterCard had a right of first refusal to the World Cup sponsorship rights. Even if MasterCard prevails and receives the relief it seeks, that does not render the Visa Contract invalid. It means that FIFA likely has breached the warranty provision of that contract, and Visa has the right to sue FIFA for that breach.

Furthermore, in Crouse-Hinds, because the absent non-party [**25] was a party to the contract at issue, its ability to protect its interest in that contract would have been seriously impaired if it were not made a party to the action. This places the absentee non-party in *Crouse-Hinds* in a distinctly different position from Visa, whose contract with FIFA is not at issue here. As the district court correctly found, Visa's

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5 MasterCard argues that Visa did not articulate this theory to the district court and therefore cannot raise it here for the first time. As we discussed above, Rule 19 issues may be raised for the first time on appeal, and therefore we need not decide whether Visa properly raised this argument below.

6 In addition, there is no dispute that complete relief can be granted without Visa's presence if FIFA prevails in the underlying lawsuit.

7 For its part, MasterCard contends that this case is governed by our decision in Conntech Dev. Co. v. Univ. of Conn. Educ. Props., Inc., 102 F.3d 677 (2d Cir. 1996). We do not agree that Conntech is applicable here. While that case did state the general rule that a "nonparty to a commercial contract ordinarily is not a necessary party to an adjudication of rights under the contract," the absent non-party in that case, the State of Connecticut, had explicitly disclaimed any interest in the proceeding or in the contracts at issue in the litigation by deliberately including language in the contracts that appeared to disavow any such interest. Id. at 682-83. Thus, the court found that the "express language of [the contract at issue] clearly demonstrates that Connecticut, ConnTech and UCEPI all intended to keep Connecticut at arm's length." Id. at 683. In this case, of course, Visa has vigorously claimed an interest in the underlying lawsuit.

ability to protect its interest in its contract [*387] with FIFA will not be impaired if is not joined here. The primary flaw in Visa's argument is that it has construed *Rule 19(a)(2)(i)* to extend to any party whose interests would be impaired or impeded by a litigation. This overlooks a key element of the definition of "necessary" party under *Rule 19(a)(2)(i)*. ***HN12*** It is not enough under *Rule 19(a)(2)(i)* for a third party to have an interest, even a very strong interest, in the litigation. Nor is it enough for a third party to be adversely affected by the outcome of the litigation. Rather, necessary parties under *Rule 19(a)(2)(i)* are only those parties whose ability to protect their interests would be impaired **because of** that party's absence from the litigation. See *Fed. R. Civ. P. 19(a)(2)* [**26] (defining necessary party as one with an "interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may. . .as a practical matter impair or impede the person's ability to protect that interest" (emphasis added)). Thus, while Visa may have an interest that would be impaired by the outcome of this litigation, Visa still does not qualify as a necessary party under *Rule 19(a)(2)(i)* because the harm Visa may suffer is not *caused by* Visa's absence from this litigation. Any such harm would result from FIFA's alleged conduct in awarding Visa sponsorship rights it could not legally give. We would be significantly broadening both *Rule 19(a)(2)(i)* and the principle discussed in Crouse-Hinds if we found that because the outcome of this case may impact a separate contract involving a different party, that finding would transform the action into "an action to set aside a lease or a contract." *Crouse-Hinds, 634 F.2d at 701* (quoting *Lomayaktewa, 520 F.2d at 1325*). Crouse-Hinds involved an actual action to set aside a contract; here we have an action that could in the future impact a [**27] third party's rights under a separate contract. We, therefore, do not find Crouse-Hinds controlling here and decline to broaden its scope to reach the facts before us, particularly since doing so would read a key element out of the text of *Rule 19(a)(2)(i)*.

Visa also relies on several cases that recite the general proposition that a party who claims title to a piece of property that is the subject of an action has sufficient interest in the action to justify compulsory joinder, and urges us to follow that reasoning here. Visa attempts to characterize this case as if it were a proceeding to determine the rightful owner of a piece of property to which MasterCard and Visa have competing claims. While we have held in cases involving this factual scenario that all claimants to the property at issue are necessary parties to the action, see, e.g., *Brody v. Village of Port Chester, 345 F.3d 103, 117-19 (2d Cir. 2003)* (holding that in action by property owner to recover land taken by eminent domain, current titleholder to land might be necessary party if district court were to restore land to plaintiff); *Kulawy v. United States, 917 F.2d 729, 736 (2d Cir. 1990)* [**28] (holding that in an action to quiet title by aggrieved tax payer against government seeking to recover automobiles sold to satisfy tax lien, purchasers of automobiles were necessary parties), we do not find this reasoning applicable here. In Brody and Kulawy, the district courts were required to determine who among several parties had title to a piece of property. Thus, the district court could not grant the relief sought-declaring the plaintiff the titleholder-in the absence of the current or competing titleholders to that piece of property. As MasterCard correctly notes, the MasterCard-FIFA dispute is not an in rem proceeding between competing claimants with the district court tasked with deciding who has superior rights to a piece of property. The district court only need decide whether [*388] MasterCard has a right of first refusal under its prior contract with FIFA. While this has the *effect* of determining who will get the sponsorship rights, that does not transform this case into an in rem proceeding nor does it place Visa in the same position as MasterCard as a competing claimant. Unfortunately for Visa, there is nothing it can do about the fact that MasterCard's [**29] prior contractual rights with FIFA may preclude FIFA's ability to grant the sponsorship rights to Visa. Visa's problems here are due to FIFA's alleged actions, not Visa's absence from this litigation. Nor will its absence prevent Visa from seeking the only remedy available to it if MasterCard indeed has a right of first refusal to the sponsorship rights: Visa can sue FIFA for breach of the warranty provision in the Visa Contract. For these reasons, we find the district court properly rejected Visa's contention that it is a necessary party under *Rule 19(a)(2)(i)*.

C. Rule 19(a)(2)(ii)

The district court's conclusion that Visa does not satisfy *Rule 19(a)(2)(ii)* is also not an abuse of discretion. Visa presents us with the following scenario: MasterCard prevails in the underlying lawsuit and is granted injunctive relief that prohibits FIFA from performing its obligations under the Visa Contract; Visa then sues FIFA for breach of the warranty provision in the Visa Contract seeking specific performance; Visa prevails and is granted specific performance requiring FIFA to perform its obligations under the Visa Contract. According to Visa, the possibility exists that FIFA could be [**30] under court order to perform the Visa Contract and under court order not to perform the Visa Contract, and this potential for inconsistent obligations renders Visa a necessary party to this litigation. Once again, Visa is ignoring a critical element in *Rule 19(a)(2)(ii)*: the substantial risk of inconsistent obligations must be **caused**

by the non-party's absence in the case. See *Fed. R. Civ. P. 19(a)(2)* (defining necessary party as one with an interest related to the action who "is so situated that the disposition of the action in the person's absence may . . . leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest" (emphasis added)). FIFA's risk of multiple obligations to different parties is not a result of Visa's absence in this lawsuit; it is the result of FIFA allegedly breaching its contract with MasterCard and awarding Visa sponsorship rights it was contractually prohibited from granting. Visa's presence in this lawsuit will not remedy that fact. Whether Visa is or is not a party in the underlying lawsuit, [**31] FIFA and Visa will litigate *their* dispute under *their* contract later on down the road if MasterCard prevails here. Visa cannot re-litigate and undo a finding in this case that the MasterCard Contract contains a right of first refusal or that FIFA breached its contract with MasterCard since these issues admittedly have nothing to do with Visa.

We are also not persuaded that the scenario envisioned by Visa, in which the court below enjoins FIFA from performing the Visa Contract while a subsequent court orders FIFA to perform the Visa Contract, presents a "substantial risk" of inconsistent obligations, as required by *Rule 19(a)(2)(ii)*. It is difficult to believe that a subsequent tribunal faced with a party under a prior court-ordered injunction will nevertheless order that party to perform the very obligations a prior court has prohibited it from performing. While Visa is correct that *it* will not be bound by any injunction entered in the underlying litigation in its absence, FIFA is certainly bound by any such injunction and a subsequent [*389] proceeding will have to recognize and respect the injunction ordered by the district court in this case. It is worth noting that FIFA, [**32] the party supposedly facing this grave predicament, has not advanced the argument that it would be prejudiced by Visa's absence from this case. FIFA never raised the Rule 19 defense before the district court, it did not join in Visa's motion below, and it has not participated in any way in the proceedings before this court. If FIFA actually believed it would suffer prejudice if Visa is not a party in this case, it surely would have had something to say on this point.

For these reasons, we cannot say that the district court's conclusion that Visa is not a necessary party under *Rule 19(a)(2)(ii)* was an abuse of discretion. Having found that Visa satisfies none of the three criteria for compulsory joinder, we affirm the district court's decision that Visa is not a necessary party under *Rule 19(a)*.

D. Rule 19(b)

The district court also found that even assuming Visa were a necessary party, it was not indispensable under *Rule 19(b)*. Since we affirm the district court's conclusion that Visa is a not a necessary party, we need not discuss whether the district court properly found that Visa was not an indispensable party. See *Viacom Int'l, Inc. v. Kearney, 212 F.3d 721, 724 (2d Cir. 2000)* [**33] (***HN13*** "If a party does not qualify as necessary under *Rule 19(a)*, then the court need not decide whether its absence warrants dismissal under *Rule 19(b)*."); see also *Jonesfilm, 299 F.3d at 139* ("A party cannot be indispensable unless it is a 'necessary party' under *Rule 19(a)*."). Accordingly, we reject the challenge to the district court's subject matter jurisdiction over the underlying action.

III. Rule 24 Order

We now turn to the district court's order denying Visa's motion to intervene under *Rule 24*. ***HN14*** Intervention as of right under *Rule 24(a)(2)* is granted when all four of the following conditions are met: (1) the motion is timely; (2) the applicant asserts an interest relating to the property or transaction that is the subject of the action; (3) the applicant is so situated that without intervention, disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the applicant's interest is not adequately represented by the other parties. See *United States v. Pitney Bowes, Inc., 25 F.3d 66, 70 (2d Cir. 1994)*. The district court found that Visa's motion was untimely. [**34] See *MasterCard, 2006 U.S. Dist. LEXIS 80663, 2006 WL 3065598, at *1-2*. The district court also noted that, for the reasons stated at the hearing on the Rule 19 motion, Visa failed to satisfy the other conditions as well. *Id. at *3*. ***HN15*** We will reverse a district court's denial of a motion to intervene only for abuse of discretion. See *Pitney Bowes, 25 F.3d at 69* (noting that deferential review is appropriate since motions to intervene are fact-intensive inquiries and a district court "has the advantage of having a better 'sense' of the case than we do on appeal").

We find no abuse of discretion in the district court's decision to deny Visa's motion to intervene. First, even assuming Visa's motion was timely, ***HN16*** if a party is not "necessary" under *Rule 19(a)*, then it cannot satisfy the test for intervention as of right under *Rule 24(a)(2)*. As Visa conceded during oral argument, these provisions contain overlapping language and thus if it failed to satisfy *Rule 19(a)*, it could not satisfy *Rule 24(a)(2)*. *Rule 19(a)(2)(i)* applies if a person "claims an interest relating to the subject of the action and is so situated that the disposition [*390] of the action in the person's absence [**35] may as a

practical matter impair or impede the person's ability to protect that interest." Similarly, *Rule 24(a)(2)* provides for intervention as of right "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 person's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." These rules are intended to mirror each other. See Fed. R. Civ. P. 24 advisory committee's note ("Intervention of right is here seen to be a kind of counterpart to *Rule 19(a)(2)(i)* . . . . The [1966] amendment provides that an applicant is entitled to intervene in an action when his position is comparable to that of a person under *Rule 19(a)(2)(i)*."); 4 James Wm. Moore et al., *Moore's Federal Practice - Civil, § 19.03(3)(f)(i)* (3d ed. 2006) ("[C]ompulsory joinder under the 'impair or impede' clause of *Rule 19* serves the same goal as intervention of right
under *Rule 24*. Indeed, the operative language of the [**36] two Rules is identical because the Rules were revised to emphasize their interrelationship in 1966.") (internal citation omitted). As we discussed in Section II.B supra, Visa does not satisfy the definition of necessary party under *Rule 19(a)(2)(i)* because its absence from this litigation is not the cause of any harm to its interests. Nor will Visa's presence allow it to protect those interests. This finding also forecloses Visa's ability to intervene under *Rule 24(a)(2)*. Visa must establish not only that it has an interest relating to the subject of the action but also that it "is so situated that without intervention the disposition of the action may, as a practical matter, impair or impede [Visa's] ability to protect its interest." *Pitney Bowes, 25 F.3d at 70* (emphasis added). Visa's ability to protect its interest will not be impaired or impeded *because* it is denied intervention in this case. As we have discussed, any harm to Visa's interests would result from FIFA's alleged conduct in breaching its contract with MasterCard and granting the sponsorship rights to Visa. And Visa cannot change this fact through intervention here since
it is a stranger to [**37] the contractual dispute between MasterCard and FIFA.

Furthermore, we agree with the district court that Visa's motion to intervene was untimely. ***HN17*** Factors to consider in determining timeliness include: "(a) the length of time the applicant knew or should have known of [its] interest before making the motion; (b) prejudice to existing parties resulting from the applicant's delay; (c) prejudice to [the] applicant if the motion is denied; and (d) [the] presence of unusual circumstances militating for or against a finding of timeliness." *United States v. New York, 820 F.2d 554, 557 (2d Cir. 1987)*. The district court properly found that these factors weigh against Visa. First, as the district court noted, Visa has known of MasterCard's position that it has prior claim to the sponsorship rights since the time this litigation began in April 2006. Visa has been in contact with FIFA throughout the course of this litigation, and MasterCard's complaint and other filings, including its motion for preliminary injunctive relief filed in June, are publicly available for anyone to access. Nevertheless, Visa did not
file its motion to intervene until the eve of the preliminary [**38] injunctive hearing. See, e.g., *D'Amato v. Deutsche Bank, 236 F.3d 78, 84 (2d Cir. 2001)* (noting that "[a]ppellant offers no explanation for waiting to file his intervention motion until three days prior to the Fairness Hearing" in finding motion to intervene untimely). Considering that Visa argued in support of its Rule 19 motion that it has a
significant interest in this [*391] litigation that will be gravely prejudiced if the matter proceeds in its absence, the district court could properly find Visa's delay unjustified. Second, Visa's delay has resulted in prejudice to the existing parties because it has postponed resolution of the MasterCard-FIFA dispute, which, due to the impending January 1, 2007, trigger date for the Visa Contract, prejudices all parties. Finally, as we have discussed at length, Visa is not prejudiced if it is denied intervention since its absence from the litigation is not the cause of any harm Visa may suffer if MasterCard prevails in this lawsuit.

Accordingly, the district court could properly find Visa's motion to intervene untimely. For this reason, we also find no abuse of discretion in the district court's decision
denying Visa permissive [**39] intervention under *Rule 24(b)*. ***HN18*** "A motion for permissive intervention, like one for intervention of right, must be timely." *Catanzano by Catanzano v. Wing, 103 F.3d 223, 234 (2d Cir. 1996)*; see also *NAACP v. New York, 413 U.S. 345, 365, 93 S. Ct. 2591, 37 L. Ed. 2d 648 (1973)* ("Whether intervention be claimed of right or as permissive, it is at once apparent, from the initial words of both *Rule 24(a)* and *Rule 24(b)*, that the application must be 'timely.' If it is untimely, intervention must be denied."). Thus, we affirm the district court's order denying Visa's motion to intervene under *Rule 24*.

CONCLUSION

For the foregoing reasons, we dismiss the appeal originally filed by Visa of the district court's Rule 19 Order, reject Visa's argument that the district court lacks subject matter jurisdiction because Visa is a necessary and indispensable party, affirm the district court's Rule 24 Order, vacate the stay previously granted by this court, and remand the matter to the district court.