UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOHN EAKIN	§	
	§	
Plaintiff,	§	
	§	
v.	§	CASE NUMBER: SA-12-CA-1002-FB(HJB)
	§	
AMERICAN BATTLE MONUMENTS COMMISSION, *et al*	§	
	§	
	§	
Defendants	§	

OPPOSED MOTION TO INTERVENE PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 24

Pursuant to Federal Rule of Civil Procedure 24(a), the below named party moves to intervene as of right as plaintiff in the above-captioned action brought by Plaintiff Eakin. In the alternative, this party move to intervene permissively as plaintiffs pursuant to Rule 24(b).

INTRODUCTION

The party seeking to intervene is:

Debbie Gerlich Christian, Niece and designated primary next-of-kin by Gloria Mae (Morgan) Gerlich, Sister of Private Robert R. Morgan, service number 1802531, originally buried near Private Arthur H. "Bud" Kelder in Cabanatuan POW Camp Cemetery grave 822 and currently buried as an Unknown in the Manila American Cemetery operated by Defendant ABMC. Pvt. Robert Morgan was of the 7th Material Squadron and survived the Bataan Death March. He died on January 1st, 1943

Intervener-Plaintiff has conferred with Plaintiff *pro se* and Counsel for Defendant. Plaintiff supports this motion to intervene. Counsel for Defendant objects.

BACKGROUND

Plaintiff originally petitioned for relief in the form of return of the remains of his family member, Arthur H. "Bud" Kelder, who was originally buried in Cabanatuan Grave 717 and subsequently interred as an Unknown in the Manila American Cemetery operated by Defendant ABMC. Plaintiff's First Amended Complaint also requested injunctive relief requiring Defendants to afford due process to all MIA families seeking the return of the remains of their deceased family members who died in military service.

Defendants concede that they have a duty to return remains to families for burial, but contend they have no duty to identify the remains nor obligation to consider evidence of identity provided by others.

After service with discovery requests to produce both documents and the subject remains, Defendants peremptorily acted to exhume the remains of all ten Unknowns originally buried in Grave 717, including the remains identified by Plaintiff as his family member and nine other Unknowns not included in Plaintiff's lawsuit. Defendants' action avoided compliance with the pending discovery requests and allowed them to retain control of the remains and subsequent DNA testing. Defendants now contend that no controversy exists and Plaintiff's suit should be dismissed.

Additionally, Plaintiff moved to dismiss his appointed counsel, which precludes his representation of MIA families similarly situated.

The action is currently stayed and administratively closed pending either side's application for further relief within thirty days of the conclusion of the DNA testing and identification of the ten Unknowns.

TIMELINESS

Whether leave to intervene is sought under section (a) or section (b) of Rule 24, the application must be timely. *United Air Lines, Inc. v. McDonald,* 432 U.S. 385, 97 S.Ct. 2464, 2466, 53 L.Ed.2d 423, 427 (1977); *NAACP v. New York,* 413 U.S. 345, 366, 93 S.Ct. 2591, 2602-03, 37 L.Ed.2d 648, 662 (1973); *Smith Petroleum Service, Inc. v. Monsanto Chemical Co.,* 420 F.2d 1103, 1115 (5th Cir. 1970).

Intervenor's motion is timely. NAACP v. New York, 413 U.S. 345, 365, 93 S. Ct. 2591, 2602-03 (1973). Intervenors neither could have known nor reasonably should have known of their interest in the suit before filing this motion. *See John Doe #1 v. Glickman,* 256 F.3d 371, 376 (5th Cir. 2001). Further, the suit has progressed only to abbreviated document discovery and Defendants have not yet filed their answer to Plaintiff's First Amended Complaint. *See United States v. Washington,* 86 F.3d 1499, 1503 (9th Cir. 1996).

"'Timeliness,'" as we recognized in *McDonald v. E. J. Lavino Co.,* 430 F.2d 1065, 1074 (5th Cir. 1971), "is not a word of exactitude or of precisely measurable dimensions." Rule 24 fails to define it, and the Advisory Committee Note furnishes no clarification. As a result, the question whether an application for intervention is timely is largely committed to the discretion of the district court, and its determination will not be overturned on appeal unless an abuse of discretion is shown." *Stallworth v. Monsanto*, 558 F.2d 257 (5th Cir. 1977) quoting *NAACP v. New York,* 413 U.S. at 367, 93 S.Ct at 2603, 37 L.Ed.2d at 663; *United States v. United States Steel Corp.,* 548 F.2d 1232, 1235 (5th Cir. 1977); *McDonand v. E.J. Lavino Co.,* 430 F.2d at 1071.

In *McDonald v. E.J. Lavino Co.,* the Circuit Court set out four factors that must be considered in passing on the timeliness of a petition for leave to intervene.

Factor 1. The length of time during which the would be intervenor actually knew or reasonably should have known of his interest in the case before he petitioned for leave to intervene.

Plaintiff -Intervenor could not have been aware of their interest in this case because Defendants had improperly classified the necessary records as defense secrets and restricted them from public access. During the time prior to release of the records, Defendants had represented to families that the remains of their family member were "non-recoverable," a misleading and disingenuous description of the actual circumstances.

The documents showing the actual facts of the burials were concealed until Plaintiff filed a related Freedom of Information action in this Court. Any delays in proposing this intervention were due to Defendant's concealment of records and failure to inform families as new information became available.

Further, Defendants had represented to MIA families that they would be notified if any additional information concerning the remains of their family members was obtained. Clearly, Defendants failed to do so as shown by their exhumation of the remains originally buried in Grave 717 without communication with those or other families that it might be possible to identify the remains of their family members.

Additionally, even if the Intervenor had known of Plaintiff's lawsuit, she could not have reasonably believed that her interests would be protected since Plaintiff's First Amended Complaint sought to protect the interests of those "similarly situated." It was not until Plaintiff's Counsel was dismissed and Defendants objected to Plaintiff's pro se reference to other similar Unknowns that her interests were threatened and it became necessary for her to intervene.

Factor 2. The extent of the prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as he actually knew or reasonably should have known of his interest in the case.

Neither Plaintiff nor Defendants will be prejudiced by Intervenors participation at this stage. Intervenors have substantially the same facts and questions of law as presented by Plaintiff Eakin. Defendants' investigations of these cases should have been completed years ago in the routine course of their business. Intervenors do not foresee the need for extensive discovery beyond that proposed by Plaintiff. Defendants have not yet answered Plaintiff's First Amended Complaint.

Factor 3. The extent of the prejudice that the would-be intervenor may suffer if his petition for leave to intervene is denied.

Plaintiff's Mandamus claims are grounded in the "Slocombe Memo" issued in 1999. This policy only became known to Plaintiff and available through litigation. Defendants are reasonably expected to cancel this policy at their first opportunity, thereby forever foreclosing any future possibility that they will ever recover the remains of her family member. Plaintiff's request for injunctive relief to provide a similar route for families to recover the remains of their missing is at the heart of this effort to intervene.

The Intervenor is representing her mother, Gloria Morgan Gerlich, sister of Pvt. Morgan. She is of an advanced age, as would be expected of those who lost a sibling in World War II. She has waited seventy years to learn the fate of her brother and insure his proper burial, as is her right and obligation. Considering the expense of litigation and the lack of any potential economic recovery in these cases, it is unlikely that she will ever have another chance to litigate the Defendant's concealment of the remains of her family member.

Factor 4. The existence of unusual circumstances militating either for or against a determination that the application is timely.

Defendants have been aware that other parties wished to intervene. At a July 16, 2014 hearing before Magistrate Judge Bemporad, plaintiff was advised by the Court that he would be unable to represent the interests of other MIA families if he proceeded pro se. Plaintiff then advised the Court that other MIA families had expressed interest in intervening to insure their families were properly represented. With this knowledge of the probable participation of other parties, Defendants proceeded with the unilateral exhumation of the remains of Plaintiff's family member and nine others. Defendants should have reasonably anticipated that their action would cause other families to intervene in this litigation.

Subsequently, a number of non-parties, including intervenors, contacted this Court seeking to make the Court aware of their concerns. In response, this Court issued its Order Regarding Letters to the Court from Non-Parties (ECF Doc. No. 86) on September 18, 2014. In this order, the Court advised them to timely file their complaint.

Since becoming aware of the need to intervene in this litigation, Intervenor has diligently attempted to obtain counsel.

INTERVENTION AS OF RIGHT

Under Rule 24(a)(2) an individual is entitled to intervention as of right [1] when he claims an interest relating to the property or transaction which is the subject of the action and [2] he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, [3] unless his interest is adequately represented by existing parties. *Stallworth v. Monsanto*, 558 F.2d 257, 268 (5th Cir. 1977)

Intervenor is the primary next-of-kin of an Unknown who has not yet been exhumed. Resolution of Plaintiff's original litigation without addressing the issue of due process in recovering the remains of their family members will likely forever prevent her from insuring the proper burial of her family members.

PERMISSIVE INTERVENTION

Determining whether an individual should be permitted to intervene is a two-stage process. First, the district court must decide whether "the applicant's claim or defense and the main action have a question of law or fact in common." Fed.R.Civ.P. 24(b)(2). If this threshold requirement is met, then the district court must exercise its discretion in deciding whether intervention should be allowed. *Id* at 269. In the cases which intervenors seek to present, both the facts and questions of law are nearly identical.

"[T]he rights asserted by two groups … should be adjudicated in one action rather than in two. 'With little strain on the court's time and no prejudice to the litigants, the controversy can be stilled and justice completely done' if the [parties] are granted permission to intervene." *Id* at 270 quoting *McDonald v. E.J. Lavino Corp.*, 430 F.2d at 1074.

CONCLUSION

The Intervenor has standing identical to that of the Plaintiff and which this Court has determined is proper for this action. Should the Intervenor be forced to bring a new law suit, if that is even possible, it is probable that she would be faced with the same procedural challenges and delay as was with the Plaintiff. Granting Intervenor's Motion to Intervene will avoid relitigation of an already decided issue, promote judicial economy and insure a fair and just outcome.

Respectfully submitted,

Debbie Gerlich Christian

Debbie Gerlich Christian
986 View Ridge, Pipe Creek, Texas 78063
210-316-0578, debbiec@txbiomed.org
Pro se

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of February, 2015, a true and correct copy of the foregoing was forwarded to Defendants and Plaintiff by First Class Mail at the following addresses:

Susan Strawn, Assistant United States Attorney
601 N.W. Loop 410, Suite 600
San Antonio, Texas 78216
Sstrawn@usa.doj.gov

John Eakin, pro se
9865 Tower View Road
Helotes, Texas 78023
jeakin@airsafety.com

Debbie Gerlich Christian

Debbie Gerlich Christian
986 View Ridge, Pipe Creek, Texas 78063
210-316-0578, debbiec@txbiomed.org
Pro se