UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOHN EAKIN Plaintiff, v. AMERICAN BATTLE MONUMENTS COMMISSION, et al. Defendants.	§ § § § § § § § § § §	Civ. A. No. SA:12-cv-1002-FB-HJB

DEFENDANTS' OPPOSITION TO MOTION TO INTERVENE FILED BY SALLY HILL JONES

Defendants United States Department of Defense, et al. oppose the Motion to Intervene filed by Dr. Sally Hill Jones. This case has been administratively closed by the Court pending efforts to identify specified remains known as X-816. Dr. Jones seeks the identification of different remains, from a WWII aircraft crash and known as X-345, which were exhumed from the National Memorial Cemetery of the Pacific in August 2005 under different circumstances. Although the X-345 remains are currently unidentified, they have been determined *not* to be those of Dr. Jones' relative. See Declaration of Greg Gardner, attached.

Dr. Jones was notified of that determination after she filed this motion. Id. However, Dr. Jones has informed undersigned counsel that she will not withdraw her motion. Dr. Jones' motion to intervene should be denied because she has no legally-cognizable interest in this action and therefore does not meet the requirements for intervention of right under Fed. R. Civ. P. 24. In the absence of any claim to specific remains, her claims are identical to the general due process and declaratory judgment claims asserted by Mr. Eakin's and opposed by defendants, as

noted below. Mr. Eakin can adequately represent those interests, as indeed Dr. Jones indicates he has been doing. Accordingly, the Court also should deny her motion to intervene by permission.

I. Background

This case was filed on October 18, 2012 – over two years ago. The ECF docket reflects almost 100 entries. There are two pending dispositive motions raising various jurisdictional grounds, including standing, failure to state a claim, and mootness – defenses that apply equally to the would-be intervenor as to the plaintiff. While declining to rule on the pending dispositive motions, approximately six months ago the Court administratively closed the case after the defendants determined to exhume ten sets of remains from the Manila American Cemetery. One set of those remains is at issue in this case. As set forth in defendants' Fifth Status Report, filed January 12, 2015, defendants have advised the Court that at least some identifications from this group are imminent.

Dr. Jones's motion relates to remains known as X-345. These remains are not among the remains exhumed from Manila American Cemetery last August. Rather, the remains are presumed to be one of a limited number of individuals lost in a WWII aircraft crash near Hong Kong, which could not be identified after the war. The remains were exhumed in 2005 for identification, but DNA was unable to be extracted due to the degraded condition of the remains and their treatment with chemicals at the time of burial. More recently, however, defendants have developed a new protocol to allow DNA to be sequenced from these remains. As explained in Attachment 1 to the Gardner Declaration, this process has not yet been validated. The validation of the protocol is expected to occur soon; however, until it occurs, identifications

cannot be formally made due to the accreditation requirements of the laboratories. Defendants have notified Dr. Jones that the remains are not those of her relative, however.

II. Dr. Jones has No Right to Intervene

Dr. Jones seeks to intervene both as of right and as a matter of the Court's discretion (permissive intervention). As applicable here, intervention as of right is proper when:

> (1) the motion to intervene is timely; (2) the potential intervener (sic) asserts an interest that is related to the property or transaction that forms the basis of the controversy in the case into which she seeks to intervene; (3) the disposition of that case may impair or impede the potential intervener's ability to protect her interest; and (4) the existing parties do not adequately represent the potential intervener's interest

Ross v. Marshall, 426 F.3d 745, 753 (5th Cir. 2005); Fed. R. Civ. P. 24(a).

Here, Dr. Jones' motion fails on at least the last three prongs of that test. To satisfy the second prong – to assert an interest that is related to the property or transaction at issue --:

> an applicant must point to an interest that is 'direct, substantial, [and] legally protectable.' This requires a showing of something more than a mere economic interest; rather, the interest must be 'one which the *substantive law* recognizes as belonging to or being owned by the applicant.' In addition, 'the intervenor should be the real party in interest regarding his claim.'

Id. at 757 (footnotes omitted). In New Orleans Public Service, Inc. v. United Gas Pipe Line Co. 732 F.2d 452 (5th Cir.1984), the Fifth Circuit discussed the "interest" requirement at length:

> The Supreme Court in *Donaldson v. United States,* 400 U.S. 517, 531, 91 S.Ct. 534, 542, 27 L.Ed.2d 580 (1971), stated that the applicant's interest had to be 'a significantly protectable interest.' It is apparent that the Supreme Court in *Donaldson* used 'protectable' in the sense of legally protectable, and it is difficult to conceive of any other sense in which the Court might have been employing 'protectable in that context.
>
> By requiring that the applicant's interest be not only "direct" and "substantial," but also "legally protectable," it is plain that something more than an economic interest is necessary. What is required is that the interest be one which the *substantive* law recognizes as belonging to or being owned by the applicant. This is reflected by the requirement that the claim the applicant seeks intervention in order to assert be a claim as to which the applicant is the real party in interest. The real party in interest requirement of Rule 17(a), Fed.R.Civ.P., "applies to

> intervenors as well as plaintiffs," as does also the rule that "a party has no standing to assert a right if it is not his own."

Id. at 464 (citations omitted).

Here, Dr. Jones has not identified a direct, substantial, and *legally-protectable* interest. Even assuming that Mr. Eakin has such an interest, which defendants have consistently denied,[1] Dr. Jones does not. The property and transaction at issue here are, arguably, the remains known as X-816, and the identification thereof. Dr. Jones expresses an interest in different remains, X-345, but those remains have now been determined not to be those of her relative. She has no direct, substantial or legally-protectable interest in this litigation at all. That she may share some broader grievances with the plaintiff regarding defendants' policies and procedures does not give her a legally-protected interest in this action.

Because Dr. Jones has no legal interest at stake, disposal of Mr. Eakin's case will not impair or impede any legal claim of hers. Accordingly, her motion fails the third prong under Rule 24 as well.

Last, "[t]he final criterion that a potential intervenor must satisfy in order to intervene as of right is that 'the existing parties do not adequately represent' his interest." Ross at 761. Here, Dr. Jones contends that Mr. Eakin cannot represent her interests since he dismissed his counsel, and therefore cannot represent others. However, her argument is based upon a misunderstanding. It is true that Mr. Eakin cannot "represent" her, or anyone else, in federal court. However, "representation" by a party of another party's interests under Rule 24 is a different inquiry. Adequacy of representation for purposes of Rule 24 looks at whether the

[1] Even were there still remains at issue in Dr. Jones' case, her claims would fail for all the reasons set forth in our prior motions (incorporated by reference herein) with respect to Mr. Eakin, including but not limited to standing. Dr. Jones is not the next-of-kin of SSG Holley, but, like Mr. Eakin, is acting as such pursuant to a power of attorney. More plainly, however, her claims, like his, fail because there is no statutory or constitutional right at issue.

interests of the party and would-be intervenor are aligned, such that his pursuit of those interests adequately protects hers.

Here, Dr. Jones admits that her claims are substantially the same as those presented by Mr. Eakin. (ECF 90 at par. 24, 37). Indeed, she states that she presumed that Mr. Eakin would adequately represent those interests, and that it was only when he dismissed his counsel that she felt compelled to intervene. E.g., id. at par. 21.

However, as explained above, intervention for this purpose is unnecessary. Were Mr. Eakin to prevail on his declaratory judgment claims and due process claims, Dr. Jones' interest would be protected. Likewise, should his claims be dismissed, they will all but certainly be dismissed on threshold legal issues which are identical to the issues Dr. Jones would face. In sum, Dr. Jones has not met the criteria for intervention by right, as she has no protected-legal interest at stake, and her general grievances are identical to those of plaintiff, and adequately represented by him.

III. Permissive Intervention Should be Denied.

Rule 24(b) states that:

> On timely motion, the court may permit anyone to intervene who:
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> **(A)** is given a conditional right to intervene by a federal statute; or
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> **(B)** has a claim or defense that shares with the main action a common question of law or fact.

However, "[p]ermissive intervention 'is wholly discretionary with the [district] court ... even though there is a common question of law or fact, or the requirements of Rule 24(b) are otherwise satisfied.'" New Orleans Public Service, Inc. at 470-71 (citations omitted).

The Court in *New Orleans Public Service* further explained:

> In acting on a request for permissive intervention, it is proper to consider, among other things, "whether the intervenors' interests are adequately represented by other parties" and whether they "will significantly contribute to full development of the underlying factual issues in the suit." *See* Spangler v. Pasadena City Bd. of Ed., 552 F.2d 1326, 1329 (9th Cir.1977); *United States Postal Service v. Brennan,* 579 F.2d 188, 191–92 (2d Cir.1978). *See also* Hoots v. Commonwealth, 672 F.2d 1133, 1136 (3d Cir.1982) (adequacy of representation).

Id. at 472. The Fifth Circuit noted that "[o]ther factors mentioned [relevant to permissive intervention] include the "nature and extent of intervenors' interest," *Spangler; Brennan,* and "their standing to raise relevant legal issues." *Spangler*"). Id. at n. 40.

In *New Orleans Public Service*, the Fifth Circuit upheld the District Court's denial of permissive intervention where the movants' interest was not a legally-protected one, and the movants did not have standing to raise relevant legal issues. The Court also noted that the plaintiff adequately represented the intervenors' interests:

> [plaintiff and intervenor] seek exactly the same relief, on exactly the same grounds, from and as against [defendant]. There is neither indication nor assertion that [plaintiff] has been or will be in any way remiss or inadequate in pursuing these claims against [defendant], or that there is any character of collusion between [plaintiff and defendant]. Under these circumstances, [plaintiff's] representation is presumed to be adequate.

Id. at 472 (footnote omitted).

Dr. Jones' motion presents as analogous situation. As discussed above in the context of intervention by right, Dr. Jones' concerns that Mr. Eakin cannot adequately represent her interests are misplaced. The issue is not whether he represents her directly, but whether his interests are sufficiently aligned with hers. Here, as in *New Orleans Public Service*, plaintiff and intervenor "seek exactly the same relief, on exactly the same grounds, from and as against [defendant]." Id. There is no suggestion that Mr. Eakin has been remiss in pursuing their common claims, and indeed the Court has commended his efforts.

Moreover, although defendants contend that neither Mr. Eakin nor Dr. Jones has standing in this action, Dr. Jones's claim to standing, in the absence of any disputed remains, is even more tenuous. She, like the intervenors in *New Orleans Public Service*, would certainly lack standing to raise legal issues herself, apart from those raised by the plaintiff.

Finally, "[i]n exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b). Here, granting the motion is unnecessary and would unduly delay this litigation and prejudice defendants. This case was filed over two years ago. The case is administratively closed, with two dispositive motions pending, one pending for almost a year. Although Dr. Jones argues that the defendants have not filed an answer, this is not the type of case where an answer is filed. Rather, defendants have filed an exhaustive administrative record, and multiple dispositive motions. Now, when the litigation is hopefully ending, with at least some identifications expected within the month, granting this motion would potentially prolong the litigation.

Were Dr. Jones' motion granted, she would face identical threshold jurisdictional issues as Mr. Eakin. However, defendants would likely be required to file an additional dispositive motion, supported by an additional administrative record. Factually, her motion relates to different remains. These remains were lost, buried and exhumed under different circumstances than those at issue in the Eakin case. The factual record underlying the inability to identify the remains before burial, and underlying the decision to exhume, based on the likelihood of identification with new techniques, are of course different. Likewise, since the identification (and DNA analysis) techniques vary according to the condition of the remains and other factors, the appropriateness of defendants' identification efforts would depend on different facts

presented by these remains. If the Court were to reach the due process issue on the merits, the process accorded Dr. Jones may differ from that accorded Mr. Eakin, based on these differing factual circumstances. The administrative record has not been produced as to Dr. Jones and it is impossible, at this point, to say exactly what the relevant facts are.

IV. Conclusion

Because she lacks a direct, substantial and legally-protectable interest of her own, and because her other interests can be adequately represented by Mr. Eakin, Dr. Jones' motion to intervene as of right should be denied. In addition, the court should exercise its discretion to deny Dr. Jones' motion for permissive intervention because intervention is not necessary to protect her interests, and to allow it would prejudice defendants and further delay this case. As noted above, and in our Fifth Status Report filed January 12, 2015, the identifications that are the subject of Mr. Eakin's case are nearing completion. Hopefully, the Court will agree that these results moot the matter, and that, for the same reason, Dr. Jones' claims, which pertain to remains that are not her relative, are also moot. In the event the Court allows the case to proceed, Mr. Eakin can certainly represent Dr. Jones' general interests in improving the accounting and identification process. On the other hand, if her motion to intervene is granted, and the case proceeds, defendants likely would be prejudiced by having to produce another administrative record with respect to Dr. Jones, since the case would present different facts from those in the current litigation, as well as an additional dispositive motion as to her. For all of the reasons above, the court should deny the motion to intervene.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of January, 2015, I caused the foregoing to be electronically filed with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

John Eakin
Plaintiff *pro se*

I further caused a copy to be sent on January 20, 2015, by certified U.S. Mail, to:

Sally Hill Jones
2661 Red Bud Way
New Braunfels, TX 78132

/s/ Susan Strawn
SUSAN STRAWN
Assistant United States Attorney