

AVMI, L.L.C., ET AL

NO. 24-CA-428

VERSUS

FIFTH CIRCUIT

METAIRIE TOWERS CONDOMINIUM
ASSOCIATION, INC., ET AL

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 839-979, DIVISION "H"
HONORABLE DONALD L. FORET, JUDGE PRESIDING

January 29, 2025

SCOTT U. SCHLEGEL
JUDGE

Panel composed of Judges Jude G. Gravois,
Marc E. Johnson, and Scott U. Schlegel

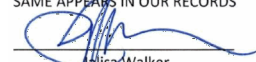
AFFIRMED

SUS

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MEJ

FIFTH CIRCUIT COURT OF APPEAL
A TRUE COPY OF DOCUMENTS AS
SAME APPEARS IN OUR RECORDS


Alisa Walker
Deputy, Clerk of Court

PLAINTIFF/APPELLANT,
ASHTON R. O'DWYER, JR.

In Proper Person

COUNSEL FOR PLAINTIFF/APPELLEE,
ANNE CANNON, INDIVIDUALLY AND ON BEHALF OF THOSE SIMILARLY
SITUATED

Kevin O. Larmann

Shannon M. Frese

George B. Recile

Eric J. O'Bell

SCHLEGEL, J.

Appellant, Ashton R. O’Dwyer, Jr., seeks review of the trial court’s May 17, 2024 judgment denying his motion for leave to intervene in this class action litigation. For the reasons stated more fully below, we affirm the trial court’s judgment.

FACTS AND PROCEDURAL BACKGROUND

This matter involves a class action petition filed on April 21, 2023, by plaintiff-appellee, Anne Cannon, individually and on behalf of others similarly situated, against defendants, Metairie Towers Condominium Association, Inc. (the “MTCA”); the MTCA’s Board of Directors through its individual members – Ron Carter, Betty Miles, Ellyn Meier, Carolyn Diaz, Jennifer Fagan, Mary Kay Zahn, and Anne Babst; the MTCA’s public adjuster, Strategic Claim Consultants, LLC; the MTCA’s property management company, GNO Property Management, LLC; and several insurers of these entities. Metairie Towers was a 219-unit condominium complex located at 401 Metairie Road in Metairie, Louisiana (“Metairie Towers”), that sustained damages following Hurricane Ida. The proposed class of plaintiffs included all persons and entities who owned a condominium unit in Metairie Towers from August 29, 2021 to the present, but excluding owners who were also members of the MTCA Board of Directors.¹ Mr. O’Dwyer is an owner of Unit 330 at Metairie Towers, and is now a putative member of the class pursuant to the July 31, 2024 class certification order.

The class action claims arise out of allegations that defendants took actions in the aftermath of Hurricane Ida that caused substantial damage to the condominium complex. The petition alleges that these defendants mismanaged the procurement of insurance to protect the condominium complex, and then

¹ The trial court entered an order granting class certification on July 31, 2024. Certain defendants have appealed the certification order and the parties are in the process of filing appellate briefs.

mishandled and mismanaged the insurance claims and proceeds, as well as the remediation, repair, and restoration of the condominium complex following Hurricane Ida.

Subsequent to the filing of the class action petition, Mr. O'Dwyer filed an individual lawsuit on November 27, 2023 in the 24th Judicial District Court, Case No. 849-260, Division N, raising similar allegations regarding the mishandling and mismanagement of insurance claims, proceeds, and repairs. Mr. O'Dwyer named some of the same defendants sued in the class action litigation, including the MTCA, certain members of the Board of Directors, Strategic Claim Consultants, LLC, and GNO Property Management, LLC. The individual suit, however, raised claims against several additional parties not named in the class action litigation, including individuals who are owners and/or officers of some of the entities named as defendants in the present matter; the MTCA's property insurer, Certain Underwriters at Lloyd's, London; and multiple lawyers and law firms hired by the MTCA's Board of Directors. Mr. O'Dwyer also named as defendants an additional contractor hired by the Board of Directors, Advanced Property Restoration Services, LLC, its owner, Jason Houp, and its attorney, Jack K. Whitehead, Jr.

In response to Mr. O'Dwyer's individual lawsuit, several of the lawyers/law firm defendants filed various exceptions, including exceptions of no right of action. These defendants argued that they were engaged by the MTCA's Board of Directors, and therefore, Mr. O'Dwyer did not have a right of action against them because they did not have an attorney-client relationship with him and he did not enjoy third-party beneficiary status. Mr. Whitehead and the public adjuster, Strategic Claim Consultants, LLC, filed similar exceptions of no right of action based on their lack of a client relationship with Mr. O'Dwyer.

Just prior to the hearing on defendants' exceptions, Mr. O'Dwyer filed a motion to transfer his individual lawsuit to the trial court division handling this class action proceeding. Mr. O'Dwyer also requested a continuance of the hearing on the exceptions based on his request to transfer his lawsuit. Following oral argument on March 20, 2024, the trial court denied Mr. O'Dwyer's motion to transfer his individual lawsuit, granted defendants' exceptions of no rights of action, and dismissed Mr. O'Dwyer's claims against them with prejudice. The trial court entered a written judgment on that same day.²

Shortly thereafter on April 17, 2024, Mr. O'Dwyer filed his motion for leave to intervene and to file a petition for intervention in the class action proceedings. In his proposed petition for intervention, Mr. O'Dwyer indicated that he sought to intervene in the class action proceedings due to the denial of his motion to transfer and the recent dismissal of his claims against certain defendants in his individual lawsuit. Mr. O'Dwyer claimed that the trial court "GUTTED" his individual lawsuit. Mr. O'Dwyer also alleged that he should be allowed to intervene due to alleged unspecified conflicts of interest involving class counsel. He finally alleged that the class action was a "misguided piece of litigation" and listed several different complaints he had regarding counsel's handling of the matter, including his complaint that the class action did not include the additional parties that he named as defendants in his individual lawsuit.

At the May 8, 2024 hearing on the motion for leave to intervene, Mr. O'Dwyer again confirmed that part of his motivation for seeking to intervene in the class action proceedings was due to the trial court's dismissal of several defendants named in his individual lawsuit. He also raised general concerns about alleged

² Mr. O'Dwyer filed an appeal of the March 20, 2024 judgment in his individual lawsuit, which is also pending before this Court in Case No. 24-CA-277.

conflicts of interest for class counsel and the adequacy of counsel's representation of the class.

Following an extensive hearing, the trial court denied Mr. O'Dwyer's motion to intervene and provided oral reasons for its ruling. The trial court explained that Mr. O'Dwyer failed to satisfy the required elements to intervene as set forth in La. C.C.P. art. 1091. The trial court also recognized that La. C.C.P. art. 592(E)(2) provided the trial court with discretion to grant leave for a member of the class to intervene in a class action proceeding. However, the trial court determined that allowing Mr. O'Dwyer to intervene at this stage of the proceedings would cause needless delay due to the numerous attacks he raised against the class action proceedings in his proposed petition to intervene. The trial court noted that the parties had spent extensive time preparing for the upcoming class certification hearing in July 2024. He further determined that as a member of the putative class, Mr. O'Dwyer's interests were adequately protected and that Mr. O'Dwyer would have the right to opt out of the class action if the trial court certified the class. During the hearing, class counsel represented that they would provide Mr. O'Dwyer and all putative class members with all relevant information. In addition, the trial court instructed counsel to cooperate and communicate with Mr. O'Dwyer and to share everything with him within reason.

Mr. O'Dwyer filed a timely motion for devolutive appeal which the trial court granted on May 22, 2024.

DISCUSSION

On appeal, Mr. O'Dwyer lists several assignments of error including that the trial court erred in denying his motion for leave to intervene because his claims against the attorneys and public adjustor in his individual suit were dismissed and class counsel failed to include these claims in the class action proceedings. He further claims that it was error for the trial court to deny his motion for leave to

intervene without considering class counsel's alleged disqualifying conflicts of interest and the prejudice to his legal rights due to the lack of adequate representation by class counsel.

We first consider, as the trial court did, whether Mr. O'Dwyer's proposed petition for intervention satisfies the requirements to intervene in a pending proceeding. La. C.C.P. art. 1033 generally provides that after an answer is filed, an incidental demand may be filed, "with leave of court, if it will not retard the progress of the principal action." La. C.C.P. art. 1091 provides the specific requirements for a third person to file a petition for intervention:

A third person having an interest therein may intervene in a pending action to enforce a right related to or connected with the object of the pending action against one or more of the parties thereto by:

- (1) Joining with plaintiff in demanding the same or similar relief against the defendant;
- (2) Uniting with defendant in resisting the plaintiff's demand; or
- (3) Opposing both plaintiff and defendant.

This Court has explained that the requirements for a third-party intervention are twofold: the intervenor must have a justiciable interest in, and connexity to, the principal action, and the interest must be so related or connected to the facts or object of the principal action that a judgment on the principal action will have a direct impact on the intervenor's rights. *ASI Federal Credit Union v. Leotran Armored Security, LLC*, 18-341 (La. App. 5 Cir. 11/7/18), 259 So.3d 1141, 1146; *Mangano Consultants, Inc. v. Bob Dean Enterprises, Inc.*, 05-449 (La. App. 5 Cir. 1/17/06), 921 So.2d 1081, 1085, *writ denied*, 06-437 (La. 4/28/06), 927 So.2d 295. A justiciable interest is defined as the right of a party to seek redress or a remedy against either the plaintiff or defendant in the original action, or both, and where those parties have a real interest in opposing it. *ASI Fed. Credit Union*, 259 So.3d at 1146. If a justiciable interest exists, it must be so related or connected to the

facts or object of the principal action that a judgment on the principal action will have a direct impact on the intervenor's rights. *Villarrubia v. Villarrubia*, 18-320 (La. App. 5 Cir. 12/27/18), 264 So.3d 554, 559.

“It is [also] well settled that an intervenor takes the proceedings as he finds them.” *IberiaBank v. Live Oak Circle Development, L.L.C.*, 12-1636 (La. App. 1 Cir. 5/13/13), 118 So.3d 27, 32. Further, “[t]he intervenor cannot change the issue between the parties, and can raise no new one.” *Id.* He must accept the suit as he finds it and cannot add new parties or raise issues that the plaintiff and defendant have not raised themselves. *Id.*; *Wallace v. Nathan*, 96-119 (La. App. 5 Cir. 7/30/96), 678 So.2d 595, 598. The intervenor's rights are confined to joining or resisting either the plaintiff or defendant, or to opposing both. *Id.* The reason the intervenor's rights are so limited is because he can bring his own separate action to raise new issues. *IberiaBank*, 118 So.3d at 32.

A trial court has broad discretion in deciding whether to allow an intervention after the answer to the principal demand has been filed. *Roy Anderson Corp. v. 225 Baronne Complex, L.L.C.*, 22-784 (La. App. 4 Cir. 4/11/23), 360 So.3d 144, 147. An appellate court reviews a trial court's ruling on an intervention for abuse of discretion. *Id.*

First, we find that Mr. O'Dwyer is not a third party to the class action proceedings because he is a putative member of the class certified by the trial court. In addition, Mr. O'Dwyer recognizes that La. C.C.P. art. 1091 prohibits a proposed intervenor from raising new claims or adding new parties. Despite this recognition, Mr. O'Dwyer admits that the primary reason he sought leave to intervene in this class action proceeding is due to the dismissal of his claims against parties in his individual action that were not included as defendants in this matter. The trial court properly determined that Mr. O'Dwyer failed to satisfy the requirements of Article 1091 based on his admission that he seeks to intervene in

order to try to pursue his claims against the parties dismissed from his individual lawsuit. We also agree with the trial court that the proper recourse to protect Mr. O'Dwyer's rights with respect to these dismissed parties is not by intervention in these proceedings, but rather by means of appeal, which he has done.

The trial court's denial of Mr. O'Dwyer's request to intervene was also warranted by its finding that the intervention would unnecessarily delay the proceedings. The trial court found that Mr. O'Dwyer's filings indicated that he did not intend to accept the case as he found it, and that his multiple complaints regarding the status of the proceedings would disrupt the standing deadlines and upcoming class certification proceedings.

We also find that the trial court did not abuse its discretion in rejecting Mr. O'Dwyer's arguments that he should be allowed to intervene due to class counsel's alleged conflicts of interest and inadequate representation of the class. The trial court recognized that La. C.C.P. art. 592(E)(2) grants it discretion to allow an intervention when it is in the interest of protecting the class:

In the conduct of actions to which Article 591 and this Article apply, the court may make any of the following appropriate orders:

* * *

(2) Requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to members of the class of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action.

Our review of the transcript from the hearing on the motion to intervene reveals that the trial court afforded Mr. O'Dwyer extensive time and ample opportunity to voice his concerns about alleged conflicts of interest and inadequate representation of the class. However, he failed to provide any evidence or arguments regarding a specific conflict of interest. We further agree with appellees

that these are issues more appropriately evaluated in the context of the class certification ruling

CONCLUSION

For all of these reasons, we affirm the trial court's judgment denying Mr. O'Dwyer's motion to intervene in this class action litigation.

AFFIRMED

SUSAN M. CHEHARDY
CHIEF JUDGE

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MARC E. JOHNSON
STEPHEN J. WINDHORST
JOHN J. MOLAISSON, JR.
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NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 2-16.4 AND 2-16.5** THIS DAY **JANUARY 29, 2025** TO THE TRIAL JUDGE, CLERK OF COURT, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

Handwritten signature of Curtis B. Pursell in blue ink.

CURTIS B. PURSELL
CLERK OF COURT

24-CA-428

E-NOTIFIED

24TH JUDICIAL DISTRICT COURT (CLERK)
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