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Gardner v. Bank of America Nat. Trust and Savings Ass'n
N.J.Super.A.D.,2004.
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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey,Appellate Division.

Albert N. GARDNER, Plaintiff,

v.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, Defendant-Respondent. FN1

FN1. This complaint was initially filed under docket number ATL-L-006555-91. It was one of a number of related complaints, all of which were eventually consolidated under docket number ATL-L-001389-92. Because the dispute before us arises solely within the *Gardner v. Bank of America* litigation, we use that caption for this opinion.

Submitted Dec. 15, 2004.
Decided Dec. 27, 2004.

On appeal from the Superior Court of New Jersey, Law Division, Atlantic County, docket no. ATL-L-001389-92.

Wilentz, Goldman & Spitzer and Marc Friedman, attorneys for appellants, Joseph M. Murphy and MLM Associates (Edward T. Kole and Mr. Friedman, of counsel and on the brief; David C. Kistler, Jr., on the brief). FN2

FN2. Appellants sought to intervene in the litigation. Their unsuccessful attempts form the basis of their appeal. However, since they were not granted leave to intervene, they are not designated in the caption.

Sills Cummis Epstein & Gross, attorneys for respondent (Joseph L. Buckley, of counsel and on the brief; Richard H. Epstein and Thomas A. Della Croce, on the brief).

Before Judges CONLEY and BRAITHWAITE.

PER CURIAM.

***1** Five and one-half years into a complicated lender liability litigation, which had been consolidated with several related complaints, appellant Joseph Murphy (Murphy) moved to intervene. Because the motion was untimely, it was denied, as were appellant's subsequent various motions for reconsideration that were periodically filed during the course of the litigation. After a jury verdict on liability, which would have benefitted the partnership created by appellant Murphy and plaintiff Albert Gardner (Gardner), MLM Associates (MLM), Murphy again moved to intervene, unsuccessfully, this time naming MLM as well. Post-final judgment, a last effort was made to intervene. It too was unsuccessful. Murphy and MLM now appeal all of these denials. We affirm. FN3

FN3. In point II of their brief, Murphy and MLM contend that a November 14, 2002, partial summary judgment limiting plaintiff's damages was erroneous. Since we affirm the denials of the motions to intervene and, therefore, Murphy and MLM lack standing to challenge that partial summary judgment, we do not address that issue.

In January 1982, Murphy and Gardner became general partners, along with another person, in MLM. MLM is a limited partnership through which the partners developed a residential condominium complex in Atlantic City known as the Ocean Club. Murphy was MLM's managing general partner, with exclusive power to manage, control and make all decisions concerning the project.

The partnership was capitalized with contributions of cash and/or appraised value property from the general and limited partners. Another significant source of financing was the Bank of America (the

Bank). Pursuant to a February 24, 1983, Construction Loan Agreement, the Bank provided $122 million in construction financing to MLM. Both Murphy and Gardner signed the necessary documents. On the same day, MLM and Pavarini Construction Company entered into a construction agreement. The agreement was signed by Murphy, as general partner, for MLM. Construction began in 1983. Condominiums were for sale by August 1985.

Meanwhile, MLM's obligation on the Bank's loan was refinanced several times. In 1988, MLM gave a general release to the Bank, executed by Murphy and Gardner, in connection with a refinancing. The release refers to "various ongoing lawsuits involving MLM" arising from, apparently, problems with some of the Ocean Club units. In return for convincing the Bank to "postpone the date upon which the outstanding indebtedness ... must be repaid," and to agree to certain modifications to the Mortgage and Loan agreements, MLM "release[d] and discharge[d]" the Bank:

from any and all actions, liabilities, loans, debts, damages, claims, suits, judgments, executions, and demands of every nature and description that MLM may have hereafter acquire against [the Bank], including any claims which may have been assigned to MLM by any person, but excluding any claim arising from conduct occurring after the date hereof.

Further, MLM acknowledged:that it is aware that it or its attorneys or agents may hereafter discover facts in addition to or different from those which it now knows or believes to exist with respect to [the Bank] or the subject matter of this Agreement, but that MLM intends hereby fully, finally and forever to settle and release all of the claims, disputes and differences, known or unknown, suspected or unsuspected, which now exist or may exist hereafter, except as otherwise expressly provided in this Agreement. The provision of this Paragraph ... shall be and remain in effect notwithstanding the discovery or existence of any such additional or different fact.

***2** MLM, also, acknowledged:that it has been represented by legal counsel of its own choice throughout all of the negotiations which preceded the execution of this Agreement and that it has executed this Agreement with the consent and on the advice of such legal counsel, and without reliance upon any promise or representation of any person or persons action for or on behalf of [the Bank]. MLM further acknowledges that it and its counsel have had adequate opportunity to make whatever investigation or inquiry they may deem necessary or desirable in connection with the subject matter of this Agreement prior to the execution hereof and the delivery and acceptance of the consideration described herein. Counsel for all MLM has read and approved the language of this Agreement.

Both Murphy and Gardner signed this release.

In 1990, the Ocean Club Condominium Association (Association) sued MLM, Murphy and Gardner, alleging, among other things, misrepresentation, faulty construction, mismanagement of the Associations' funds, violations of the New Jersey Planned Real Estate Development Full Disclosure Act, *N.J.S.A.* 45:22A-21 to -56, and the New Jersey Consumer Fraud Act, *N.J.S.A.* 56:8-1 to -80. Compensatory and punitive damages were sought. In its answer, MLM counterclaimed against the Association, alleging that various actions taken by the Association caused MLM to lose sales.[FN4]

FN4. Ultimately, this litigation settled during 1996 and January 1997.

The Bank was not, then, joined by way of a third-party complaint. However, it is clear that during the early stages of this litigation, Gardner discussed with his personal attorney whether there was a legal theory that would support an action against the Bank. Murphy, at the time, thought that:

given our shared fiduciary responsibilities, that any actions [Gardner] might take were in his capacity as a general partner just as all actions I undertook then and now were in my capacity as managing general partner. I did not think either of us had individual

rights to pursue claims arising from the partnership in any way other than our representative capacities as general partners.

Although Murphy "believe[ed]" he referred Gardner's theories to the law firm who then represented MLM, a well as Gardner and Murphy as partners, he has said that he did not intend to pursue these claims because at the time:

I was embroiled in several claims and lawsuits involving construction defects, accounting issues, architect malpractice, and criminal allegations connected to some of the individuals involved in the OCCA project. Moreover, the partnership had fulfilled its purpose, the Bank of America loan had been repaid, and the partnership had many liabilities but were without assets to fund or support further litigation.

Additionally, [the law firm was] owed a great deal of money for the suits they were defending and did not have the interest or the resources to underwrite further litigation-particularly under a novel theory of liability B without any expectation of being paid. In fact, [the law firm] later applied to withdraw as counsel for MLM Associates and me individually for failure to pay attorneys' fees. Their motion was granted on 11/25/92. I subsequently continued in the Ocean Club litigation representing myself only on a pro se basis.

***3** Without giving authorization pursuant to the terms of the Partnership Agreement, I acquiesced to [Gardner's] instituting a separate action in the belief that any claims he pursued arose out of partnership activities ... so he was pursuing those claims on behalf of the partnership.

I never authorized [Gardner] to pursue partnership claims or assets for his individual benefit because to do so would require the approval of the partners. I never sought nor obtained their approval to undertake such an action. Additionally, I didn't abandon any claims, which would also have required the consent of the partners which was neither sought nor obtained.

In November 1991, Gardner filed his lender liability action against the Bank based upon various allegations, including that the Bank had exercised "undue control" in Ocean Club's construction and development, was the *de facto* developer, had exercised control over and approval of construction disbursements at the Ocean Club project, retention of Pavarini as the general contractor, and had engaged the services of professionals to inspect the construction and supervise the project, all to the detriment of MLM. Gardner sought indemnification for the claims asserted by the Association in its lawsuit, as well as personal damages.

From November 1991 to March 1997, Murphy and MLM took no action to intervene as direct parties, even after a July 11, 1994, case management order allowing "anyone who in good faith wishes to assert a specific claim against a party who has been joined in the litigation by another party to do so without the necessity of filing a motion"; nor after an August 1, 1994, order granting Murphy leave to intervene as a plaintiff. During this time substantial activity occurred. The Association's litigation was consolidated with Gardner's litigation, along with two separate lawsuits, one brought by Murphy against various insurance companies, and another brought by MLM, also against various insurance companies. *See* footnote 1, *supra*. And too, the Association, in 1996, brought its own litigation against the Bank. All of these actions were consolidated under one docket number and shall hereinafter be referred to as the "global" litigation.

Throughout 1993, 1994, 1995 and 1996, the parties engaged in extensive discovery in the "global" litigation, brought various motions relating thereto and to the claims that might be pursued. Multiple case management orders were entered. Areas of alleged construction defects were identified by the Association's experts and thirty-five days of depositions occurred, in large part focusing upon whether Pavarini constructed the Ocean Club in a defective manner. Participation in these depositions by the lender liability parties would seem to have been crucial as the heart of their claim was that the Bank improperly foisted Pavarini upon MLM and improperly controlled Pavarini's performance. Many of the orders arising from motions during this time, too, focused upon the potential liability of the

Bank. Murphy himself was compelled to engage in and respond to discovery beginning in October 1994.

***4** This "global" litigation clearly was extensive. Indeed, an April 1996 case management order listed fifty-four counsel. In the same month, the trial judge, in permitting the Association's then new expert to engage in a new examination and estimate of damages, expressed concern over the time and expense already incurred in the litigation thusly:
I recognize that what I am about to do [relating to expert reports] will most likely prolong this already too-long case. There may still be a few law firms in New Jersey which are not involved in this matter and we want to make sure that everyone has a chance to join the feeding frenzy....

In September 1996, the entire "global" litigation was referred to mediation by the trial judge. In doing so, the judge directed "that all counsel and parties and/or insurance adjusters will attend the opening sessions of the mediation now scheduled for November 25, 1996 and November 26, 1996" and that failure to attend will subject the parties to sanctions. It was at that point that Murphy hired an attorney to attend the mediation. Yet, still, he did not move to participate as a plaintiff party who might be entitled to damages.

As a result of the mediation, forty-three parties involved in the "global" litigation, including Pavarini, settled and were dismissed with prejudice on January 28, 1997. The only remaining claims were those of the Association against MLM, Murphy, Gardner, the Bank and the architect (which had defaulted), and Gardner's claims against the Bank.

Not until after this substantial discovery, motion practice, mediation and settlement of a number of claims, did Murphy move, pursuant to *R.* 4:33, to intervene. In the certification accompanying this first notice of motion, brought five and one-half years into the litigation, Murphy's attorney alleged that the claims asserted by Gardner against the Bank apply to Murphy and that their interests are "substantially similar, if not identical." That clearly is so. But, no explanation was offered for the five and one-half year delay. In denying the motion by order dated April 4, 1997, the trial judge wrote:
In my view, the key to this motion is found in the first three words of *R.* 4:33-2: 'Upon timely application ...' This litigation is now over five years of age. Movant had more than enough time to assert this claim years ago. In the absence of any explanation, there simply is no basis upon which I could find this application timely. It is denied.

Murphy moved for reconsideration. He again did not offer any excuse for the delay. Rather, he argued that the judge had failed to consider a July 1994 Case Management Order allowing parties to assert claims without formal motion. In denying this motion, the judge pointed out:
In this motion for reconsideration, the only thing that movant has pointed out as having been overlooked previously is a case management order from July 14, 1994. That order, among other things, allows a party to assert a claim without filing a formal motion. Unfortunately, the order does not provide a deadline for doing so, and the movant apparently interprets it to mean that he has forever within which to assert a claim. For whatever reason, he did not do so an there is no persuasive explanation for that failure. For these reasons, the motion is denied. The next stop for this issue is the Appellate Division.

***5** Murphy did not file an appeal from the denial of his motion to intervene. *See Grober v. Kahn*, 88 *N.J.Super.* 343, 360 (App.Div.1965), *modified*, 47 *N.J.* 135 (1966); Pressler, *Current N.J. Court Rules*, Comment on *R.* 4:33-1 (2005). *But see Government Sec. Co. v. Waire*, 94 *N.J.Super.* 586, 588 (App.Div.), *certif. denied*, 50 *N.J.* 84 (1967).

A liability trial in Gardner's lender liability case occurred in 2001. Murphy, his attorney, and Gardner all testified. During the course of his testimony, Murphy denied any untoward action by the Bank thusly:
Q. Did you as the managing general partner of MLM feel pressured or compelled to sign that

contract with Pavarini as a result of any action or inaction by the Bank of America?
A. No.
Q. Did you reach the decision to hire Pavarini as the general contractor solely on the basis of what you thought was best for MLM as its managing general partner?
A. Yes.
Q. And did you reach that decision with the advice and counsel of a number of people?
A. Yes.

Murphy testified that he based his decision to hire Pavarini on a number of factors, such as price, quality and contract terms, as well as meeting with George Pavarini.

Murphy further testified that his choice of Pavarini was not coerced by the Bank:
Q. Did there come a point in time when you received a phone call from Charlotte [McDowell, the Bank's loan officer] regarding Charlotte's wanting Pavarini as the general contractor?
A. No, I don't-I don't ever recall Charlotte asking or demanding that Pavarini be in any such shape or form the general contractor.

He was adamant that he had never asserted that the Bank had imposed Pavarini or otherwise interfered in the Ocean Club project:Q. To the best of your ability and recollection since 1992, have you ever, Joe Murphy, testified or signed a written document in which you have asserted that you as the managing general partner or you individually, Joe Murphy, were forced by Bank of America as a condition of financing to hire Pavarini as the general contractor?
A. I believe I have testified to that a number of times, and my final answer is no.
....
Q. Have you ever told an individual, you yourself, Joe Murphy, that you were forced or required as a condition of financing to hire Pavarini?
....
A. No.

This caused the trial judge to observe:Obviously, ... Mr. Murphy supports the bank's point of view with respect to this and does not support [Gardner's] point of view with respect to either the forcing of Pavarini by the bank on MLM or taking control of the project as it went forward.

Nonetheless, after a forty day trial, the jury returned a verdict on liability in favor of Gardner. Upon motion by the Bank in July 2002, Gardner's damage claims were limited to the percentage of damages he would have received based upon his individual partnership interest in MLM.

Following this ruling, Murphy tried yet again to intervene in December 2002. This time the motion was brought in the name of MLM as well. Pointing to an August 1, 1994, consent order prepared by Murphy when he was acting in a *pro se* capacity which granted him leave to intervene, the motion sought reconsideration of the prior denials and to amend the pleadings to conform to the evidence adduced at the liability trial and the jury's verdict.

***6** In arguing the motion, counsel urged that Murphy:
[H]as not separated himself. He has in fact wrapped himself around, wrapped himself with the cloak of MLM Associates as its general and limited partner in pursuing this litigation. And when you amend this complaint and you stick Joe Murphy's name in there I submit to Your Honor that you have the same exact case today involving him as the plaintiff as you would have then without any prejudice to any party, any delay to the Court, and without any additional discovery which has to be performed.

The trial judge, however, observed that, if the motion to amend the pleadings to conform to the trial evidence were to be granted without a separate trial, Murphy, unfairly, would not have to face the "embarrassing contradiction of his position, which was that the, that the bank didn't foist Pavarini upon MLM, nobody tells Joe Murphy what to do." Murphy, thus, could "jump right into the case, take advantage of the jury's finding, even though his position, his sworn position at trial was they didn't make us take Pavarini." Furthermore, the judge

believed it was “a little incongruous” that Murphy is coming in and saying: “Let me get the benefit of that finding that the jury made that the bank did make MLM take Pavarini on as the general contractor. I'm going to take the benefit of that even though I swore in court that that didn't happen.”

In denying the motion, the trial judge said:
I understand the liberality with which we're supposed to grant motions to intervene. But there are some criteria that the Rule and the cases talk about. And one of those criteria is, well, the first three words of the Rule, which is upon timely application, I think those are the words. And I ruled, rightfully or wrongfully, five and a half years ago that the application to intervene then was not timely. It's really difficult to argue that the application now, some five and a half years later, has suddenly become timely. The timeliness, I think is that [Gardner] prevailed in a case that [Murphy] never thought was going to, never thought was going to be successful and now he wants to take advantage of that. And I don't necessarily want to cast aspersions on his motives. That's the American way, I suppose. But there's, there are other factors at work here, not the least of which is inconvenience to the Court and to the parties. I think [counsel] is quite correct that if [Murphy] were allowed in the case at this point, he's already given testimony that's favorable to the bank's position and now he wants to reap the benefit of the jury finding, in effect, against his position. The bank would have to be permitted, in all fairness, to put before the jury the fact that he doesn't agree with the position that the first jury took. So to some extent we would have to relitigate the first case.

As to the August 1, 1994, consent order, the judge said:I'm unpersuaded by the argument about the consent order. Even if the consent order arguably would put [Murphy] in the case as a plaintiff, and I recognize that the bank didn't sign the consent order, but probably the management order which preceded the consent order to which the bank was a party would probably suffice to get over that hurdle that the bank didn't physically sign or nobody from the bank physically signed the consent order. But the fact of the matter is that [Murphy] didn't act as a plaintiff after that. He didn't get involved in the case as a plaintiff, for whatever reason. At the very least I would have expected that before the 1990, no, before the 2001 trial that there would have been an expression from [Murphy], and I think I expressed this during the argument a little while ago, hey, what about me? I'm a plaintiff here too. I'm going to participate, I gotta participate in this case too. It would have been interesting to see what his testimony would have been had that happened....

***7** The litigation, then, proceeded to a damages trial. During that trial, Gardner and the Bank settled. As the only other pending litigation, that brought by the Association against Murphy, Gardner and MLM had previously settled, this disposed of the entire “global” litigation. A stipulation of dismissal with prejudice was entered. At that point, a motion was filed by counsel for Murphy and MLM, seeking intervention and/or relief from the stipulation of dismissal. In declining to entertain the motion, the trial judge wrote:
Inasmuch as this case has been settled in its entirety and closed out, there is nothing in which to “intervene” and so I decline to entertain the motion. Although MLM was a named party in the predecessor litigation, it long ago opted not to participate in the case, and has not appeared for years.

This appeal then ensued.

Intervention as of right is governed by *R.* 4:33-1 which provides:
Upon *timely application* anyone shall be permitted to intervene in an action if the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
[Emphasis added.]

Ordinarily, *R.* 4:33-1 is to be liberally applied.

Meehan v. K.D. Partners, L.P., 317 *N.J.Super.* 563, 568 (App.Div.1998). If all of the criteria required by the Rule are met, "a court must approve an application for intervention as of right...." *Ibid.* But that determination is, in the first instance, to be made by the trial judge. *State v. Lanza*, 39 *N.J.* 595, 600 (1963), *cert. denied*, 375 *U.S.* 451, 84 *S.Ct.* 525, 11 *L. Ed.*2d 477 (1964). Furthermore, our review of a trial judge's denial of such a motion must be from the perspective of whether an abuse of discretion occurred. *Ibid.*

When timeliness is at issue, "a motion judge must consider 'the purpose of the intervention motion in relation to the stage of the action when the motion is made." ' *Meehan v. K.D. Partners, L.P., supra*, 317 *N.J.Super.* at 569 (quoting *Chesterbrook Ltd. Partnership v. Planning Bd.*, 237 *N.J.Super.* 118, 125 (App.Div.), *certif. denied*, 118 *N.J.* 234 (1989)). "An essential prerequisite to intervention is timeliness, which should be equated with diligence and promptness. One who is interested in pending litigation should not be permitted to stand on the sidelines, watch the proceedings and express his disagreement, only when the results of the battle are in and he is dissatisfied." *Hanover Tp. v. Town of Morristown*, 118 *N.J.Super.* 136, 143 (Ch. Div.), *aff'd*, 121 *N.J.Super.* 536 (App.Div.1972), *certif. denied*, 62 *N.J.* 427 (1973).

Here, we cannot say that the trial judge abused his discretion in 1997 when he denied the first motion to intervene. The litigation, in fact a consolidation of a number of lawsuits spawned by the condominium project, had, by then, been in active process and closely case managed for over five years. Murphy did not then, or thereafter ever, express a rational explanation for the delay, other than that he was too engaged and preoccupied by other matters and did not wish to pay for legal fees. That is plainly not "good cause ." And, although he was involved in obtaining the August 1994 consent order which permitted him to participate as an intervening plaintiff, the trial judge aptly pointed out that, he did not thereafter participate as a party.

***8** We acknowledge that the litigation dragged on for a number of years after the 1997 denial, with a trial not occurring until 2001. But at the time of that denial, this could not have been foreseen by the trial judge. Furthermore, we share the trial judge's observation that Murphy's own trial testimony significantly undercuts his belated lender liability claims. Probably, it partially explains why he did not jump on Gardner's bandwagon from the beginning. As for MLM, its delay of eleven years to exert an entity of its own in this litigation is without question untimely. We see no abuse of the trial judge's discretion in his declining to entertain MLM's post-verdict/settlement motions.

Affirmed.

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Not Reported in A.2d, 2004 WL 5211176 (N.J.Super.A.D.)

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