UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re:

TAYLOR, BEAN & WHITAKER MORTGAGE CORP., et al.,

Debtors.
_____/

CASE NO. 3:09-bk-07047-JAF
(Jointly Administered Under Chapter 11)

TAYLOR, BEAN & WHITAKER MORTGAGE CORP.,

Plaintiff,

v.

SOVEREIGN BANK,

Defendant.
_____/

Adversary No. 3:10-ap-0644-JAF

ORDER GRANTING IN PART THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS' AMENDED MOTION TO INTERVENE

This matter came before the Court upon an Adversary Complaint to Determine Validity, Priority, and Amount of Liens Held by Defendant Sovereign Bank ("Sovereign") (Doc. 1), filed by debtor-in-possession, Taylor, Bean, & Whitaker Mortgage Corp. ("TBW"), on December 30, 2010. Presently pending before the Court is the Official Committee of Unsecured Creditors' (the "Committee") Amended Motion to Intervene (Doc. 19), Sovereign's Response in Opposition thereto (Doc. 20), and the Committee's Reply to Sovereign's Response in Opposition (Doc. 21). For the reasons stated herein, the Motion will be **GRANTED in part**.

I. BACKGROUND

In this adversary proceeding, TBW seeks, *inter alia*, a declaratory judgment that Sovereign does not have a security interest in certain servicing contracts, servicer advances, hedging

arrangements, and proceeds from various settlement agreements (Doc. 1 at 5-7). By way of a counterclaim, Sovereign seeks, *inter alia*, a declaratory judgment that it has a security interest in the disputed collateral, *supra* (Doc. 4 at 9-19).

On April 4, 2011, the Committee filed an Unopposed Motion to Intervene (Doc. 13). Thereafter, on April 7, 2011, Sovereign filed a Response in Opposition to the Committee's "unopposed" motion (Doc. 15).[1] By Order dated April 13, 2011, the Court denied the Committee's motion to intervene without prejudice to include greater specificity as to the grounds supporting intervention (Doc. 16, Order). In accordance therewith, on April 18, 2011, the Committee filed the instant Amended Motion to Intervene (Doc. 19).

II. DISCUSSION

In the Motion, the Committee argues it should be granted leave to intervene in this adversary proceeding on three (3) alternative grounds (Doc. 19 at 2-5). First, the Committee maintains it has an "unconditional statutory right" to intervene pursuant to section 1109(b) of the Bankruptcy Code (Doc. 19 at 2-3). *See* 11 U.S.C. § 1109(b); Fed. R. Bankr. P. 7024; Fed. R. Civ. P. 24(a)(1). Second, the Committee argues it should be permitted to intervene "as a matter of right" pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure, made applicable by Rule 7024 of the Federal Rules of Bankruptcy Procedure (Doc. 19 at 3). Lastly, the Committee asserts that it should be permitted to intervene pursuant to Rule 24(b) of the Federal Rules of Civil Procedure, which provides for "permissive" intervention (Doc. 19 at 3-4).

[1] The Committee apparently entitled the motion as unopposed because TBW does not oppose its intervention.

In response, Sovereign argues: (1) the Committee does not have an unconditional statutory right to intervene; and (2) neither intervention as a matter of right nor permissive intervention is warranted in this instance (Doc. 20 at 3-9).

Federal Rule of Civil Procedure 24(a)(1), provides that a person or entity shall be permitted to intervene in an action when a statute of the United States confers an unconditional right to intervene. The Committee maintains that section 1109(b) of the Bankruptcy Code confers such a right in an adversary proceeding by providing: "[a] party in interest, including . . . a creditors' committee, . . . may raise and may appear and be heard on any issue in a case under this chapter." 11 U.S.C. § 1109(b).

The Committee contends that Congress intended the term "case," as used in section 1109(b), to be an all-encompassing term, allowing a party in interest to intervene in any proceeding related to a case in bankruptcy (Doc. 19 at 2-3). The Third Circuit Court of Appeals took this position in *Official Unsecured Creditors' Comm. v. Michaels (In re Marin Motor Oil, Inc.)*, 689 F.2d 445, 449-57 (3rd Cir. 1982), *cert. denied*, 459 U.S. 1206 (1983). The Fifth Circuit Court of Appeals, however, in *Fuel Oil Supply & Terminaling v. Gulf Oil Corp.*, 762 F.2d 1283 (5th Cir. 1985), ruled that a party in interest's right to intervene in an adversary proceeding is restricted to those who meet the requirements of Federal Rules of Civil Procedure 24(a)(2) or 24(b). In 2002, the Second Circuit Court of Appeals followed the Third Circuit's approach, *supra*, and held that a creditor committee had an unconditional right to intervene in an adversary proceeding pursuant to section 1109(b) of the Bankruptcy Code. *Term Loan Holder Comm. v. Ozer Group, LLC (In re Caldor Corp.)*, 303 F.3d 161, 166 (2d Cir. 2002).

In *D'Lites of America, Inc. v. William Blair & Co. (In re D'Lites of America, Inc.)*, the bankruptcy court acknowledged the aforementioned conflict between the circuits but chose not to

address it, finding instead that the moving creditor committee met the procedural requirements for intervention under the Federal Rules of Civil Procedure. 100 B.R. 612, 614 (Bankr. N.D. Ga. 1989). Because the Court finds permissive intervention under the Federal Rules of Civil Procedure is appropriate in this instance, the Court will take the same approach here.

Pursuant to Rule 24(b)(1)(B), upon a timely motion to intervene, the Court may permit anyone leave to intervene if their claim or defense shares with the main cause of action a common question of law or fact and intervention will not unduly prejudice the adjudication of the rights of the other parties. *Gleason v. Commonwealth Cont'l Hlth. Care (In re Golden Glades Reg'l Med. Ctr.)*, 147 B.R. 813, 815-816 (S.D. Fla. 1992).

With respect to the first prong, the Court finds the Motion is timely. The Adversary Complaint (Doc. 1) was filed on December 30, 2010. Sovereign filed its answer and counterclaims (Doc. 4) on January 13, 2011. The Court entered the initial scheduling order on March 28, 2011 (Doc. 11).[2] The following week, on April 4, 2011, the Committee filed the "unopposed" motion to intervene (Doc. 13). Although the Court denied this motion on April 13, 2011, it granted the Committee leave to refile (Doc. 16). Five days later, on April 18, 2011, the Committee filed the instant Amended Motion to Intervene (Doc. 19). As the Committee has not been dilatory, the Court finds the Motion is timely.

As to whether the Committee's claims share with the main cause of action a common question of law or fact, there is no dispute here. Although Sovereign maintains the Committee's failure to attach to the Motion a proposed pleading is fatal to its request for relief, the Court is not persuaded. Rule 24(c) provides that a "motion [under Rule 24] must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which

[2] An Amended Scheduling Order (Doc. 31) was entered on August 3, 2011 at the request of the parties.

intervention is sought." Fed. R. Civ. P. 24(c). The Eleventh Circuit Court of Appeals, however, permits courts to disregard a procedural Rule 24(c) defect when it is non-prejudicial to the party opposing intervention. *Piambino v. Bailey*, 757 F.2d 1112, 1120-21 (11th Cir. 1985); *see also South Florida Equitable Fund, LLC v. City of Miami*, No. 10-21032-CIV, 2010 WL 2925958, slip op. at *2 n.3 (S.D. Fla. July 26, 2010).[3]

The Committee asserts that its proposed claims in this adversary proceeding are identical to those of TBW (Doc. 19 at 4). Thus, Sovereign has been put on notice of the nature of the Committee's claims and has not been prejudiced by the Committee's procedural failure to comply with Rule 24(c). *See also Anderson v. HNS, LP Ingenious Designs, Inc. (In re Donovan)*, No. 03-9357, 2004 WL 5848453, at *4 (N.D. Ga. Sept. 27, 2004) (finding when the movant made clear it sought intervention as to all claims in the adversary proceeding, denial of the motion on the basis of a Rule 24(c) procedural defect "would advocate form over substance").

The final factor for the Court to consider is whether the Committee's intervention will prejudice the other parties to this action. Here, TBW does not oppose the Committee's intervention. Although Sovereign argues it would be prejudiced by any intervention of the Committee, the Court is not convinced (Doc. 20 at 8). To illustrate, at the joint request of TBW and Sovereign, the Court entered an Amended Scheduling Order (Doc. 31), which provides for discovery to be completed by September 27, 2011 and for any dispositive motions to be filed by October 31, 2011 (Doc. 31 at 2-3). To date, no dispositive motions have been filed and a trial date has not been set (*see* Doc. 31 at 3). Consequently, the Court finds any prejudice to Sovereign in allowing the Committee to intervene at this time would be minimal. Sovereign also argues generally, without citation to authority, that the additional expense of litigation would cause it prejudice (Doc. 20 at 8). This

[3] Unpublished opinions are not considered binding authority; however, they may be cited as persuasive authority pursuant to the Eleventh Circuit Rules. 11th Cir. R. 36-2.

general claim of prejudice fails to establish that the Committee's intervention would cause such additional expense as to prejudice Sovereign. Based on the foregoing, the Court finds the Committee's intervention will not prejudice the parties and that permissive intervention is appropriate in this instance. This bankruptcy case is complex and the Committee should be permitted to intervene in the instant adversary proceeding on behalf of the unsecured creditors.

III. CONCLUSION

For the reasons stated herein, the Court finds the Committee has satisfied the requirements for permissive intervention pursuant to Rule 24(b)(1)(B) of the Federal Rules of Civil Procedure, made applicable by Rule 7024 of the Federal Rules of Bankruptcy Procedure.

Accordingly, it is **ORDERED**:

The Official Committee of Unsecured Creditors' Amended Motion to Intervene (Doc. 19) is **GRANTED to the extent that** the Official Committee of Unsecured Creditors is permitted to intervene in this adversary proceeding.

DATED this 17th day of August, 2011 in Jacksonville, Florida.

/s/ Jerry A. Funk

Jerry A. Funk
United States Bankruptcy Judge

Copies Furnished To:

David L. Gay, Esq., Counsel for the Official Committee of Unsecured Creditors;
All Interested Parties