NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP NO. PR 07-051

Bankruptcy Case No. 02-02887-GAC
Adversary Proceeding No. 02-00113-GAC

REDONDO CONSTRUCTION CORPORATION,
Debtor.

BONNEVILLE CONSTRUCTION, S.E.,
Appellant,

v.

PUERTO RICO HIGHWAY AUTHORITY,
Appellee.

Appeal from the United States Bankruptcy Court
for the District of Puerto Rico
(Hon. Gerardo A. Carlo, U.S. Bankruptcy Judge)

Before
Hillman, Feeney & Kornreich, United States Bankruptcy Appellate Panel Judges.

Pedro A. López Onna Esq., on brief for the Appellant.

Luís A. Rivera-Cabrera, Esq. and Maria del Pilar García-Incera Esq.,
on brief for the Appellee.

December 18, 2007

Hillman, U.S. Bankruptcy Appellate Panel Judge.

Appellant Bonneville Construction S.E. ("Bonneville") appeals the order denying its request to intervene in the adversary proceeding which the debtor, Redondo Construction Corporation ("Redondo"), brought against appellee, Puerto Rico Highway Authority (the "Authority"), and the order denying reconsideration of that ruling. For the reasons set forth below, the Panel AFFIRMS both orders.

BACKGROUND

Redondo filed a Chapter 11 petition on March 19, 2002. On September 6, 2002, Redondo filed a complaint commencing an adversary proceeding against the Authority (the "Complaint"). In the Complaint, Redondo alleged that it had entered into six construction contracts with the Authority which it had completed and sought compensation for the alleged damages it incurred as a result of "major cardinal changes to the projects." In its Answer to the Complaint, the Authority denied liability for sums due under the contracts.

One of the contracts that Redondo identified was Contract AC-019916-Ave. Las Cumbres-El Capa ("the Contract") under which Redondo was to construct a roadway in exchange for payment of $6,182,000. Although in the Complaint Redondo claimed to have attached a copy of the Contract at Exhibit 4, that exhibit is a letter from Bonneville to the Authority seeking compensation for extra costs and damages. In the Complaint, Redondo listed its claim under the Contract as $5,644,638.66. It included in the calculation of that amount a "Sub Contractor Claim" of $269,632.45.

The docket in the Adversary Proceeding reflects considerable delay. The Authority disputed the bankruptcy court's jurisdiction over the matter and the parties failed to comply with

discovery requests and orders. In March, 2006, Redondo moved to waive one of the six contract claims and sever another until a later date; the Authority objected. The bankruptcy court issued an order granting the waiver request and denying the request to sever. Consistent with this order, the bankruptcy court entered partial judgment with respect to the waived claim.

Also in March, 2006, the parties submitted their Proposed Pre-Trial Order.[1] In the Pre-Trial Statement, the parties devoted five pages to a discussion of the Contract. In the itemization Redondo provided regarding its claim under the Contract, it included Bonneville's claim for $269,632.45. The Pre-Trial Statement also contained thirty-five, one-sentence paragraphs of admitted facts regarding the Contract. In the Pre-Trial Statement, the Authority represented that one of its contested issues of fact was "[w]ith respect to [Redondo's] claims for subcontractor costs, whether [Redondo] was paid previously in whole or in part in respect of such claims." Redondo explained that it was submitting approximately 30 exhibits regarding the Contract, two of which were exhibits relating to Bonneville's claims. It was clear from the reservations in the Pre-Trial Statement that the parties had not completed discovery at that time. Thereafter, the parties engaged in further discovery disputes which resulted in an order in mid-September, 2006 in which the bankruptcy judge denied a motion in limine and admonished counsel to behave cordially and ethically.[2]

On November 21, 2006, the bankruptcy judge held a hearing regarding, *inter alia*, scheduling the trial. The transcript of the hearing reflects Redondo's representation that, at trial,

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[1] The Proposed Pre-Trial Order is what is commonly referred to as a Joint Pre-Trial Statement. For ease of reading, this document will be referred to as the Pre-Trial Statement.

[2] There is no indication in the Pre-Trial Statement or on the docket as to a date certain by which discovery was to be completed.

one of its expert witnesses was going to provide testimony regarding the Contract. No party mentioned the status of Bonneville's claim. On November 26, 2006, Redondo filed its Motion Amending Plaintiff's Part of the Pre Trial Report which motion did not address the issue of the Contract.

Trial commenced on November 27, 2006. On November 30, 2006, as the trial transcript reflects, Redondo reported to the bankruptcy court that it was not presenting any evidence regarding Bonneville's claim as shortly before the trial Redondo had asked Bonneville to hire counsel and intervene and Bonneville had declined. Redondo explained that not only was it waiving the claim because it did not have any authority to represent Bonneville but it was also voluntarily dismissing the Bonneville portion of the Contract claim because it had insufficient evidence regarding the claim. The Authority responded that up to that time it did not know Redondo would waive the subcontractor claim.

There is no indication that Bonneville was present on November 30, 2006, or that Bonneville was notified of the foregoing discourse. The bankruptcy court did not enter an order on the docket reflecting that Redondo had waived the subcontractor portion of its claim on the Contract. There is no reference on the docket of the main case that Redondo had abandoned a claim which it previously was pursuing as an asset.

Forty days later, on January 9, 2007, Bonneville filed its Urgent Motion Requesting Intervention (the "Motion to Intervene"). In it, Bonneville explained that it had filed a proof of claim in the Debtor's main bankrutpcy case on May 23, 2002 and that it understood that the trial

in the Adversary Proceeding was not to commence until June, 2007.[3] Bonneville alleged that it had evidence to support its claim, including a witness. Bonneville argued that the Motion to Intervene was timely and that it was the proper party to protect its interest in the Adversary Proceeding. The Authority did not respond to the Motion to Intervene.

On March 9, 2007, the bankruptcy court held a hearing to consider the Motion to Intervene. Bonneville requested that it be permitted to join the Adversary Proceeding as a co-plaintiff because, although Bonneville had failed to provide Redondo with certain evidence, its claim should not have been removed from Redondo's claim on the Contract. Redondo represented that it had no objection to the requested intervention. The Authority, however, objected on the ground that the opportunity for discovery had expired. Bonneville responded that no further discovery was necessary and, in fact, all the evidence regarding its claim had been produced. The Authority pointed to the fact that the reason that Redondo had not pursued the claim was that Bonneville had failed to assist Redondo with the trial. Redondo explained that Bonneville had provided evidence of its claim, and it had turned over the evidence Bonneville produced to the Authority. The ground for waiving the claim, it asserted, was that Bonneville had not responded to Redondo during trial preparation.[4]

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[3] The Claims Register in Redondo's Chapter 11 case reflects that, on May 23, 2002, Bonneville filed a claim. See In re Redondo Constr. Corp., Case No. 02-02887-GAC, Claim No. 114-1. Bonneville asserted a secured claim for $239,063.55 based upon Bond # 20-000-606 for $234,463.55 and Bond #407435 for $4,600. At oral argument, Bonneville was unable to speak to the status of its claim in the Chapter 11 case or the terms of the contract between Redondo and Bonneville other than representing that Bonneville could not sue the Authority under the Contract. It did state that its request for payment on the bonds was denied in 2002.

[4] The representations about what evidence Bonneville had provided prior to trial to Redondo or the Authority prior to trial was conflicting. It appears, however, that more discovery was necessary.

The bankruptcy judge found that intervention would be burdensome to the Authority and that Bonneville's claim could be raised in a different forum.[5] He ruled that the request was untimely and denied the Motion to Intervene. He suggested that Bonneville could file a motion for reconsideration.

On March 19, 2007, Bonneville filed its Motion for Reconsideration (the "Reconsideration Motion"). In it, Bonneville explained that intervention is governed by Fed. R. Civ. P. 24 which mandates that an intervention motion must be timely. Bonneville argued that the test for timeliness is the totality of circumstances and, in applying that test to the question of whether it timely filed the Motion to Intervene, the bankruptcy judge should have determined that intervention was appropriate. That is, according to Bonneville, it filed its proof of claim four years prior to trial, the trial was not going to resume again until June, 2007, and its subcontractor claim had been included in Redondo's claim for the Contract since the inception of the litigation. Bonneville attached to the Reconsideration Motion a letter from Bonneville to the Authority dated May 22, 2002 in which it provided a detailed breakdown of the amounts it claimed it was due for the work it performed.

The Authority objected to the Reconsideration Motion on the ground that Bonneville did not and could not meet the exacting standards for reconsideration. With respect to the Motion to Intervene, the Authority argued that it did not comply with Fed. R. Civ. P. 24 as it lacked a

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[5] The docket in the main case reflects that on October 5, 2005, the Redondo's first amended Chapter 11 plan was confirmed. See In re Redondo Constr. Corp., 02-02887-GAC, Docket No. 1207. Redondo filed a motion for a final decree on February 8, 2007, Docket No. 1679, but it appears no such decree has entered. See Minutes of Hearing held on June 19, 2007, Docket No. 1776. There is no mention of Bonneville's claim in the that portion of the Motion for Final Decree that addresses secured claims.

description of Bonneville's purported claim. The Authority claimed that the Motion to Intervene was untimely because Redondo had already presented its case and rested with respect to all of its claims other than the severed claim. The Authority considered intervention an undue burden as discovery had closed. The Authority also argued that Bonneville's predicament was the result of its own failure to cooperate with Redondo and that there was no prejudice to Bonneville as it retained a claim against Redondo based upon its proof of claim.

The bankruptcy judge did not hold a hearing on the Reconsideration Motion and objection. Rather, on May 31, 2007, he issued his Decision and Order (the "Order"). In it, he reviewed the facts relating to the Motion to Intervene and described how Redondo had withdrawn the subcontractor claim it had brought on behalf of Bonneville. He also explained the position of the parties regarding the Reconsideration Motion. With respect to reconsideration, he explained that such a motion cannot repeat prior arguments but must have facts or law which strongly convince the trier to reconsider. The bankruptcy judge then repeated the grounds upon which he denied the Motion to Intervene.

The Order was docketed on June 4, 2007. On June 14, 2007, Bonneville filed its Notice of Appeal in which it referenced only the Order and not the order denying the Motion to Intervene.

In its Designation of the Items to Be Presented in the Record on Appeal and Statement of the Issues to Be Presented, Bonneville set forth two issues. The first issue on appeal, asserted Bonneville, was whether the bankruptcy judge erred in denying the Motion to Intervene as untimely. The second issue was whether he erred in denying the Motion for Reconsideration. Both parties filed appellate briefs.

In its brief, Bonneville represented that it was addressing the denial of both its motions. Regarding the facts of the case, Bonneville offered some additional background with respect to the nature of its claim. It cited a "lack of a direct formal contractual relationship between Bonneville and [the Authority], because of its subcontractor status to Redondo, is the only reason why such claim has been left unattended at [the Authority]." Appellant's Brief at 10. It further explained that it "had a contractor lien not perfectioned [sic] and unrecognized on its claim because of Redondo's Bankruptcy." Id. at 12. It also referred to "the unilateral rejection and abandonment by Redondo of the formal claim established by Bonneville . . . . Bonneville . . . [incurred] legal expenses not otherwise required." Id.

Bonneville then addressed the merits of the Motion to Intervene. Bonneville explained that once it discovered that Redondo had dropped from its claim under the Contract that portion of the damages that pertained to Bonneville's subcontractor claim, it sought intervention. It argued that intervention would not prejudice the Authority as the Authority had all of the paperwork regarding its claim and the trial would not be unduly delayed as it was scheduled to be a long trial. Bonneville also presented what appear to be mitigating factors: (1) Bonneville received no notice and hence no due process with respect to the November 30, 2006 hearing; (2) the Authority had known of its claim since at least February, 2001 and at no time did Bonneville fail to produce documents regarding its claim; (3) reduction in the overall claim amount would unfairly favor Redondo in any settlement negotiations; (4) Bonneville would have been able to recover its damages in negotiations with the Authority but it was forced to participate in the bankruptcy and had diligently done so; and (5) Bonneville would have used the same evidence to support its claim

as Redondo would have used to support its claim on the Contract as both claims arose out of the same set of facts and the two claims should be decided at the same time.

In its appellate brief, the Authority also treated the appeal as one of both the denial of the Motion to Intervene and denial of the Reconsideration Motion. With respect to the facts of the case, the Authority placed great emphasis on the fact that despite knowing of its claim for several years Bonneville waited until the last moment to attempt to intervene and only after it failed to provide Redondo with information during the litigation. The Authority argued that the bankruptcy judge did not abuse his discretion or commit manifest errors of law or fact in his rulings.

Regarding the Motion to Intervene, the Authority agreed that timeliness of such a motion must be determined based upon the circumstances, citing for support Banco Popular de Puerto Rico v. Greenblatt, 964 F.2d 1227 (1st Cir. 1992).[6] In that case, the First Circuit reiterated its position that the timeliness requirement of Fed. R. Civ. P. 24 is of "great importance" and that, to determine whether that requirement was met, courts must consider a four-factor test. 964 F.2d at 1230-31. The Authority contended that Bonneville cannot establish any of the factors because the Adversary Proceeding was too advanced to start discovery on Bonneville's claim; Redondo waived Bonneville's claim due to Bonneville's inaction; Bonneville unreasonably delayed bringing the Motion to Intervene; and Bonneville's motion did not comply with Fed. R. Civ. P. 24 in that it did not include a proposed pleading explaining its purported claim.

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[6] In that case, the First Circuit referred to and relied upon the four cases to which Bonneville cites in its brief: NAACP v. New York, 413 U.S. 345 (1973); Public Citizen v. Liggett Group, Inc., 858 F.2d 775 (1st Cir. 1988); Garrity v. Gallen, 697 F.2d 452 (1st Cir. 1983); Culbreath v. Dukakis, 630 F.2d 15 (1st Cir. 1980).

With respect to the Reconsideration Motion, the Authority argued that Bonneville had failed to demonstrate that there was newly discovered evidence or a manifest error of law. Even if the standard were a patent misunderstanding of the law or an error of apprehension, Bonneville failed to make that showing.

JURISDICTION

A. Finality

Although neither party disputed the Panel's jurisdiction, a bankruptcy appellate panel is duty-bound to determine its jurisdiction before proceeding to the merits even if the litigants have not raised the issue. See In re George E. Bumpus, Jr. Constr. Co., 226 B.R. 724 (B.A.P. 1st Cir. 1998). The Panel has jurisdiction to hear appeals from "final judgments, orders and decrees . . . or with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under § 157 of this title." 28 U.S.C. § 158(a); see also Fleet Data Processing Corp. v. Branch (In re Bank of New Eng. Corp.), 218 B.R. 643, 645 (B.A.P. 1st Cir. 1998). "A decision is final if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" Bank of New Eng., 218 B.R. at 646. An interlocutory order "'only decides some intervening matter pertaining to the cause, and which requires further steps to be taken in order to enable the court to adjudicate the cause on the merits.'" Id. (quoting In re American Colonial Broad. Corp., 758 F.2d 794, 801 (1st Cir. 1985)).

Before deciding the issue of finality, however, the Panel must decide which orders are included in this appeal. In its Notice of Appeal, Bonneville referenced only the Order and not the order denying the Motion to Intervene. In the "Designation of the Items to Be Presented in the

Record on Appeal and Statement of the Issues to Be Presented" and its brief, Bonneville primarily challenged the latter order. In its appellate brief, the Authority treated the appeal as one of both orders.

In this circuit, there are reported decisions in which courts confine the appeal to the ruling on the motion for reconsideration, without addressing the underlying order if it is only the former order which is listed in the notice of appeal. See, e.g., Hoult v. Hoult, 57 F.3d 1, 3 (1st Cir. 1995) ("In addition, our review is limited to the denial of the motion itself. We may not consider the merits of the underlying judgment."); Kristan v. Patriot Growth Fund, L.P., 2006 WL 53800 *1 (B.A.P. 1st Cir. Jan. 11, 2006) (limiting scope of appeal to order on reconsideration motion); Aguiar v. Interbay Funding, LLC (In re Aguiar), 311 B.R. 129, 134 (B.A.P. 1st Cir. 2004) ("Without an appeal of the initial order, when a party files a timely appeal of the denial of a motion for relief from that order, the reviewing court is limited to consideration of the denial of the motion for relief; the reviewing court cannot consider the merits of the underlying order.").

The First Circuit, however, has ruled that notwithstanding the orders referenced in the notice of appeal, an appeal of a motion for reconsideration may include an appeal of the underlying motion if the circumstances warrant. Alstom Caribe, Inc. v. Geo. P. Reintjes Co., Inc., 484 F.3d 106, 112 (1st Cir. 2007). The First Circuit also has considered the underlying motion if the parties contemplated such an appeal based upon a review of the record as a whole. Kotler v. American Tobacco Co., 981 F.2d 7, 11 (1st Cir. 1992). When the parties have briefed and/or argued the appeal of the underlying order, the First Circuit has found no prejudice to considering the appeal of that order. Devila Vincenty v. San Miguel Sandoval (In re San Miguel Sandoval),

327 B.R. 493, 504 (B.A.P. 1st Cir. 2005) (reviewing appeal of both motions as parties briefed and argued both matters); Chamorro v. Puerto Rican Cars, Inc., 304 F.3d 1, 4 (1st Cir. 2002).

Although in the Notice of Appeal Bonneville referred only to an appeal of the Order, the designation and briefs address both motions. At oral argument, the parties primarily addressed the denial of the Motion to Intervene. Based upon the foregoing cases and the circumstances of this appeal, the Panel will treat this appeal as an appeal of both the Order and the order denying the Motion to Intervene.

By the Order, the bankruptcy judge denied further consideration of the order denying intervention. "An order denying reconsideration is a final appealable order if the underlying order was a final appealable order and together the order denying reconsideration and the underlying order end the litigation on the merits." Nesbit v. Rowbotham (In re Rowbotham), 359 B.R. 356 (B.A.P. 1st Cir. 2007); In re Aguiar, 311 B.R. at 134. The Order was a final order since the order denying intervention was a final order. Rhode Island v. U.S.E.P.A., 378 F.3d 19, 26 (1st Cir. 2004); Credit Francais Intern., S.A. v. Bio-Vita, Ltd., 78 F.3d 698, 703 (1st Cir. 1996). Accordingly, both orders may be considered final orders.

B. Timeliness

Pursuant to Fed. R. Bankr. P. 8002(a), a notice of appeal must be filed within 10 days of the entry of judgment. The bankruptcy court issued the Order on May 31, 2007, and that order was docketed on June 4, 2007. Bonneville filed the Notice of Appeal on June 14, 2007. Therefore, the Notice of Appeal was timely.

STANDARD OF REVIEW

A. Intervention

In State of Maine v. Director, U.S. Fish and Wildlife Serv., 262 F.3d 13 (1st Cir. 2001), the First Circuit set forth the standard of review regarding intervention. It stated:

> The appellate standard of review in this Circuit is that "[w]e will reverse the denial of a motion to intervene as of right 'if the court fails to apply the general standard provided by the text of Rule 24(a)(2), or if the court reaches a decision that so fails to comport with the standard as to indicate an abuse of discretion.'" Public Serv. Co. of N.H. v. Patch, 136 F.3d 197, 204 (1st Cir. 1998) (quoting International Paper Co. v. Town of Jay, 887 F.2d 338, 344 (1st Cir. 1989)). As we have said, "'abuse of discretion' . . . may be a misleading phrase. Decisions on abstract issues of law are always reviewed *de novo*; and the extent of deference on 'law application' issues tends to vary with the circumstances." . . . "Despite its nomenclature, intervention 'as of right' usually turns on judgment calls and fact assessments that a reviewing court is unlikely to disturb except for clear mistakes . . . . [I]n practice, the district court enjoys a reasonable measure of latitude . . . ."

Id. at 17; see also Int'l Paper Co. v. Town of Jay, 887 F.2d 338, 344 (1st Cir. 1989) (standard of review is abuse of discretion which is applied more closely with Fed. R. Civ. P. 24(b)).

According to the court in Ewers v. Heron, 419 F.3d 1 (1st Cir. 2005):

> One way to show such an abuse of discretion is to show that the district court ignored the four pertinent legal criteria that one must meet in order to intervene under Fed.R.Civ.P. 24(a)(2):
>
> > (1) the party must claim an interest in the property; (2) disposition of the case without intervention, would, as a practical matter, impair or impede the party's ability to protect that interest; (3) the party's interest is inadequately represented by the existing parties; and (4) the motion for intervention is timely made.
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> United States v. 116 Emerson St., 942 F.2d 74, 77 (1st Cir.1991) (internal quotation marks and alteration omitted).

> Another way to show abuse of discretion is to show the court was just wrong-- it committed clear error in the facts it found or was entirely unreasonable in its judgment about applying the four criteria to the facts.

Id. at 2-3.

With respect to the fourth prong of the foregoing test, the First Circuit explained the standard as follows:

> We have made it pellucidly clear that Rule 24's timeliness requirement is of great importance. . . . There is no bright-line rule delineating when a motion to intervene is or is not timeous. Instead, courts must decide the question on a case by case basis, examining the totality of the relevant circumstances. . . . One highly relevant circumstance implicates the status of case at the time when intervention is attempted . . . The more advanced the litigation, the more searching the scrutiny which the motion must withstand. . . .
>
> In this circuit, four factors - all of which are informed to some degree by the case's posture - must be considered in ruling on the timeliness of a motion to intervene: (1) the length of time the applicant knew or reasonably should have known that its interest was imperilled before it moved to intervene; (2) the foreseeable prejudice to existing parties if intervention is granted; (3) the foreseeable prejudice to the applicant if intervention is denied; and (4) idiocratic circumstances which, fairly viewed, militate for or against intervention.

Banco Popular de Puerto Rico v. Greenblatt, 964 F.2d at 1230 (citations omitted).

B. Reconsideration

With respect to the standard of review for reconsideration, the Federal Rules of Civil Procedure contemplate reconsideration without applying such an appellation. See Fed. R. Civ. P. 59 (New Trials; Amendment of Judgments) and 60 (Relief from Judgment or Order) as adopted by Fed. R. Bankr. P. 9023 and 9024. Under Rule 59, a request for relief must be brought within 10 days of the order and, under the latter rule, a motion must be brought within one year. As

Bonneville filed its motion for reconsideration within 10 days, it is likely that it intended for Rule 59 to apply. In order to prevail on a motion brought under Fed. R. Civ. P. 59(e), a litigant "must either establish a manifest error of law or must present newly discovered evidence." F.D.I.C. v. World University Inc., 978 F.2d 10, 16 (1st Cir. 1992). A denial of such a motion is reviewed for a manifest abuse of discretion. Vasapolli v. Rostoff, 39 F.3d 27, 36 (1st Cir. 1994).

DISCUSSION

A. Whether the Bankruptcy Court Erred In Denying the Motion to Intervene

Rule 24 of the Federal Rules of Civil Procedure, as adopted by Fed. R. Bankr. P. 7024, provides as follows:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
>
> (b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . .

Fed. R. Civ. P. 24.

Neither the parties nor the bankrutpcy court specified whether Bonneville brought the Motion to Intervene under subsection (a) or (b). With the exception of the ruling that abuse of discretion should be applied more closely with respect to a motion under subsection (b), the distinction is not important in this appeal.

In order to determine whether the bankruptcy judge abused his discretion in denying the Motion to Intervene, the Panel must determine from the record whether the bankruptcy court adequately addressed the four pertinent legal criteria for such relief set forth in Ewers v. Heron, 419 F.3d at 2-3. The first criterion is whether Bonneville claimed an interest in the Contract. The threshold for asserting such a claim is not high. Northrop Grumman Information Tech., Inc. v. U.S., 74 Fed. Cl. 407, 413 (2006). Generally, however, such a claim must be one recognized by law and cannot be frivolous. Id. at 413-14.

The parties did not dispute that Bonneville claimed such an interest; it gave the Authority notice of its claim as early as May, 2002. Nonetheless, Bonneville failed to describe the nature of its claim. It did not provide the bankruptcy court with a copy of the Contract, and explained at oral argument that it did not have contractual relationship with the Authority and could not sue the Authority directly. It never argued that it was a third party beneficiary of the Contract. Therefore, while the issue was not squarely addressed at the hearing on the Motion to Intervene or in the Order, it appears that Bonneville's claim for damages under the Contract is not recognized by law.

The next criterion is whether the bankruptcy judge considered whether disposition of the case without intervention would impair or impede Bonneville's ability to protect its interest. He agreed with the Authority that Bonneville would be able to resolve its claim in other fora. At oral argument in this appeal, Bonneville did not dispute this conclusion, and it could not describe the procedural posture of its proof of claim in the main case.

The next criterion is whether the bankruptcy judge considered whether Bonneville's interest was inadequately represented by the existing parties. He recognized that Redondo was no longer including Bonneville's claim in that portion of the Complaint that addressed the Contract

and determined that this was of no consequence as Bonneville had other remedies. This conclusion is consistent with Bonneville's representation at oral argument that it has no direct claim against the Authority under the Contract.

The last criterion is whether the bankruptcy judge considered whether Bonneville timely filed the Motion to Intervene. At the hearing, he ruled that the motion was too late given the late stage of the proceeding. In the Order, the bankruptcy judge ruled that the motion was untimely because the trial had commenced and the Authority would be prejudiced in reopening discovery with respect to Bonneville's claim. He explained that Bonneville simply failed to explain its tardiness.

The court in Banco Popular de Puerto Rico v. Greenblatt observed that to consider the timeliness criterion, the first of four factors a court must review is the length of time between when the intervenor knew or reasonably should have known that its interest was imperilled and when it moved to intervene as opposed to when the proposed intervenor knew that its claim was involved in the litigation. 964 F.2d at 1230. The knowledge of the litigation is irrelevant, it is the knowledge of the impact on the intervenor's interest that is the operative date. Public Citizen v. Liggett Group Inc., 858 F.2d 775, 785 (1st Cir. 1988); Combustion Eng'g Caribe, Inc. v. Geo. P. Reintjes Co., Inc., 2007 WL 1521566 *4 (D.P.R. May 24, 2007).

Bonneville contended that the moment its interest was imperilled was when Redondo waived Bonneville's subcontractor claim. The Authority countered that Bonneville knew its claim was at issue since Redondo filed the Complaint and instead, Bonneville sat on its rights. The Authority's characterization is correct.

Based upon Bonneville's representation that it has no direct claim against the Authority under the Contract, its subcontractor claim is against Redondo. Thus, Redondo's waiver of Bonneville's claim against the Authority during trial is irrelevant. Bonneville explained at oral argument that it did not know why Redondo elected to pursue its claim as part of Redondo's claim under the Contract. Bonneville did not explain why it relied on Redondo to pursue the claim despite the fact that Bonneville is a creditor in Redondo's bankruptcy case and, depending on the terms of the plan of reorganization, would likely receive payment through a plan, not directly from any payment on a judgment in favor of Redondo against the Authority. Accordingly, Bonneville should have known that its claim for subcontracting services was imperilled at the commencement of the litigation, not when Redondo waived the claim.

The second factor used to assess the timeliness criterion is the foreseeable prejudice to the Authority if intervention is allowed. The bankruptcy court found that the Authority would be greatly prejudiced if intervention were granted because discovery had closed and Bonneville sought further discovery.[7] At the time of the hearing on the Motion to Intervene, the parties had proceeded through several days of trial. The Authority, however, had started trial knowing that Bonneville's claim would be addressed as evidenced by the Pre-Trial Statement in which Bonneville's claim and the method by which it was to be established were described. Notwithstanding the Authority's awareness of Bonneville's claim, the bankruptcy judge appropriately exercised his discretion to determine that after the trial was well underway it would be overly burdensome to let Bonneville conduct discovery.

[7] Although the parties disputed the amount of discovery, it appears that additional discovery was required.

The third factor used to determine timeliness is the foreseeable prejudice to Bonneville if intervention were denied. The bankruptcy court and the Authority made much of the fact that Bonneville would not be prejudiced because it may pursue its claim in a different forum. While it is unclear whether the claims process in the main case will provide a remedy for Bonneville, Bonneville did not dispute that resolution of its proof of claim would be appropriate. Moreover, it is unclear if there is prejudice as Bonneville cannot proceed against the Authority under the Contract. Moreover, as Bonneville is not presently a party to the litigation, it would not be bound by any settlement or judgment with respect to the claim under the principles of res judicata. Therefore, the bankruptcy judge considered the prejudice to Bonneville, and concluded there would be none. Nothing in the record suggests that his conclusion was an abuse of his discretion.

The last Greenblatt factor to be considered with respect to the timeliness criterion is whether the idiocratic circumstances which, fairly viewed, militate for or against intervention. Bonneville was a subcontractor who relied on the general contractor to include its claim in a lawsuit. No one pointed to a specific contractual term which obligated Redondo to pursue such a claim. Bonneville was unable to address how it could pursue such a claim against the Authority. When Redondo asked Bonneville to appear via its own counsel, Bonneville did not respond. Moreover, Bonneville failed to comply with the requirements of Fed. R. Civ. P. 24©, which requires that the asserted claim be "well-pleaded." Rhode Island Fed. Of Teachers, AFL-CIO v. Norberg, 630 F.2d 850 (1st Cir. 1980). Indeed, it failed to attach to the Motion to Intervene a copy of the Contract, a complaint or any other pleading. The bankruptcy judge correctly relied upon this failure in denying reconsideration.

Bonneville contended that there was no prejudice as all of the litigants knew that Bonneville asserted a claim as a subcontractor as early as 2002. In addition to the letter Bonneville sent to the Authority in 2002 outlining its claim, the parties knew of the claim from the Complaint and the Pre-Trial Statement. The Authority participated in three days of trial during which it considered Bonneville's claim to be a part of the Contract. Therefore, Bonneville argued its claim was a part of the record, and no one was prejudiced by Bonneville's failure to attach a formal complaint to the Motion to Intervene.

While Bonneville did not cite any authority for this argument, there are cases which have relaxed the pleading requirement. City of Bangor v. Citizen Communications Co., 2007 WL 1557426, *2 (D. Me. May 25, 2007) ("[T]he Court's ultimate decision on intervention must be driven by the merits of the motion, especially when the record otherwise makes clear exactly what claims or defenses the proposed intervenor seeks to pursue or otherwise resolve."). Even if this Panel were to relax the general standard, however, the record establishes that Bonneville did not have a claim against the Authority. The idiocratic circumstances militate against intervention as did the three other timeliness factors.

Bonneville had the burden of establishing entitlement to intervention. The bankruptcy judge addressed most, if not all the criteria and factors set forth in the cited cases. He based his conclusion on these criteria as well as reasonable inferences from the record provided. Nothing in the record demonstrates that he abused his discretion. Accordingly, the order denying the Motion to Intervene is AFFIRMED.

B. Whether the Bankruptcy Judge Erred in Denying the Reconsideration Motion

In the Order, the bankruptcy judge clearly set forth the standard for reconsideration. He reviewed the grounds upon which he decided the underlying motion and pointed out that Bonneville had only rehashed the Motion to Intervene and did not demonstrate that it had newly discovered evidence or that in denying intervention the bankruptcy court committed a manifest error of law. His characterization of the Reconsideration Motion was correct. It did not meet the applicable standard. Accordingly, the Order is AFFIRMED.

CONCLUSION

For the reasons set forth above, the Panel **AFFIRMS** the bankruptcy court's orders denying intervention and reconsideration.