IN THE UNITED STATE BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

In Re:	
Derivium Capital, LLC	
Debtor.	C/A No. 05-15042-JW
Kevin Campbell, Chapter 7 Trustee,	
Plaintiff,	Adv. Pro. No. 06-80111
vs.	**ORDER**
Shenandoah Holdings Limited,	
Defendant.	

THIS MATTER comes before the Court upon the Motion to Intervene (the "Motion") of Jerry Pryor ("Pryor") in an adversary proceeding (Adv. No. 06-80111) brought by Kevin Campbell as the Trustee against Shenandoah Holdings Limited ("Shenandoah"). Pryor seeks to be heard pursuant to Fed. R. Civ. P. 24(a) (2), which applies to the bankruptcy cases pursuant to Fed. R. Bankr. P. 7024. Based on the following Facts and Conclusions of Law, the Court denies intervention of right, but permits Pryor to be heard in the discretion of the Court.

FINDINGS OF FACT

1. Scienda, LLC (formerly known as C3 Industries, LLC) ("Scienda") was a South Carolina company with its principal place of business in Orangeburg, SC. Scienda manufactured integrated steel framing solutions for residential and light commercial construction. In its Operational Agreement, Pryor was designated as its manager with a 20% interest in the company. The remaining 80% was held by Diversified Design Associates, Ltd, a company

registered in the Irish Republic that was controlled by Charles Cathcart. During the course of Scienda's operations, Cathcart displaced Pryor's management authority. Cathcart was allegedly responsible for transferring Scienda's assets to other corporations under his ownership, of which Pryor maintained no interest.

2. Shenandoah Holdings, Limited ("Shenandoah") is a holding company of which Charles Cathcart has 50% ownership, and which had a membership interest in Scienda.
3. On February 15, 2002, Pryor filed a complaint in South Carolina state court against Charles Cathcart seeking a declaratory judgment, as well as equitable relief and other causes of action to recoup his deprived interest in Scienda. This matter was eventually the subject of an adversary proceeding in this Court and on March 31, 2004, the Court entered an order in favor of Pryor against Shenandoah in the amount $ 470,000.00 plus interest.
4. On May 6, 2004, the sheriff for Orangeburg County attempted an execution against Shenandoah's property but the execution was returned *nulla bona*.
5. Derivium Captial, LLC ("Derivium") is another South Carolina company principally owned by Charles Cathcart.
6. On September 1, 2005, Devirium filed a voluntary petition for Chapter 11 bankruptcy in the United State Bankruptcy Court for the Southern District of New York. The bankruptcy was converted to Chapter 7 on November 3, 2005 and shortly thereafter an order was entered transferring venue to the United States Bankruptcy Court for the District of South Carolina.
7. On November 7, 2005, Plaintiff was assigned as Trustee in Derivium's Chapter 7 case.
8. On June 6, 2006, the Trustee filed a complaint against Shenandoah alleging that the proceeds obtained by Derivium through the stock collateral of certain loan customers were funnelled through Shenandoah into various start-up companies. Charleston Aluminum is a start-up that

was allegedly funded through Shenandoah. Shenandoah is a member of Charleston Aluminum and Charleston Aluminum appears to be the only profitable start-up and has been distributing dividends to Shenandoah, as a member. The Trustee's complaint alleges that Shenandoah is the alter ego of Derivium and the Trustee seeks to include Shenandoah's membership interest in Charleston Aluminum in the bankruptcy estate of Derivium.

9. On June 7, 2006, Pryor obtained a Charging Order in South Carolina state court, which granted Pryor a perfected lien against Shenandoah's distributional interest in Charleston Aluminum.
10. On June 22, 2006, Pryor filed a Motion to Intervene and a Memorandum in Support of Motion to Intervene in this case pursuant to Fed. R. Civ. P. 24(a)(2) in order to be heard and to protect his pecuniary interest in Charleston Aluminum, as an asset of Shenadoah, from being subject to Derivium's bankruptcy estate.
11. On July 6, 2006, the Trustee and Shenandoah agreed to a Consent Order issued by the Court placing a preliminary injunction on Shenandoah prohibiting the transfer of any of its assets.
12. At July 6, 2006 hearing, Shenandoah and the Trustee objected to a formal intervention by Pryor.

CONCLUSIONS OF LAW

In Chapter 7 adversary bankruptcy proceedings, when a "party in interest" motions to intervene as of right under Rule 24(a)(2) intervention is not automatic, the "party in interest" must satisfy the requirements of intervention. *See* Richman v. First Woman's Bank (*In re* Richman), 104 F.3d 654, 658 (4th Cir. 1997) (holding that the bankruptcy code does not provide unconditional statutory intervention in adversary matters and that the tougher standard of intervention, within the sphere of bankruptcy, is necessary to prevent the court "from being overwhelmed by a flood of automatic parties."). *See also* In re Coram Resources Network, Inc., 305 B.R. 386, 388 (citing *In re Richman*); *contra* United States v. Union Electric Co., 64 F.3d 1152 (8th Cir. 1995) (listing the

circuits that hold intervention is unconditional.). The movant has the burden to (1) apply timely, (2) show an interest in the property that is subject to the action, (3) show that denial of the right to intervene would undermine the movant's property interest, and (4) show that the property interest is not adequately represented by the parties to the action. F.R. Civ. P. 24(a); *See* Houston General Ins. Co. v. Moore, 193 F.3d 838, 839 (4th Cir. 1999) (appealing from the District of South Carolina). *See also* In re Coram Resource Network, Inc., 305 B.R. 386, 387 (Bankr. Del. 2004) (stating that "a would be intervener bears the burden of demonstrating to the court a right to intervene."). Furthermore, Rule 24(c) requires the movant to serve the parties to the action with a pleading stating the claims and defenses upon which the intervention is based.

Where a motion to intervene is granted under Rule 24(a), the federal law is clear that courts have very limited discretion after intervention is granted. In Columbus-America Discovery Group v. Atlantic Mutual, Ins. Co., 974 F.2d 450, 469 (4th Cir. 1992), the court notes that parties that join by intervention of right are normally treated as original partied to the action. The court cites the Advisory Committee Notes to the 1966 FRCP 24(a) amendments and notes that whatever conditions may be permissible under the rule they will merely be "housekeeping in nature." Id.; *See also* In re Oceana International, Inc, 49 F.R.D. 329, 333 (S.D.N.Y. 1970) (holding that "once intervention as of right has been granted, an intervenor should be entitled to litigate fully on the merits and be considered a party for all purposes.").

In determining whether or not a motion for intervention under Rule 24(a)(2) is timely, a court should consider (1) how far the suit has progressed, (2) the prejudice which delay might cause other parties, and (3) the reason for the tardiness in moving to intervene. *See* Gould v. Alleco, Inc., 883 F.2d 281, 286 (4th Cir. 1989). The first factor is concerned more so with the readiness of the case for trial and not so much the amount of time that has passed since the institution of the

action. *See* Alexander, 64 F.R.D. at 157 (noting this analysis applies to cases of intervention of right or permissive intervention). The United States Court of Appeals for the Fourth Circuit states that timeliness is a "cardinal consideration" for intervention and such a determination is at the discretion of the court. *See* Houston General Insurance Co. v. Moore, 193 F.3d 838, 839 (4th Cir. 1999). When evaluating the timeliness of a motion to intervene, "the most important consideration is whether the delay has prejudiced the other parties." *See* Spring Const. Co., Inc. v. Harris, 614 F.2d 374, 377 (4th Cir. 1980).

Undoubtedly, Pryor's motion to intervene meets the requirement of timeliness. On June 6, 2006, the Trustee filed the complaint commencing this adversary proceeding. Pryor's motion to intervene was filed a day later.

The second element of intervention requires that Pryor's interest be directly subject to the action, and not remote or contingent on future events. *See* United States v. Peoples Benefit Life Ins. Co., 271 F.3d 411, 415 (2d Cir. 2001). Pryor's application is supported by his Charging Order issued in state court, which presently gives him a perfected lien on Shenandoah's distributional interest as a member of Charleston Aluminum. *See* S.C. Code Ann § 33-44-504(b) (rev. 2005) ("a charging order constitutes a lien on the judgment debtor's distributional interest").[1] The Trustee's complaint asserts that Shenandoah is the alter ego of Derivium, and, therefore, its interest in Charleston Aluminum should be part of the bankruptcy estate. Consequently, the distributional interest held by Shenandoah and awarded to Pryor, are directly related to the Trustee's adversary

[1] In order to perfect a lien on personal property a judgment creditor must levy or attach the property respectively either by actual possession or by immediate control. *See* In re Inter-Pac, Inc., 36 B.R. 488, 490 (Bankr. D.S.C. 1982) (holding that a judgment creditor's execution against intangible personal property that was returned *nulla bona* could have been properly perfected through supplemental proceedings as defined by § 15-39-410); *See also* McManus v. Bank of Greenwood, 171 S.C. 84, 171 S.E.473, 474 (S.C. 1933) (holding that supplemental proceedings "are not a substitute for an execution, but are intended to assist in reaching assets that cannot be reached merely by levy."). Where a judgment creditor's lien is against the distributional interest of a member, the "sole" remedy is to obtain a Charging Order. *See* S.C. Code Ann § 33-44-504(b) (rev. 2005) (Comment).

proceedings, as the property is both central to the pleadings of the Trustee and the basis of Pryor's charging lien.

In examining the facts pertaining to the third element of intervention, the Court finds that were the Trustee to prevail, the Trustee's interest may impair and impede Pryor's ability to collect his judgment. *See* United States v. Union Electric Co., 64 F.3d 1152, 1161 (8th Cir. 1995) (holding that an applicant is only required to show that his interest 'may be impaired' but for intervention, and not that the interest 'would be impaired'."). Based on the facts and the sequence of events, the Court finds that Pryor's interest in distributions made by Charleston Aluminums may be impaired and impeded by being subordinated should the Trustee prevail in this case. Pryor did obtain a judgment by this Court on March 31, 2004 (before Derivium was in bankruptcy), however, the execution of the claim was returned *nulla bona* and Pryor did not obtain the Charging Order until post-petition on June 7, 2006. Pryor's interest may be subordinate to the Trustee (and the many other creditors), which may foreclose any possibility of him collecting even a small percentage of his $470,000.00 lien against Shenandoah.

As to the fourth element of intervention, the remaining facts indicate that Pryor's property interest is adequately represented by Shenandoah, the party to the action. The complaint filed by the Trustee indicates that during the years 2003 through 2005 Charleston Aluminum distributed up to $1.3 million in dividends or distributions on equity to Shenandoah. The Trustee also indicates a likelihood of a substantial distribution by Charleston Aluminum in 2006. Considering the value of Charleston Aluminum's distributions over the previous three years, it appears likely that Shenandoah will raise its claims and defenses in opposition to the Trustee in order to secure its interest in the distributions that may be in excess of Pryor's lien. Based on these factual conclusions, Shenandoah's position against the alter ego theory of the Trustee adequately represents

Pryor's opposition to his property interest from becoming part of Derivium's bankruptcy estate. As a result of failing to meet this important element, the Court denies Pryor's motion of intervention of right under F. R. Civ. P. 24(a) (2).

While the Court finds that Pryor's interest appears to be adequately protected by Shenandoah's litigation of the adversary proceedings, the Court is inclined to allow Pryor to be heard (short of intervention) in its discretion, as a matter of fairness and in the interest of judicial economy, and to limit actions by Pryor in other courts which could effectively raise the cost of litigation to all parties involved.

The bankruptcy court is a court with broad equitable powers. *See* In re Harborview Development 1986 Ltd. Partnership, 152 B.R. 897, 900 (D.S.C. 1993). Under 11 U.S.C. § 105, the Court is empowered with equitable "authority to issue any order that is necessary or appropriate to carry out the provisions of this title." *See* In re A.H. Robbins Co. Inc., 828 F.2d 1023, 1026 (4th Cir. 1987). The Court finds it fair to permit Pryor's participation in light of the fact that it was this Court that previously granted Pryor's judgment against Shenandoah. The Court also gives credence to Pryor's earnest and steadfast efforts, demonstrated here and in state court, to collect his judgment. Although Pryor does not satisfy the requirements of Rule 24(a)(2),[2] the Court is not inclined to silence Pryor, considering that he appears to be an innocent lien holder in this bankruptcy case and considering that the Trustee seeks to make Pryor's perfected lien interest subject to Derivium's bankruptcy estate by alleging an alter ego theory claim against Shenandoah, a non-debtor corporation in these matters. The Court does not foresee that such intervention will unduly delay the proceedings of this bankruptcy.

[2] The Court further notes, Pryor does not meet the statutory requirements under F. R. Civ. P. Rule 24(b), for formal Permissive Intervention.

IT IS SO ORDERED that Pryor shall be allowed to participate in this adversary proceeding to establish his own priority regarding his lien interest in Charleston Aluminum's equity distributions and he shall be included in the service and processing of motions filed by the Trustee and Shenandoah in this case. As indicated by his counsel at the hearing, not all causes of action affect Pryor. Within 10 days of this order, Pryor shall file a detailed written statement identifying which causes of action he asserts affect him and which do not. The statement shall also include a description of his position thereon. To the extent that Pryor wishes to be heard on an issue in the proceeding, he must file and serve upon the Trustee and Shenandoah a detailed written statement of his position on the issue at least 5 days before such hearing, excluding weekends and holidays. Absent further order, the Trustee and Shenandoah shall serve Pryor with copies of any written responses to discovery, and shall allow attendance, but not questioning, by counsel for Pryor, at depositions or at any 2004 exam. This order shall be subject to further order of the Court and Pryor's participation may be suspended at any time.

AND IT IS SO ORDERED.

UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina
July 31, 2006