2010

Skypark Airport Association LLC v. Jay Jensen : Brief of Appellee

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

SKYPARK AIRPORT ASSOCIATION, LLC, a Utah limited liability company, et al., Plaintiff and Appellee, v. JAY JENSEN and ELINOR JENSEN, individually, and GAS BUSTERS, et al.,, Defendants, DYNASTY CORPORATION, Petitioner in Intervention and Appellant	**APPELLEE BRIEF OF SKYPARK AIRPORT ASSOCIATION, LLC** Appellate Case No. 20100273 Second District Court No. 020801861

Jerald D. Conder
341 South Main Street, #406
Salt Lake City, UT 84111
Attorney for Appellant Dynasty Corp.

Jeffrey L. Silvestrini
Eddie T. Vasquez
Bradley M. Strassberg
Cohne Rappaport & Segal, PC
257 E. 200 S., Suite 700
Salt Lake City, UT 84111
Attorneys for Plaintiff and Appellee
Skypark Airport Association, LLC

Kevin Swenson
Robert J. DeBry & Associates
243 St. George Blvd., Suite 110
St. George, UT 84770
Attorneys for Defendants

IN THE UTAH COURT OF APPEALS

SKYPARK AIRPORT ASSOCIATION, LLC, a Utah limited liability company, et al., Plaintiff and Appellee, **v.** JAY JENSEN and ELINOR JENSEN, individually, and GAS BUSTERS, et al.,, Defendants, DYNASTY CORPORATION, Petitioner in Intervention and Appellant	**APPELLEE BRIEF OF SKYPARK AIRPORT ASSOCIATION, LLC** Appellate Case No. 20100273 Second District Court No. 020801861

Jerald D. Conder
341 South Main Street, #406
Salt Lake City, UT 84111
Attorney for Appellant Dynasty Corp.

Jeffrey L. Silvestrini
Eddie T. Vasquez
Bradley M. Strassberg
Cohne Rappaport & Segal, PC
257 E. 200 S., Suite 700
Salt Lake City, UT 84111
Attorneys for Plaintiff and Appellee
Skypark Airport Association, LLC

Kevin Swenson
Robert J. DeBry & Associates
243 St. George Blvd., Suite 110
St. George, UT 84770
Attorneys for Defendants

Pursuant to Utah Rule of Appellate Procedure 24, Appellee Skypark Airport Association, LLC (hereafter "Skypark") submits the following appellate brief, replying to the arguments of Appellant Dynasty Corporation (hereafter "Dynasty").

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Other

STATEMENT OF JURISDICTION

This Court has jurisdiction over this matter pursuant to Utah Code section 78A-4-103(2)(a). *See* Utah Code Ann. § 78A-4-103(2)(a).

STATEMENT OF ISSUES

There are only two issues that need to be resolved by the Court in this appeal.

1. **Whether the district court properly denied Dynasty's motion to intervene pursuant to Utah Rule of Civil Procedure 24(a).**

Denials of intervention as of right under rule 24(a) are subject to de novo review on appeal. *See Parduhn v. Bennett*, 2005 UT 22, ¶ 13, 112 P.3d 495 (citing *In re Marriage of Gonzalez*, 2000 UT 28, ¶ 16, 1 P.3d 1074).

2. **Given the district court's denial of Dynasty's motion to intervene, whether the district court properly rejected Dynasty's motion to add parties pursuant to Utah Rule of Civil Procedure 19.**

This Court reviews the district court's rule 19 determination under an abuse of discretion standard. *See Smith v. Osguthorpe*, 2002 UT App 361, ¶ 15, 58 P.3d 854 (citing *Grand County v. Rogers*, 2002 UT 25, ¶ 27, 44 P.3d 734). "However, the district court's 'interpretation of . . . rule [19] is a question of law that we review for correctness.'" *Id.* (quoting *Brown v. Glover*, 2000 UT 89, ¶ 15, 16 P.3d 540).

CONTROLLING STATUTE

Rules 19 and 24 of the Utah Rules of Civil Procedure, which are set forth in Appellant's Brief, pp. 6-7.

STATEMENT OF THE CASE

This case involves a suit by the Plaintiff, Skypark, and several property owners entitled to enforce a set of declarations, covenants and restrictions against certain defendants, who are also property owners in the same subdivision. The suit was brought to enjoin these defendants from engaging in activities prohibited by the declarations and to enforce the collection of assessments against defendants levied pursuant to the 1979 declarations. *See* Complaint (R.1).

The defendants answered the complaint and filed a counterclaim for an accounting and declarations that the use restrictions contained in the declarations were unenforceable under various theories including waiver and abandonment. *See* Answer and Counterclaim (R.95). The defendants also sought an accounting from Skypark for the assessments and challenged the right of Skypark to assess pursuant to the declarations. (*Id.*).

Skypark did not join other parties to the declarations because the defendants named in the action were the parties deemed to be violating the declarations and other parties bound by the declarations, including the non-airport plaintiffs, were not violating the same and in fact desire to enforce the same. (*See* R.1.)

The action was originally commenced in 2002 and was intensely litigated. More than 60 pretrial motions were filed by the parties, more than 20 depositions were taken, and several sets of written discovery were exchanged between the two sides. *See generally*, district court docket.

Following the resolution of some claims by pretrial motion, the case proceeded to a trial before a jury in May and June, 2009. The jury rendered its verdict in June, 2009, finding for the plaintiffs that the subject declarations were enforceable and had not been waived or abandoned in any respect, and that Skypark was entitled to enforce the use restrictions contained in the declaration. *See* Jury Verdict and Judgment on Jury Verdict (R.8976, 9941). Following the jury verdict, the district court was in the process of formulating an award of attorneys fees to plaintiffs as the successful parties (as provided in the declarations). Only then did Dynasty seek leave to intervene in this action and to add other parties to the litigation. *See* Dynasty's motion to intervene (R.10013).

The district court considered the parties' respective pleadings and held oral argument on Dynasty's motions. *See* January 26, 2010 Hearing Transcript (R.11270). The district court subsequently denied Dynasty's motion to intervene. (*See* R.10935). Dynasty now appeals from this ruling.

STATEMENT OF RELEVANT FACTS

Dynasty's "Statement of the Facts" sets forth a somewhat confusing and insufficient statement of facts. Moreover, Dynasty includes unfounded allegations in paragraphs 4, 6 and 7 that should not be considered, as they were improperly produced to the district court for the first time in a reply brief. Accordingly, Skypark submits its own statement of relevant facts.

1. This case was originally filed in November, 2002, by Skypark against Jay

Jensen and Eleanor Jensen individually and *Gas Busters, et al.*, concerning the interpretation of and rights of parties pursuant to a Declaration of Covenants, Conditions, and Restrictions, recorded on October 1st, 1979 (1979 Declarations) in Book 796 page 412 in the office of the Davis Count Recorder. (*See* Complaint (R.1).)

2. The complaint filed by Skypark named as defendants some but not all landowners whose property is burdened by the restrictive covenants. (*See id.*)

3. Defendants (sometimes referred to herein as the "Gas Buster Defendants") filed an answer and counterclaim challenging the enforceability of the "Restrictive Covenants" set forth in the 1979 Declarations. (*See* Answer and Counterclaim (R.95).)

4. Following a jury trial, judgment was awarded to Skypark finding that the land use restrictions were valid and enforceable. (*See* R.9941).

5. On September 30, 2009, Dynasty Corporation filed a complaint in the Second District Court Case No. 090700634 against Skypark alleging, among other issues, that the restrictive covenants burdening the property owners in the Skypark Industrial Park to have been abandoned and waived. (*See* Appellant's Brief, Ex. M.)

6. Pursuant to Rule 19, Utah Rules of Civil Procedure, Dynasty – in Case No. 090700634 – filed an ex parte motion to join all property owners of the Skypark Industrial Park whose property was burdened by the 1979 Declarations seeking to set aside the use restrictions contained therein. (*See id.*, Ex. O.)

7. On October 7, 2009 Judge Page – in Case No. 090700634 – executed an

Order granting Dynasty's ex parte motion and joining all property owners in Skypark Industrial Park whose property was and is burdened by the restrictive land use covenants. (*See id.*, Ex. P)

8. The action brought by Dynasty in Case No. 090700634 (Second Claim for Relief) seeks an Order declaring that the use restrictions contained in the 1979 Declarations were waived or abandoned. (*See id.*, Ex. M.)

9. The judgment in the case before this Court declares the restrictive covenants not to have been abandoned or waived and fully enforceable. (*See* R.9941.)

10. On September 29, 2009, Dynasty moved the district court in this case to intervene, to join additional parties, and to set aside the district court's judgment. (*See* Motion to Intervene (R.10013).

11. On March 18, 2010, following previously submitted briefing and oral argument, the district court entered an Order denying Dynasty's motions, without a finding that Dynasty and the parties sought to be joined were necessary parties, because Dynasty's motion to intervene was untimely and Dynasty's interests were adequately protected. (*See* R.10935.)

12. On March 24, 2010, Dynasty filed a Notice of Appeal. (R.10940.)

SUMMARY OF ARGUMENTS

1. The district court correctly determined that Dynasty's application for intervention was untimely. This determination precluded intervention and renders moot the remaining arguments set forth in Dynasty's brief.

2. Dynasty is unable to show that the district court erred when it determined that Dynasty's interests were adequately protected by the other named defendants. Thus, even if Dynasty's application had been timely, its motion to intervene was properly denied.

3. Dynasty's assertion that the district court erred by failing to consider Rule 19 considerations is without legal basis. Because the district court denied the motion to intervene, Dynasty had no standing to assert a motion to add other parties.

4. Dynasty's allegation that the district court erred in its application of Rule 24 is inadequately briefed and, in any event, is without legal or factual support.

ARGUMENT

Dynasty moved to intervene in the underlying action as a matter of right pursuant to Utah R. Civ. P. 24(a). That rule states:

> (a) Intervention of right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute 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 he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Utah R. Civ. P. 24(a). Utah case law provides that, absent a statutory grant (which is not at issue here), a potential intervenor must show four elements:

> (1) its application to intervene was timely, (2) it has an interest relating to the property or transaction which is the subject of the action, (3) it is so situated that the disposition of the action may as a practical matter impair or impede [its] ability to protect that interest, and (4) its interest is not adequately represented by existing parties.

Beacham v. Fritzi Realty Corp., 2006 UT App 35, ¶ 7, 131 P.3d 271 (citations omitted).

The district court ruled that Dynasty failed to show at least two of these required criteria, to wit, that Dynasty's application was timely and that Dynasty was not adequately represented by existing parties. *See* Order, p. 2 (R.10936). On appeal, Dynasty fails to show why these determinations were erroneous. Accordingly, the district court's ruling should be affirmed.

1. The District Court Correctly Determined That Dynasty's Application Was Untimely.

Dynasty did not file its motion to intervene until the underlying case was decided by the jury – some seven years after the case was originally filed. After considering all of the circumstances, the district court determined that Dynasty's application for intervention was untimely. Because Dynasty's motion was determined untimely, its motion was properly denied. *See Parduhn v. Bennett,* 2005 UT 22, ¶ 18, 112 P.3d 495.

The right to intervene pursuant to rule 24(a) "is not absolute." *Jenner v. Real Estate Services*, 659 P.2d 1072, 1073 (Utah 1983). An application must be made "timely." *Id.* This is the "first requirement" that must be shown by an applicant, *Republic Ins. Group v. Doman*, 774 P.2d 1130, 1131 (Utah 1989), and is a "threshold issue." *Concerned Citizens of Spring Creek Ranch v. Tips Up, LLC*, 185 P.3d 34, 39 (Wyo. 2008). Accordingly, "[a]n application to intervene may be denied solely on the basis of timeliness." *Id.; see also Parduhn,* 2005 UT 22, ¶ 18.

"Use of the word 'timely' in the Rule requires that the timeliness of the application be determined under the facts and circumstances of each particular case, and in the sound discretion of the court." *Jenner,* 659 P.2d at 1073-74; *see also Concerned Citizens* . . ., 185 P.3d at 39 (a "determination whether an application for intervention is timely is within the sound discretion of the trial judge."). In addition, the general rule is that "intervention is not to be permitted after entry of judgment. The courts are reluctant to make exceptions to the general rule *and do so only upon a strong showing of*

entitlement and justification, or such unusual or compelling circumstances as will justify the failure to seek intervention earlier." *Jenner,* 659 P.2d at 1074 (emphasis added). *See also Parduhn,* 2005 UT 22, ¶ 15 ("Our cases have treated postjudgment motions to intervene unfavorably, articulating a general rule that intervention is not to be permitted after entry of judgment." (Internal quotations and citation omitted.)).

Dynasty fails to explain why an exception to the general rule should apply here, and fails to make any showing, let alone a "strong showing" of entitlement and justification, or "such unusual or compelling circumstances as will justify the failure to seek intervention earlier." *Id.* Instead, Dynasty simply argues that no "formal" judgment had been entered at the time it filed its motion to intervene.

In *Hoopiiaina v. Williams*, 2005 UT App 139 (mem.) this Court addressed and rejected the same argument. There, "after completion of trial but prior to issuance of a final judgment, Lucille Williams filed a motion to intervene based on her ownership of the property. The trial court denied Williams's motion as untimely." *Id.*, * 1. This Court noted that, although the district court "did not formally enter judgment prior to Williams's motion to intervene . . . the named parties had conducted extensive trial preparation, taken the case to trial, and received a tentative ruling from the trial court some six months prior to Williams's motion." *Id.* The Court held that the general rule set forth above applies in such circumstances:

> These circumstances implicate many of the same policy considerations raised by postjudgment motions. The general

> rule is that "intervention is not to be permitted after entry of judgment" except "upon a strong showing of entitlement and justification, or such unusual or compelling circumstances as will justify the failure to seek intervention earlier." "Postjudgment intervention is looked upon with disfavor by reason of the tendency thereof to prejudice the rights of existing parties and the undue interference it has upon the orderly processes of the court."

Id. (quoting *Jenner v. Real Estate Servs.*, 659 P.2d at 1073-74). Thus, Dynasty's argument is insufficient to justify reversal.

Dynasty also asserts that reversal is warranted because it alleged that it did not have notice of the litigation until just prior to the time it filed its motion. Dynasty's allegation is unsupported, save for one conclusory allegation that is contained in an unsigned declaration that was improperly filed for the first time in a reply brief. Declarations, even if signed, are improper if first set forth in a reply brief. *See Soriano v. Graul*, 2008 UT App 188, ¶ 12, 186 P.3d 960; *Stevens v. LaVerkin City*, 2008 UT App 129, ¶ 31, 183 P.3d 1059. This objection was raised to the district court at oral argument. *See* January 26, 2010 Hearing Transcript, p. 18 (R.11270).

Moreover, there was sufficient evidence of record that was considered by the district court to justify its determination. The determination of whether a request to intervene is timely includes "the facts and circumstances of each particular case." *Jenner*, 659 P.2d at 1074. Courts also examine the "length of time the applicant . . . knew or reasonably should have known of its interest in the case before the application for leave to intervene was filed." *Concerned Citizens . . .*, 185 P.3d at 39; *see also Stallworth v.*

Monsanto Co., 558 F.2d 257, 264 (C.A.Fla. 1977) . The facts herein are that the underlying litigation began in 2002, some nine years before Dynasty's motion was filed. The litigation began when Defendant Jay Jensen failed to abide by the terms of a 1999 settlement agreement regarding the land use restrictions in the 1979 Declaration. (Skypark's Mem. in Opp. to Motion to Intervene, p. 3, R.10308). Also in 1999, Dynasty's principal Mort Ebling filed his own lawsuit against the Skypark Landowners' Association seeking to have the same 1979 Declarations declared invalid. (*See id.*) Dynasty is a member of the Skypark Landowners' Association. Mr. Jensen periodically briefed members of the Skypark Landowners' Association about this litigation at annual association meetings, (*see id.*, p. 4, *and see* January 26, 2010 Hearing Transcript, p. 19 (R.11270) while those members were assessed in 2009 for 2008 legal fees relating to this very litigation (*see* January 26, 2010 Hearing Transcript, p. 25). Given all of these facts, along with the fact that Dynasty waited until after Skypark had succeeded at trial, the district court found it "hard to believe that there were any owners at Skypark that are not aware of this ongoing litigation," (*id.*, p. 29), and issued its Order that Dynasty's motion was untimely. Order, p. 2 (R.10936).

Dynasty fails to show that the district court erred when it determined that Dynasty's motion to intervene was untimely. Accordingly, this Court need not address or determine Dynasty's other arguments on appeal. *See Parduhn v. Bennett,* 2005 UT 22, ¶ 18 ("Having concluded that University Texaco's motion to intervene was untimely, we

can affirm the district court's ruling on intervention without addressing the other requirements of rule 24(a).").

2. Dynasty Fails to Show That the District Court Erred When it Determined that Dynasty's Interests Were Adequately Protected.

Even if Dynasty was able to overcome the presumption that its motion was untimely and show that the district court erred when it held that Dynasty's motion was untimely, Dynasty must still be able to show that "its interest [was] not adequately represented by existing parties." *Beacham*, 2006 UT App 35, ¶ 7. Dynasty failed to make this showing below, and fails to establish why the district court erred when it held that Dynasty's interests in the litigation were adequately protected by the parties already part of that lawsuit.

The burden of proof regarding adequate representation is on the applicant. *See Beacham*, 2006 UT App 35, ¶ 8. "An applicant may meet this burden by presenting evidence that, for example, the representative party has an interest adverse to the applicant, has colluded with the opposing party, or is otherwise unable to diligently represent the applicant's interest." *Id.*, ¶ 9 (citations omitted). No such showing is even attempted, let alone successfully made by Dynasty. Instead, Dynasty simply alleges that its arguments were "much broader" than the Gas Buster Defendants. Appellant's Brief, pp. 19, 22. This conclusory assertion fails to set forth a reason to overturn the district court.

"Regardless of the reason necessitating intervention, a prospective intervenor[ ]. . . must give specific reasons why an existing party's representation is not adequate." *Beacham*, 2006 UT App 35, ¶ 9 (quotations and citation omitted). To prevail on appeal, Dynasty "must provide some evidence, in the form of specific reasons or a concrete showing of circumstances, to indicate why [the Gas Buster Defendants'] representation would be inadequate or how it was in fact inadequate...." *Id.*, ¶ 10. Conclusory allegations are insufficient. *See id.*, ¶¶ 11, 12. Furthermore, "when the interest of one of the parties and the interest of the applicant are identical, there arises a presumption of adequacy," *id.*, ¶ 9, (citing 6 James Wm. Moore et al., Moore's Federal Practice § 24.03[4][a] [ii] (3d ed.2005), which may be rebutted only upon "a concrete showing of circumstances . . . that make [the existing party's] representation inadequate." *Id.* (quotations and citation omitted).

At oral argument, the district court determined that, "given the history of this case, and the evidence that has been presented by very qualified counsel over the years, there are no interests of this defendant that were not adequately protected." January 26, 2010 Hearing Transcript, p. 30 (R.11270). This same determination is set forth in the district court's Order, p.2 (R.10936). Dynasty is unable to challenge this determination.

Dynasty concedes that the Gas Buster Defendants' Answer and Counterclaim "challenged the enforceability of the 1979 covenants claiming they had been long since waived and abandoned." Appellant's Brief, p. 19. Dynasty also concedes that its own

claim for intervention was "seeking an Order declaring said land use restrictions set forth in Section IV of the 1979 Restrictive Covenants applicable to the Skypark Industrial Park land owners, to be abandoned and waived and to be of no force or effect . . .." *Id.*, p. 18. Accordingly, there is no question that these interests are, in essence, the same. Nonetheless, Dynasty seeks reversal on the lone basis that its "interest and reason to challenge" these covenants "was and is much broader." *Id.*, p. 19. This conclusory allegation, as set forth in *Beacham*, 2006 UT App 35, ¶¶, 9-13, is simply insufficient to show that a person's interests were not adequately protected.[1]

Moreover, a *presumption of adequate representation* arises where a putative intervenor and a named party have the same ultimate objective in the lawsuit. *See Edwards v. City of Houston*, 78 F.3d 983, 1005 (5th Cir. 1996); *Adarand Constructors, Inc. v. Romer*, 174 F.R.D. 100, 104 (D. Colo. 1997); *Clark v. Putnam County*, 168 F.3d 458 (11th Cir. 1999); *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171 (2nd Cir. 2001); *Coalition of Arizona/New Mexico Counties for Stable Economic Growth v. Dept. of Interior*, 100 F.3d 837, 845 (10th Cir. 1996).[2] "The interest of a putative intervenor is

---

[1]It is telling that, when Dynasty tried to explain one or two specific circumstances where its interests had not been adequately protected, these assertions were quickly and specifically rebuked by the district court. For instance, counsel for Dynasty tried to argue that no evidence of waiver had been received, and the district court interjected that such evidence had been heard "time and time again." January 26, 2010 Hearing Transcript, p. 7-8 (R.11270). Dynasty was, and to date is, unable to set forth any other specific instance of inadequate protection of its interests.

[2]Utah Courts have previously relied on federal cases for guidance in interpreting rule 24. *See Beacham v. Fritzi Realty Corp.*, 2006 UT App 35, ¶ 8, 131 P.3d 271.

not inadequately represented by a party to a lawsuit simply because the party to the lawsuit has a motive to litigate that is different from the motive to litigate of the intervenor." *Oregon Envtl. Council v. Oregon Dep't of Envtl. Quality*, 775 F.Supp. 353, 359 (D. Or. 1991) (citing *Natural Resources Defense Council, Inc. v. New York State Dept. of Envtl. Conservation*, 834 F.2d 60, 61-62 (2d Cir.1987); *see also Concerned Citizens of Spring Creek Ranch v. Tips Up, LLC*, 185 P.3d 34, 41 (Wyo. 2008) ("[a] simple difference between a party and an intervenor's motivation in the litigation is not enough to show inadequacy of representation"). Here, Dynasty's appeal brief makes clear that, while its motivation for pursuing its claim be different than the Gas Buster Defendants', the ultimate goals was the same - to obtain a declaration that the use restrictions were invalid. Dynasty fails to present any record evidence that could overcome this presumption.

Dynasty also alleges that intervention should have been granted because Dynasty would have asserted a separate claim for damages for "unauthorized calculations." Appellant's Brief, p. 18. This assertion ignores applicable law regarding intervention. Even if it were somehow appropriate to allow intervention after trial and a jury verdict, Dynasty would not be allowed to raise new claims. "When intervention is permitted, the intervenor must accept the pending action as he finds it; his right to litigate is only as broad as that of the other parties to the action." *Lima v. Chambers*, 657 P.2d 279, 284-85 (Utah 1982). As explained in American Jurisprudence Second,

> Intervention is not an independent proceeding, but an ancillary and supplemental one which, unless otherwise provided for by legislation, must be in subordination to the main proceeding, and, as a general rule, an intervenor is limited to the field of litigation open to the original parties... [T]he rule is stated to be that one who intervenes in a pending action ordinarily must come into the case as it exists and conform to the pleadings as he or she finds them, or that an intervenor must take the case as he or she finds it. An intervenor is admitted to the proceeding as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues or compel an alteration of the nature of the proceeding. Having been permitted to come into the case because of his or her interest in the subject matter of the suit, the intervenor is restricted to the issue of that subject matter and cannot insist on raising or trying other issues not involved.

59 Am. Jur. 2d Parties § 247. *See also People ex rel. Rominger v. County of Trinity*, 195 Cal.Rptr. 186, 189 (Cal.App. 3 Dist. 1983) ("the interveners may not enlarge the issues so as to litigate matters not raised by the original parties"); *Chicago, Milwaukee, St. Paul & Pac. R. Co. v. Harris Trust and Sav. Bank*, 380 N.E.2d 835, 842 (Ill.App. 1 Dist.,1978) ("It is established that an intervenor must take the suit as he finds it and, where intervention would result in the injection of many new and complicated issues, it may be denied."). Accordingly, Dynasty's argument that its interests were not adequately protected because it would have asserted new claims is without legal basis and flies in the face of Utah and other case law that does not allow for such claims upon intervention.

Dynasty therefore fails to show any error committed by the district court when it determined that Dynasty's interests were adequately protected by the Gas Buster Defendants.

3. Dynasty's Assertion that the District Court Erred by Failing to Consider Rule 19 Considerations is Without Any Legal Basis.

Dynasty's next argument is as follows: "The ruling of the lower court denying intervention, based solely on [rule 24] considerations of timeliness and adequate representation, failed to address the core issue of whether Dynasty or the other parties whose joinder Dynasty sought were necessary parties pursuant to [rule 19]." Appellant's Brief, p. 26. This argument ignores the fact that, absent status as a party to the underlying lawsuit, Dynasty's motion under rule 19 could not be addressed let alone decided in its favor.

"A court may not grant relief to a nonparty." *Butler v. Wilkinson*, 740 P.2d 1244, 1263 Utah 1987. Dynasty was not a party to the underlying action. That is why it moved to intervene in that action. "Intervention is the act by which a third party obtains standing to become a party in a suit. It has been described as a method by which an outsider with an interest in an action may enter and participate as a party." *In re E.H.*, 2006 UT 36, ¶ 51, 137 P.3d 809. A non-party such as Dynasty cannot simply demand that a court hear its motion. To the contrary, "non-parties must adhere to the procedural requirements of Rule 24© in order to intervene in an action." *Ostler v. Buhler*, 989 P.2d 1073, 1076 (Utah 1999). The fact that Dynasty's motion to intervene was denied meant that Dynasty

was not a party when it filed its motion under rule 19. *See id.* The district court therefore had no power to grant Dynasty's motion to join additional parties, as it lacked jurisdiction to do so. *See id; see also Parduhn*, 2005 UT 22, ¶ 18 (holding that, "because the district court properly denied University Texaco's motion to intervene, University Texaco lacks standing to challenge the propriety of the equitable distribution itself.").[3]

Moreover, Dynasty fails to explain (and points to no legal authority that could explain) why rule 19, and the allegations of failure to join an indispensable party, have anything to do with the considerations necessary to determine whether a motion to intervene should or should not be granted pursuant to rule 24. Dynasty's bare assertion, "to deny Dynasty's Motion of Joinder without a 'necessary party analysis' regarding Dynasty and the parties whose joinder is sought is error," Appellant's Brief, p. 27, is without any legal support.[4] Dynasty also fails to cite a single authority where a non-party's rule 19 motion was even considered by a trial court where its motion to intervene had been denied.

---

[3]For the same reason, Dynasty's rule 60(b) motion was properly rejected. *See Parduhn*, 2005 UT 22, ¶ 18. *See also Edwards v. City of Houston*, 78 F.3d 983, 993 (5th Cir. 1996) (would-be intervenor whose motion is denied cannot challenge ultimate judgment).

[4]This also renders Dynasty's argument regarding section 78B-6-403 moot. In any event, Dynasty's argument fails because it was not properly raised below (only in an unauthorized "supplemental" reply memorandum) and because Dynasty fails to explain what a statute enacted in 2008 has to do with a case filed in 2002.

Accordingly, this argument fails to establish any reason to disturb the district court's ruling.

4. Dynasty's Allegation that the District Court Erred in its Application of Rule 24 is Unfounded.

Last, Dynasty argues that the district court erred by relying on case law issued before amendment of rule 24. This argument should not be considered as it is insufficiently briefed. "It is well established that a reviewing court will not address arguments that are not adequately briefed." *State v. Thomas*, 961 P.2d 299, 304 (Utah 1998); *see also Valcarce v. Fitzgerald*, 961 P.2d 305, 313 (Utah 1998) (declining to address appellant's claim on appeal due to inadequate analysis). Dynasty fails to set forth what "amendment" to rule 24 is at issue, when that purported amendment was made, and why the "amendment" has anything to do with the determinations made by the district court.

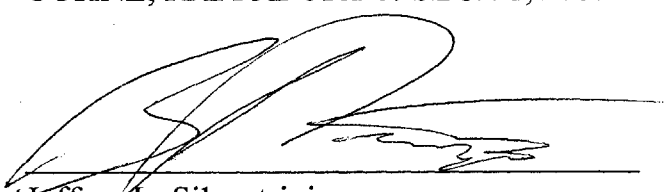
In any event, this argument is without merit. The district court denied Dynasty's motion to intervene on the basis of timeliness and the fact that its interests were adequately protected. These factors are, without dispute, part of the analysis that must be conducted under rule 24. *See* Utah R. Civ. P. 24; *Beacham v. Fritzi Realty Corp.*, 2006 UT App 35, ¶ 7, 131 P.3d 271. The district court said *nothing* in its Order regarding the issue presented by Dynasty, to wit, whether a party "will be bound by the judgment in the action." Appellant's Brief, p. 30. Accordingly, this argument is *non-sequitur* and fails to provide a reason to overturn the district court's determination.

CONCLUSION

The district court properly denied Dynasty's post-verdict motion to intervene. Given that ruling, the district court also properly rejected Dynasty's non-party motion to add parties under rule 19. Dynasty has failed to show any error committed by the district court in relation to these rulings. Accordingly, Dynasty has set forth no reason to reverse, and the district court's rulings should be affirmed.

DATED this 6th day of January, 2011.

COHNE, RAPPAPORT & SEGAL, P.C.



Jeffrey L. Silvestrini
Eddie T. Vasquez
Bradley M. Strassberg
Attorneys for Appellee Skypark Airport Association, LLC

CERTIFICATE OF SERVICE

I hereby certify that, on this 6TH day of January, 2011, I caused to be served a true and correct copy of the foregoing Brief via First Class Mail, postage fully pre-paid, to the following:

Jerald D. Conder
341 South Main Street, #406
Salt Lake City, UT 84111

Kevin Swenson
Robert J. DeBry & Associates
243 St. George Blvd., Suite 110
St. George, UT 84770