COURT OF APPEALS
DECISION
DATED AND FILED

June 30, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2010AP1533 **Cir. Ct. No. 2009CV3386**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

MILWAUKEE MILE HOLDINGS, LLC,

PLAINTIFF-RESPONDENT,

V.

WISCONSIN STATE FAIR PARK,

DEFENDANT-RESPONDENT,

JP MORGAN CHASE BANK, N.A.,

INTERVENING DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: JUAN B. COLAS, Judge. *Affirmed.*

Before Vergeront, P.J., Lundsten and Higginbotham, JJ.

¶1 LUNDSTEN, J. JP Morgan Chase Bank seeks to intervene in this case. The dispute involves licensing agreements between Milwaukee Mile Holdings, LLC, and the Wisconsin State Fair Park Board. The agreements required Milwaukee Mile to obtain a letter of credit as security for its license fee obligations. JP Morgan provided that letter of credit. JP Morgan argues that the circumstances here warrant its intervention so that it may protect its interests related to that letter of credit. We disagree, and affirm the circuit court.

Background

¶2 Milwaukee Mile entered into a licensing agreement with the Wisconsin State Fair Park Board to operate a racetrack at the State Fair Park grounds. The agreement included a requirement that Milwaukee Mile obtain an irrevocable letter of credit as security for its license fee obligations to the Board arising out of the licensing agreement. JP Morgan entered into an agreement with Milwaukee Mile to provide that letter of credit. JP Morgan issued the letter of credit, which was later amended and which provided that the Board could request funds from JP Morgan, up to a limit of $3,664,500, if the Board followed certain procedures. As part of its agreement with JP Morgan, Milwaukee Mile agreed to repay JP Morgan for any payments on the letter of credit. Two individuals with interests in Milwaukee Mile, Frank Andrews and David Stroud, and a related marketing entity also entered into repayment agreements with JP Morgan.

¶3 A series of disputes led to a mutual release as to the first licensing agreement between Milwaukee Mile and the Board, and those parties then entered into a second licensing agreement. After further disagreements, the Board informed Milwaukee Mile that it was terminating the second agreement, asserting that Milwaukee Mile had "defaulted." Milwaukee Mile sent its own termination

letter, citing alleged breaches by the Board. Subsequently, the Board sought to collect $2,613,338 of the funds secured by the letter of credit by submitting a request to JP Morgan. JP Morgan informed Milwaukee Mile of its intention to honor the Board's request.

¶4 Before JP Morgan paid the Board, Milwaukee Mile sued the Board, alleging breach of the licensing agreement and other related claims. As part of that lawsuit, Milwaukee Mile also joined JP Morgan as a necessary and indispensable party, seeking to bar JP Morgan from paying on the letter of credit. As described in more detail below, the circuit court declined to bar JP Morgan from paying and, with JP Morgan's consent, dismissed JP Morgan from the case.

¶5 JP Morgan paid on the letter of credit, but the guarantors, including Milwaukee Mile, did not reimburse JP Morgan. Related to this, Andrews and Stroud filed suit in federal court seeking a declaratory judgment that they were not required to reimburse JP Morgan because, as alleged in their amended complaint, JP Morgan had improperly amended the letter of credit. Subsequently, pointing to these post-dismissal events, JP Morgan attempted to reenter the case by moving to intervene. The circuit court did not address the merits of JP Morgan's motion, but instead denied it based on judicial estoppel. The court concluded that JP Morgan's attempt to reenter the case was the sort of "manipulation" that the doctrine of judicial estoppel is intended to deter. JP Morgan appeals that decision.[1]

[1] Only the Board has filed a responsive brief in this appeal. Milwaukee Mile has not filed a brief.

Discussion

¶6 The circuit court relied on judicial estoppel to reject JP Morgan's motion to intervene. On appeal, JP Morgan argues that judicial estoppel is inapplicable and that we should address the merits of its intervention arguments. We will assume, without deciding, that judicial estoppel is inapplicable. Still, for the reasons that follow, JP Morgan's arguments do not persuade us that JP Morgan should be allowed to intervene.

A. Intervention As Of Right

¶7 JP Morgan asserts that it is entitled to intervene as of right under WIS. STAT. § 803.09(1).[2] In ***Helgeland v. Wisconsin Municipalities***, 2008 WI 9, 307 Wis. 2d 1, 745 N.W.2d 1, the court explained:

> A movant must satisfy four requirements to intervene as a matter of right under WIS. STAT. § 803.09(1). The movant must show:
>
> (A) that the movant's motion to intervene is timely;
>
> (B) that the movant claims an interest sufficiently related to the subject of the action;
>
> (C) that disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest; and
>
> (D) that the existing parties do not adequately represent the movant's interest.

Id., ¶38 (footnotes omitted). The moving party has the burden of showing that all four requirements are met. *See* ***Olivarez v. Unitrin Prop. & Cas. Ins. Co.***,

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

2006 WI App 189, ¶12, 296 Wis. 2d 337, 723 N.W.2d 131. Application of the intervention statute to a given set of facts is a question of law, which we review *de novo*. ***Id.***, ¶13.

¶8 Because JP Morgan must satisfy all four requirements, and because we conclude that, at a minimum, it has failed to satisfy the third requirement, we limit our discussion to that requirement.

¶9 Under the third requirement, JP Morgan needed to show "that disposition of the action may as a practical matter impair or impede the movant's ability to protect [the claimed] interest." ***Helgeland***, 307 Wis. 2d 1, ¶38. JP Morgan does not assert that it has an interest in the underlying dispute between Milwaukee Mile and the Board. Rather, JP Morgan asserts that it has an interest in having a single court rule on its payment obligations under the letter of credit because that is the only way to avoid the possibility of conflicting rulings from multiple courts on this topic. To protect that claimed interest, JP Morgan argues that it must be allowed to intervene here. We begin our analysis of this argument with a brief recap of the relationships between the various parties.

¶10 First, there are licensing agreements between Milwaukee Mile and the Board. Second, there is JP Morgan's obligation to pay the Board on the letter of credit under specified circumstances. Third, there is the repayment obligation owed by the guarantors to JP Morgan if JP Morgan pays out on the letter of credit. JP Morgan's concern here is with the second relationship, involving its obligations under the letter of credit.

¶11 Letters of credit generally involve three parties: (1) "the applicant," here Milwaukee Mile; (2) "the beneficiary to whom payment is due upon the presentation of documents required by the letter of credit," here the Board; and

(3) "the issuer who obligates itself to honor the letter of credit by paying up to a stated amount of money when it is presented with documents the letter of credit requires," here JP Morgan. *See* ***Admanco, Inc. v. 700 Stanton Drive, LLC***, 2010 WI 76, ¶21, 326 Wis. 2d 586, 786 N.W.2d 759.[3] As the issuer, JP Morgan's obligation to honor the letter of credit upon presentation of the proper documentation by the Board is independent of any other claims among the parties. *See* ***id.***, ¶22 (recognizing that "the independence principle" applies to letters of credit). It is readily apparent that the Board required the letter of credit so that, in the event of a contract dispute with Milwaukee Mile, the Board would have the right to immediate payment of amounts it believed it was owed, rather than waiting for the resolution of any dispute. *See* ***id.*** As it turned out, the Board decided to invoke this right.

¶12 As is pertinent here, the Board's presentment under the amended letter of credit could take two forms. Under one option, the Board could obtain payment by presenting to JP Morgan language stating, in essence, that Milwaukee Mile "defaulted" under the licensing agreement. Under a second option, the Board could obtain payment if the Board received notice that JP Morgan had chosen not to extend the duration of the letter of credit and Milwaukee Mile did not provide alternate security.

[3] We note that the letter of credit states that it is governed by New York law. For purposes of the issues here, however, the circuit court observed that "the parties [do] not dispute that New York's and Wisconsin's statutes on relevant points are identical." On appeal, the parties do not argue otherwise.

¶13 Here, the Board invoked the second option. Before JP Morgan paid the Board, however, Milwaukee Mile joined JP Morgan in this action for purposes of preventing the payment.

¶14 At a hearing on Milwaukee Mile's request for a temporary restraining order, it became apparent that Milwaukee Mile's argument was focused on the merits of the underlying contract dispute between it and the Board. The circuit court determined that the underlying merits of that dispute were not relevant to JP Morgan's obligation to pay on the letter of credit. To the extent that Milwaukee Mile raised arguments about the presentment's facial invalidity or about fraud that might negate JP Morgan's obligation to pay the Board, the arguments were vague and the circuit court found them to be meritless on their face. For example, as to the presentment's validity, Milwaukee Mile seemed to contend that the Board, when invoking the *second* presentment option, failed to use specific language required by the *first* presentment option. That argument had no apparent merit because Milwaukee Mile was unable to explain why invoking the second option required compliance with the procedure for the first option. Similarly, Milwaukee Mile merely asserted fraud, but failed to support that assertion with either factually or legally developed argument. The circuit court found that the only substantial arguments made by Milwaukee Mile went to Milwaukee Mile's underlying contract dispute with the Board. Accordingly, the court concluded that "on the record that we have … it's not really disputed … that the presentation … conformed to the requirements of the [amended] letter." Thus, the court declined to prohibit JP Morgan's payment.[4]

[4] More specifically, the court vacated a stipulated temporary restraining order and then denied the motion for a temporary restraining order on its merits. Milwaukee Mile sought to (continued)

¶15 After this decision, JP Morgan agreed that it was proper to dismiss it from the case, and JP Morgan was dismissed. JP Morgan does not assert that its dismissal was error. Rather, JP Morgan believes subsequent events warrant its reentry into the case.

¶16 JP Morgan notes that, after it was dismissed and after it paid the Board, the guarantors refused to repay JP Morgan. Also, two of the guarantors, Andrews and Stroud, initiated a federal action against JP Morgan seeking to avoid repayment. Although not in our record, JP Morgan's argument here relies on the federal filings, and the parties agree that it is proper for us to consider them.

¶17 For our purposes, what is notable about the guarantors' federal action against JP Morgan is that, in the guarantors' amended federal complaint, the only reason alleged by the guarantors to avoid repayment is that "they did not consent to the terms of the Amendment to the Letter of Credit" and that the Board's presentment was premised on the option created by this unauthorized amendment. The guarantors additionally alleged that this was true "*regardless of whether* JPMorgan Chase was obligated to the Board to make that payment" (emphasis added). In other words, on its face, the amended federal complaint is concerned with whether the amendment to the letter of credit was authorized by the guarantors—the amended complaint does not assert that JP Morgan was not obligated under the amended letter of credit to pay the Board.

¶18 With this background in mind, we return to JP Morgan's reason for intervention, which turns on JP Morgan's belief that there is a possibility of

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appeal as of right, but we determined that Milwaukee Mile was not entitled to an appeal as of right. We also declined to allow a permissive appeal.

inconsistent rulings. Specifically, we understand JP Morgan's reasoning to include the following propositions:

- The present state case will eventually "necessarily include a final ruling on the sufficiency of the Board's Presentment" under the amended letter of credit, and the same issue is bound to arise in the federal action.

- One court could determine that JP Morgan was bound to pay on the letter of credit because the presentment was facially valid, and the other court could come to the opposite conclusion.

- If this occurs, JP Morgan will face conflicting rulings and, accordingly, will be in a situation where it may not seek repayment from the guarantors or recovery of the payment from the Board.

- Intervention here would remove the possibility of these conflicting rulings.

¶19 We observe that each of these propositions is based on inadequately explained assumptions. For example, JP Morgan assumes that conflicting rulings will be avoided by permitting intervention here because that will cause the federal court to order a stay or dismissal. But JP Morgan merely asserts that this will occur. For that matter, JP Morgan does not explain why continuing litigation in this state case will "necessarily include a final ruling on the sufficiency of the Board's Presentment."

¶20 This lack of developed argument, standing alone, justifies rejecting JP Morgan's argument. However, we choose to address another assumption, which we view as JP Morgan's core assumption: that the question of the presentment's facial validity will be ruled on in the federal action.

¶21 In its briefing before this court, JP Morgan asserted: "The guarantors [Andrews and Stroud] filed a federal lawsuit attempting (in effect) to

overturn the Circuit Court's finding that the Presentment satisfies the terms of the Amended Letter of Credit …." After concluding that this and similar assertions were ambiguous, we ordered supplemental briefing on this topic. Specifically, we asked whether the amended complaint filed in federal court "contain[ed] the allegation that the board's presentment did not comply with the terms of the amended letter of credit." If the answer to that question was "no," then we asked: "[D]oes the record in this case provide a factual basis for concluding that such a claim might be raised by the guarantors in the federal action?"

¶22 Responding to our questions, JP Morgan acknowledges that the amended federal complaint does not allege that the Board failed to comply with the terms of the amended letter of credit.[5] As to why that issue might nonetheless arise, JP Morgan argues that, given that Milwaukee Mile raised this issue before, it is "strong evidence" that Milwaukee Mile, a third-party defendant in the federal action, will do so again. JP Morgan adds that Andrews and Stroud will also likely raise this topic because "there is no practical difference between Milwaukee Mile and [Andrews and Stroud]." JP Morgan summarizes its view by asserting that, because this topic could come up, this court "should assume" that it will.

¶23 This combination of general assertions and argument is not helpful. JP Morgan did not, as we requested, point to facts in the record indicating a basis for a claim that the Board did not comply with the amended letter of credit in seeking payment from JP Morgan. Simply telling us that the presentment's validity was previously challenged does not provide a basis for concluding that it

[5] JP Morgan asserts that the original federal complaint did raise challenges to the validity of the presentment. JP Morgan acknowledges, however, that the amended complaint contains no such challenge.

is likely to be challenged again, especially when the record does not indicate that there was any substance to that previous challenge in state court. As we recount above, the circuit court had no difficulty rejecting this challenge because, by all appearances, it was patently meritless. In fact, the circuit court appeared to believe that the argument was so weak that the court understood the issue of the presentment's validity as essentially conceded by Milwaukee Mile. Nor does JP Morgan address Milwaukee Mile's apparent position before the circuit court that Milwaukee Mile's presentment arguments were specifically directed at stopping payment *in the first place*, which, as Milwaukee Mile explained it, is a "ship [that] has sailed."[6]

¶24 Also, JP Morgan fails to make a necessary connection. There is, at least potentially, an important difference between the subject matter of the federal action and the subject matter addressed at the restraining order hearing in state court. That is, the federal action's topic is the guarantors' repayment obligations, which, presumably, focuses on the repayment agreements. On the other hand, the topic addressed at the restraining order hearing in this case was whether JP Morgan should be barred from honoring the Board's presentment *under the letter of credit*. JP Morgan does not explain how these two issues interact. It is not apparent why the facial validity of the presentment would be relevant in the federal action.

[6] JP Morgan does not explain why there is independent significance to the fact that Milwaukee Mile attempted, and failed, to obtain review of the temporary restraining order decision. As with the temporary restraining order hearing itself, this attempted appeal by Milwaukee Mile came before JP Morgan's honoring of the Board's request for payment.

¶25 Finally, we note that JP Morgan may intend to make an additional argument for intervention as of right. JP Morgan may be suggesting that, regardless whether there is a risk of conflicting rulings, intervention is warranted so that JP Morgan may protect its interest in repayment from the guarantors. However, so far as JP Morgan explains, the repayment obligations are independent of anything at issue in this case, which, as JP Morgan previously acknowledged, is about "the controversy between Milwaukee Mile and [the Board]." Moreover, this argument is not sufficiently developed to warrant a response from this court.

¶26 Thus, for the reasons discussed, we conclude that JP Morgan failed to meet its burden for intervention as of right because it failed to satisfy the third intervention requirement. *See* ***Olivarez***, 296 Wis. 2d 337, ¶12 (a party moving to intervene as of right must show that all four requirements are met).

B. Permissive Intervention

¶27 In the alternative, JP Morgan argues that permissive intervention is warranted. Although permissive intervention is generally a discretionary call, and although the circuit court did not reach this topic, JP Morgan does not ask us to remand for the circuit court to exercise its discretion. Rather, JP Morgan asks this court to direct the circuit court to grant permissive intervention. We need not address whether we have the authority to exercise discretion in this area because we conclude that JP Morgan is not entitled to permissive intervention as a matter of law.

¶28 "While intervention as a matter of right requires a person to be necessary to the adjudication of the action, permissive intervention requires a person to be merely a proper party." ***City of Madison v. WERC***, 2000 WI 39, ¶11

n.11, 234 Wis. 2d 550, 610 N.W.2d 94. Specifically, permissive intervention is governed by WIS. STAT. § 803.09(2), which states, as relevant here:

> [U]pon timely motion anyone may be permitted to intervene in an action when a movant's claim or defense and the main action have a question of law or fact in common.… In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

"[T]he circuit court has discretion to decide whether a movant may be permitted to intervene *when* the movant's claim or defense and the main action have a question of law or fact in common." ***Helgeland***, 307 Wis. 2d 1, ¶120 (emphasis added).

¶29 JP Morgan raises nothing new here, but rather acknowledges that it relies on what it "has already argued" in the intervention-as-of-right context. Given this, we need not discuss this topic in detail. We conclude that JP Morgan's argument for permissive intervention fails for the reasons we have already discussed in the intervention-as-of-right section.

¶30 For example, in the permissive-intervention context, JP Morgan again refers to its payment to the Board pursuant to the letter of credit and "the Guarantors' attempt to overturn the Circuit Court's finding [in federal court] with respect to the sufficiency of the Presentment." As we have already discussed, however, JP Morgan provides insufficient support for its speculation that this topic will arise in the federal action.

¶31 If JP Morgan means to argue that, apart from the federal action, there is a reason for permissive intervention, JP Morgan fails to adequately develop the argument. For instance, on the same day it submitted its motion to intervene, JP Morgan filed a counterclaim and third-party complaint with claims

against the guarantors for repayment under the repayment agreements. However, as we have explained above, JP Morgan does not persuade us that its repayment claims would overlap with the issues here. Stated differently, what is missing from JP Morgan's argument is a specific question of law or fact that will arise with regard to the repayment obligations and that will need to be answered in this case going forward.

¶32 Therefore, we reject JP Morgan's request that we direct the circuit court to allow permissive intervention.

Conclusion

¶33 For the reasons discussed, we affirm the circuit court.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.