



Honorable Mike K. Nakagawa
United States Bankruptcy Judge



Entered on Docket
October 27, 2023

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

* * * * *

In re:

TIMOTHY L. BLIXSETH,

Alleged Debtor.

Case No.: 11-15010-MKN
Chapter 7

TIMOTHY L. BLIXSETH,

Plaintiff,

Adv. Proc. No.: 21-01274-MKN

vs.

MONTANA DEPARTMENT OF
REVENUE,

Defendant.

Date: July 12, 2023
Time: 9:30 a.m.

**ORDER ON AMENDED THIRD PARTY PLAINTIFFS' MOTION TO INTERVENE
PURSUANT TO FRCP 24¹**

On July 12, 2023, the court heard the Amended Third Party Plaintiffs' Motion to Intervene Pursuant to FRCP 24 ("Intervention Motion"), brought by proposed third party plaintiffs Beau Blixseth and George Mack ("Third Party Plaintiffs") in the above-referenced

¹ In this Order, all references to "ECF No." are to the documents filed in the above-captioned bankruptcy proceeding. All references to "AECF No." are to the documents filed in the above-captioned adversary proceeding. All references to "Section" or "§" are to provisions of the Bankruptcy Code, 11 U.S.C. § 101, *et seq.* All references to "Bankruptcy Rule" are to the Federal Rules of Bankruptcy Procedure. All references to "Civil Rule" are to the Federal Rules of Civil Procedure. All references to "FRE" are to the Federal Rules of Evidence.

1 adversary proceeding. The appearances of counsel were noted on the record. After arguments
2 were presented, the matter was taken under submission.

3 **BACKGROUND²**

4 On April 5, 2011 (“Petition Date”), the Montana Department of Revenue (“Montana”),
5 joined by the Idaho State Tax Commission (“Idaho”) and the California Franchise Tax Board
6 (“California”), filed an involuntary Chapter 7 petition (“Involuntary Petition”) against Timothy
7 L. Blixseth, Alleged Debtor, commencing the above-captioned case (“Involuntary Proceeding”).
8 (ECF No. 1). All three petitioning creditors asserted unsecured claims for unpaid taxes owing to
9 their respective States, with \$219,258.00 asserted by Montana, \$1,117,914.00 asserted by Idaho,
10 and \$986,957.95 asserted by California. Commencement of the Involuntary Proceeding spawned
11 additional matters commenced in multiple courts, requiring multiple decisions and orders to be
12 entered by many courts.

13 On June 3, 2021, an order was entered dismissing the Involuntary Proceeding pursuant to
14 Section 303(j). (ECF No. 828).

15 On December 23, 2021, former Alleged Debtor Timothy L. Blixseth (“Blixseth”)
16 instituted the above-captioned adversary proceeding by filing a complaint (“Complaint”) against
17 Montana, alleging three claims:

18 Count I – Judgment Against Defendant MDOR for Reasonable
19 Costs and Attorney’s Fees Pursuant to 11 U.S.C. § 303(i)(1)(A)–
(B)

20 Count II – Judgment Against Defendant MDOR That it
21 Commenced the Involuntary Proceeding in Bad Faith, Damages
22 Proximately Caused by Defendant MDOR’s Bad Faith Bankruptcy
Filing, and Punitive Damages Pursuant to 11 U.S.C. §
303(i)(2)(A)–(B).

23
24 ² Pursuant to FRE 201(b), the court takes judicial notice of all materials appearing on the
25 dockets in the above-captioned bankruptcy case and adversary proceeding. See U.S. v. Wilson,
631 F.2d 118, 119 (9th Cir. 1980). See also Burbank-Glendale-Pasadena Airport Auth. v. City
26 of Burbank, 136 F.3d 1360, 1364 (9th Cir. 1998) (taking judicial notice of court filings in a state
27 court case where the same plaintiff asserted similar claims); Bank of Am., N.A. v. CD-04, Inc.
(In re Owner Mgmt. Serv., LLC Trustee Corps.), 530 B.R. 711, 717 (Bankr. C.D. Cal. 2015)
28 (“The Court may consider the records in this case, the underlying bankruptcy case and public
records.”).

Count III – Judgment Against Counsel³ for Petitioner for Sanction
Pursuant to Fed. R. Bankr. P. 9011(b)–(c)

(AECF No. 1). On December 28, 2022, a certificate of service was filed attesting that a copy of the Complaint and a summons in this adversary proceeding (“303(i) Action”) were served by first-class mail. (AECF No. 4).⁴

On January 25, 2022, Montana filed a motion to dismiss the 303(i) Action (“Dismissal Motion”). (AECF No. 6).

On July 27, 2022, an order was entered granting in part and denying in part the Dismissal Motion (“Dismissal Motion Order”). (AECF No. 30).

On August 10, 2022, Montana filed a Notice of Appeal regarding the Dismissal Motion Order (“Dismissal Order Appeal”) (AECF No. 34) along with a motion to stay all litigation related to the 303(i) Action until the appeal is decided (“Stay Motion”). (AECF No. 35). The appeal was heard by the Bankruptcy Appellate Panel (“BAP”) for the Ninth Circuit Court of Appeals (“Ninth Circuit”).

³ Montana’s counsel is not named as a defendant in the complaint.

⁴ Since the commencement of the Involuntary Proceeding as well as the 303(i) Action, the bankruptcy court’s orders entered in the Involuntary Proceeding have included the following: (1) Order Granting Motion to Dismiss Involuntary Case entered July 10, 2013 (ECF No. 528); (2) Order on Motion for Order: (1) Lifting Stay; (2) Finding Violation of 2nd Stay Order; and (3) for Protective Order, entered December 20, 2017 (ECF No. 728); (3) Order on Montana Department of Revenue’s Motion for Relief from Judgment entered June 3, 2021 (ECF No. 825); (4) Order on Motion to Strike Montana Department of Revenue’s Motion for Relief From Judgment and Memorandum in Support Thereof, entered June 3, 2021 (ECF No. 827); and (5) Order on Motion Confirming Dismissal of Involuntary Petition, or, In the Alternative, Motion to Dismiss Involuntary Petition for Want of Prosecution Pursuant to 11 U.S.C. §303(j) (ECF No. 828). The orders entered by this bankruptcy court in the 303(i) Action have included the following: (1) Order on Plaintiff’s Motion Pursuant to Federal Rule of Bankruptcy Procedure 9011 and this Court’s Inherent Power under 11 U.S.C. §105(a) for Sanctions Against the Montanta (sic) Department of Revenue, entered July 27, 2022 (AECF No. 28); (2) Order on Montana Department of Revenue’s Motion to Dismiss Adversary Proceeding, entered July 27, 2022 (AECF No. 30); and Order on Montana Department of Revenue’s Motion to Strike Application for Entry of Default, entered December 21, 2022 (AECF No. 113). Among other things, the aforementioned orders set forth in detail the procedural history, as well as the factual and legal dispositions rendered to date in the Involuntary Proceeding and the 303(i) Action. As the parties have notice of those orders, and to avoid repetition, those orders are incorporated by reference in the instant order.

1 On August 24, 2022, Blixseth filed a Notice of Cross-Appeal and Statement of Election
2 (“Cross-Appeal”). (AECF No. 56).

3 On October 13, 2022, the BAP entered an order dismissing the Dismissal Order Appeal
4 (“BAP Dismissal Order”). (AECF No. 106).⁵

5 On October 27, 2022, Montana filed a limited answer to the Complaint in this 303(i)
6 Action. (AECF No. 102).

7 On October 31, 2022, the BAP entered an order dismissing Blixseth’s Cross-Appeal.
8 (AECF No. 110).

9 On November 14, 2022, the BAP entered an order denying the Stay Motion. (AECF No.
10 108).⁶

11 On December 22, 2022, Montana filed its first amended limited answer to the Complaint
12 in this 303(i) Action. (AECF No. 116).

13 On June 5, 2023, the alleged Third Party Plaintiffs filed the instant Intervention Motion.
14 (AECF No. 135). Attached as Exhibit “1” to the Intervention Motion is a copy of a “Third
15 Parties’ Complaint,” to which is attached a copy of the Complaint filed by Blixseth commencing
16 this 303(i) Action.

17 On June 28, 2023, Montana filed its objection (“Objection”) to the Intervention Motion
18 along with a declaration of Lynn Hamilton Butler (“Butler Declaration”). (AECF Nos. 144 and
19 145). Attached to the Butler Declaration is a copy of the Intervention Motion and a copy of the
20 Dismissal Order Appeal (which includes a copy of the Dismissal Motion Order).

21 On June 29, 2023, Blixseth filed a reservation of rights regarding Montana’s Objection to
22 the Intervention Motion. (AECF No. 147).

23 On July 5, 2023, the alleged Third Party Plaintiffs filed a reply in support of their
24 Intervention Motion (“Reply”). (AECF No. 148). Attached as Exhibit “1” to the Reply is a copy

25
26 ⁵ Montana appealed the BAP Dismissal Order to the Ninth Circuit, which appeal was
assigned Case No. 22-60046.

27
28 ⁶ Montana apparently did not obtain a stay of all litigation from the Ninth Circuit pending
its appeal of the BAP Dismissal Order.

1 of a Declaration of John Doubek (“Doubek Declaration”), counsel for the alleged Third Party
 2 Plaintiffs, that authenticates a copy of an appellate brief filed by Blixseth on May 31, 2023, in
 3 response to Montana’s pending appeal in the Ninth Circuit of the BAP Dismissal Order.

4 DISCUSSION

5 This adversary proceeding was brought by the Alleged Debtor under Section 303(i),
 6 which provides as follows:

7 If the court dismisses a petition under this section other than on consent of all
 8 petitioners and the debtor, and **if the debtor** does not waive the right to judgment
 under this subsection, the court may grant judgment—

9 (1) against the petitioners and **in favor of the debtor** for—

(A) costs; **or**

(B) a reasonable attorney’s fee; **or**

10 (2) against any petitioner that filed the petition in bad faith, for—

(A) any damages proximately caused by such filing; **or**

11 (B) punitive damages.

12 11 U.S.C. § 303(i)(1)-(2) (emphasis added).⁷

13 As previously listed, the Complaint filed by the Alleged Debtor is framed as three
 14 separate “counts.” Count I is against Montana and seeks reasonable costs and attorney’s fees
 15 pursuant to Section 303(i)(1)(A)–(B). Count II also is against Montana and seeks compensatory
 16 and punitive damages for alleged bad faith pursuant to Section 303(i)(2)(A)–(B). Count III is
 17 against Montana’s legal counsel and seeks sanctions under Bankruptcy Rule 9011(b)–(c).

18 The proposed “Third Parties’ Complaint” is brought by Beau Blixseth (son of the
 19 plaintiff Blixseth) and George Mack (accountant for plaintiff Blixseth). They allege that they
 20 were “damaged by the tortious acts and omissions by [Montana] and wrongful Chapter 11
 21 bankruptcy instituted by [Montana].”⁸ Third Parties’ Complaint at 2:19-22. (emphasis added).

22 Based on the alleged conduct, Beau Blixseth alleges that he suffered losses in excess of \$3

23 ⁷ Because Sections 303(a)(1) and 303(a)(2) are in the disjunctive, it is not clear whether
 24 Congress intended both forms of remedy to be available. Likewise, because Sections
 25 303(a)(1)(A) and 303(a)(1)(B) are in the disjunctive, it is not clear whether both costs and
 26 attorney fees are available. Similarly, because Sections 303(a)(2)(A) and 303(a)(2)(B) are in the
 disjunctive, it is not clear whether both actual damages and punitive damages are available. It is
 not necessary to address this concern at this stage, if at all.

27 ⁸ There was no Chapter 11 proceeding at all. The Involuntary Petition was filed under
 28 Chapter 7.

1 million, while George Mack alleges losses from employment and investments in excess of \$1.95
2 million. Id. at 2:23-27.

3 By the instant Intervention Motion, the alleged Third Party Plaintiffs seek to become
4 parties to the 303(i) Action pursuant to Civil Rule 24, which is applicable under Bankruptcy Rule
5 7024. In pertinent part, Civil Rule 24 provides as follows:

6 (a) **Intervention of Right.** On a timely motion, the court must permit
7 anyone to intervene who:

- 8 (1) is given an unconditional rights to intervene by a federal statute; or
9 (2) claims an interest relating to the property or transaction that is the
10 subject of the action, and is so situated that disposing of the action **may**
as a practical matter impair or impede the movant’s ability to
protect its interest, unless existing parties adequately represent that
11 interest.

12 (b) **Permissive Intervention.**

13 (1) In General. On timely motion, the court may permit anyone to
14 intervene who:

15 (A) is given a conditional right to intervene by a federal statute; or

16 (B) has a claim or defense that **shares with the main action a**
common question of law or fact.

17 (2) By a Governmental Officer or Agency. On a timely motion, the
18 court may permit a federal or state governmental office or agency to
19 intervene if a party’s claim or defense is based on:

20 (A) a statute or executive order administered by the officer or
21 agency; or

22 (B) any regulation, order, requirement, or agreement issued or made
23 under the statute or executive order.

24 (3) Delay or Prejudice. **In exercising its discretion, the court must**
consider whether the intervention will unduly delay or prejudice
the adjudication of the original parties’ rights.

25 FED.R.CIV.P. 24 (emphasis added). The party seeking to intervene as a matter of right
26 (“mandatory intervention”) under Civil Rule 24(a) bears the burden of proof. See United States
27 v. Alisal Water Corp., 370 F.3d 915, 919 (9th Cir. 2004); Williams v. Sisolak, 2022 WL
28 2819842, at *9 (D. Nev. July 18, 2022). The party seeking to intervene by permission
29 (“permissive intervention”) under Civil Rule 24(b) also bears the burden of proof. See San Jose
Mercury News, Inc. v. U.S.Dist.Court, 187 F.3d 1096, 1100 (9th Cir. 1999); Iowa Pork
Producers Assoc. v. Bonta, 2022 WL 1042561, at *5 (C.D. Cal. Feb. 28, 2022).

1 Not surprisingly, Montana objects to attempts by the alleged Third Party Plaintiffs to use
2 the 303(i) Action brought by Blixseth to obtain their own compensatory and punitive damages
3 against Montana. Montana asserts a variety of arguments, including that it is protected by
4 sovereign immunity under the Eleventh Amendment, that the alleged Third Party Plaintiffs lack
5 standing to recover damages under Section 303(i), that tort actions under state law are pre-
6 empted by Section 303(i), and that neither mandatory intervention under Civil Rule 24(a) nor
7 permissive intervention under Civil Rule 24(b) applies. As to the later, the alleged Third Party
8 Plaintiffs simply do not specify the basis on which the Intervention Motion should be resolved.
9 More important, the Intervention Motion is not supported by any affidavits or declarations
10 providing an evidentiary basis for granting the requested relief.

11 The court, having considered the written and oral arguments of counsel, along with the
12 record in this proceeding, concludes that the Intervention Motion should be denied. Several
13 reasons lead to this conclusion.

14 First, the alleged Third Party Plaintiffs fail to offer any evidence to support the findings
15 required for mandatory intervention or permissive intervention. The Third Parties' Complaint
16 attached to the Intervention Motion is not verified and therefore has no evidentiary value. While
17 it contains arguments and allegations of their counsel, the arguments and allegations are not
18 evidence. Similarly, the Doubek Declaration offers only a copy of an appellate brief filed with
19 the Ninth Circuit by Blixseth but that brief likewise provides arguments and allegations at best.
20 Thus, as a threshold matter, there is no evidence on which the court can conclude that exclusion
21 as a party in the 303(i) Action "**may as a practical matter impair or impede the movant's**
22 **ability to protect its interest**" as required for mandatory intervention under Civil Rule 24(a).
23 Likewise, there is no evidence on which the court could conclude that the alleged Third Party
24 Plaintiffs have a claim or defense that "**shares with the main action a common question of law**
25 **or fact**" as required for permissive intervention under Civil Rule 24(b). Indeed, Blixseth seeks
26 relief against Montana under Section 303(i), while the alleged Third Party Plaintiffs assert that
27 they were "damaged by tortious acts and omissions" by Montana. Moreover, the factual basis
28

1 for the damages they seek is entirely separate from the remedies sought by Blixseth. Thus, the
2 Intervention Motion fails because the moving parties have not met their burden of proof.

3 Second, mandatory intervention does not apply. The moving parties identify no federal
4 statute giving them an “unconditional right to intervene” in this 303(i) Action because no such
5 statute exists. See Civil Rule 24(a)(1). The moving parties also identify no interest that they
6 could assert against Montana that would be impaired or impeded if the 303(i) Action proceeds.
7 See Civil Rule 24(a)(2). Unlike Blixseth, the alleged Third Party Plaintiffs point to no provision
8 similar to Section 106(a)(3), that would permit them to obtain an order or judgment for damages
9 against Montana for “tortious acts and omissions.” Compare Dismissal Motion Order at 20:3 to
10 23:5.⁹ In other words, whatever right of action against Montana that the moving parties may
11 have are not impaired or impeded by the 303(i) Action. Thus, mandatory intervention under
12 Civil Rule 24(a) does not apply.

13 Third, permissive intervention is not warranted. The moving parties identify no federal
14 statute giving them a conditional right to interest in this 303(i) Action, as no such statute exists.
15 See Civil Rule 24(b)(1). The moving parties also identify no claim in the Third Parties’
16 Complaint that shares a common question of law or fact with the 303(i) Action. Whatever state
17 law tort theory that they allege against Montana is entirely separate from the federal statutory
18 claim asserted by Blixseth under Section 303(i). Similarly, whatever may be the basis for the \$3
19 million losses suffered by Beau Blixseth and the \$1.95 million claimed by George Mack is
20 entirely separate from the remedies available under Section 303(i) that must be proven by

21
22 ⁹ In their Reply and at oral argument, the alleged Third Party Plaintiffs cited the recent
23 decision in Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 143 S.Ct.
24 1689 (2023). While the Court concluded that Section 106(a)(3) unequivocally abrogates
25 sovereign immunity for federally recognized Native American Indian tribes, id. at 1702, the
26 decision simply does not address whether intervention is appropriate under Civil Rule 24 in a
27 statutory bankruptcy action against a state entity. Moreover, Section 106(a)(5) also provides that
28 “Nothing in this section shall create any substantive claim for relief or cause of action not
otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy
law.” In other words, the abrogation of sovereign immunity under Section 106(a)(1) for claims
under Section 303(i) does not create any substantive claims for relief under state law for non-
bankruptcy parties.

1 Blixseth. In other words, there are no common questions of law nor common questions of fact
2 that are shared by the Third Party Plaintiffs and Blixseth. Thus, permissive intervention under
3 Civil Rule 24(a) is not warranted.

4 Fourth, the language of Section 303(i) focuses on the rights of the alleged debtor named
5 in an involuntary bankruptcy petition that has been dismissed, and the right of the alleged debtor
6 to waive its right to a judgment seeking relief under Section 303(i).¹⁰ The language of Section
7 303(i) identifies no other party in interest that can obtain the relief provided under subsections
8 (1) and (2).¹¹ As the alleged Third Party Plaintiffs are not the alleged debtor against whom the
9 Involuntary Proceeding was commenced, they are not entitled to relief under Section 303(i). See
10 Matter of 8Speeds8, Inc., 921 F.3d at 1196.

11 Fifth, the standing of the alleged Third Party Plaintiffs under Section 303(i) is not only
12 absent, but the purported damages claimed for “tortious acts and omissions” also are not
13 available under principles of federal preemption. In Miles, the Ninth Circuit panel observed that
14 “state law tort causes of action...are completely preempted by 11 U.S.C. § 303(i).” 430 F.3d at
15 1093 n.6. While there was some disagreement within the circuit panel whether federal
16 preemption analysis should be applied in an action by a state court or applied upon removal of an
17 action to federal court, see id. at 1095-96, there was no disagreement that Section 303(i)
18 preempts state law causes of action. See also Steward Financial, LLC v. Bral (In re Bral), 622
19 B.R. 737, 743-45 (B.A.P. 9th Cir. 2020). Thus, if the alleged Third Party Plaintiffs commence
20 separate proceedings against Montana in state court or any other forum, Montana is free to raise

21 _____
22 ¹⁰ Because Section 303(i) provides a remedy only to the alleged debtor, it also provides
23 the remedy only if the alleged debtor does not waive the right to a judgment. The statute simply
24 does not address the ability of a non-debtor to waive the right to a judgment because no such
25 right exists.

26 ¹¹ Moreover, there is no suggestion by the alleged Third Party Plaintiffs or even Blixseth
27 that the alleged Third Party Plaintiffs had any role in obtaining the dismissal of the Involuntary
28 Proceeding. Compare Vibe Micro, Inc. v. Sig Capital, LLC (Matter of 8Speeds8, Inc.), 921 F.3d
1193, 1199-1200 (9th Cir. 2019) (Bennett, J., dissenting) (the Ninth Circuit's prior decision in
Miles v. Okun (In re Miles), 430 F.3d 1083 (9th Cir. 2005) "says nothing about a non-debtor
who obtains a dismissal of the debtor and requests that damages be awarded *to the debtor* under
§ 303(i)(2).”).

1 preemption under Section 303(i). In other words, intervention in the instant 303(i) Action offers
2 no legal benefit to the alleged Third Party Plaintiffs.

3 Finally, the court considers the history of this particular proceeding. The Involuntary
4 Petition that commenced the bankruptcy proceeding against Blixseth originally was filed on
5 April 5, 2011, jointly by Montana, as well as the tax authorities for Idaho and California. After
6 multiple proceedings in the bankruptcy court and on appeal, Blixseth eventually reached a
7 settlement with Idaho and California tax authorities, leaving Montana as the only petitioner
8 seeking to keep the Involuntary Proceeding alive. Ultimately, the Involuntary Proceeding was
9 dismissed on June 3, 2021, under Section 303(j). Eighteen months later, Blixseth commenced
10 this 303(i) Action. Whatever may have been the terms of the settlement reached by Blixseth
11 with Idaho and California, the alleged damages claimed by the alleged Third Party Plaintiffs
12 arguably may have been caused, if at all, when Idaho and California joined with Montana to file
13 the Involuntary Petition more than a decade earlier. Presumably, whatever releases were
14 included in those settlements reached with Blixseth would not have included releases of the
15 claims against Idaho and California that could be alleged by the Third Party Plaintiffs. Under
16 these circumstances, whatever claims, if any, that the Third Party Plaintiffs have against
17 Montana or any other non-debtor parties are not encompassed by the 303(i) Action.¹²

18 **IT IS THEREFORE ORDERED** that the Amended Third Party Plaintiffs' Motion to
19 Intervene Pursuant to FRCP 24, brought by alleged third party plaintiffs Beau Blixseth and
20 George Mack, Adversary Docket No. 135, be, and the same hereby is, **DENIED**.

21
22 Copies sent via CM/ECF ELECTRONIC FILING

23 Copy sent via BNC to:
24 TIMOTHY L. BLIXSETH
25 1605 73RD AVE., NE
26 MEDINA, WA 98039-2330

26
27 ¹² To the extent that Civil Rule 24(b)(3) requires consideration of undue delay or
28 prejudice to the rights of Montana and Blixseth in the 303(i) Action, the court concludes that
permissive intervention by the alleged Third Party Plaintiffs would result in both delay and
prejudice to the existing parties.

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