

JUN 15 1999

GINO J. AGNELLO
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
No. 99-2158

DOROTHY GAUTREAUX, et al.,	)	Appeal from the United States
	)	District Court for the Northern
Plaintiffs,	)	District of Illinois, Eastern Division
	)	
v.	)	
	)	
CHICAGO HOUSING AUTHORITY, et al.,	)	66 C 1459
	)	
Defendants,	)	
	)	
Appeal of: LAKEFRONT COMMUNITY	)	
ORGANIZATION.	)	Chief Judge Marvin Aspen

**LAKEFRONT COMMUNITY ORGANIZATION'S RESPONSE TO
THE RECEIVER'S MOTION TO DISMISS**

Now comes the Lakefront Community Organization (hereinafter "LCO"), through its attorneys, the Legal Assistance Foundation of Chicago, and respectfully submits the following response to the Court-appointed Receiver's motion to dismiss this appeal.¹

PROCEDURAL BACKGROUND

- November 23, 1998 LCO files an emergency motion to intervene along with a motion to enjoin the demolition of the Lakefront buildings or, in the alternative, to obtain *before the demolition* an order requiring the defendants to construct replacement housing units within a reasonable and definite time thereafter. Exhibits A-D.
- December 10, 1998 This Court denies LCO's motion to intervene on the grounds that the request for emergency injunctive relief is untimely. Exhibit E.
- December 12, 1998 CHA demolishes the Lakefront buildings.

¹On June 7, 1999, LCO filed a motion to extend the deadline for responding to the Receiver's motion to ten days after the district court rules on LCO's Rule 59(e) motion. Since this court has not yet ruled on LCO's motion to extend, LCO is filing its response on June 15 in order to comply with the briefing schedule this Court set on June 3, 1999.

- February 12, 1999 LCO files its second motion to intervene in an effort to obtain a post-demolition remedy for CHA's breach of the 1995 contract in which it agreed *not* to demolish the Lakefront buildings before completing construction on 341 replacement housing units. Exhibits F-H.
- April 7, 1999 This Court denies LCO's second motion to intervene but states no reasons for its decision. Exhibit I.
- April 9, 1999 The April 7 order is docketed. Exhibit I.
- April 28, 1999 LCO's attorneys learn for the first time about this Court's April 7 order and obtain a copy of the order from chambers. Exhibit J, at ¶ 3.
- April 29, 1999 LCO files a motion for clarification of the April 7 order. Exhibit J.
- May 6, 1999 This Court grants LCO's motion for clarification, and states that it denied the second motion to intervene for two reasons: (1) the Receiver (which has sole authority over the construction of the replacement housing units) cannot be forced to comply with the terms of a contract it never signed; and (2) CHA had no right to enter into a binding agreement with LCO regarding the construction of non-elderly public housing. Exhibit K.
- May 10, 1999 LCO files a protective Notice of Appeal from this Court's April 7 order denying the second motion to intervene.
- May 20, 1999 LCO files a timely Rule 59(e) motion to alter or amend this Court's May 6, 1999 order.

ARGUMENT

I. LCO's Failure To Appeal The Denial Of Its First Petition To Intervene Did Not Deprive This Court Of Jurisdiction To Review The April 7 Order Denying The Second Petition To Intervene.

Relying upon *B.H. v. Murphy*, 984 F.2d 196 (7th Cir. 1993), the Court-appointed Receiver ("Receiver") argues that LCO's failure to appeal the December 10, 1998 order denying the first motion to intervene deprives this Court of jurisdiction to review the April 7, 1999 order denying

the second motion to intervene. Receiver's Motion to Dismiss, at ¶¶ 12-14. In *B.H.*, the Cook County Public Guardian (Patrick Murphy) filed a motion to intervene. When the court denied the motion, he did not appeal. 984 F.2d at 198. Seven months later, however, he filed a second motion to intervene that was "a virtual carbon copy of the first." *Id.* at 199. Then he appealed from the court's decision to deny the second motion. The Seventh Circuit dismissed the Public Guardian's appeal on the grounds that it was untimely, and criticized "Mr. Murphy's improper attempt, by filing a *virtually identical* intervention motion, to circumvent his failure to appeal the first motion's denial within the required time." *Id.* (emphasis added).

The Receiver's reliance upon *B.H.* is misplaced. LCO's second motion to intervene was not a "virtual carbon copy" of its first, and the circumstances under which LCO first sought intervention were different from the circumstances under which it filed a second motion to intervene. On November 23, 1998 (the date on which LCO filed its first motion), LCO was seeking *emergency* injunctive relief and trying to prevent the demolition of the Lakefront buildings until the promised replacement housing was built, or at least until some timetable was established for building it. By February 12, 1999 (the date on which LCO filed its second motion), the buildings had been demolished and LCO was seeking a remedy for that breach of contract. The demolition of the Lakefront buildings, therefore, constituted a change in circumstances that justified the renewed motion for intervention.

Furthermore, the district court order denying LCO's second motion to intervene was not a mere reinstatement of its order denying the first motion. The first motion was denied on the grounds that it was untimely. Exhibit E. The second motion was denied on two entirely different grounds: (1) the Receiver could not be forced to comply with the terms of a contract it had not

signed, and (2) the CHA lacked the authority to enter into the contract. Exhibit I. The later order, therefore, constituted a fresh evaluation of LCO's motion for intervention, not a reiteration of the earlier order.

Thus, the relevant case is not *B.H.*, but a trio of appellate court decisions recognizing that a second (or even a third) motion to intervene can be sufficiently different from its predecessors to constitute a separate, and independently reviewable, claim. In the first of these cases, *Hodgson v. United Mine Workers of America*, 473 F.2d 118 (D.C. Cir. 1972), individual members of the United Mine Workers of America ("UMWA") moved to intervene in a suit brought by the Secretary of Labor against the UMWA. On March 10, 1972, the district court denied this motion on the grounds that it was untimely. 473 F.2d at 122. On June 5, the members filed a second motion to intervene, which was denied on June 20. *Id.* at 123. Like the earlier March 10 order, the June 20 order stated that the motion was untimely, but it also stated that the Secretary of Labor adequately represented the members' interests. *Id.* The members then filed a timely appeal from the June 20 order. *Id.* Like the Receiver in the instant case, the UMWA argued that the members' only recourse was to appeal the first denial, not to file (and appeal the dismissal of) a second motion. *Id.* In addressing this argument, the appellate court held that:

In the final analysis, the question of jurisdiction must be resolved by ascertaining whether the June 20 order, from which this appeal was taken, was merely a reinstatement of the court's March 10 ruling or whether it constituted a new determination by the District Court reached under circumstances materially changed from those existing in March. If the later order was only an attempt to revive the earlier order, it did not start the time for appeal all over again. But if, on the other hand, it was in essence a new decision on appellant's motion for intervention, the District Court's June 20 denial is properly before us.

Id. at 125. Ultimately, the court found that the June 20 order “constituted a fresh evaluation of the intervention application, well within the discretionary power of the District Court to make, and amenable to review on the merits by this court.” *Id.* at 127.

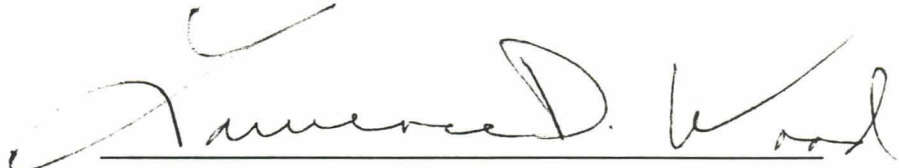
Relying on *Hodgson*, the court in *United States E.P.A. v. City of Green Forest, Arkansas*, 921 F.2d 1394, 1401 (8th Cir. 1990), *cert. denied sub nom. Work v. Tyson Foods*, 502 U.S. 956 (1991), held that it also had jurisdiction to review the denial of a second motion to intervene filed *after* the deadline for appealing the denial of the first motion to intervene had passed. Residents of the City of Green Forest moved to intervene in the EPA’s action against the City. 921 F.2d at 1399. The district court denied their motion on December 3, 1987. *Id.* at 1400. More than a year later, the EPA entered into a proposed consent decree with the City, and the citizens filed a second petition to intervene. *Id.* This petition was also denied on March 24, 1989. *Id.* On April 20, 1989, the residents appealed from the orders denying both their first and second motions to intervene. *Id.* The appeal from the order denying the first motion was dismissed as untimely, and the appellee urged the court to dismiss the appeal from the second order as well, claiming that it was a “back door attempt” to revive the trial court’s earlier order so as to start the time for appeal running anew. *Id.* at 1401. The appellate court, however, rejected this argument. “Consistent with *Hodgson*, we hold that the existence of the proposed consent decree resulted in a change in circumstances that made a renewed motion for intervention legitimate.” *Id.*

Finally, the court in *Meek v. Metropolitan Dade County, Florida*, 985 F.2d 1471, 1477 (11th Cir. 1993), held that it had jurisdiction to review the denial of the appellants’ *third* successive motion to intervene. R.H. Swann and David Sampson moved to intervene as defendants in an action challenging Dade County’s electoral system, but the district court denied

this motion on January 14, 1992. 985 F.2d at 1475. On May 27, the court denied a second motion to intervene, which Swann and Sampson had filed in order to preserve their ability to take an appeal if the court ruled against the County and the County did not appeal. *Id.* at 1476. On August 14, the district court did rule against the County, and the County Commission decided not to appeal. *Id.* On September 1, 1992, Swann and Sampson filed, and the district court denied, a post-judgment motion to intervene for purposes of appeal. *Id.* On September 11, they appealed from the September 1 order. *Id.* The appellees moved to dismiss on the grounds that Swann's and Sampson's failure to appeal from either of the orders denying their first two motions to intervene precluded appeal on the merits of the intervention issue. *Id.* at 1477. Relying on both *Hodgson* and *Green Forest*, however, the court found that "Dade County's subsequent decision to forego its right to appeal the district court's [decision] was a sufficient change in circumstances to justify a renewed motion for intervention." *Id.*

Under the standards set forth in *Hodgson*, *Green Forest*, and *Meeks*, the district court's April 7 order denying LCO's second motion to intervene is amenable to review on the merits. After the first motion to intervene was denied, CHA demolished the Lakefront buildings, and this demolition constituted a change in circumstances that justified LCO's decision to file a second motion. *See Green Forest*, 921 F.2d at 1401. Furthermore, the grounds (set forth in the May 6 clarification of the April 7 order) for denying the second motion to intervene were entirely different from the grounds set forth in the order denying the first motion. Therefore, the order denying the second motion constituted, in the words of the *Hodgson* court, "a fresh evaluation of the intervention application, well within the discretionary power of the District Court to make, and amenable to review on the merits by this court." *Hodgson*, 473 F.2d at 127.

WHEREFORE, LCO respectfully requests that this Court deny the Receiver's motion to dismiss.

A handwritten signature in black ink, appearing to read "Lawrence D. Wood", is written over a horizontal line.

One of the Attorneys for the LCO

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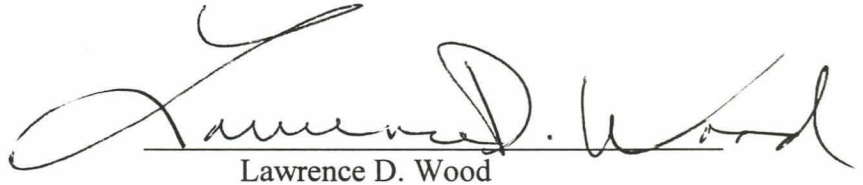
CERTIFICATE OF SERVICE

The undersigned, as attorney, hereby certifies that on **June 15, 1999**, he sent (by facsimile) *Lakefront Community Organization's Response to the Receiver's Motion to Dismiss the Appeal* to the parties listed below (without exhibits). On **June 16, 1999**, the undersigned hand-delivered to each of the attorneys listed below, at their respective addresses, the response brief with the exhibits.

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