**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

DOROTHY GAUTREAUX, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	66 C 1459
	)	
CHICAGO HOUSING AUTHORITY, et al.,	)	Chief Judge Marvin Aspen
	)	
Defendants.	)	

LAKEFRONT COMMUNITY ORGANIZATION'S REPLY IN SUPPORT OF ITS RULE 59(e) MOTION TO ALTER OR AMEND THE JUDGMENT ENTERED ON MAY 6, 1999

Now comes the Lakefront Community Organization (hereinafter "LCO"), through its attorneys, the Legal Assistance Foundation of Chicago, and replies to the Court-appointed Receiver's statement in response to LCO's motion to alter or amend this Court's order (dated May 6, 1999) denying LCO's second motion to intervene.

PROCEDURAL BACKGROUND

The following chronology sets forth LCO's attempts to intervene in this case:

- 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.

- December 10, 1998 — This Court denies LCO's motion to intervene on the grounds that the request for emergency injunctive relief is untimely.

- December 12, 1998 — CHA demolishes the Lakefront buildings.

- 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 the Receiver built at least 341 replacement housing units.
- April 7, 1999 — This Court denies LCO's second motion to intervene but states no reasons for its decision.
- April 9, 1999 — The April 7 order is docketed.
- 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.
- April 29, 1999 — LCO files a motion for clarification of the April 7 order.
- May 6, 1999 — This Court grants LCO's motion for clarification, and states that it has 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.
- 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

The Receiver first argues that LCO waived its right to challenge the denial of its second motion to intervene by not appealing the denial of its first motion. Receiver's Statement, at 5-6. This argument lacks merit because the demolition of the Lakefront buildings constituted a material change in circumstances that justified LCO's decision to file the second motion. Furthermore, the grounds (first set forth in the May 6 clarification order) on which this Court denied the second motion were entirely different form the grounds on which it denied the first motion. Therefore, the later order constituted a fresh evaluation of the intervention application, as opposed to a mere repetition of the earlier order. The Receiver contends that this Court erred in reaching the merits of LCO's second motion to intervene (Receiver's Statement, at 6), and made another mistake in granting LCO's motion for clarification and setting forth its reasons for denying the motion (*id.* at 7 n.3). The Receiver made no such contentions when the Court took those actions, and its revisionist approach now merely highlights the weakness of its argument. The fact is that this Court denied LCO's second motion to intervene on the merits (instead of treating it as a belated attempt to revive the first motion). In doing so, this Court issued a new decision, and it is that new decision that LCO's Rule 59(e) motion now properly challenges.

The Receiver also argues that LCO's motion to alter or amend the May 6 order does not comply with the essential elements of Rule 59(e). The cases upon which the Receiver relies in support of this argument, however, are inapposite. LCO's motion should be granted because this Court failed to apply the proper 12(b)(6) standard in assessing the sufficiency of LCO's complaint.

I. LCO Did Not "Waive" Its Right To File A Second Motion To Intervene By Not Appealing This Court's Order Denying The First Motion.

Relying upon *B.H. v. Murphy*, 984 F.2d 196 (7th Cir. 1993), the Receiver argues that LCO's failure to appeal this Court's denial of the first motion to intervene precludes LCO from filing a second motion to intervene. Receiver's Statement, at 5-6. 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 he filed a second motion to intervene that was "a virtual carbon copy of the first." *Id.* at 199. The court denied the second motion and the

Public Guardian appealed. *Id.* The Seventh Circuit dismissed the 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 far 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, this Court's order denying LCO's second motion to intervene was not a mere reiteration of its order denying the first motion. The first motion was denied on the grounds that it was untimely. The second motion was denied on the grounds that the Receiver could not be forced to comply with the terms of a contract it had not signed, and that CHA lacked the authority to enter into the contract. Therefore, the April 7 order (subsequently clarified on May 6) constituted a fresh evaluation of LCO's motion for intervention. It was, in essence, a new decision that LCO has every right to challenge through a Rule 59(e) motion.

The relevant authority in this 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 ("Secretary") against the UMWA to lift allegedly unlawful trusteeships. In support of their motion, the members relied upon a case in which another district court had been ordered to let a UMWA member intervene in a suit brought by the Secretary to challenge UMWA elections. 473 F.2d at 122. (This election case had been tried and was under advisement when the court was ordered to allow intervention.) *Id.*

On March 10, 1972, the district court denied the members' motion to intervene on the grounds that it was untimely. *Id.* On June 5, the members filed a second motion to intervene. The district court denied this motion on June 20, and the members filed a timely appeal. *Id.* at 123. The UMWA moved to dismiss and argued that the appellate court had no jurisdiction to hear the appeal. *Id.* In addressing that 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 (emphasis added). The Court then noted that in the time between the denial of the first motion to intervene and the filing of the second motion, two significant events had occurred: (1)

the district court had found the trusteeships invalid and asked the Secretary to file a proposed decree; and (2) an opinion was entered in the election case, and "the nature of the remedial measures to be formulated in that case . . . was in great part contingent on the nature of the resolution achieved in the trusteeship litigation." *Id.* at 126. Taken together, said the Court, these two events substantially changed the context in which the members brought their second motion to intervene. *Id.* The Court also focused on the fact that the order denying the second motion stated not just that the motion was untimely, but that the Secretary adequately represented the members' interests. *Id.* "Surely, with the inclusion of that additional reason in the June 20 order, ostensibly in light of the changed circumstances, it cannot be seriously contended that the court merely vacated and reinstated the March 10 ruling." *Id.* Accordingly, 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 residents filed a second motion to intervene. *Id.* This motion was also denied. *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 the second motion to intervene was merely 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 their 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 any 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 *Meek*, it is clear that LCO did not, as the Receiver contends, "waive" its right to file a second motion to intervene. After the first motion to intervene was denied, CHA demolished the Lakefront buildings. (Therefore, any appeal of the order denying the first motion to intervene – which was filed in an effort to prevent the demolition or, in the alternative, to obtain *before the demolition* an order setting forth a timetable for building replacement housing units – would have been dismissed as moot.) That demolition, however, 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 Court's 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. Although the Receiver now contends that the Court never needed to state its grounds (Receiver's Statement, at 6 and 7 n.3), it was well within this Court's discretion to do so. *Hodgson*, 473 F.2d at 127. The order denying the second motion to intervene, therefore, constitutes a new decision that may be challenged by LCO's Rule 59(e) motion.

II. LCO's Rule 59(e) Motion Was Timely Filed

The Receiver argues that LCO's motion for clarification of this Court's April 7 order was untimely under Rule 59(e), and must therefore be viewed as a Rule 60(b) motion. Receiver's Statement, at 7. According to the Receiver, therefore, LCO's pending motion challenging the order granting the motion for clarification must be viewed as yet another Rule 60(b) motion. *Id.* This argument misses the point.

Whether LCO's motion for clarification is treated as a Rule 59(e) motion (because none of LCO's attorneys received a copy of the order denying the second motion to intervene until three weeks after it was issued) or a Rule 60(b) motion (because the time to file a Rule 59(e) motion may not be extended for any reason), the fact is that the Court granted the motion. In doing so, the Court set forth, for the very first time, its reasons for denying LCO's second motion to intervene, thereby resolving a genuine ambiguity in the April 7 order. Accordingly, the May 6 order constituted a new judgment, and a new ten-day period for filing a Rule 59(e) motion began to run. *See Charles v. Daley*, 799 F.2d 343, 348 (7th Cir. 1986). Even the Receiver acknowledges that *Charles* "supports an argument that the 'clarification' set out in the May 6 order constituted an amendment to the April 7 order that permitted a new Rule 59(e) motion to be filed." Receiver's Statement, at 8 n.4. Accordingly, LCO's Rule 59(e) motion is timely.

III. LCO's Rule 59(e) Motion To Alter The May 6 Judgment Should Be Granted

"Rule 59(e) allows a party to direct the district court's attention to . . . a manifest error of law or fact, and enables the court to correct its own errors and thus avoid unnecessary appellate procedures." *Moro v. Shell Oil Co.*, 91 F.3d 872, 876 (7th Cir. 1996). Here the Court pointed to no failure on LCO's part to satisfy the intervention requirements of Rule 24. Instead, the Court assessed a set of facts different from those alleged in LCO's complaint, and concluded that LCO could not as a matter of law prevail on those facts.

In other words, in denying the LCO's Second Motion To Intervene, the Court failed to judge LCO's complaint by the proper Rule 12(b)(6) standard. *Lake Investors Dev. Group v. Egidi Dev. Group*, 715 F.2d 1256, 1258 (7th Cir. 1983). A motion to intervene "should not be dismissed unless it appears to a certainty that the intervenor is not entitled to relief under any set of facts which could be proved under the complaint." *Id.*, *see* LCO's Motion To Alter Judgment at ¶¶ 13-14. Moreover, "[a] complaint need not point to the appropriate statute or law in order to raise a claim for relief under Rule 8 of the Federal Rules of Civil Procedure. . . . [A] complaint sufficiently raises a claim even if it points to no legal theory or even if it points to the wrong legal theory as a basis for claim, as long as 'relief is possible under any set of facts that could be established consistent with the allegations.'" *Tolle v. Carroll Touch, Inc*, 977 F.2d 1129, 1134 (7th Cir. 1992).[1]

Although LCO may not have labeled its legal theories correctly, LCO alleged facts sufficient to show that Habitat may be equitably or promissorily estopped to deny its obligation to build replacement housing under the 1995 Agreement. *See* Intervenor LCO's Complaint ("Complaint") at ¶¶ 20-22; LCO's Rule 59(e) Motion at ¶¶ 16-32. It can also be inferred from Habitat's role under the 1995 Agreement and its joining CHA in seeking a locational waiver that the 1995 Agreement was not a unilateral undertaking by CHA in violation of this Court's Receivership Order. *See* Complaint, Exhibits B-E. The Court erred when it failed to give LCO the opportunity to prove those facts. When reviewing the sufficiency of a complaint "[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). A complaint should not "be dismissed merely because the court doubts plaintiff will prevail in the action. Whether plaintiff can prevail is a matter properly determined on the basis of proof and not merely on the pleadings." 5A Wright & Miller at § 1357 (1990) (citations omitted).

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[1] Habitat concedes that LCO's intervenor's complaint is to be judged by the same standards that apply to motions to dismiss ordinary complaints. <u>See</u> Receiver's Statement Concerning the Lakefront Community Organization's Second Motion To Intervene at 2.

Moro v. Shell Oil Co., 91 F.3d 872 (7th Cir. 1996), a case cited by Habitat, does not support the Court's decision because it did not arise in the context of a motion to dismiss. *Moro* states that Rule 59(e) "does not allow a party to . . . advance arguments that could and should have been presented to the district court *prior to judgment*." 91 F.3d at 876 (emphasis added). But *Moro* dealt with a situation where plaintiff's motion for summary judgment had been granted and defendant filed a Rule 59(e) motion to present affidavits not tendered in its response to the summary judgment motion. The Court held that defendant's "attempt to show a genuine issue of material fact by supplementing the record at the Rule 59(e) stage of the proceedings was too little, too late." Id. at 876. Here, LCO is not attempting to revive a lost summary judgment motion, but only to have a threshold opportunity to make its case.[2]

Three other cases on which Habitat relies are no more apposite. In *Garner v. Kinnear Manufacturing Co.*, 37 F.3d 263 (7th Cir. 1994), and *North American Agricultural, Inc. v. Tulsa Screw Products Co.*, No. 90 C 2573, 1990 U.S. Dist. LEXIS 16292 (N.D. Ill. Dec. 3, 1990), plaintiffs filed post-judgment motions to amend their complaints. Here, LCS does not seek to amend its complaint at all, much less to amend it after the claims in it have been tried. In *Lewis v. Hermann*, 783 F. Supp. 1131 (N.D. Ill. 1991), plaintiffs took issue with the Court's reasoning in an exhaustive opinion dismissing some, but not all, of the claims in their first amended complaint based on clear legal defects (e.g., statute of limitations bars, inability to allege "loss causation," etc.). *See Lewis v. Hermann*, 775 F. Supp. 1137 (N.D. Ill. 1991). They also sought leave to file a

[2] Nor can Habitat's response to LCO's motion to intervene be treated like a summary judgment motion. What is effectively a motion to dismiss cannot be converted to a motion for summary judgment without giving the non-moving party proper notice and an adequate opportunity to present evidence. 5A Wright & Miller at § 1366 (1990).

second amended complaint which did not, and could not, cure those defects. Unlike the plaintiffs in *Lewis*, LCO is not rehashing old arguments, or asking this Court to ignore incurable pleading defects – but only questioning whether this Court has actually decided that the facts alleged in the complaint, together with the reasonable inferences to be drawn therefrom, cannot support recovery under *any* legal theory. Given the procedural history of this case, we do not believe the Court has yet made – or could properly make – that determination.

WHEREFORE, LCO respectfully requests that this Court alter its May 6 order and grant LCO's second motion to intervene. LCO also requests that this Court grant such other relief as may be proper and just.

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Defendants.	)	

NOTICE OF FILING

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On June 18, 1999, I filed with the clerk of the District Court **Lakefront Community Organization's Reply in Support of Its Rule 59(e) Motion**, a copy of which is attached.

One of LCO's Attorneys

CERTIFICATE OF SERVICE

I, Lawrence D. Wood, an attorney, certify that I hand-delivered a copy of the attached Reply Brief to each of the attorneys listed above before the close of business on **June 18, 1999.**

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