UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, - against - L&M 93RD STEET LLC and COSTAS KONDYLIS & PARTNERS, LLP, Defendants.	10 Civ. 7495 (RMB) **DECISION & ORDER**

I. Background

On September 30, 2010, the United States ("Government") commenced this action pursuant to the Fair Housing Act ("FHA"), 42 U.S.C. §§ 3601–3619, against L&M 93rd Street LLC ("L&M") and Costas Kondylis & Partners, LLP ("Costas," and collectively, "Defendants"), the developer and architect of The Melar, a residential apartment complex in Manhattan. (Compl., filed Sept. 30, 2010.) The Government alleges that Defendants "unlawfully discriminated against persons with disabilities . . . by failing to design and construct The Melar so as to be accessible to persons with disabilities." (Compl. ¶ 1.) And, on September 30 and November 10, 2010, respectively, the Government submitted executed settlement agreements with L&M and Costas (collectively, "Agreements"), seeking the Court's entry of such Agreements as consent decrees. (See Govt.'s Ltr. to the Ct., dated Nov. 10, 2010, at 1 ("Together, these two proposed consent decrees resolve this action in its entirety. Accordingly, the Government respectfully requests that the Court enter the enclosed consent decrees.").)

On March 21, 2011, following a period of negotiations among the Government, L&M, and Costas which did not lead to any modification of the Agreements, the Real Estate Board of New York ("REBNY") moved pursuant to Rule 24 of the Federal Rules of Civil Procedure

("Fed. R. Civ. P.") "to intervene as a defendant at this stage of the litigation, before the proposed consent decree[s are] entered." (REBNY's Mem. of Law in Supp. of Mot. to Intervene, dated Mar. 21, 2011 ("REBNY Mem."), at 2.) REBNY argues that it should be permitted to intervene "as a matter of right" under Fed. R. Civ. P. 24(a) because, among other reasons, REBNY, a real estate trade association with 12,000 members, "has an interest in the validity and enforceability of the proposed consent decree[s]" which "the broader real-estate-development industry cannot rely solely on the defendants in this case to vindicate." (REBNY Mem. at 8, 11, 19.) Alternatively, REBNY argues that the Court should grant it "permission to intervene" under Fed. R. Civ. P. 24(b) because, among other reasons, "REBNY's proposed defenses involve issues of law and fact common to the main action," and "REBNY's intervention would not produce delay in the proceedings." (REBNY Mem. at 19–21.)

On March 28, 2011, the Government filed an opposition, arguing, among other things, that the Court should deny REBNY's motion to intervene "outright" for failure to submit with the motion "'a pleading that sets out the claim or defense for which intervention is sought.'" (Govt.'s Mem. of Law in Opp'n to REBNY's Mot., dated Mar. 28, 2011 ("Govt. Opp'n"), at 8 (quoting Fed. R. Civ. P. 24(c)).) The Government also argues that "REBNY has no interest in the transaction and property at issue in the [proposed] consent decrees," and "[D]efendants vociferously share REBNY's [alleged] interest in setting the consent decrees aside," as evidenced by Defendants' planned motion to withdraw from the Agreements ("Motion to Withdraw").[1] (Govt. Opp'n at 13, 14; see Tr. of Proceedings, dated Mar. 14, 2011 ("Tr."), at 17:22-23.) Alternatively, the Government contends that "REBNY has failed to identify common

[1] Defendants' opening brief in support of their Motion to Withdraw is due on April 15, 2011; briefing will be completed on May 13, 2011.

claims or defenses," and "[i]ntervention . . . would merely prolong this case." (Govt. Opp'n at 17, 19.)

On April 1, 2011, REBNY filed a reply, requesting, among other things, that the Court excuse its failure to file a pleading because the Court is "otherwise apprised of the grounds for the motion and there is an absence of prejudice to the parties." (REBNY's Reply Mem. of Law, dated Apr. 1, 2011 ("REBNY Reply"), at 9 (internal quotation marks omitted).) The parties waived oral argument. (Tr. at 31:17-21.)

For the reasons set forth below, REBNY's motion to intervene is respectfully denied.

II. Legal Standard

Intervention as of right under Rule 24(a) is granted when all four of the following conditions are met: "(1) the motion is timely; (2) the applicant asserts an interest relating to the property or transaction that is the subject of the action; (3) the applicant is so situated that without intervention, disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the applicant's interest is not adequately represented by the other parties." MasterCard Int'l Inc. v. Visa Int'l Serv. Ass'n, 471 F.3d 377, 389 (2d Cir. 2006).

Permissive intervention under Rule 24(b) "may be granted when an applicant's claim or defense and the main action have a question of law or fact in common," AT&T Corp. v. Sprint Corp., 407 F.3d 560, 561 (2d Cir. 2005) (internal quotation marks omitted), and when intervention will not "unduly delay or prejudice the adjudication of the original parties' rights," Fed. R. Civ. P. 24(b)(3); see AT&T, 407 F.3d at 561–62.

A motion to intervene "must . . . be accompanied by a pleading that sets out the claim or defense for which intervention is sought." Fed. R. Civ. P. 24(c).

III. Analysis

Preliminarily, even if the Court were able to find REBNY eligible to intervene (which it would not for the reasons set forth below), REBNY's failure to submit a pleading that sets out the claim or defense for which intervention is sought, see Fed. R. Civ. P. 24(c), "alone warrants denial of the motion to intervene under both Rule 24(a) and (b)," Gen. Ins. Co. of Am. v. Clark Mali Corp., No. 08 Civ. 2787, 2010 WL 807433, at *8 (N.D. Ill. Mar. 10, 2010); see SEC v. Bear, Stearns & Co., No. 03 Civ. 2937, 2003 WL 22000340, at *4 & n.3 (S.D.N.Y. Aug. 25, 2003).

(1) Intervention of Right

REBNY argues, among other things, that "[a] settlement between two parties that affects a third party's legally protected rights can suffice as an 'interest' warranting intervention of right"; and REBNY "would make a more vigorous presentation" than Defendants who have "demonstrated an interest in settling the case." (REBNY Mem. at 11, 18 (citing Brennan v. N.Y.C. Bd. of Educ., 260 F.3d 123, 130, 132–33 (2d Cir. 2001)).) The Government responds, among other things, that REBNY misconstrues the content of consent decrees "as well as their limited precedential weight"; and "REBNY has identified no defects in [D]efendants' representation by sophisticated counsel who have been involved in this dispute for years [and] . . . cannot overcome the presumption that [D]efendants adequately represent REBNY's interest in opposing settlement." (Govt. Opp'n at 12, 14.)

REBNY has not shown that its interest is "direct, substantial, [or] legally protectable." Wash. Elec. Coop. v. Mass. Mun. Wholesale Elec. Co., 922 F.2d 92, 96–97 (2d Cir. 1990). The Agreements, as noted, were entered into among the Government, L&M, and Costas, all of whom were represented by capable and experienced counsel. REBNY speculates that the Court's

entering of consent decrees "would give a green light for future enforcement actions . . . and would embed the decree[s] as a template for resolution of such actions," which, in turn, "would cause tremendous uncertainty and expense in the New York real estate market." (REBNY Mem. at 14.) But, "an interest [as propounded here by REBNY] . . . that is contingent upon the occurrence of a sequence of events before it becomes colorable[] will not satisfy the rule." Wash. Elec., 922 F.2d at 97; see H.L. Hayden Co. of N.Y. v. Siemens Med. Sys., Inc., 797 F.2d 85, 88 (2d Cir. 1986). Moreover, a consent decree is "not a ruling on the merits . . . that . . . becomes precedent applicable to any other proceedings." Langton v. Hogan, 71 F.3d 930, 935 (1st Cir. 1995) (emphasis omitted); see United States v. Tex. E. Transmission Corp., 923 F.2d 410, 414 (5th Cir. 1991); Bethune Plaza, Inc. v. Lumpkin, 863 F.2d 525, 531 (7th Cir. 1988) ("When a would-be intervenor says that it fears only the stare decisis effect of a decision . . . the desire to block a settlement is never a legitimate reason to intervene, because if the case settles the possibility of an authoritative appellate decision vanishes, and with it the only substantial concern of the putative intervenor."). REBNY's claim of strong and significant interest in this case is also somewhat inconsistent with its failure to seek intervention in two similar cases in this district in which consent decrees were recently approved. See United States v. Berk-Cohen Assocs., No. 09 Civ. 4368 (Feb. 19, 2010 [#13]) (Cote, J.); United States v. CVP I, L.L.C., No. 08 Civ. 7194 (Oct. 15, 2010 [#52]) (Stein, J.); (Tr. at 29:6-12 (Court: "[Y]ou never intervened in those proceedings." Counsel for REBNY: "We did not, your Honor.").)

REBNY identifies no "direct" interest in any of the (property or other) rights implicated in the Agreements. Restor-A-Dent Dental Labs., Inc. v. Certified Alloy Prods., Inc., 725 F.2d 871, 874 (2d Cir. 1984) ("[A]n interest must be direct, as opposed to remote or contingent."); see Wash. Elec., 922 F.2d at 96–97. This is a different posture than that of intervenors in cases cited

by REBNY such as Brennan, 260 F.3d at 132, where employees sought "to protect their present employment status – in particular, their seniority rights," which they stood to lose "ineluctably [as] the result of the proposed [settlement a]greement," and New York Public Interest Research Group, Inc. v. Regents of University of State of New York, 516 F.2d 350, 352 (2d Cir. 1975) (per curiam), where a pharmacists' association had "a sufficient interest to permit it to intervene since the validity of a regulation from which its members benefit is challenged" and could result in "an adverse decision" with "stare decisis effect."

And, as both parties acknowledge, "[D]efendants themselves dispute the validity of the consent decrees." (REBNY Reply at 7.) "[W]here the putative intervenor and a named party have the same ultimate objective," the movant "must rebut the presumption of adequate representation by the party already in the action." Butler, 250 F.3d at 179–80; see Wash. Elec., 922 F.2d at 98. REBNY has made no showing that L&M (a REBNY member (see Govt. Mem. at 20)) or Costas inadequately will pursue relief from the Agreements (as evidenced by the proposed filing of the Motion to Withdraw), and there is no "evidence of collusion, adversity of interest, nonfeasance, or incompetence . . . to overcome the presumption of adequacy," Butler, 250 F.3d at 180.

(2) Permissive Intervention

REBNY argues, among other things, that its "challenges to the validity and enforceability of the proposed consent decree[s]" involve issues of law and fact common to the main action and "[t]here is no colorable argument that intervention would delay the proceedings." (REBNY Mem. at 20–21.) The Government responds, among other things, that the consent decrees nowhere resolve the legal question REBNY seeks to adjudicate and "'[t]he prospect that a new party might string out a case that the original parties want[ed] to resolve usually is a compelling

objection to intervention rather than a reason to allow it.'" (Govt. Opp'n at 17, 18 (quoting Bethune Plaza, 863 F.2d at 531).)

The Court respectfully denies REBNY's motion for permissive intervention. See H.L. Hayden, 797 F.2d at 89. Assuming, without deciding, that REBNY's interest in exploring the relationship between the FHA, 42 U.S.C. § 3604(f)(3)(C), and Local Law 58 of 1987, N.Y.C. Admin. Code tit. 27 (amended 2008), constitutes "a claim or defense that shares with the main action a common question of law or fact," Fed. R. Civ. P. 24(b)(1)(B), REBNY's intervention in the current settlement dispute could "unduly delay" the proceedings, Fed. R. Civ. P. 24(b)(3); see N.Y. News, Inc. v. Kheel, 972 F.2d 482, 487 (2d Cir. 1992); Ragsdale v. Turnock, 941 F.2d 501, 504 (7th Cir. 1991). "[I]ntervention at this time would render worthless all of the parties' painstaking negotiations because negotiations would have to begin again and [the intervenor] would have to agree to any proposed consent decree." City of Bloomington v. Westinghouse Elec. Corp., 824 F.2d 531, 535 (7th Cir. 1987).[2]

IV. Conclusion

For the foregoing reasons, REBNY's motion to intervene [#36] is respectfully denied.

Dated: New York, New York
April 5, 2011

RMB

RICHARD M. BERMAN, U.S.D.J.

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[2] United States v. American Cyanamid Co., 556 F. Supp. 357, 358 (S.D.N.Y. 1982), aff'd, 719 F.2d 558 (2d Cir. 1983), where termination of a proposed consent decree would have ended the intervenor's "substantial . . . annual sales" and "effectively force[d] it out of business," is distinguishable. REBNY has not shown such a "direct and substantial adverse impact" in this dispute over a single residential building (The Melar). Am. Cyanamid, 719 F.2d at 561; see Moore's Fed. Prac. 3d § 24.10[2][c], at 24-69; U.S. Postal Serv. v. Brennan, 579 F.2d 188, 191 (2d Cir. 1978) ("[W]e fail to see what [the movant] would . . . gain by intervening and superimposing a motion . . . to secure the same relief [sought by defendants]."); see also R Best Produce, Inc. v. Shulman-Rabin Mktg. Corp., 467 F.3d 238, 240 (2d Cir. 2006).