

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-000877-MR

LYNDON PROPERTY INSURANCE COMPANY

APPELLANT

v. APPEAL FROM BOYLE CIRCUIT COURT  
HONORABLE DARREN W. PECKLER, JUDGE  
ACTION NO. 01-CI-00115

CITY OF STANFORD, KENTUCKY;  
MAVERICK ENVIRONMENTAL &  
CONSTRUCTION SERVICES, INC.;  
AND CALDWELL STONE COMPANY, INC.

APPELLEES

OPINION

AFFIRMING

\*\* \*\* \* \* \*

BEFORE: COMBS, McANULTY AND PAISLEY, JUDGES.

PAISLEY, JUDGE. This is an appeal from an order entered by the Boyle Circuit Court which denied appellant's post judgment motion to intervene. For the following reasons we affirm.

Appellant Lyndon Property Insurance Company contracted to act as surety on a bond given by Maverick Environmental and Construction Services, Inc. in connection with Maverick's

contract with the City of Stanford, Kentucky for the implementation of drainage improvements. The agreement included an indemnity clause whereby, in the event of Maverick's default, Maverick's right to receive payment from the city was assigned to Lyndon to the extent that Lyndon had to make payments on the bond.

In the spring of 2001, Maverick defaulted on its obligation with respect to the bond, and Lyndon's agent sent a written letter to the city notifying it that Maverick's right to receive payment under the drainage contract had been assigned to Lyndon. During the same period of time, Caldwell Stone Company, Inc. obtained a default judgment against Maverick for its failure to pay Caldwell in connection with a separate job. In an effort to satisfy its judgment out of the drainage contract funds due to Maverick, Caldwell served the city with an order of garnishment on July 30, 2001. The city responded that the funds held under the drainage contract no longer belonged to Maverick, as they previously had been assigned to Lyndon. On February 21, 2002, Maverick obtained a court order directing the city to pay Caldwell's judgment out of the drainage contract funds. Some three weeks later, on March 14, 2002, Lyndon filed a motion to intervene in the matter in a belated effort to establish superior priority to the drainage contract funds. The court denied Lyndon's motion and this appeal followed.

The sole issue on appeal is whether the trial court abused its discretion in denying Lyndon's post judgment motion to intervene in the matter between Caldwell and Maverick. Lyndon relies almost entirely on National Surety Corporation v. Massachusetts Bonding & Insurance Co., 280 Ky. 785, 134 S.W.2d 611 (1939), which reversed the trial court's denial of a motion to intervene. However, the parties in that case did not raise the issue of whether it was proper to grant a motion to intervene after entry of final judgment, but instead focused their attention on which entity had priority to the funds in dispute.

Conversely, this case is exclusively concerned with whether the trial court was within its discretion to deny appellant's motion to intervene. This matter is governed by CR 24.01 and CR 24.02, which describe the circumstances under which intervention is permitted. More specifically, "[p]ursuant to both provisions of CR 24, a threshold requirement for intervention is that the motion be timely." Arnold v. Commonwealth ex rel. Chandler, Ky., 62 S.W.3d 366, 368 (2001). Further, "[a] party wishing to intervene after final judgment has a 'special burden' to justify the untimeliness. . . . While the rule does not forbid post judgment intervention, it is broadly within the discretion of the trial judge whether to allow a party to intervene at that stage." Id. at 369 (citing

Monticello Electric Plant Board v. Board of Education of Wayne County, Ky., 310 S.W.2d 272, 274 (1958)).

Here, Lyndon failed to provide any explanation below or on appeal for its failure to intervene prior to entry of the court's final order on February 21, 2001. In addition, Lyndon does not deny that it received timely notice of the proceedings as alleged by Caldwell. In the absence of some explanation or evidence to support Lyndon's failure to timely file its motion to intervene, we must find that the trial court acted within its discretion. Clearly, a nonparty cannot "simply lie back and await the result of the action in circuit court and then, if not satisfied with the judgment, compel a retrial by the device of intervening after judgment." Pearman v. Schlaak, Ky., 575 S.W.2d 462, 463 (1978) (quoting Murphy v. Lexington-Fayette County Airport Board, Ky., 472 S.W.2d 688, 690 (1971)).

The decision of the Boyle Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Edward L. Lasley  
Kenneth A. Bohnert  
Richard M. Sullivan

Louisville, Kentucky

BRIEF FOR APPELLEE,  
Caldwell Stone Company, Inc:

Merle C. Clark  
Danville, Kentucky