

STATE OF VERMONT  
WASHINGTON COUNTY, SS.

FILED

2003 MAY -5 A 8:47

DAIMLERCHRYSLER SERVICES OF )  
NORTH AMERICAN, LLC, )  
Plaintiff, )

v. )

JOYCE LARRABEE N/K/A WOLFORD, )  
Defendant. )

SUPERIOR COURT  
WASHINGTON COUNTY

Washington Superior Court  
Docket No. 530-8-02 Wncv

ENTRY ORDER

This is a case brought for the collection of a deficiency after the Defendant's vehicle was repossessed for nonpayment and sold at private auction, leaving a balance due after application of the sale proceeds. The sale occurred on November 6, 1997, leaving a deficiency of \$3,385.51. Defendant was served on August 14, 2002, more than 4 ½ years later, and suit was filed on August 26, 2002. Defendant has not appeared, and Plaintiff seeks a default judgment in the amount of \$6,100.86 as of February 6, 2003, including interest and attorneys' fees. In an Entry Order entered February 3, 2003, the court denied default judgment on the grounds that it appeared that the case was filed after the running of the statute of limitations. The court left the case open for ten days for a supplemental affidavit or motion to be filed on behalf of Plaintiff.

Plaintiff's attorney filed a memorandum of law, arguing that it is error for the court to raise the issue of the statute of limitations *sua sponte*, as it is an affirmative defense which must be pleaded and proved by Defendant. Plaintiff's attorney also argues that the court applied the wrong statute of limitations as a matter of law.

Both of these issues are important legal issues which affect the rights and credit of numerous defendants who are sued for deficiency judgments in collection cases, and who seldom enter appearances or defend the actions. The court has discretion to permit the participation of an amicus curiae to brief legal issues and thereby assist the court in reaching sound legal conclusions. V.R.A.P. Rules 29 and 34(i) provide guidance at the appellate level for participation of amicus curiae, and the Reporter's Notes to Rule 29 note that the rule standardizes what was previously an informal practice. The absence of a complementary rule in the Rules of Civil Procedure reflects the infrequency of amicus curiae involvement in trial court cases, rather than a proscription of it. Authorities uniformly acknowledge the appropriate use of amicus involvement in trial court cases as an exercise of the trial court's inherent discretion when the

same is neither specifically permitted nor proscribed by statute or court rule.<sup>1</sup>

Wright and Miller note with interest the following excerpt from a chambers opinion of Chief Judge Richard Posner:

An amicus brief should normally be allowed when a party is not represented competently or is not represented at all, when the amicus has an interest in some other case that may be affected by the decision in the present case (though not enough affected to entitle the amicus to intervene and become a party in the present case), or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide. . . . Otherwise, leave to file an amicus curiae brief should be denied.

16A Wright and Miller, Federal Practice and Procedure § 3975 at 542 (quoting Ryan v. Commodity Futures Trading Commn., 125 F.3d 1062, 1063 (7<sup>th</sup> Cir. 1997) (opinion of Posner, C.J., in chambers)). In making these comments, Judge Posner was attempting to articulate the appropriate circumstances for the use of amicus briefs. He contrasted those with the abusive use of amicus briefs as a means to duplicate arguments already made by litigants. He expressed the need for limits to such abuse, and denied permission for amicus participation in the case.

Judge Posner's comments concerning the circumstances appropriate for the participation of an amicus are particularly applicable to this case, in which the issues that have been raised affect a large number of future defendants who are unlikely to have resources with which to advance legal arguments on their behalf, but whose credit status will be affected significantly by the entry of default judgments against them. The role of the court is implicated, if the court knowingly enters sizeable default judgments with significant interest components without examining whether there is a valid legal basis for such judgments. At the same time, the court's obligation is to provide a neutral forum, and not engage in advocacy on behalf of absent defendants. In this case, the legal issues presented merit close examination, and the court will be better prepared to render a sound decision with the benefit of legal arguments presented from the perspective of attorneys familiar with the interests of those likely to be in Defendant's position.

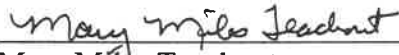
---

<sup>1</sup>See, e.g., Witty v. Planning and Zoning Comm. of the Town of Hartland, 784 A.2d 1011, 1017 (Conn. App. 2001) ("Permission to appear as amici curiae . . . rests in the sound discretion of the trial court."); State Commissioner of Transportation v. Medicine Bird, Black Bear, White Eagle, 63 S.W.3d 734, 758 (Tenn. App. 2001) ("courts have inherent authority to appoint an amicus even in the absence of a rule or statute"); In re Justice, 392 N.E.2d 897, 899 (Ohio App. 1978) ("the rule is that permitting the appearance of an Amicus curiae and the extent of his participation in the proceedings is a matter within the sound discretion of the trial court"); McCoy v. Briegel, 305 S.W.2d 29, 39 (Mo. App. 1957) ("The rule is well established that in a proper case an amicus curiae may be appointed to aid and assist the court by the performance of certain services which are necessary to guide the court to a proper conclusion.").

For the foregoing reasons, the court invites an attorney from Vermont Legal Aid, Inc., a law firm familiar with the legal interests of persons without resources, to file an amicus brief on the issues identified above and argued in Attorney Bjerke's "Reponse to Entry Order Dated January 3, 2003," filed February 10, 2003. The court is not appointing Vermont Legal Aid, Inc., or any individual attorney, as attorney to represent the interests of the Defendant in this case. Furthermore, no compensation will be available for services performed. Legal Aid is not required to accept the invitation to file an amicus brief. However, upon notice filed within the next ten days that a Legal Aid attorney will file an amicus brief, the court will permit a period of thirty days for an amicus brief to be filed. Plaintiff's attorney will then have thirty days to file a response.

**So Ordered.**

Dated at Montpelier, Vermont this 2nd day of May, 2003.

  
\_\_\_\_\_  
Mary Miles Teachout  
Superior Court Judge

cc: Alan A. Bjerke, Esq.  
Eric B. Avildsen, Esq.