DISTRICT COURT, DENVER COUNTY, COLORADO 1437 Bannock Street Denver, CO 80202	
DAVID S. CHEVAL, Acting Securities Commissioner for the State of Colorado, Plaintiff, v. GARY DRAGUL, GDA REAL ESTATE SERVICES, LLC, and GDA REAL ESTATE MANAGEMENT, LLC, Defendants.	DATE FILED: January 2, 2020 3:38 PM FILING ID: 5767DC8EAE1A6 CASE NUMBER: 2018CV33011 ▲ **COURT USE ONLY** ▲
JEFFREY A. SPRINGER, 6793 Springer and Steinberg, P.C. 1600 Broadway, Suite 1200 Denver, CO 80202 Tel: (303) 861-2800 Fax: (303) 832-7116 jspringer@springersteinberg.com *Attorney for Defendants Gary Dragul, GDA Real Estate Services, LLC, and GDA Real Estate Management, LLC*	Case No.: 2018 CV 33011 Courtroom: 424
DEFENDANTS' COMBINED OPPOSITION TO **1. MOTION BY AARON METZ TO INTERVENE AND TO LIFT STAY FOR LIMITED PURPOSES** **AND** **2. AARON METZ'S MOTION TO CONSOLIDATE**	

Defendants Gary Dragul ("Mr. Dragul"), GDA Real Estate Services, LLC ("GDARES"), and GDA Real Estate Management, LLC ("GDAREM") (collectively "Defendants") by and through Springer and Steinberg, P.C., hereby submit their Combined Opposition to 1. Motion by Aaron Metz to Intervene and to Lift Stay for Limited Purposes and 2. Aaron Metz's Motion to Consolidate.

BACKGROUND

The Securities Commissioner for the State of Colorado ("Commissioner") filed this action under Colo. Rev. Stat. § 11-51-602 on August 15, 2018 by filing a Complaint for

Injunctive and Other Relief ("Complaint"). The Complaint alleges Defendants defrauded investors in relation to property known as Plaza at the Mall of Georgia ("Property"). After the Complaint was filed, the parties agreed to appoint Harvey Sender as a receiver ("Receiver") under § 11-51-602(1), C.R.S., and C.R.C.P. 66. A preliminary injunction was also entered. In the order appointing the Receiver, Defendants' assets, except for Mr. Dragul's personal residence, were place in a receivership estate, and Defendants lost the ability to use those assets without the Receiver's and the Court's approval for any liabilities they may have. This Court also enjoined all actions in equity or law against the Receiver, Defendants, and the receivership estate and stayed all such actions that were currently pending.

On December 5, 2019, the Receiver filed a motion to approve a settlement agreement that would resolve certain claims against Mr. Dragul in this matter. Under the agreement, Mr. Dragul agreed that SSC 02, LLC and its assets, including a storage unit, would be turned over to the Receiver, a $120,000 judgment would enter against Mr. Dragul, vehicles would be turned over to the Receiver or Mr. Dragul would have the opportunity to redeem them by paying the Receiver the value of the vehicles' equity, and Mr. Dragul would turn over jewelry and sports memorabilia to the Receiver for sale and retain other enumerated assets. On December 18, 2019, the Court approved the settlement agreement and entered judgment against Mr. Dragul.

Prior to the entry of judgment, Aaron Metz ("Metz")—who previously filed claims with the Receiver based on transactions unrelated to this case—moved to intervene, to lift the stay for the limited purpose of filing a motion for order to show cause in the case *Colorado Department of Public Health & Environment v. YM Retail 07 A, LLC, GDA Real Estate Management, Inc., GDA Real Estate Services, LLC d/b/a the GDA Companies, Gary Dragul and Aaron Metz*, Denver District Court Case 13-CV-33076 ("Environmental Action"), and for leave to object to the settlement agreement. The Environmental Action was filed in 2013 seeking remediation of

environmental contamination of a property unrelated to this action. On January 19, 2015, it was settled, and under the settlement, Defendants and Metz became jointly and severally liable with respect to any stipulated obligations related to the property contamination.

The remediation in the Environmental Action has only been partially paid for, and on January 23, 2019, a motion for order to show cause was filed against Metz for not funding further remediation work. No order to show cause was filed against Defendants because of the stay issued in this action. Metz moved for relief from the judgment in the Environmental Action under C.R.C.P. 60(b) on grounds that his attorney, who also represented Defendants, had a conflict of interest that renders his agreement to fund the remediation voidable. Metz also seeks to have Defendants held in contempt in the Environmental Action and to object to Mr. Dragul's agreement to pay $120,000 on grounds that it will deplete the assets that he could use to pay for the remediation in the Environmental Action.

ARGUMENT

I. The Court should deny Metz's Motion to Intervene and to Lift Stay

A. Metz has not asserted any basis to intervene in this matter.

Metz's motion to intervene is not well-taken. Metz failed to comply with C.R.C.P. 24(c). And although a party may intervene as of right or permissively, he has not provided any legal or factual basis to intervene in this matter.

1. Metz failed to comply with C.R.C.P. 24(c)

Metz's motion to intervene is procedurally improper. A motion to intervene "shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought." C.R.C.P. 24(c). "'Pleadings' are the formal allegations by the parties of their respective claims and defenses and are intended to provide notice of what is to be expected at trial." *In re Estate of Jones*, 704 P.2d 845, 847 (Colo. 1985). They include only complaints, answers, replies to

counterclaims, answers to crossclaims, third-party complaints, third-party answers, and replies to affirmative defenses. C.R.C.P. 7(a); *see also In re Marriage of Runge*, 2018 COA 23M, ¶¶19-20, 415 P.3d 884. Thus, motions, objections, or other documents filed with a court are not pleadings. *See* C.R.C.P. 7; *Capitol Indus. Bank v. Strain*, 442 P.2d 187, 188 (Colo. 1968); *In re Marriage of Runge*, 2018 COA 23M, ¶18; *People v. Anderson*, 828 P.2d 228, 231 (Colo. 1992); *see also Shell v. Am Family Rights Ass'n*, Civil Action No. 09-cv-00309-MSK-KMT, 2012 U.S. dist. LEXIS 32203, *2 (D. Colo. Mar. 12, 2012)(unpublished); 2 James Wm. Moore et. Al., *Moore's Federal Practice* § 12.37[2].

Metz did not file any pleading with his motion to intervene. Instead, he filed the following documents:

- Exhibit A: *Stipulation and Proposed Order Regarding Parties' Settlement Agreement* (from Environmental Action)
- Exhibit B: *Plaintiff's Motion for Order to Show Cause and Contempt Citation against Defendant Aaron Metz and to Re-open Discovery* (from Environmental Action)
- Exhibit C: *Notice of Receivership and Stay* (from Environmental Action)
- Exhibit D: *Aaron Metz's Motion for Order to Show Cause and Contempt Citation against Defendants Gary Dragul, GDA Real Estate Management, Inc., and GDA Real Estate Services, LLC d/b/a The GDA Companies* (from Environmental Action)
- Exhibit E: *Aaron Metz's Limited Objection to Proposed Settlement Agreement Concerning Turnover Motion*

Each of these documents is either a stipulation, motion, notice, or objection, none of which are pleadings. Thus, Metz failed to comply with C.R.C.P. 24(c), and his motion should be denied as procedurally improper.

2. Metz cannot intervene as of right.

But even if he had complied with C.R.C.P. 24(c), Metz does not have the right to intervene in this action. A party may intervene as of right if (1) a statute confers an unconditional

right to do so or (2)(a) the party "claims an interest relating to the property or transaction which is the subject of the action", (b) "the disposition of the action may as a practical matter impair or impede his ability to protect that interest", and (c) his interest is not "adequately represented by existing parties." C.R.C.P. 24(a); *see also Feigin v. Alexa Group, Ltd.*, 19 P.3d 23, 28 (Colo. 2001). In *Feigin*, the Colorado Supreme Court concluded that defrauded investors could not intervene as a matter of right in a civil enforcement action brought by Commissioner under Colo. Rev. Stat. § 11-51-602. The *Feigin* defendants sold securities and investments in a Ponzi scheme and defrauded their investors of approximately $500,000. The Commissioner and *Feigin* defendants entered into a stipulation and settlement agreement providing for a process whereby investors could seek compensation for their losses. Certain investors moved to intervene to contest the stipulation and settlement. The trial court denied the motion.

On appeal, the Colorado Supreme Court determined that the *Feigin* investors had interests in the action because they had been defrauded. *Feigin*, 19 P.3d at 28. However, it determined that the disposition of the action would not impair or impede the investors' ability to protect their interests and that their interests were adequately represented by the Commissioner. *Id*. Thus, the *Feigin* investors did not have a basis to intervene as of right.

Metz has less of a basis to intervene in this action than the *Feigin* investors. Both this action and the *Feigin* action were initiated by the Commissioner under Colo. Rev. Stat. § 11-51-602. The *Feigin* investors sought to intervene to contest a settlement agreement. Metz seeks to intervene to contest a settlement agreement. The *Feigin* investors could not intervene as of right because they failed to satisfy two of the three C.R.C.P. 24(a) requirements. And while the *Feigin* investors failed to satisfy two of the three requirements, Metz cannot satisfy any of them.

Unlike the *Feigin* investors, Metz has not shown that he has an interest in the subject matter of this action. The *Feigin* investors actually claimed that they had been defrauded by the

Feigin defendants. But Metz does not claim Defendants defrauded him in relation to the Property. Instead, he notes that he and Defendants were co-defendants in the Environmental Action. This action was brought because Defendants allegedly sold securities without a license and defrauded investors in relation to the purchase and sale of interests in the Property, but the Environmental Action was brought because Defendants and Metz allegedly were liable for contamination on a separate piece of land. Metz does not claim that he purchased any interest in the businesses or the property at issue in this case. Rather, he states that he is jointly and severally liable with Defendants in the Environmental Action and that if Defendants do not fund the required remediation in that action, he may be required to do so.

Additionally, Metz failed to explain how—if he is required to fund the remediation—he has a claim against Defendants. He has not tendered a proposed third-party complaint, cited to any statute, or provided any caselaw to show that he could bring a lawsuit against Defendants. He also failed to show that he has any basis to claim any interest in the property and money Mr. Dragul agreed to turn over and pay in the settlement agreement. In fact, Metz concedes that any claim he might have related to the Defendants and the Property already is subject to the exclusive equitable claims process the Receiver is administering. *See Motion by Aaron Metz to Intervene and to Lift Stay for Limited Purposes*, p 10 (stating, "[Metz] already is a person who has made a claim under the procedure established by the Receiver"); *Aaron Metz's Motion to Consolidate*, p 4 (stating, "Metz has submitted a claim pursuant to the Receiver's established Claims Procedure authorized by this Court for funds to be used to remediate the Property."). Thus, Metz failed to show any interest in the subject matter of this action.

But even if he did have such an interest, Metz failed to show that his ability to protect that interest would be impaired or impeded by this action. "An intervenor's interest is impaired if the disposition of the action in which intervention is sought will prevent any future attempts by

the applicant to pursue his interest." *Feigin*, 19 P.3d at 30. Further, "where there [are] alternative forums in which to bring a suit, an intervenor is neither impaired nor impeded in his ability to protect his interests". *Id*.

If Metz had an interest in the subject matter of this action, his ability to protect it would not be impaired. He has an alternative forum to seek relief: the Environmental Action. In fact, he is already pursuing such relief. He filed a Rule 60(b) motion to set aside the order holding him jointly and severally liable to fund the remediation of the environmental contamination in the Environmental Action. If he prevails, the order against him will be vacated, and he will be able to challenge the allegations against him in the Environmental Action.

Metz also failed to explain how any existing party does not adequately represent any interest he may have. Again, Metz does not claim any interest in the subject matter of this action. The claims he filed with the Receiver are not related to the Property, and allowing him to pursue these claims with the Receiver also allows him to protect his interests. But even if Metz did have an interest in the subject matter of this action, his interests would be adequately represented by the Commissioner. Just as in *Feigin*, the Commissioner has filed an action to protect allegedly defrauded investors. The *Feigin* investors' interests were adequately represented by the Commissioner. Thus, even if Metz claimed to have been defrauded in relation to the Property, the Commissioner would adequately represent his interests without allowing Metz to formally intervene.

As illustrated, Metz has failed to show that he may intervene as of right. He does not have any interest in this action. He has an alternative forum to protect his interests. And he has not shown the existing parties do not adequately represent his interests.

3. Metz failed to show he may permissively intervene.

Metz also failed to show that he may permissively intervene. A party may permissively

intervene if (1) a statute confers a conditional right to do so or (2) "when an applicant's claim or defense and the main action have a question of law or fact in common." C.R.C.P. 24(b). Metz does not cite to any statute granting him the conditional right to intervene. He instead argues this action and the Environmental Action have a common question of fact: "the availability of funds Dragul and [Defendants] to fund the environmental remediation."

But Metz's argument suffers from a fundamental problem. To permissively intervene, his *claim* must have a question of fact in common with this action. Again, he failed to identify any claim against Mr. Dragul or Defendants in his motion to intervene. Without a claim, he does not have any basis to argue that Mr. Dragul or Defendants would be required to pay him anything.

More importantly, this action and the Environmental Action lack any factual or legal connection. This action was brought because Defendants allegedly sold securities without a license and defrauded investors. The Environmental Action was brought because Defendants and Metz allegedly were liable for contamination on a separate piece of land. The two actions are unrelated. Thus, they do not have any factual or legal questions in common, and there is no basis for Metz to permissively intervene.

B. This Court should not lift the stay.

Moreover, there is no basis to lift the stay to allow Metz to seek to hold Defendants in contempt in the Environmental Action because seeking to hold Defendants in contempt would be futile. To hold Defendants in contempt, Metz would be required to show (1) the existence of a lawful order; (2) Defendants knew of the order; (3) Defendants had the ability to comply with the order, and (4) Defendants willfully refused to comply with the order. *People ex rel. State Eng'r v. Sease*, 2018 CO 91, ¶23, 429 P.3d 1205. Although Metz could establish the first two requirements, he could not establish the third and fourth.

Defendants have not had the ability to comply with the remediation order in the

Environmental Action. When this Court appointed the Receiver, it also placed Defendants' assets (except Mr. Dragul's personal residence) in the Receivership Estate. Because of this, the Receiver and the Court decide what claims against Defendants should be paid and when they should be paid. Thus, Defendants have not had the ability to pay for the remediation.

Defendants also have not willfully refused to comply with the remediation order. Again, the Receiver and this Court decide whether Defendants' assets should be used to pay for the remediation. And the Environmental Action has been stayed as to Defendants. Thus, Defendants lack any authority concerning what claims against them should be paid and are not willfully refusing to comply with the remediation order.

Lifting the stay to allow Metz to pursue contempt against Defendants would be a waste of judicial resources. Defendants are not in contempt, and Metz's claims already are subject to the exclusive equitable claims process administered by the Receiver. Thus, the stay should remain in place.

C. Metz cannot object to the proposed settlement agreement.

The Court should not allow Metz to object to the settlement agreement, either. Metz's stated purpose for objecting is to "avoid[] a contempt citation in the Environmental Action based, in substantial part, on the inaction of his co-defendant and former employer, Mr. Dragul." But whether Metz is in contempt in the Environmental Action does not depend on Mr. Dragul's actions. Rather, it depends on whether he knew of the order, had the ability to comply with it, and willfully refused to comply with it. *See Sease*, 2018 CO 91, ¶23. Whether his co-defendants have failed to comply with the remediation order is irrelevant. *See id*. Thus, it would also be futile and a waste of judicial resources to lift the stay to allow Metz to object to the settlement agreement.

II. The Court should deny Metz's Motion to Consolidate.

Finally, the Court should not consolidate this action with the Environmental Action. Actions may be consolidated if they "involve[e] a common question of law or fact". C.R.C.P. 42(a). As discussed above, this action and the Environmental Action do not share any common legal or factual questions. Thus, Metz's motion to consolidate should be denied.

CONCLUSION

This Court should deny Metz's Motion to Intervene and to Lift Stay for Limited Purposes and his Motion to Consolidate. His only asserted basis for intervening is that he may be left holding the bag in the Environmental Action. But that is not grounds to intervene. He failed to show he has any claim whatsoever against Defendants. He is already pursuing relief in an alternative forum. He failed to show any interest he may have is not adequately represented in this action. And this action and the Environmental Action are legally and factually distinct. Further, lifting the stay would be a waste of judicial resources because Metz cannot prove Defendants should be held in contempt in the Environmental Action and whether Metz is in contempt in the Environmental Action does not depend on Defendants' actions. Finally, because Metz has failed to show any common question of law or fact, this action should not be consolidated with the Environmental Action.

WHEREFORE, PREMISES CONSIDERED Defendants Gary Dragul, GDA Real Estate Services, LLC, and GDA Real Estate Management, LLC respectfully request that this Court deny the Motion by Aaron Metz to Intervene and to Lift Stay for Limited Purposes and Aaron Metz's Motion to Consolidate.

Respectfully submitted this 2nd day of January 2020.

SPRINGER AND STEINBERG, P.C.

/s/ Jeffrey A. Springer

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Certificate of Service

I certify that on January 2, 2020, a copy of the foregoing was served via Colorado Courts E-filing system to the following:

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