

DISTRICT COURT, DENVER COUNTY, COLORADO	
Court Address: 1437 Bannock Street, Rm 256, Denver, CO, 80202	
Plaintiff(s) GERALD ROME SECURITIES COM FOR THE ST OF CO v. Defendant(s) GARY DRAGUL et al.	DATE FILED: January 21, 2020 11:31 AM CASE NUMBER: 2018CV33011 <p style="text-align: center;">△ COURT USE ONLY △</p> Case Number: 2018CV33011 Division: 424 Courtroom:
Order: Motion by Aaron Metz to Intervene and to Lift Stay for Limited Purposes w/attach	

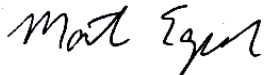
The motion/proposed order attached hereto: DENIED.

The Court finds the motion to intervene procedurally deficient inasmuch as it is not accompanied by a qualifying pleading setting forth the claim or defense for which intervention is sought. C.R.C.P. 24(c). The Court further finds that, even if the motion were procedurally proper, the motion fails to establish a claim for intervention as a matter of right. The motion does not demonstrate that Metz has an interest in the subject matter of this action; rather it establishes that he was a co-defendant in an unrelated action. *See Feigin v. Alexa Group, Ltd.*, 19 P.3d 23 (Colo. 2001). The motion also fails to show that Metz has any basis to claim an interest in the property at issue in this case, nor does it demonstrate that his ability to protect his interests would be impaired or impeded by this action. The Court further finds that the motion fails to identify any factual or legal connection between this action and the environmental action that would justify intervention as a permissive matter.

The Court also denies the request to lift the stay in this matter inasmuch as the creation of the receivership over Dragel's assets effectively have precluded him from having the ability to comply and willfully failing to comply with the environmental action. Any purported contempt against Dragel would therefore be futile.

The Court further finds no basis for Metz's objection to the settlement agreement in this matter, inasmuch as his obligations in that action are joint and several. Accordingly, whether the co-defendants in that action willfully failed to comply with the remediation order is irrelevant.

Issue Date: 1/21/2020



MARTIN FOSTER EGELHOFF
District Court Judge

DISTRICT COURT, DENVER COUNTY, COLORADO
1437 Bannock Street, Room 256
Denver, CO 80202

Plaintiff: DAVID S. CHEVAL, ACTING SECURITIES
COMMISSIONER FOR THE STATE OF COLORADO,

v.

Defendants: GARY DRAGUL; GDA REAL ESTATE
SERVICES, LLC; AND GDA REAL ESTATE
MANAGEMENT LLC

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▲ COURT USE ONLY ▲

Case No. 2018CV33011

Division: 424

**MOTION BY AARON METZ TO INTERVENE AND TO LIFT STAY
FOR LIMITED PURPOSES**

Aaron Metz, through his attorneys Haddon, Morgan & Foreman, P.C., moves to intervene pursuant to C.R.C.P. 24 for the limited purposes of (1) asking the Court to lift the stay imposed by the Receivership Order so that he may request an Order to Show Cause and Contempt Citation against defendants Gary Dragul, GDA Real Estate Services, LLC (“GDA RES”) and GDA Real Estate Management, LLC (“GDA REM”) in a separation action, *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 (2) permitting Mr. Metz to file a limited objection to the Proposed Settlement Agreement Concerning Turnover Motion. As further grounds, he asserts as follows:

C.R.C.P. 121 § 1-15(8) CONFERRAL

Sueanna P. Johnson, Assistant Attorney General acting as counsel for David S. Cheval, Acting Securities Commissioner for the State of Colorado (“Plaintiff”) and Michael T. Gilbert and Rachel Sternlieb, counsel for Harvey Sender, the court-appointed Receiver (“Receiver”) oppose the relief requested.

Jeffery A. Springer, counsel for Defendants Gary Dragul (“Dragul”), GDA Real Estate Services, LLC (“GDA RES”) and GDA Real Estate Management, LLC (“GDA REM”) (together with GDA RES, the “GDA Entities”), has not responded to the request for conferral.

BACKGROUND

There are two separate civil actions pending in separate Denver District Courts against Dragul, GDA RES and GDA REM.

Environmental Action¹

Mr. Metz along with YM Retail 07 A (“YM Retail”), Dragul and the GDA Entities are co-defendants in the Environmental Action, currently pending before Judge Whitney in Division 203. The Enforcement Action pertains to the need to perform remediation of environmental contamination that occurred at 6460 East Yale Avenue, Denver, Colorado (the “Property”). A settlement agreement was reached in the Enforcement Action on January 19, 2015. The

¹ The facts concerning the Environmental Action are summarized in pertinent parts here, but are more fully described with supporting exhibits in Defendant Aaron Metz’s Motion for Relief from Judgment, Request for Stay, and for Declaratory Judgment filed in *CDPHE v. YM Retail, et al.*, 2013CV33076 (Feb. 27, 2019).

agreement provided for joint and several liability of Dragul, the GDA Entities, YM Retail, and Mr. Metz, and it became an order of the Court on January 20, 2015 (hereafter “Remediation Order”), attached hereto as Exhibit A.

At the time of the Environmental Action, Mr. Metz was an employee of GDA RES. Dragul owned and operated GDA RES and GDA REM (and he owns an interest in YM Retail). Dragul hired one lawyer to represent himself, GDA RES and his employee, Mr. Metz. Mr. Dragul funded the litigation, told his employee Mr. Metz to “not worry,” and agreed to indemnify him. The lawyer, however, was subject to an inherent conflict of interest based on his joint representation of parties with divergent interests, but he never sought or obtained from Mr. Metz any waiver of conflict pursuant to Colorado Rule of Professional Conduct 1.7. On the day of trial in the Environmental Action when the settlement agreement was brokered, the lawyer simply told Mr. Metz to sign the document, without explaining its terms, including the potential for Mr. Metz to be personally liable for indeterminate expenses associated with the clean-up of the Property.

In August 2018, Mr. Metz resigned from his position with GDA RES. In November 2018, Mr. Metz hired undersigned counsel and first learned of the conflict of interest that his prior counsel had operated under during the litigation of the Environmental Action and the negotiation of the Remediation Order.

On January 23, 2019, CDPHE filed a Motion for Order to Show Cause and Contempt Citation Against Defendant Aaron Metz, scheduled for hearing on February 11, 2020 in Division 203. CDPHE moved to hold only Mr. Metz in contempt for “not funding the Remediation Work.” Ex. B. According to the motion, CDPHE did not move to hold Dragul or the Dragul

entities in contempt due to the stay issued in this action. *Id.* at 5. CDPHE contends that Mr. Metz, a former employee of Dragul and GDA RES, should be held solely responsible for the cost of remediation of the Property.

Mr. Metz filed on February 27, 2019 a Motion for Relief from Judgment, Request for Stay and for Declaratory Judgment to, *inter alia*, relieve him of his obligations under the Remediation Order pursuant to C.R.C.P. 60(b). That Motion is scheduled for hearing before Judge Whitney on February 10, 2020, one day prior to CDPHE's contempt hearing.²

Civil Fraud Action

On August 15, 2018, the Colorado Securities Commissioner filed his Complaint for Injunctive and Other Relief against Dragul and the GDA Entities in the instant case ("Civil Fraud"). On August 30, 2018, the Court appointed Harvey Sender as receiver over Dragul, the GDA Entities, their respective properties and assets, and their interests and management rights in related affiliated and subsidiary businesses (the "Receivership Estate") pursuant to C.R.S. § 11-51-602(1), C.R.C.P. 66. Receivership Order at 2, ¶ 5.

The Receivership Order also provided:

It is further Ordered that all actions in equity or at law against the Receiver, Dragul, GDARES and GDAREM, or the Receivership Estate are hereby enjoined (and any actions already pending are hereby stayed), pending further action by this Court. The Receiver is instructed to file a request for an Order to Show Cause if any business, entity, or person commences or continues the prosecution of any action in any other court seeking relief in equity or at law against the Receiver, Dragul, GDARES and GDAREM or the Receivership Estate *without first seeking relief from this stay of proceedings.*

Id. at 18, ¶ 26 (emphasis added).

² Judge Whitney has ruled that the Rule 60(b) Motion should be heard first, and then, if necessary, he will proceed to the Order to Show Cause proceedings against Mr. Metz.

Shortly after the Receivership Order entered, the Receiver directed counsel for Dragul and the GDA Entities (who then also represented Mr. Metz and YM Retail) to file in the Enforcement Action a “Notice of Receivership and Stay,” noting that the assets of the defendants to that action “are part of the Receivership Estate and this action may therefore affect the Receivership Estate.” *See* Ex. C at ¶ 3, 5 (Notice of Receivership and Stay).

On December 5, 2019, the Receiver filed a Motion to Approve Settlement Agreement with Dragul Concerning Turnover Motion. Pursuant to the proposed Settlement Agreement, Dragul and his wife will turn over certain property and assets to the Receivership Estate, and Dragul “stipulates to the entry of judgment against him for \$120,000.” Motion at 4, ¶ 7(B). Presumably, property turned over by Dragul to the Receivership Estate is intended to satisfy creditors identified by the Receiver who will apply all such revenues, incomes and sales proceeds according to the priorities established by the Receivership Order at ¶ 22. Mr. Metz submitted a claim pursuant to the Receiver’s established Claims Procedure authorized by this Court for funds to be used to remediate the Property.

Mr. Metz seeks to intervene in this case, and to lift the stay of proceedings concerning Dragul and the GDA Entities, in order to permit him to request an Order to Show Cause and Contempt Citation Against Mr. Gary Dragul and the GDA Entities in the Enforcement Action, to permit one court to hear in one action the respective culpability of all the defendants to that action for failure to comply with the terms of the Remediation Order. He also seeks to interpose a limited objection to the Proposed Settlement Agreement to the extent it includes a \$120,000 monetary judgment against Dragul which has the effect of depleting assets of Dragul that otherwise could be used to satisfy his obligations in the remediation action.

ARGUMENT

I. This Court Should Allow Mr. Metz to Intervene for Limited Purposes in this Action

A. Rule 24(a) – Intervention of Right.

C.R.C.P. 24(a)(2) provides for intervention as of right where (1) the applicant claims an interest in the subject matter of the litigation; (2) disposition of the action may impair or impede the applicant's ability to protect that interest; and (3) the applicant's interest is not adequately represented by existing parties. *Mauro by & through Mauro v. State Farm Mut. Auto. Ins. Co.*, 2013 COA 117, ¶ 13, 410 P.3d 495, 498, citing *Feigin v. Alexa Grp., Ltd.*, 19 P.3d at 26 (Colo. 2001). C.R.C.P. 24 should be liberally interpreted to allow, whenever possible and compatible with efficient and due process, issues related to the same transaction to be resolved in the same lawsuit and at the trial court level. *Feigin*, at 26; *O'Hara Grp. Denver, Ltd. v. Marcor Housing Sys., Inc.*, 197 Colo. 530, 541, 595 P.2d 679, 687 (1979).

Colorado has a “flexible approach” to determining whether a party possesses an interest in intervening under C.R.C.P. 24(a)(2), and the supreme court has held that the existence of an interest “should be determined in a liberal manner” and the interest requirement “should not be viewed formalistically.” *Feigin* at 29; *see O'Hara Grp.* at 687. This requirement is a prerequisite rather than a determinative criterion for intervention. *Feigin*, at 29; *O'Hara Grp.* at 687.

B. Rule 24(b) – Permissive Intervention.

Rule 24(b) permits “Permissive Intervention” when an “applicant’s claim or defense and the main action have a question of law or fact in common.” Rule 24(b) “gives the trial court considerable discretion” in permitting intervention and provides for intervention “so long as the intervention will not unduly delay or prejudice the rights of the original parties. *In re Marriage*

of Paul, 978 P.2d 136, 139 (Colo. App. 1998) citing *Rutenbeck v. Grossenbach*, 867 P.2d 36 (Colo.App.1993).

C. Intervention of Right and Permission Intervention are Warranted.

Mr. Metz is entitled to intervene by right in the Civil Fraud Action pursuant to Rule 24(a)(2). First, Mr. Metz has an interest in the subject matter of the litigation, specifically, using Dragul and GDA Entities' funds for remediation of the Property. Mr. Metz's obligations in the Enforcement Action depend upon the ability of the other Defendants to pay the costs of the remediation. Second, disposition of this action may impair or impede Mr. Metz's ability to protect his interest in applying Dragul and GDA Entities' funds to the costs for remediation, as opposed to other uses of the money. Third, Mr. Metz's interest is not adequately represented by existing parties, as CDHPE has sought to enforce the Remediation Order against Mr. Metz alone, and the Receiver's objective is to direct Dragul and GDA Entities' funds to satisfy creditors other than CDPHE. To wit, CDPHE (represented by the same Attorney General's Office representing Plaintiff in this action) has not sought to intervene in this case, nor to ensure that Dragul or the GDA Entities interests in the Receivership Estate are directed towards the environmental remediation of the Property. Mr. Metz's interest in the disposition of funds and the manner they are used to remediate the property exists coextensively with the Remediation Order signed by Judge Madden on January 20, 2015. As long as Mr. Metz is deemed to be subject to this Order he has economic and, apparently, penal, interests in having as much money from Dragul and the GDA Entities to remediate the property. Thus, decisions about what funds are received from Dragul and the GDA Entities, whether any judgments should be imposed on Dragul and the GDA Entities, what funds should be allocated to the remediation, and the cost of

the remediation impact Mr. Metz significantly and he has a due process rights to notice and an opportunity to be heard regarding these decisions.

The subject matter of litigation in this action directly affects Mr. Metz and his liability under the Remediation Order. Disposition of this matter may impair or impede his ability to protect his interest in the preserving the ability of a jointly and severally liable codefendant to contribute to the remediation costs. His interest is not adequately represented by the Receiver, the Securities Commissioner, Dragul or the GDA Entities.

Additionally, Mr. Metz is entitled to intervene pursuant to Rule 24(b). Mr. Metz's "claim and the main action have questions of law and fact in common." Rule 24(b) "gives the trial court considerable discretion" in permitting intervention which should be "liberally construed" to permit resolution of "all related controversies in one action. *Great Neck Plaza, L.P. v. Le Peep Restaurants, LLC*, 37 P.3d 485 (Colo. App. 2001). The common questions of fact pertain to the availability of funds from Dragul and the Dragul Entities to fund the environmental remediation. Whether the funds should be applied in the first instance to creditors or to the clean-up of a contaminated site in the City of Denver should be decided in one court.

Finally, intervention by Mr. Metz "will not unduly delay or prejudice the rights of the original parties" given the questions of law and fact, and parties, in common. He does not seek to delay any current proceedings before this Court.

II. The Court Should Lift the Stay in the Receivership Order to the Extent it Precludes Litigation of Dragul and the Dragul Entities' Liability for Remediation of the Property through a Simultaneous Contempt Proceeding

Mr. Metz seeks to lift the stay to the extent he may be allowed to file in the Environmental Action a Motion for Order to Show Cause and Contempt Citation against Dragul, GDA RES and GDA REM. A proposed motion is attached hereto as Exhibit D.

At present, there are two conflicting paths being pursued simultaneously in two different courtrooms of the Denver District Court. In Division 203, one party, Aaron Metz, is facing contempt proceedings for not fully funding out of his own personal pocket an unspecified cost associated with the environmental remediation of a property in which his former boss and company owned a possessory interest. Although his liability is purportedly joint and several with Dragul and the Dragul Entities, he is precluded from seeking such contribution by virtue of the stay imposed in this case. At the same time, in this Division, the Receiver is acting pursuant to the Receivership Order to take possession of all of the property and possessions of Dragul and the Dragul Entities and then to apply those revenues, incomes and sale proceeds to payment of certain obligations according to the priorities described in the Order at ¶ 22. Notably, the Receivership Order makes no special allowance for payment of funds pursuant to a Court Ordered Remediation agreement. *Id.*

In essence, the Receiver in this matter is acting at cross-purposes with the Receiver appointed over YM Retail in the Environmental Action, whose mission it is to fund the remediation of the Property. Defendant Dragul and his Entities only possess so many assets. Where this action permits the possession and disbursement of those assets to creditors who suffer from any securities fraud violations committed by Mr. Dragul, that necessarily means fewer

assets available to pay for the remediation of the Property under the terms of the Remediation Order. Mr. Metz stands to lose all of his personal assets to pay for a remediation he did not cause at a Property he never owned.

Mr. Metz asks this Court to lift the stay solely to the extent that Dragul and his Entities can be joined in the Environmental Action with respect to who failed to pay for the remediation, when and for how much. If the Court in that action deems Dragul to be in contempt for a certain amount of money towards the remediation, such award could be entered in this Court and deemed a priority for payment from the Receivership Estate. All parties could be heard with respect to the priority it should be granted. Without Dragul's participation in the contempt proceedings, there stands the risk of an inconsistent judgment; the Court in the Environmental Action might determine that Mr. Metz is only partially, or minimally, responsible for payment towards the remediation but the parties will be without sufficient funding to complete the necessary remediation work.

III. The Court Should Allow Mr. Metz to Interpose a Limited Objection to the Proposed Settlement Agreement.

The Court also lift the stay to the extent necessary to allow Mr. Metz to interpose a limited objection to the proposed settlement agreement, as attached hereto as Exhibit E. Mr. Metz does not oppose the bulk of the Turnover Motion, but would seek an opportunity to be heard as to the proposal that Mr. Dragul is ordered to pay a \$120,000 judgment to the Receivership Estate, rather than to pay that same money towards the funding of the environmental cleanup pursuant to the Remediation Order. Although Mr. Metz has standing to object to the settlement agreement to extent he already is a person who has made a claim under the procedure established by the Receiver, he also seeks to separately object based on his real

interest in avoiding a contempt citation in the Environmental Action based, in substantial part, on the inaction of his co-defendant and former employer, Dragul.

CONCLUSION

As outlined above Mr. Metz is entitled to intervene in the instant matter by right and permission. The Complaint filed by the Attorney General in this action against Mr. Dragul and his GDA Entities resulted in a Receivership Order which is asserted to stay enforcement of the Remediation Order against all Defendants in the Environmental Action, except Mr. Metz and YM Retail. The Notice filed in the Enforcement Action by Mr. Metz's own counsel at the time of filing, specifically asked the Court to construe the Receivership Order as a stay as to all Defendants, except Mr. Metz. As it stands, based on the actions of others, and due to circumstances beyond his control, CDHPE seeks to enforce the Remediation Order against Mr. Metz alone. Consequently, his interest in this matter, and the questions of fact and law in common with the Enforcement Action, support granting his request to intervene.

Likewise, this Court should lift the stay imposed by the Receivership Order to the extent it bars a request by Mr. Metz to join Mr. Dragul and his Entities to the contempt proceedings concerning the failure to fund the remediation of the Property. Permitting Mr. Dragul and his entities' liability for funding in the same hearing, before one judge, conserves judicial resources and those of the parties, ensures that all funds available for the remediation are conserved for that purpose, and reduces the risk of inconsistent judgments in different courtrooms.

Finally, this Court should permit Mr. Metz to intervene for the limited purpose of filing a separate objection to the Proposed Settlement Agreement to the extent it imposes an additional \$120,000 judgment against Mr. Dragul.

WHEREFORE, Mr. Metz moves to intervene by right and permission in the instant matter pursuant to Colorado Rule of Civil Procedure 24 and asks that the Receivership Order stay be lifted to the extent it will permit Mr. Metz to file a Motion for Order to Show Cause and Contempt Citation against Defendants Gary Dragul, GDA RES and GDA REM in Case No. 13-CV-33076. He also asks that he be permitted to interpose a limited objection to the Proposed Settlement Agreement.

Dated December 13, 2019.

Respectfully submitted,

s/ Laura A. Menninger

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Certificate of Service

I certify that on December 13, 2019, a copy of this *Motion by Aaron Metz to Intervene and to Lift Stay for Limited Purposes* was served via Colorado Courts E-filing system to the following parties:

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