

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

GREAT AMERICAN INSURANCE COMPANY,

Plaintiff,

- against -

ARCH REAL ESTATE HOLDINGS, LLC, JEFFREY SIMPSON, JARED CHASSEN, WIGGIN AND DANA LLP, GRIFFIN LLP, and OFFIT KURMAN PA,

Defendants.

Index No. 653208/2024

REPLY MEMORANDUM IN FURTHER SUPPORT OF MOTION TO INTERVENE

DAVIDOFF HUTCHER & CITRON LLP
Attorneys for Intervenor JJ Arch LLC
605 Third Avenue, 34th Floor
New York, New York 10158
(212) 557-7200

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Proposed Intervenor-Defendant-Claimant JJ Arch LLC (“**JJ Arch**”), by and through its undersigned counsel, Davidoff Hutcher & Citron LLP, respectfully submits this reply memorandum of law in further support of its motion (the “**Motion**”) for an Order: (1) granting it intervention, pursuant to CPLR 1012; and (2) ordering plaintiff Great American Insurance Company (“**Plaintiff**”) to make an immediate deposit of the res with this Court.

Preliminary Statement

In lieu of advancing any credible legal argument in opposition to JJ Arch’s motion to intervene, Arch Real Estate Holdings, LLC (“**AREH**”), or at least its ostensible counsel, Olshan Frome Wolosky LLP (“**Olshan**”), has instead elected to lob a series of irrelevant, unsubstantiated, and plainly false allegations directed at JJ Arch and its sole managing member, Jeffrey Simpson. Notably, all such factual averments ostensibly made on behalf of AREH are contained in the August 19, 2024 affirmation of Jeremy King (NYSCEF Doc. No. 47), an Olshan attorney who has no first-hand knowledge of the allegations set forth therein, as well as Mr. King’s August 19, 2024 memorandum of law (NYSCEF Doc. No. 58). By way of example, Mr. King, the Olshan attorney, alleges that JJ Arch’s Motion “is part of a broader pattern of activity aimed at misappropriating AREH’s property and avoiding adjudication in the Supreme Court of the State of New York through misuse of bankruptcy law.” Olshan Memo., at 1. He alleges that Simpson caused JJ Arch to file for voluntary Chapter 11 bankruptcy protection “[in] an effort to circumvent Justice Cohen’s preliminary injunction order and to relitigate the matters already decided in the Simpson Action, on March 7, 2024.” Olshan Memo., at 4 (citing J. King Affirm., at ¶ 12). He alleges that JJ Arch pressured its counsel to “present[] a claim or defense [in the Chapter 11 SDNY Bankruptcy] that is not warranted under existing law.” Olshan Memo., at ¶ 7. And he speculates that “[i]f permitted to intervene in this action, JJ Arch likely will remove this proceeding to the [Chapter 11 SDNY Bankruptcy], either immediately or at the first sign of an

unfavorable outcome, in an attempt to use the procedures in that court to restrict the payment of legitimate Insured's claims and use the proceeds to pay its own bills," *id.*, at ¶ 16, which bald allegation Olshan does not even attempt to corroborate with, or ground in, the hearsay testimony of its attorney affirmation. Mr. King's aforementioned representations, among numerous others within the opposition ostensibly filed on behalf of AREH, comprise nothing more than averments and speculation made by an attorney who has no actual knowledge thereof. Accordingly, JJ Arch respectfully submits that this Court should disregard same as inadmissible and unauthenticated hearsay.

Moreover, Mr. King's aforementioned representations are wholly irrelevant. Olshan's allegations that JJ Arch misappropriated AREH's property, Olshan's allegations that JJ Arch has sought to circumvent Justice Cohen's preliminary injunction order, Olshan's allegations that JJ Arch has pressured its counsel to assert meritless claims, and Olshan's allegations that JJ Arch intends to abuse bankruptcy procedure, have no bearing on the issue of JJ Arch's entitlement to intervene. The only facts that are relevant thereto concern the identities and relationships of the interested parties, namely GAIC, JJ Arch, Simpson, and AREH, the terms of the Policy, and the parties' respective claims to insurance defense funds thereunder. And indeed, JJ Arch has proffered facts establishing, among other things, that (i) Simpson is the sole managing member of JJ Arch, *see J. Simpson Aff.*, at ¶ 5, (ii) JJ Arch holds an 80% membership interest in AREH, *see id.*, at ¶ 7, (iii) Simpson is an "Insured Person" under the Policy, *see J. Simpson Aff.*, at ¶ 14; Policy, Ex. 2, at § III.A.J.1; Compl., Ex. 1, at ¶ 16, (iv) JJ Arch is an "Insured Organization" under the Policy, *see J. Simpson Aff.*, at ¶¶ 15, 16; Policy, Ex. 2, at § III.A.I, Q, and (v) JJ Arch has sought and received from GAIC Cost of Defense expenses under the Policy for the purposes of defending itself in no less than three Noticed Matters, *see J. Simpson Aff.*, at ¶ 19. These

comprise the sole issues relevant to JJ Arch's entitlement to intervene in this action pursuant to CPLR 1012(a). JJ Arch respectfully asks this Court to recognize Olshan's allegations for what they are: a deliberate effort to disparage and prejudice JJ Arch, and distract from what is – and should remain – the only facts and evidence relevant to this inquiry.

Noticeably absent from the opposition purportedly filed on behalf of AREH is any statement, whether sworn or otherwise, from any person who is conceivably authorized to speak on AREH's behalf. It is indisputable that JJ Arch holds an 80% membership interest in AREH. It is indisputable that Simpson has at all times remained the sole managing member of JJ Arch. Neither Simpson nor JJ Arch, however, authorized AREH to retain Mr. King's firm, Olshan, to appear in this action and speak on AREH's behalf. The only other person or entity remotely capable of asserting such authority is AREH's only other member, 608941 NJ Inc. ("Oak"). Nonetheless, no Oak member, principal, agent, or representative has contributed a statement, sworn or otherwise, in support of the opposition ostensibly made on behalf of AREH. Simply put, not only does AREH's purported opposition to JJ Arch's intervention comprise inadmissible and unauthenticated second-hand hearsay; it also lacks any fact or allegation capable of establishing that Olshan has been authorized to serve as AREH's counsel.

Facts

JJ Arch has proffered facts and evidence establishing that (i) Simpson is the sole managing member of JJ Arch, *see* J. Simpson Aff., at ¶ 5, (ii) JJ Arch holds an 80% membership interest in AREH, *see id.*, at ¶ 7, (iii) Simpson is an "Insured Person" under the Policy, *see* J. Simpson Aff., at ¶ 14; Policy, Ex. 2, at § III.A.J.1; Compl., Ex. 1, at ¶ 16, (iv) JJ Arch is an "Insured Organization" under the Policy, *see* J. Simpson Aff., at ¶¶ 15, 16; Policy, Ex. 2, at § III.A.I, Q, and (v) JJ Arch has sought and received from GAIC Cost of Defense expenses under the Policy for the purposes of defending itself in no less than three Noticed Matters, *see* J.

Simpson Aff., at ¶ 19. Indeed, GAIC's Interpleader Complaint expressly acknowledges that Griffin and Wiggin, which were retained by JJ Arch in two of the Noticed Matters may be entitled to part of the insurance defense funds, a clear admission that JJ Arch is an Insured under the Policy. *See Compl.*, Ex. 1, at ¶ 4 ("Interpleader-Defendant Griffin was retained as counsel to JJ Arch . . . in the pending Chapter 11 SDNY Bankruptcy . . . As a result, Griffin has incurred fees that are potentially covered under the Policy."); *id.*, at ¶ 5 ("Interpleader-Defendant Wiggin was retained as counsel to JJ Arch . . . in the pending Chapter 11 SDNY Bankruptcy; Wiggin is also counsel to JJ Arch LLC in an [A]dversarial [P]roceeding stemming from the SDNY Bankruptcy . . . As a result, Wiggin has incurred fees that are potentially covered under the Policy. The foregoing are the only facts that are even remotely germane to JJ Arch's motion.

Olshan, in its opposition, alleges that JJ Arch's Motion "is part of a broader pattern of activity aimed at misappropriating AREH's property and avoiding adjudication in the Supreme Court of the State of New York through misuse of bankruptcy law." Olshan Memo., at 1. Olshan alleges that Simpson caused JJ Arch to file for voluntary Chapter 11 bankruptcy protection "[in] an effort to circumvent Justice Cohen's preliminary injunction order and to relitigate the matters already decided in the Simpson Action, on March 7, 2024." Olshan Memo., at 4 (citing J. King Affirm., at ¶ 12). Olshan alleges that JJ Arch pressured its counsel to "present[] a claim or defense [in the Chapter 11 SDNY Bankruptcy] that is not warranted under existing law." Olshan Memo., at ¶ 7. And Olshan speculates that "[i]f permitted to intervene in this action, JJ Arch likely will remove this proceeding to the [Chapter 11 SDNY Bankruptcy], either immediately or at the first sign of an unfavorable outcome, in an attempt to use the procedures in that court to restrict the payment of legitimate Insured's claims and use the proceeds to pay its own bills," *id.*, at ¶ 16, which bald allegation Olshan does not even attempt to corroborate with, or ground in, the

hearsay testimony of its attorney affirmation. These meritless allegations have no bearing on JJ Arch's entitlement to intervene and should be disregarded by this Court.

Olshan also argues that JJ Arch "is not an Organization that was created to support an Investment Fund," which it defines as an " 'Organization that is a pooled investment vehicle which is created or established prior to or during the Policy Period.' " Olshan Memo., at 13. To be clear, Olshan has identified no statement, whether that of Mr. King, a representative of AREH, or otherwise, even remotely capable of establishing this fact. And Olshan has identified no evidence even remotely capable of establishing this fact. It has thus failed to rebut the presumption that JJ Arch, an Organization that was created in 2017 well prior to the commencement of the Policy Period, *see J. Simpson Aff.*, at ¶ 17, and that exists for the sole purpose of indirectly owning and controlling in excess of \$1 billion in investments through vertically integrated corporate structures, *see J. Simpson Aff.*, at ¶¶ 6, 8, qualifies as a "pooled investment vehicle which is created or established prior to or during the Policy Period." For this reason alone, Olshan's argument is meritless.

Argument

Upon a timely motion, courts grant motions to intervene as of right pursuant to CPLR § 1012(a)(3) when the intervening party demonstrates the action involves the distribution or disposition of property in which that party has an interest and may be adversely affected by a judgment. *See George v. Grand Bay Assoc. Enter. Inc.*, 45 A.D.3d 451 (1st Dept. 2007); *Wells Fargo Bank, Nat'l Ass'n v. McLean*, 70 A.D.3d 676, 677 (2d Dept. 2010). It is well established that CPLR § 1012(a)(3) has been "liberally construed and intervention is liberally allowed." *In re Karl Springer Woodworking, Ltd.*, 148 Misc. 2d 626, 627 (Sup. Ct. N.Y. Cnty. 1990) (citing *Vantage Petroleum v. Bd. of Assessment Review*, 91 A.D.2d 1037 (2d Dept. 1983); *Bay State Heating & Air Conditioning Co. v. Am. Ins. Co.*, 78 A.D.2d 147 (4th Dept. 1980); 2 Weinstein-

Korn-Miller, N.Y. Civil Practice, ¶ 1012.05). As set forth in JJ Arch's moving papers, it easily meets the very modest threshold for intervention because it is an "Insured Organization" under the Policy and its herein application was made within days of the commencement of this action.

I. OLSHAN'S ARGUMENTS THAT JJ ARCH DOES NOT QUALIFY AS AN INSURED UNDER THE POLICY ARE DEFECTIVE AS A MATTER OF LAW

A. Olshan's "Hopelessly Circular" Argument Is Meritless.

Olshan argues that JJ Arch's position that it is an Insured under the policy "is hopelessly circular." Olshan Memo., at 13. Specifically, it falsely characterizes JJ Arch's "circular" position as follows: (i) Simpson is an "Insured Person" solely because he is the managing member of JJ Arch, an insured "Operating Entity"; and (ii) JJ Arch is an "Insured Organization" because Simpson, an Insured Person, manages it. *See id.*, at 13. To be clear, JJ Arch never claimed that Simpson is an "Insured Person" *because he is the managing member of JJ Arch*. And Olshan itself, earlier in its own papers, expressly acknowledges this fact. *See id.*, at 12 ("JJ Arch's Motion does not specify whether JJ Arch contends that Simpson qualifies as an Insured Person . . . due to his role as 'managing member of JJ Arch.'"). In this exercise, Olshan has contrived a position that JJ Arch never advanced for the purposes of arguing that such position, as apparently advanced by JJ Arch, is "hopelessly circular." In doing so, Olshan demonstrates the epitome of legal circuitry.

Not only does Olshan's aforementioned argument rebut positions never advanced by JJ Arch, it also attempts to contrive a dispute with respect to a fact that is decidedly not in dispute. GAIC, in its complaint, claims that Simpson is an Insured Person under the Policy. *See Compl.*, Ex. 1, at ¶ 16. JJ Arch, in its motion papers, claims that Simpson is an Insured Person under the Policy. *See J. Simpson Aff.*, at ¶ 14. Olshan, in its opposition, concedes that Simpson qualifies as an Insured Person under the Policy. Olshan Memo., at 13 ("For purposes of this Motion, AREH

does not contest that Simpson qualifies as an Insured Person.”). No party has even suggested otherwise. Olshan also revealed the reason why Simpson decidedly qualifies as an Insured Person under the Policy, namely his status as the “de facto manager of AREH.” *Id.*, at 12 n.8. This is precisely the same reasoning underpinning GAIC’s conclusion as set forth in its November 22, 2023 letter attached as Exhibit 7 to Mr. King’s affirmation. *See* NYSCEF Doc. No. 47, at 7 (“Great American recognizes that Mr. Simpson was acting as the de facto managing member of AREH; and that Mr. Simpson signed the application for the Policy as “managing member” of AREH. With the foregoing in mind, Great American acknowledges that Mr. Simpson constitutes an Insured Person and thus an Insured under the Policy.”). Simply put, all parties hereto are in agreement that Mr. Simpson is an Insured under the Policy. All parties hereto are in agreement that Mr. Simpson is an Insured by virtue of his status as de facto managing member of AREH. And no party hereto has advanced that Mr. Simpson is an Insured solely by virtue of his role as managing member of JJ Arch. Olshan’s disingenuous efforts to manufacture arguments that JJ Arch never advanced and factual disputes that do not exist should be disregarded by this Court.

B. Olshan’s Argument that the Policy’s Limiting Language Disqualifies JJ Arch from Being an Insured Is Meritless.

Olshan argues that JJ Arch is not covered as an “insured” under the Policy “for the independent reason that it ignores limiting language in the definition of an Operating Entity.” Olshan Memo., at 13. According to Olshan, JJ Arch’s position would result in “any company created and managed by an Insured Person, even if wholly unrelated to the business of the Named Insured . . . qualify[ing] as an Operating Entity.” *Id.*, at 13. Before even addressing the merits of Olshan’s argument, its worth noting that JJ Arch is not “any company created and managed by” Simpson. Far from it. JJ Arch exists for the sole purpose of indirectly owning and

controlling various real property assets through vertically integrated corporate structures. *See J. Simpson Aff.*, at ¶ 6. It holds an 80% membership interest in AREA, *see id.*, at ¶ 7, and was AREH's sole Managing Member until November of 2023, *see NYSCEF Doc. No. 47*, at 3. Olshan's suggestion otherwise is not only categorically misleading, but also belied by the undisputed facts before this Court.

Olshan next argues, without any supporting facts or evidence (other than the terms of the Policy itself) that "JJ Arch is not an Organization that was created to support an Investment Fund," which it defines as an "Organization that is a pooled investment vehicle which is created or established prior to or during the Policy Period." Olshan Memo., at 13. To be clear, Olshan has identified no statement, whether that of Mr. King, a representative of AREH, or otherwise, even remotely capable of establishing this fact. And Olshan has identified no evidence even remotely capable of establishing this fact. It has thus failed to rebut the presumption that JJ Arch, an Organization that was created in 2017 well prior to the commencement of the Policy Period, *see J. Simpson Aff.*, at ¶ 17, and that exists for the sole purpose of indirectly owning and controlling in excess of \$1 billion in investments through vertically integrated corporate structures, *see J. Simpson Aff.*, at ¶¶ 6, 8, qualifies as a "pooled investment vehicle which was created prior to or during the Policy Period." For this reason alone, Olshan's argument that the Policy's limiting language disqualifies JJ Arch from being an Insured is meritless.

II. OLSHAN'S ARGUMENT THAT PERMITTING JJ ARCH TO INTERVENE WOULD PREJUDICIAL IS ENTIRELY SPECULATIVE, IS DEVOID OF EVIDENTIARY OR FACTUAL SUPPORT, AND LACKS A COGNIZABLE LEGAL BASIS

Olshan argues that "JJ Arch's Motion should be denied for the additional reason that the relief sought would cause delay and prejudice to the parties." Olshan Memo., at ¶ 16. Underpinning this claim is its speculation that "[i]f permitted to intervene in this action, JJ Arch

likely will remove this proceeding to the [Chapter 11 SDNY Bankruptcy], either immediately or at the first sign of an unfavorable outcome, in an attempt to use the procedures in that court to restrict the payment of legitimate Insured's claims and use the proceeds to pay its own bills." *Id.*, at ¶ 16. In purported support of this allegation, Olshan cites not a single piece of evidence, and not a single statement, whether sworn, hearsay, or otherwise. It has failed to do so because no evidentiary of factual support for this argument exists. Rather, Olshan's argument comprises pure speculation that is incapable of any degree of probative corroboration. Indeed, Mr. King, in his affirmation, does not even attempt to suggest that he has any degree of knowledge concerning JJ Arch's intentions.

But even if AREH actually filed materials with evidentiary value suggesting or alleging JJ Arch's intention to delay this action by removing same to the bankruptcy court in bad faith, and even if those materials were not hearsay, but rather admissible, they would fail to establish prejudice under CPLR § 1012(a)(3). Prejudice can be established only upon a showing that the movant's "delay in seeking intervention would cause a delay in resolution of the action or otherwise prejudice a party." *Yuppie Puppy Pet Prods. Inc. v. Street Smart Realty, LLC*, 77 A.D.3d 197, 202 (1st Dept. 2010) (citing *Teichman v. Comm. Hosp. of W. Suffolk*, 87 N.Y.2d 514, 522 (1996)). Notably, prejudice requires a showing that *the delay in seeking intervention would prejudice a party*. See *Yuppie Puppy Pet Prods. Inc.*, 77 A.D.3d at 202 ("Here, there was no delay in Petra's motion to intervene in the case and *no prejudice to Yuppie Puppy as a result of the motion*.")) (emphasis supplied). Olshan, in its opposition, makes no allegation of any delay, unreasonable or otherwise, by JJ Arch in seeking intervention. And indeed, it is incapable of making such an allegation because JJ Arch filed its motion within days of being served with the Complaint. Instead, Olshan speculates that JJ Arch will delay this action, and thus prejudice

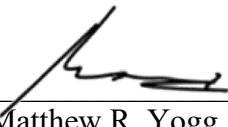
AREH, at some future time by seeking removal in bad faith. It cites no case law even remotely supportive of its ostensible position that a party's hypothetical future decision in the underlying litigation that could possibly delay its resolution can establish prejudice to the non-moving parties. And indeed, no such case law or authority supports this position. Accordingly, Olshan's argument that permitting JJ Arch to intervene would prejudice AREH is meritless.

Conclusion

WHEREFORE, it is respectfully submitted that JJ Arch's motion be granted in its entirety, together with such other and further relief as this Court deems just and proper.

Dated: New York, New York
August 23, 2024

DAVIDOFF HUTCHER & CITRON LLP

By: 

Matthew R. Yogg
605 3rd Avenue, 34th Floor
New York, New York 10158
(212) 557-7200
mry@dhclegal.com

Attorneys for Intervenor JJ Arch LLC

CERTIFICATION OF COMPLIANCE WITH WORD COUNT LIMIT

I hereby certify pursuant to Section 202.8-b(c) of the Uniform Civil Rules for the Supreme Court that the total number of words in the foregoing document, exclusive of the caption, table of contents, table of authorities, and signature block, is 3,224 according to the "Word Count" function of Microsoft Word, the word-processing system used to prepare the document, and thus that the document complies with the word count limit set forth in Section 202.8-b(a) of the Uniform Civil Rules for the Supreme Court.

Dated: New York, New York
August 23, 2024

DAVIDOFF HUTCHER & CITRON LLP

By: 

Matthew R. Yogg
605 3rd Avenue, 34th Floor
New York, New York 10158
(212) 557-7200
mry@dhclegal.com

Attorneys for Intervenor JJ Arch LLC