IN THE SUPREME COURT OF THE STATE OF NEVADA

ARCHON CORPORATION, PAUL W. LOWDEN, and SUZANNE LOWDEN,

Petitioner,

v.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE JOE HARDY, DISTRICT COURT JUDGE

Respondents

and

STEPHEN HABERKORN, an individual,

Real Party in Interest.

Supreme Court Case No.: 71802

Eighth Judicial District Court Case No.: A-16-732619-B

REAL PARTY IN INTEREST STEPHEN HABERKORN'S RESPONSE TO NRAP 8 MOTION TO STAY PROCEEDINGS IN THE DISTRICT COURT

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I. INTRODUCTION

On August 4, 2016, the District Court denied the motion of Petitioners Archon Corporation ("Archon"), Paul W. Lowden, and Suzanne Lowden (collectively "Petitioners") to dismiss the underlying case on the grounds that Plaintiff's claims were barred by the applicable statutes of limitations. Almost four months later, on December 2, 2016, Petitioners filed a Petition for Writ of Prohibition or Mandamus ("Writ Petition") with this Court requesting that it issue a Writ: (1) vacating the District Court's decision finding, in part, that cross-jurisdictional class action tolling applies to this case; and (2) directing the District Court to reconsider their Motion to Dismiss without applying cross-jurisdictional class action tolling. *Id.* After another 4 months, Petitioners now seek a stay of the lower court proceedings, despite the fact that their Writ Petition is without merit and they cannot meet any of the standards required to obtain such a stay under Nevada Rule of Appellate Procedure ("NRAP") 8(c).

The Motion to Stay filed by Petitioners should not be granted. First, Petitioners have failed to demonstrate that the object of the Writ Petition will be defeated if the stay is denied because they have an adequate legal remedy through direct appeal after final judgment. Second, Petitioners cannot demonstrate a likelihood of success on the merits of their Writ Petition because the cross-jurisdictional tolling issue was only one basis for the lower Court's decision to deny the Motion to Dismiss. Third, Petitioners have not and cannot demonstrate any irreparable harm from the case proceeding other than legal fees and costs,

which do not constitute irreparable harm. Accordingly, Petitioners have not met the extremely high burden of demonstrating that a stay is justified pending a ruling from this Court on a Writ Petition seeking interlocutory review of an order denying a motion to dismiss.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

The Factual and Procedural Background section contained in Petitioners' Motion to Stay is misleading with regard to the bases for the District Court's denial of Petitioners' Motion to Dismiss. Specifically, the Motion to Stay implies that the Court's decision to deny Petitioners' Motion to Dismiss was primarily based on the following two conclusions: (1) general class action tolling applies; and (2) under the circumstances, cross-jurisdictional tolling also applies. *See* Petitioners' Motion to Stay, at p. 5. However, in reality, the District Court's denial of Petitioners' Motion to Dismiss was based on the following:

> (1) general class action tolling applies; (2) under these circumstances, cross jurisdictional tolling also applies; (3) the remaining arguments in favor of, or against, dismissal, would be more appropriately raised in a Motion for Summary Judgment, in particular Petitioners' argument that Plaintiff knew or should have known of various public record filings; (4) the Court could not rule on NRS 11.500 at this time, as it was not raised in the briefs; and (5) in the alternative, the Motion should also be denied because of the ongoing harm as alleged in Plaintiff's Opposition, generally set forth on pages 13-19 of the opposition brief...

See Order Denying Motion to Dismiss Without Prejudice, dated August 4, 2016, at p. 2, lines 1-8, attached hereto as Exhibit 1.

Thus, the District Court's decision to deny Plaintiff's Motion to Dismiss was based upon multiple factors in addition to cross-jurisdictional tolling; including a factual dispute as to when Plaintiff knew or should have known of various public record filings and a factual finding that ongoing harm rendered dismissal as a matter of law based upon the running of the statute of limitations inappropriate. *Id.* These factual findings provide more than enough justification for the Court's denial of Petitioners' Motion to Dismiss, separate and apart from the cross-jurisdictional tolling issue. As this Court has often stated: "[w]hen the plaintiff knew or in the exercise of proper diligence should have known of the facts constituting the elements of his cause of action is a question of fact for the trier of fact." *Havas v. Engebregson*, 97 Nev. 408, 411-12, 633 P.2d 682, 684 (1981); *Golden Nugget, Inc. v. Ham*, 95 Nev. 45, 48-49, 589 P.2d 173, 175-76 (1979). Accordingly, Petitioners are unlikely to prevail upon their claim that a stay of this case is justified based upon a Writ Petition challenging only one basis for the denial of Petitioners' Motion to Dismiss.

III. LEGAL ARGUMENT

A. Legal Standard Governing Motions to Stay

While NRAP 8(a) applies on its face only to appeals, it also has been held to be applicable to extraordinary writ petitions. *See Fritz Hansen A/S v. Dist. Ct.*, 116 Nev. 650, 6 P.3d 982 (2000). Generally, in determining whether to issue a stay pending disposition of an appeal or writ petition, the Court must consider the following factors: (1) whether the object of the appeal will be defeated if the stay

is denied; (2) whether appellant will suffer irreparable or serious injury if the stay is denied; (3) whether respondent will suffer irreparable or serious injury if the stay is granted; and (4) whether appellant is likely to prevail on the merits in the appeal. NRAP 8(c); *see also Fritz Hansen*, 116 Nev. at 658, 6 P.3d at 986.

The first and fourth factors set forth in NRAP 8(c) are usually the most important, because the harm if the stay is granted or denied, as contemplated by the second and third factors, is generally limited to delay in the litigation if a stay is granted, or the increased cost of the litigation if a stay is denied and neither of those harms is deemed to be irreparable. *Mikohn Gaming Corp. v. McCrea,* 120 Nev. 248, 253, 89 P.3d 36, 39 (2004). Here, there is no claim by Petitioners to any irreparable harm if the stay is denied, other than the increased costs of the litigation. Thus, the second factor of the test does not support the issuance of a stay in this case. In fact, as set forth below, none of the four factors weigh in Petitioners' favor.

B. NRAP 8(c) Requires the Denial of Petitioners' Motion to Stay

1. The Object of the Writ Will Not Be Defeated if the Stay is Denied

As set forth above, the first factor a court must consider when determining whether to issue a stay pending the disposition of an appeal or Writ Petition is "whether the object of the appeal will be defeated if the stay is denied." In *Fritz Hansen A/S v. Dist. Ct.*, *supra*, the party seeking appellate review brought "a writ of prohibition challenging a district court order that denied a motion to quash service of process for lack of personal jurisdiction." 116 Nev. at 652, 6 P.3d at 983.

This Court held that the appellant had preserved its objection on the basis of lack of personal jurisdiction, and so the underlying case could proceed, even though the writ was pending. *Id.*, 116 Nev. at 657-658, 6 P.3d at 986.

The present case is similar to *Fritz Hansen.* Allowing this case to proceed through discovery would not defeat the object of Petitioners' Writ Petition. At best, if they prevail, Petitioners will get a remand and order to reconsider the Motion to Dismiss. The order denying the Motion to Dismiss is interlocutory and can be appealed after final judgment. Petitioners will not waive their argument that Plaintiff's claims are barred by the statute of limitations. Indeed, in its August 4, 2016 Order Denying Motion to Dismiss Without Prejudice, the District Court specifically found that "the remaining arguments in favor of, or against, dismissal, would be more appropriately raised in a Motion for Summary Judgment." *See* Exhibit 1. If the stay is denied, Petitioners will still have the opportunity to seek summary judgment pursuant to NRCP 56, raise the same arguments and possibly prevail.

Moreover, the Order Denying Motion to Dismiss Without Prejudice specifically found that in addition to cross jurisdictional tolling, denial of the Motion to Dismiss was warranted because: "(3) the remaining arguments in favor of, or against, dismissal, would be more appropriately raised in a Motion for Summary Judgment, in particular Petitioners' argument that Plaintiff knew or should have known of various public record filings;...and (5) in the alternative, the Motion should also be denied because of the ongoing harm as alleged in Plaintiff's

Opposition, generally set forth on pages 13-19 of the opposition brief." *See* Order Denying Motion to Dismiss Without Prejudice, Exhibit 1, at p. 2, lines 1-8. Thus, even if Petitioners prevail on their Writ Petition, many of Plaintiff's claims against Petitioners will remain to be adjudicated in this case. Simply stated, there is no basis for this Court to stay this case based upon Petitioners' Writ Petition seeking review of a single legal issue in an interlocutory order.

2. Petitioners Are Not Likely to Prevail on the Merits of the Writ

Mandamus does not generally lie to correct a district court's legal error in denying a motion to dismiss for failure to state a claim upon which relief can be granted. *See State ex rel. Dep't of Transp. v. Thompson*, 99 Nev. 358, 361–62, 662 P.2d 1338, 1340 (1983); *see also Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. (UAW) v. Nat'l Caucus of Labor Comms.*, 525 F.2d 323, 326 (2d Cir.1975) ("It is not the function of mandamus to allow ad hoc appellate review of interlocutory orders when only error is alleged."). Such an error, if one occurs, is correctable by the district court as the case proceeds and by this Court on direct appeal from the eventual final judgment. *See Reno Hilton Resort Corp. v. Verderber*, 121 Nev. 1, 5–6, 106 P.3d 134, 136–37 (2005).

Consequently, this Court has held that it will generally not intervene to consider writ petitions challenging district court orders denying motions to dismiss. "[S]uch petitions rarely have merit, often disrupt district court case processing, and consume an 'enormous amount' of this court's resources." *International Game Tech., Inc. v. Second Judicial Dist. Court,* 124 Nev. 193, 197, 179 P.3d 556, 558–

59 (*quoting State ex rel. Dep't Transp. v. Thompson*, 99 Nev. 358, 361–62, 662 P.2d 1338, 1340 (1983)). In addition, mandamus "requires not only a clear error but one that unless immediately corrected will wreak irreparable harm." *In re Linee Aeree Italiane (Alitalia)*, 469 F.3d 638, 640 (7th Cir.2006); *see* NRS 34.170 (allowing for mandamus in cases "where there is not a plain, speedy and adequate remedy in the ordinary course of law"). "[B]ecause an appeal from the final judgment typically constitutes an adequate and speedy legal remedy, we generally decline to consider writ petitions that challenge interlocutory district court orders denying motions to dismiss." *International Game Tech.,* 124 Nev. at 197, 179 P.3d at 558.

Petitioners do not even attempt to establish that an eventual appeal will not afford them an adequate legal remedy and the only harm alleged from proceeding is the expense associated with the Petitioners having to defend themselves in district court while the Writ Petition is pending. But this harm inheres in any order denying a motion to dismiss and, by itself, is not enough to justify writ relief. "Postponing appeal to the end of litigation, rather than interrupting it in *medias res* with a mandamus proceeding that would require this court to conduct interlocutory appellate review, is as likely to reduce as to increase the total expense of the litigation." *In re Linee Aeree Italiane*, 469 F.3d at 640.

In fact, Petitioners here already were denied a similar Writ Petition by the Nevada Supreme Court in a related case raising similar issues. As in that case, here the district court has not definitively ruled upon the issues of limitations,

repose and tolling. *See, e.g.,* Order Denying Writ of Prohibition, Mandamus, or Certiorari in *Archon Corporation v. Eighth Judicial District Court (Raider)*, Case No. 68995, 2016 WL 1106992 (Nev. S. Ct. March 18, 2016) ("we conclude that our extraordinary intervention is not warranted at this stage of the proceedings, when the district court has yet to definitively rule upon the jurisdiction, limitations, repose, and tolling issues."). A copy of this Order is attached hereto as Exhibit 2. Thus, Petitioners' likelihood of prevailing on the merits in this virtually identical situation is low.

Finally, on the merits of the claims in this case, courts throughout the country widely accept the doctrine of class action tolling. *See Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974); *Crown, Cork & Seal Co., Inc. v. Parker,* 462 U.S. 345, 353 (1983). This Court has adopted the doctrine of class action tolling. *See Jane Roe Dancer I-VII v. Golden Coin, Ltd.,* 124 Nev. 28, 176 P.3d 271 (2008). By contrast, Petitioners Writ Petition seeks to deny class action tolling here. But in this case, Plaintiff's claims are timely because the commencement of a prior class action in 2007 tolled the applicable statutes of limitations for the period of time through September 29, 2014, when the prior class action was dismissed in federal court. Plaintiff's Complaint in this case was filed 17 months later, on February 29, 2016. The statute of limitations on Plaintiff's claims did not expire during this brief 17 month time period.

Petitioners argue that class action tolling was not appropriate in this case only because the prior cases were filed in federal court, not state court. Petitioners

contend such "cross-jurisdictional tolling" is not applicable in Nevada. However, most of the cases rejecting cross-jurisdictional tolling involve courts located in different states. Here, the prior cases were filed in Nevada federal court and all involved the same defendant, Archon Corporation, a Nevada corporation. Under these circumstances, there is no compelling reason for a Nevada state court to not recognize tolling based upon a Nevada federal court action encompassing substantially the same claims and the exact same defendant, which is itself a Nevada corporation.

Moreover, even if this Court considers Nevada's federal district court a separate jurisdiction for cross-jurisdictional tolling analysis, numerous cases have recognized and adopted cross-jurisdictional tolling under similar circumstances. *See, e.g., Patrickson v. Dole Food Company, Inc.,* 368 P.3d 959, 968-70 (Hawaii 2015); *Dow Chemical Corp. v. Blanco*, 67 A.3d 392 (Del. 2013); *Stevens v. Novartis Pharmaceuticals Corp.,* 247 P.3d 244 (Mont. 2010); *Vaccariello v. Smith & Nephew Richards,* 763 N.E.2d 160 (Ohio 2002); *Staub v. Eastman Kodak Co.,* 726 A.2d 955 (N.J. App.Div.1999); *Hyatt Corp. v. Occidental Fire & Cas. Co. of N.C.,* 801 S.W.2d 382 (Mo.Ct.App.1990) and Lee *v. Grand Rapids Bd. of Educ.,* 384 N.W.2d 165 (Mich. App. 1986). As the Delaware Supreme Court stated in *Dow Chemical Corp. v. Blanco*:

> While *American Pipe* and its progeny all involved class actions and subsequent suits brought in the same jurisdiction, this factual distinction makes no legal difference. *American Pipe* considered the competing interests of class actions and statutes of limitation—

> efficiency and economy of litigation balanced against notice to the defendants. Balancing these two interests, the Supreme Court found that the relevant statute of limitations was tolled during the pendency of the class action. That analysis is equally sound regardless of whether the original class action is brought in the same or in a different jurisdiction as the later individual action.

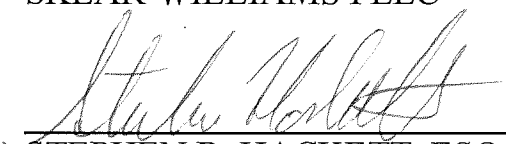
Id. 67 A.3d at 397. This reasoning is in accord with this Court's position as set forth in *Jane Roe Dancer*, 124 Nev. at 34, 176 P.3d at 275 (Nevada has an opt-in scheme whereby statutes of limitations are tolled during the pendency of a class action). Accordingly, the District Court here properly recognized cross jurisdictional tolling for identical reasons and the Writ Petition is without merit.

IV. CONCLUSION

For all of the reasons set forth above, Real Party in Interest Stephen Haberkorn respectfully requests that the Court deny Petitioners' Motion to Stay in its entirety and allow this case to proceed in the District Court while Petitioners' Writ Petition is pending before this Court.

Dated this 20th day of April, 2017.

SKLAR WILLIAMS PLLC



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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(d), the undersigned, an employee of Sklar Williams PLLC, hereby certifies that on the 20th day of April 2017, he served a copy of the forgoing REAL PARTY IN INTEREST STEPHEN HABERKORN'S RESPONSE TO MOTION TO STAY PROCEEDINGS IN THE DISTRICT COURT upon the following, by depositing a copy of same in the United States Mail, postage prepaid, addressed to:

Honorable Joe Hardy
Eighth Judicial District Court
Department XV
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/s/ Gene Crawford
An employee of Sklar Williams PLLC

EXHIBIT 1

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Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

STEPHEN HABERKORN, an individual, Plaintiff, vs. ARCHON CORPORATION, a Nevada corporation; PAUL W. LOWDEN, an individual; and SUZANNE LOWDEN, an individual; UNKNOWN DOE DIRECTORS OF ARCHON CORPORATION; DOES 1 through 10; and ROE ENTITIES 1 through 10, inclusive Defendants.	CASE NO. A-16-732619-B DEPT. XV **ORDER DENYING MOTION TO DISMISS WITHOUT PREJUDICE** **Date of Hearing: June 22, 2016** **Time of Hearing: 9:00 a.m.**

This matter came before the Court on June 22, 2016 at 9:00 a.m., upon Defendants ARCHON CORPORATION, PAUL W. LOWDEN, and SUZANNE LOWDEN'S (collectively, "Defendants") Motion to Dismiss Complaint. Plaintiff STEPHEN HABERKORN ("Plaintiff") appeared, by and through his counsel of record, Stephen R. Hackett, Esq. of SKLAR WILLIAMS PLLC and Defendants appeared, by and through their counsel of record, Justin J. Bustos, Esq. of DICKINSON WRIGHT, PLLC.

Based upon the all the papers and pleadings on file herein, the briefs of the parties and the arguments of counsel and good cause appearing therefore, the Court has determined that the Motion to Dismiss the Complaint should be DENIED WITHOUT PREJUDICE, and finds

as follows: (1) general class action tolling applies; (2) under these circumstances, cross jurisdictional tolling also applies; (3) the remaining arguments in favor of, or against, dismissal, would be more appropriately raised in a Motion for Summary Judgment, in particular Defendants' argument that Plaintiff knew or should have known of various public record filings; (4) the Court could not rule on NRS 11.500 at this time, as it was not raised in the briefs; and (5) in the alternative, the Motion should also be denied because of the ongoing harm as alleged in Plaintiff's Opposition, generally set forth on pages 13 -19 of the opposition brief. Accordingly, for all the foregoing reasons,

IT IS HEREBY ORDERED that the Defendants' Motion to Dismiss the Complaint is DENIED WITHOUT PREJUDICE.

IT IS SO ORDERED.

DATED this 4th day of ~~July~~ August, 2016.

DISTRICT COURT JUDGE

Submitted by:	Approved as to Form and Content:
SKLAR WILLIAMS PLLC	DICKINSON WRIGHT, PLLC
Stephen R. Hackett, Esq. Nevada Bar No. 5010 Email: shackett@sklar-law.com Johnathon Fayeghi, Esq. Nevada Bar No. 12736 Email: jfayeghi@sklar-law.com 410 South Rampart Blvd., Suite 350 Las Vegas, NV 89145 Tel: (702) 360-6000 Fax: (702) 360-0000 *Attorneys for Plaintiff*	John P. Desmond, Esq. Nevada Bar No. 5618 Email: jdesmond@dickinsonwright.com Justin J. Bustos, Esq. Nevada Bar No. 10320 Email: jbustos@dickinsonwright.com 100 W. Liberty Street, Suite 940 Reno, Nevada 89501 Tel: (775) 343-7500 Fax: (775) 786-0131 *Attorneys for Defendants*

EXHIBIT 2

IN THE SUPREME COURT OF THE STATE OF NEVADA

ARCHON CORPORATION; PAUL W. LOWDEN; AND SUZANNE LOWDEN,
Petitioners,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE MARK R. DENTON, DISTRICT JUDGE,
Respondents,
and
DAN RAIDER, AN INDIVIDUAL ON HIS OWN BEHALF AND ON BEHALF OF OTHERS SIMILARLY SITUATED,
Real Party in Interest.

No. 68995

FILED

MAR 18 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER DENYING PETITION FOR WRIT OF MANDAMUS, PROHIBITION, OR CERTIORARI

This original petition for a writ of mandamus, prohibition, or certiorari challenges a district court order denying a motion to dismiss in a contract action. Having considered the petition, answer, reply and supporting documents, we conclude that our extraordinary intervention is not warranted at this stage of the proceedings, when the district court has yet to definitively rule upon the jurisdiction, limitations, repose, and tolling issues. *Smith v. Eighth Judicial Dist. Court*, 113 Nev. 1343, 1344-45, 950 P.2d 280, 281 (1997) (explaining that this court generally will intervene at the motion to dismiss stage only when no factual disputes exist and clear authority requires dismissal); *Smith v. Eighth Judicial*

Dist. Court, 107 Nev. 674, 677, 679, 818 P.2d 849, 851, 853 (1991); *Zamarripa v. First Judicial Dist. Court*, 103 Nev. 638, 640, 747 P.2d 1386, 1387 (1987). Accordingly, we

ORDER the petition DENIED.[1]

/ Hardesty, J.
Hardesty

Saitta, J.
Saitta

Pickering, J.
Pickering

cc: Hon. Mark R. Denton, District Judge
Dickinson Wright PLLC
Goren, Goren & Harris, P.C.
Law Offices of Steven J. Parsons
Eighth District Court Clerk

[1]We vacate our December 31, 2015, stay in this matter.

2016 WL 1106992
Unpublished Disposition
Only the Westlaw citation is currently available.
This is an unpublished disposition. See Nevada Rules of Appellate Procedure, Rule 36(c) before citing.
Supreme Court of Nevada.

ARCHON CORPORATION; Paul W. Lowden; and Suzanne Lowden, Petitioners,
v.
The EIGHTH JUDICIAL DISTRICT COURT OF the STATE of Nevada, in and for the COUNTY OF CLARK; and The Honorable Mark R. Denton, District Judge, Respondents,
and
Dan Raider, an Individual on His Own Behalf and on Behalf of Others Similarly Situated, Real Party in Interest.

No. 68995.
|
March 18, 2016.

Attorneys and Law Firms

Dickinson Wright PLLC

Goren, Goren & Harris, P.C.

Law Offices of Steven J. Parsons

ORDER DENYING PETITION FOR WRIT OF MANDAMUS, PROHIBITION, OR CERTIORARI

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ORDER the petition DENIED.[1]

All Citations

Slip Copy, 2016 WL 1106992 (Table)

Footnotes

1 We vacate our December 31, 2015, stay in this matter.