

**IN THE SUPREME COURT OF THE
STATE OF NEVADA**

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Elizabeth A. Brown
Clerk of Supreme Court

NUVEDA, LLC,

Petitioner,

VS

EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF
NEVADA, IN AND FOR THE
COUNTY OF CLARK, THE
HONORABLE ELIZABETH
GONZALEZ, DISTRICT JUDGE,

Respondent,

SHANE TERRY,

Real Party in Interest.

Supreme Court Case No. TBD

Case: A-20-817363-B

Lead Case: A-17-755479-B

Other Consolidated Cases with Lead
Case:
A-19-791405-C and A-19-796300-B

**PETITION FOR WRIT OF PROHIBITION OR, IN THE ALTERNATIVE,
PETITION FOR WRIT OF MANDAMUS**

LAW OFFICE OF MITCHELL STIPP
MITCHELL STIPP, ESQ. (Nevada Bar No. 7531)
1180 N. Town Center Drive, Suite 100, Las Vegas, Nevada 89144
Telephone: 702.602.1242; Email: mstipp@stipplaw.com
Counsel for Petitioner¹

¹ A. William Maupin, of Clark Hill LLP, 3800 Howard Hughes Parkway, Suite 500, Las Vegas, Nevada 89169, Email: awmaupin@clarkhill.com, serves as co-counsel to Petitioner in this matter.

DISCLOSURE STATEMENT

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

1. NuVeda, LLC is a private, Nevada limited liability company.
2. Dr. Pejman Bady is a resident of the State of Nevada and manager of NuVeda, LLC.
3. Mitchell Stipp, Nevada Bar No. 7531, of the Law Office of Mitchell Stipp, represents NuVeda, LLC.
4. A. William Maupin, Nevada Bar No. 1315, Senior Counsel at Clark Hill LLP, represents NuVeda, LLC.

DATED this 14th day of April, 2021.

LAW OFFICE OF MITCHELL STIPP



MITCHELL STIPP, ESQ.

Nevada Bar No. 7531

1180 N. Town Center Drive

Suite 100

Las Vegas, Nevada 89144

Telephone: (702) 602-1242

mstipp@stipplaw.com

Counsel for Petitioner

I. Introduction

This petition for a writ concerns the refusal of Judge Elizabeth Gonzalez (Department 11 of the Eighth Judicial District Court, State of Nevada) in Case No. A-20-817363-B to dismiss claims or grant summary judgment when such claims are subject to a final order, which cannot be set aside under NRCP 60(b). The matter is governed by Helfstein v. Eighth Judicial Dist. Court of State, 362 P.3d 91 (Nev. 2015) (granting writ petition and instructing Judge Gonzalez to vacate her previous order regarding a NRCP 60(b) motion). For the same reasons contained in Helfstein, NuVeda respectfully requests the court to intervene in the interest of judicial economy. NuVeda raised the matter of Helfstein with the district court in its request for a stay of the case to pursue this petition. See Appendix 0385-0407 (Exhibit D-Appendix 0403-0407) and 0409-0425. The court denied the stay and set the matter for trial. See Appendix 0427-0434.

II. Jurisdictional/Routing Statement

Pursuant to Article 6, Section 4 of the Nevada Constitution: “[t]he court shall also have power to issue writs of mandamus, certiorari, prohibition, quo warranto, and habeas corpus and also all writs necessary or proper to the complete exercise of its appellate jurisdiction.” NRS 34.160 provides that “[t]he writ [of

mandamus] may be issued by the Supreme Court ... to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station ...” For more than a century, the Nevada Supreme Court has interpreted Nevada’s constitutional and statutory law to vest original jurisdiction in the Supreme Court to issue writs of mandamus. See State v. Dist. Ct., 116 Nev. 127, 994 P.2d 692 (2000) (citing State ex rel. Curtis v. McCollough, 3 Nev. 202 (1867)). Thus, the court has the constitutional and statutory authority to issue a writ of mandamus when, in the court’s discretion, circumstances warrant.

A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust or station, or to control a manifest abuse of discretion. See Beazer Homes, Nev., Inc. v. Dist. Ct., 120 Nev. 575, 97 P.3d 1132, 1135 (2004); NRS 34.160. An abuse of discretion occurs if the district court’s decision is arbitrary and capricious or if it exceeds the bounds of law or reason. Crawford v. State, 121 P.3d 582, 585 (Nev. 2005) (citation omitted).

Petitions for extraordinary writs are addressed to the sound discretion of the Nevada Supreme Court and may only issue where there is no “plain, speedy, and adequate remedy” at law. See NRS 34.330; State ex rel. Dep’t Transp. v.

Thompson, 99 Nev. 358, 662 P.2d 1138 (1983). However, “each case must be individually examined, and where circumstances reveal urgency or strong necessity, extraordinary relief may be granted.” See Jeep Corp. v. Dist. Ct., 98 Nev. 440, 443, 652 P.2d 1183, 1185 (1982) (citing Shelton v. Dist. Ct., 64 Nev. 487, 185 P.2d 320 (1947)). The Nevada Supreme Court will exercise its discretion to consider writ petitions, despite the existence of an otherwise adequate legal remedy, when an important issue of law needs clarification, and this Court’s review would serve considerations of public policy, sound judicial economy, and administration. See Dayside Inc. v. Dist. Ct., 119 Nev. 404, 407, 75 P.3d 384, 386 (2003), overruled on other grounds by, Countrywide Home Loans, Inc. v. Thitchener, 124 Nev. Adv. Op. No. 64, 192 P.3d 243 (2008).

III. Petitioner’s Requested Relief.

NuVeda seeks an order requiring Judge Gonzalez (Department 11) to dismiss with prejudice claims by Shane Terry (Real Party in Interest) against NuVeda (and its affiliates) in Case No. A-20-817363-B and/or to grant summary judgment as required by Helfstein.

IV. Statement of the Issue Presented for Review.

Whether the district court has jurisdiction to refuse to dismiss claims and/or grant summary judgment when a final order disposing of such claims cannot be set aside under NRCP 60(b) (including NRCP 60(b)(4) which Mr. Terry claims is the basis for relief)?

V. Statement of Facts.

Mr. Terry filed a lawsuit against NuVeda *in 2015* (Case No. A-15-728510-B). Mr. Terry sought to stop the potential joint venture between CWNevada, LLC (“CWNevada”) and NuVeda. However, the district court denied Mr. Terry’s request for a preliminary injunction. See Appendix 0096-0101 (Exhibit 2 to Motion, Appendix 0085-0160)). The Nevada Supreme Court also upheld the district court’s decision on Mr. Terry’s appeal. See Appendix 0102-0106 (Dkt. No. 17-35048, Case No. 69648) (Exhibit 3 to Motion, Appendix 0085-0160)).

At the request of the parties, Case No. A-15-728510-B was referred to the American Arbitration Association (“AAA”) for binding arbitration (AAA Case No. 01-15-0005-8574). During the arbitration before AAA, Mr. Terry sold his interest

in and claims against NuVeda to BCP 7 Holdings, LLC, a Nevada limited liability company (“BCP 7”), which NuVeda understands is the manager of CWNevada, LLC and affiliated with Brian Padgett. See Appendix 0002-0008; see also Appendix 0147-0153 (Exhibit 5 to Motion, Appendix 0085-0160). BCP 7 voluntarily and unconditionally dismissed all of Mr. Terry’s claims with prejudice in the case before AAA. See Appendix 0156-0157 (Exhibit 7 to Motion, Appendix 0085-0160) and Appendix 0158-0160 (Exhibit 8 to Motion, Appendix 0085-0160). Ultimately, BCP 7 defaulted on its obligations to Mr. Terry, and Mr. Terry sued BCP 7 and Mr. Padgett (but did not seek rescission). See Appendix 0010-0033 (Case No. A-19-796300-B). As this Court will note, NuVeda’s counsel previously represented Mr. Terry but withdrew as agreed if Mr. Terry pursued claims against NuVeda. See Appendix 0035-0040.

Mr. Terry entered into a “litigation partnership” with the receiver appointed over CWNevada, and this arrangement was approved by Judge Gonzalez (Department 11) in Case No. A-17-755479-B (“Receivership Action”). See Appendix 0042-0046. Rather than litigate the matter in Case No. A-15-728510-B or pursue claims in Case No. A-19-796300-B, Mr. Terry filed a new complaint (Case No. A-20-817363-B). See Appendix 0048-0083. The new case was

consolidated by Judge Gonzalez at the request of Mr. Terry in the Receivership Action. In the new action, Mr. Terry asserted claims against NuVeda (and its affiliates). Id. As part of Case No. A-20-817363-B, Mr. Terry seeks to rescind the transaction with BCP 7 and to set aside AAA's dismissal under NRCP 60(b)(4). See Appendix 0162-0237. Mr. Terry's separate case against BCP 7 and Mr. Padgett (Case No. A-19-796300-B) was also consolidated into the Receivership Action by Judge Gonzales and remains pending.

The allegations in the complaint filed in Case No. A-20-817363-B mirror the allegations by Mr. Terry in the arbitration. Compare Appendix 0107-0146 (Exhibit 4 to Motion, Appendix 0085-0160) with Appendix 0048-0083 (Complaint filed on June 30, 2020 in Case No. A-20-817363-B, paragraph 16-21 and 30-62)). After Mr. Terry entered into a binding agreement to sell his interest in and claims against NuVeda, Mr. Terry through his counsel-of-record (Erika Pike Turner, Esq.) filed a motion in the arbitration to substitute BCP 7 **in place of** Mr. Terry as the real party in interest **with all rights** to Mr. Terry's interest and claims. See Appendix 0154-0155 (Exhibit 6 to Motion, Appendix 0085-0160). Mr. Terry's motion before AAA specifically argued the following:

Here, there should be no impediment to the requested substitution of Buyer for Mr. Terry, as Buyer now has the sole right to prosecute claims pendent to Mr. Terry's rights and interests relative to NuVeda and make decisions relative thereto, pursuant to Buyer/Mr. Terry's voluntary agreement wherein Mr. Terry agreed to assign all rights and interests relative to NuVeda, LLC to Buyer, including the pendent claims. Further, Respondents have repeatedly argued that Mr. Terry has no rights under the Operating Agreement that survive his termination on March 10, 2016; thus, Respondents should be judicially estopped from making a contrary argument now.

(emphasis added). The AAA permitted BCP 7 to substitute into the arbitration for Mr. Terry. Subsequently, BCP 7 voluntarily and unconditionally dismissed all claims in the arbitration with prejudice. See Appendix 0156-0157. In accordance with the motion filed by Mr. Terry and the request by BCP 7 to dismiss the claims with prejudice, AAA ordered these claims finally to be dismissed on October 9, 2018. See Appendix 0158-0160.

The decision by the arbitrator in Case No. A-15-728510-B is not subject to being set aside under NRCP 60(b)(4). Regardless, the district court provided Mr. Terry 90 days to obtain relief from AAA. See Appendix 0092-0095 (Exhibit 1 to Motion, Appendix 0085-0160). After the 90-day stay elapsed, and NuVeda did not receive notice of any request for relief before AAA filed by Mr. Terry, NuVeda

filed an *ex parte* motion for the district court to enter an order granting the request for dismissal and/or summary judgment. The district court denied the request to hear the matter on shortened time and requested further briefing. As a result, NuVeda filed its motion. See Appendix 0085-0160. Mr. Terry opposed, and the district court denied NuVeda's motion but ordered that an evidentiary hearing (no jury trial) should be held on the issue of rescission. See Appendix 0383. Before ruling that an evidentiary hearing would be set on the issue of rescission, however, the district court did order Mr. Terry to provide a copy of his request for relief before AAA. See Appendix 0312-0381 (Declaration of Joe Coppedge, Appendix 0301-0381).

In light of the decision by the district court, NuVeda filed a motion to stay the proceedings in order to file a writ under Helfstein, 362 P.3d 91 (Nev. 2015). See Appendix 0385-0407. The court denied the stay but vacated its decision to conduct an evidentiary hearing. See Appendix 0427. The claims by Mr. Terry remain pending and subject to a jury trial. See Appendix 0430-0434.

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VI. Points and Authorities.

The issue of contract rescission is separate and distinct from the issue of setting aside the final orders dismissing Mr. Terry's claims in the arbitration. Rescission of a contract will require a trial in this case (but not with NuVeda). There are genuine issues of material fact which prevent summary judgment in favor of Mr. Terry on the issue of contract rescission with BCP 7. "A party must rescind a contract within a reasonable time, but what constitutes a reasonable time depends upon the facts of a particular case and must be determined by the trier of fact." Mackintosh v. California Federal Savings & Loan Ass'n, 113 Nev. 393, 403 (Nev. 1997) (citing Wall v. Foster Petroleum Corp., 791 P.2d 1148, 1151 (Colo.Ct.App. 1989) (emphasis added). Mr. Terry sued BCP 7 and Mr. Padgett on or about May 15, 2019 for default after Mr. Terry collected \$757,757.00 in consideration. See Appendix 0010-0033; see also Appendix 0239-0299 (Exhibit D). Mr. Terry waited more than two (2) years after the transaction with BCP 7 was consummated and one (1) year after there was an alleged uncured default to pursue rescission. See Appendix 0042-0046 and Appendix 0048-0083.

If Mr. Terry can prevail at trial (which seems unlikely but not impossible), then he would be required to pay back the consideration he received from

CW Nevada through BCP 7. See Bergstrom v. Estate of Devoe, 109 Nev. 575 (Nev.1993). After rescission, Mr. Terry has explained that his client has the right to set aside AAA's orders dismissing Mr. Terry's claims under NRCP 60(b)(4) (void judgments). See Appendix 0172-0177. ***Rescission of the deal with BCP 7 does not automatically "void" BCP 7's separate and independent request voluntarily to dismiss the claims purchased by BCP 7 with prejudice in the arbitration and the final orders entered by AAA as a result.*** Unfortunately, neither the district court nor Mr. Terry explain the basis of litigating causes of action against NuVeda (and its affiliates) until trial is completed.

Under Nevada law, a final judgment is void only when a "defect [exists] in the court's authority to enter judgment through either lack of personal jurisdiction or jurisdiction over the subject matter in the suit." See Gassett v. Snappy Car Rental, 111 Nev. 1416, 1419, 906 P.2d 258, 261 (1995), superseded by rule on other grounds as stated in Fritz Hansen A/S v. Eighth Judicial Dist. Court, 116 Nev. 650, 656, 6 P.3d 982, 985 (2000). Mr. Terry does not dispute that AAA had personal and subject matter jurisdiction to enter the orders dismissing the claims. It appears Mr. Terry is simply trying to avoid the 6-month limitation expressly set forth in NRCP 60(c) to set aside an order for fraud (which is the alleged basis of

the claim for rescission of the deal with BCP 7). See Appendix 0172-0177. Generally (even for void judgments), a motion to set aside a final judgment must be filed within a reasonable time (but in no event later than six (6) months). See Stoecklein v. Johnson Elec., Inc., 109 Nev. 268, 272, 849 P.2d 305, 308 (1993). Accordingly, the case initiated by Mr. Terry against NuVeda and its affiliates should be dismissed and/or summary judgment entered. There is no factual or legal basis for NuVeda to defend against Mr. Terry's claims in Case No. A-20-817363-B. **The matter is res judicata.** However, Mr. Terry has every right to pursue BCP 7 and Mr. Padgett.

If the orders of dismissal by AAA can be set aside under NRCP 60(b)(4), Mr. Terry's claims against NuVeda are subject to binding arbitration before AAA in Case A-15-728510-B (not in Case A-20-817363-B). If rescission occurs and orders also set aside, however, the case is still subject to dismissal with prejudice under NRCP 41(e)(2)(B) (5-Year Rule). See NRCP 41(e)(6); Morgan v. Las Vegas Sands, Inc., 118 Nev. 315 (Nev. 2002) (arbitration does not toll the 5-year rule—dismissal is mandatory). The effect of the 5-year rule was briefed before the district court. See Appendix 0409-0425 (specifically Appendix 0413). However, Judge Gonzalez refused to address the matter, and Mr. Terry contends the time

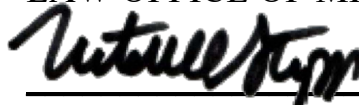
under NRCP 41(e) actually begins from the filing of the new complaint in Case No. A-20-817363-B. There is no authority for Mr. Terry's position.

VII. Conclusion

For the reasons set forth in this Petition, NuVeda seeks an order requiring the claims of Mr. Terry be dismissed and/or summary judgment granted.

DATED this 14th day of April, 2021.

LAW OFFICE OF MITCHELL STIPP



MITCHELL STIPP, ESQ.

Nevada Bar No. 7531

1180 N. Town Center Drive

Suite 100

Las Vegas, Nevada 89144

Telephone: (702) 602-1242

mstipp@stiplaw.com

Counsel for Petitioner

CERTIFICATE OF COMPLIANCE AND VERIFICATION

1. The petition has been prepared in a proportionally spaced typeface using Microsoft Word, Version 16.11.1, in 14 point, Times New Roman.
2. The petition does not exceed 15 pages.
3. I hereby certify that I have read the petition, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 21. I understand that I may be subject to sanctions in the event that the petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

LAW OFFICE OF MITCHELL STIPP



MITCHELL STIPP, ESQ.
Nevada Bar No. 7531
1180 N. Town Center Drive
Suite 100
Las Vegas, Nevada 89144
Telephone: (702) 602-1242
mstipp@stipplaw.com
Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of April, 2021, I filed the foregoing **PETITION FOR WRIT OF PROHIBITION OR, IN THE ALTERNATIVE, PETITION FOR WRIT OF MANDAMUS and APPENDIX (VOLUMES I-VI)**, using the court's electronic filing system.

Notice of the filing of the Petition and Appendix was made upon acceptance by the Nevada Supreme Court using the District Court's electronic filing system to the following e-service participants in District Court Case No. A-17-755479-B and by mail to the addresses as indicated:

Judge Elizabeth Gonzalez:

Dept11lc@clarkcountycourts.us

Regional Justice Center
200 Lewis Ave.
Las Vegas, NV 89155

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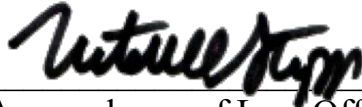
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Shane Terry as Real Party-in- Interest:

Michael R. Mushkin, Esq.
Nevada Bar No. 2421
L. Joe Coppedge, Esq.
Nevada Bar No. 4954
MUSHKIN & COPPEDGE
6070 S. Eastern Avenue, Suite 270
Las Vegas, Nevada 89128
Telephone: (702) 454-3333
Fax: (702) 386-4979
michael@mushlaw.com
jcoppedge@mccnvlaw.com

By:

A handwritten signature in black ink, appearing to read "Mitchell Stipp", written over a horizontal line.

An employee of Law Office of Mitchell Stipp