

IN THE SUPREME COURT FOR THE STATE OF NEVADA

PHILLIP J. FAGAN, JR. an individual and as Trustee of the
FAGAN, FR. 2001 TRUST

Electronically Filed
Apr 19 2022 01:34 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Petitioner,

vs.

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

Respondent,

and

AAL-JAY, INC., a Nevada corporation

Real Party in Interest.

Petition from the Eighth Judicial District Court, Clark County, Nevada
District Court Case No. A-21-832379-C
The Honorable Erika Ballou

PETITION FOR REHEARING

BLACK & WADHAMS

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I. 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 Justices of this Court may evaluate possible disqualification or recusal.

- Phillip J. Fagan, Jr., is an individual residing in Clark County, Nevada.
- The Phillip J. Fagan, Jr., 2001 Trust, is a Nevada revocable trust.

Phillip J. Fagan, Jr., as an individual and as trustee of the Phillip J. Fagan, Jr., 2001 Trust, is represented in the District Court and in this Court by Christopher V. Yergensen, Esq., Allison R. Schmidt, Esq., both of the law firm of Black & Wadhams.

DATED: April 18, 2022

BLACK & WADHAMS

s/ Allison R. Schmidt
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IV. INTRODUCTION

Petitioner Dr. Philip J. Fagan Jr. (“Dr. Fagan”), individually and as trustee of the Philip J. Fagan Jr. 2001 Trust hereby petitions this Court for rehearing of this matter pursuant to Rules 40(a)(2) and 40(c)(2) of the Nevada Rules of Appellate Procedure.

This court may grant rehearing if it: (1) overlooked or misapprehended a material fact in the record or a material question of law in the case, or (2) overlooked, misapplied, or failed to consider a statute, procedural rule, regulation, or decision directly controlling a dispositive issue in the case. NRAP 40(c).

Though this Court recognized that factual or evidentiary issues raised in the initial petition may be later considered on an appeal on the merits, Dr. Fagan seeks reconsideration of the denial of the writ because the improbable procedural posture of the case below; the lower court has issued an order for the remedy of specific performance without ever reaching judgment on any claim asserted by either party on the merits, Dr. Fagan is losing his house before discovery, before the evidence or claims have been tested before the court, and with no procedural avenue for review, as no judgment whatsoever has been entered.

Dr. Fagan is suffering irreparable harm presently, and will suffer further irreparable harm in the loss of his unique house in the absence of this Court’s intervention. The lower court has denied Dr. Fagan the due process guaranteed by the

United States and Nevada Constitutions, and issued a prejudgment remedy that is not authorized by rule or statute. Because the procedural safeguards put in place by the Nevada Rules of Civil Procedure have not been observed, Dr. Fagan is left with no avenue for recourse, other than to seek extraordinary relief from this Honorable Court.

This Petition and Motion are based on the following Memorandum of Points and Authorities, the Appendix of Record, and such oral arguments as presented to this Honorable Court.

V. MEMORANDUM OF POINTS AND AUTHORITIES

A. INTRODUCTION

Prohibition is a proper remedy to restrain a district judge from exercising a judicial function without or in excess of its jurisdiction. *See* NRS 34.320; NRS 34.330. Mandamus is a proper remedy to compel performance of a judicial act when there is no plain, speedy, and adequate remedy at law in order to compel the performance of an act which the law requires as a duty resulting from office. *See* NRS 34.160; NRS 34.170.

Here, the lower court has essentially abandoned the procedural safeguards and processes set forth in the Nevada Rules of Civil Procedure and has issued an order for the Remedy of Specific Performance, despite there being no underlying judgment on any claim, and despite “Specific Performance” not being an available prejudgment

remedy under any rule or statute. A writ of prohibition is appropriate where the court has acted in excess of its authority and jurisdiction.

Second, because Dr. Fagan is now set to lose his home prior to the application for or entry of judgment on the merits of any claim, he stands to suffer irreparable harm – the loss of his home, and there is no plain, speedy and adequate remedy at law.

Even if this Court were to ignore the substantive findings of fact by the lower court, which amount to an abuse of discretion, this Court should not ignore the wholesale abandonment of procedure – that a remedy (which is not an authorized pre-judgment remedy) was issued before *any* judgment was entered, or even requested.

B. STATEMENT OF FACTS

This case arises from a dispute over a residential home located in the Lake Las Vegas community at 1 Grand Anacapri, Henderson, Nevada (the “Property”). Dr. Fagan - a longtime Nevada Emergency Room Physician from Boulder City - has owned the Property since 2006.¹

In 2014, Petitioner leased the Property to Real Party in Interest. Real Party in Interest in turn allowed the property to be occupied by an individual known as

¹ Appendix, Vol. 1, Tab 3, PET000021-000082, First Amended Complaint, and Appendix, Vol. I, Tab 6, PET000085-000122, Answer to Plaintiff’s Amended Complaint and Counterclaim.

Christiano DeCarlo – a violent felon with apparent ties to organized crime.² AAL-JAY, and specifically Christiano DeCarlo, remains in possession of the Property as of today.

Following the breach by Real Party in Interest's of a prior lease-to-own agreement related to the Property, the parties attempted to negotiate the ultimate purchase and sale of the Property. Various terms and conditions were negotiated, and ultimately never agreed to by either Petitioner or Real Party in Interest - such as an appropriate closing date and an appropriate purchase price. When terms and conditions of a purchase and sale of the Property could not be reached, Petitioner and Real Party in Interest executed two short term lease agreements for the months of February, March and April, 2021.³ Each lease agreement provided that the lease superseded all previous agreements between the parties, and that at the end of the Lease Term (as defined in each lease agreement), Real Party in Interest would vacate the premises.⁴ As of today, Real Party in Interest is wrongfully in possession of the

² See "Man Who Shot Himself in Standoff Gets Prison Term" <https://www.reviewjournal.com/news/man-who-shot-himself-in-standoff-gets-prison-term/#:~:text=March%2030%2C%202010%20%2D%2011%3A,from%20the%20Gambino%20crime%20family>. (accessed April 18, 2022) ("A decade ago, federal prosecutors labeled Christiano DeCarlo as the mastermind of an extortion plot designed to take over the city's outcall entertainment industry, with a little help from the Gambino crime family. On Tuesday, DeCarlo was again in federal court, this time on a charge of being an ex-felon in possession of a firearm.")

³ See Exhibits 11 and 12 to the Answer, Appendix, Vol. I, Tab 4, at PET000172-000184.

⁴ See *id.* at PET000179 and PET000180.

Property without the consent of Dr. Fagan, who has been unable, due to the pending litigation, to evict, despite no rent payments having been made for approximately 16 months. *See* Henderson Justice Court Case No. 21EH000690

On April 6, 2021, Real Party in Interest filed its Complaint. On May 3, 2021, Real Party in Interest filed its First Amended Complaint.⁵ On May 18, 2021, Petitioner filed its Answer to Plaintiff's Amended Complaint and Counterclaim.⁶

On May 18, 2021, Real Party in Interest filed a document called "Emergency Motion for Specific Performance of Purchase Agreement, on an Order Shortening Time."⁷ The "Emergency" Motion for Specific Performance set forth no real emergency basis for hearing the motion on an expedited schedule. *Id.* It was not a motion for summary judgment pursuant to NRCP 56, nor does it request judgment, nor does the word "judgment" even appear in the motion. *Id.*

On June 22, 2021, the district court the "Emergency" Motion for Specific Performance in its entirety.⁸ The lower court noted, in its oral ruling, that it was inclined to give AAL-JAY's attorney whatever she requested:

⁵ Appendix, Vol. 1, Tab 3, PET000021-000082, First Amended Complaint.

⁶ Appendix, Vol. I, Tab 6, PET000085-000122, Answer to Plaintiff's Amended Complaint and Counterclaim.

⁷ Appendix, Vol. I, Tab 9, PET 000196-000223, Emergency Motion for Specific Performance of Purchase Agreement, on An Order Shortening Time.

⁸ See Appendix, Vol. III, Tab 16, PET000293-000299, Recorder's Transcript of Hearing: Emergency Motion for Specific Performance of Purchase Agreement, on An Order Shortening Time (Court making clear that the Court was going "to sign whatever Ms. Brown puts in front of" the Court. PET000298).

“And I’m still inclined to grant the motion. Mr. Yergensen, you’re welcome to take that up, but I’m going to sign whatever Ms. Brown puts in front of – not whatever Ms. Brown puts in front, but a motion basically stating what I had said – I mean, an Order stating what I had said.”

(See Appendix, Vol. III, Tab 16, Transcript of Hearing at PET0002989). The Court did just that, adopting the entire order submitted by AAL-JAY’s counsel over the objections of Dr. Fagan’s attorney. On August 26, 2021, the district court entered the Order, and on August 26, 2021, a Notice of Entry of Order was filed by Real Party in Interest.⁹

Dr. Fagan, fearful of losing his home, filed an emergency petition for a writ on August 31, 2021; this Court has since denied the writ and directed Dr. Fagan to seek appellate relief following the resolution of the case below on the merits. However, the problem presented by the denial of the writ is that Dr. Fagan is losing his home *now*, without any judgment or ruling on the merits having occurred.

C. ARGUMENT

1. Dr. Fagan is Being Denied Procedural Due Process

Nevada standards of procedural due process are consistent with pronouncements of the United States Supreme Court. *Turner v. Saka*, 518 P. 2d 608,

⁹ Appendix, Vol III, Tab. 22, PET 000355-000379, Notice of Entry of Order Granting Emergency Motion for Specific Performance of Purchase Agreement, on An Order Shortening Time.

90 Nev. 54 (1974). In *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972), the United States Supreme Court described procedural due process, its goals, and its requirements:

"For more than a century the central meaning of procedural due process has been clear: `Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'" *Id.* at 80, 92 S.Ct. at 1994. "If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented." *Id.* at 81, 92 S.Ct. at 1994.

Here, Dr. Fagan has been denied the entire procedural protections of litigation by the lower court, which has skipped over the stages of discovery, and summary judgment and/or trial and issued a remedy to the Plaintiff. The "Emergency" Motion for Specific Performance does not give Dr. Fagan any notice that it seeks judgment, which would be required by a motion pursuant to NRCP 56, nor could Dr. Fagan have suspected that a remedy would issue in the absence of a judgment or any opportunity whatsoever to obtain discovery and litigate the facts of the case.

Had the Plaintiff filed a motion for summary judgment, Dr. Fagan could have requested a continuance pursuant to NRCP 56(d), the Plaintiff would have been required to identify the causes of action upon which judgment was sought, and would have been required submit, authenticated, admissible evidence demonstrating there were *no issues of material fact*. See NRCP 56. Importantly had judgment on all

claims been granted to the Plaintiff, Dr. Fagan would have had appellate rights. NRAP 3A(b)(1).

The Order granting the “Emergency” Motion for Specific Performance, in reality, is more properly categorized as an improper mandatory injunction requiring Dr. Fagan to immediately sell his home to the Plaintiff (for an amount that does not even cover the existing liens on the property – so to that end Dr. Fagan is being deprived of the hundreds of thousands of dollars it would cost him to transfer clear title). *See State ex rel. Pacific Reclamation Co. v. Ducker*, 35 Nev. 214, 127 P. 990 (1912)(an order requiring defendants to deliver property to a plaintiff was a mandatory injunction). However, the “Emergency” Motion for Specific Performance did not even begin to engage the elements the lower court was required to consider before an injunction could issue, and the Order did not require the posting of any bond, as required by NRCP 65(c). Additionally, such a preliminary mandatory injunction could only have issued upon proper notice to Dr. Fagan. NRCP 65(a)(1). Again, had the Court properly called the order a mandatory injunction, a direct appeal would have lied for Dr. Fagan. NRAP 3A(b)(3). Additionally, the issuance of a mandatory injunction is outside of a lower court’s subject matter jurisdiction only if it is properly applied for, and the requisite notice given. *Maheu v. Eighth Judicial Dist. Ct., County of Clark*, 493 P. 2d 709, 88 Nev. 26 (1972). Such an order is void without the proper notice. *Id.* Here, the “Emergency” Motion, as it was styled and

written, gave no notice that a mandatory injunction was being sought, nor did it argue any of the elements of an injunction, nor did it meet the requirements of NRCP 65 or NRS Ch. 33. No matter the label given to the Order, it is, in reality, a mandatory injunction, unsupported by the proper notice, procedure, or required bond. The lower Court acted in excess of its jurisdiction in granting it, and a writ of prohibition should issue.

2. Specific Performance is a Remedy

A writ should issue in this case, because Specific Performance is a remedy. Here, there is no judgment supporting the issuance of a remedy, and Specific Performance is not a recognized, available prejudgment remedy under any Nevada law or rule.

Specific performance is a remedy for a breach of contract claim. *Golden West Baseball Co. v. City of Anaheim*, 25 Cal. App. 4th 11 - Cal: Court of Appeal, 4th Appellate Dist., 3rd Div. 1994; *LaSalle Nat. Bank v. Metropolitan Life Ins. Co.*, 18 F. 3d 1371 (7th Cir. 1994)(“specific performance is a remedy, not a cause of action.”); Restatement (Second) of Contracts § 357; 81A C.J.S. Specific Performance § 4 (2015); *Chambliss, Bahner and Crawford v. Luther*, 531 S.W.2d 108 (Tenn. App. 1975); *Gordon v. Pfab*, 246 N.W.2d 283 (Iowa 1976); *Hart v. Dick*, 570 S.W.2d 820 (Mo. App. 1978); Corbin on Contracts § 1102 (1964); *Daley v. Earven*, 639 P. 2d 372 - Ariz: Court of Appeals, 2nd Div. 1981; *Green Valley Landowners Association*

v. City of Vallejo, 241 Cal.App.4th 425, 433 (2015); *Chi. Police Sergeants Ass'n v. City of Chicago*, 2011 WL 2637203, at *9 (N.D. Ill. July 6, 2011) ("injunctive relief and specific performance are remedies, not independent causes of action").

No party has requested judgment on any claim in the lower court action, nor has any judgment been issued. Nonetheless, the court has granted AAL-JAY the remedy of specific performance, despite “specific performance” not being an available prejudgment remedy under any Rule of Civil Procedure or statute. *See, e.g.* NRCP 65; NRS Ch. 33; NRCP 64. The lower court acted in excess of its jurisdiction and authority by granting an unauthorized prejudgment remedy, and a writ of prohibition should enter.

3. No Plain, Adequate, and Speedy Remedy at Law Exists

Dr. Fagan is losing his home. Unlike in typical situations where the applicable rules of civil procedure have been observed, there is no plain, adequate and speedy remedy at law for Dr. Fagan. Dr. Fagan cannot appeal the Order Granting Emergency Motion for Specific Performance, Dr. Fagan cannot affirmatively seek summary judgment in favor of the Plaintiff AAL-JAY and against himself without creating an estoppel issue, Dr. Fagan cannot stipulate to entry of judgment against him without creating a waiver issue, and Dr. Fagan cannot even seek certification of the Order pursuant to NRCP 54(b) because the Order itself is not a judgment. Dr. Fagan is stuck in a procedural no-man’s-land, where he is being forced - *under the threat of*

contempt - to sign documents and releases he does not agree to, to effectuate the sale of his home that he did not acquiesce to, and to attempt to come up with nearly \$400,000 in cash to clear the existing liens on the property in order to transfer title to the home.

Because real property and its attributes are considered unique and loss of real property rights results in irreparable harm. *See Dixon v. Thatcher*, 742 P. 2d 1029, 103 Nev. 414 (1987); *Leonard v. Stoebling*, 102 Nev. 543, 728 P.2d 1358 (1986) (view from home is unique asset; injunction issued to preserve view); *see also Nevada Escrow Service, Inc. v. Crockett*, 91 Nev. 201, 533 P.2d 471 (1975) (denial of injunction to stop foreclosure reversed because legal remedy inadequate). When threatened with irreparable harm, a litigant may receive a writ of mandamus from this Court when there is not plain, adequate *and* speedy legal remedy. NRS 34.170. Here, there is no avenue for appeal that will be open to Dr. Fagan prior to the actual loss of his property interest, and the loss of the hundreds of thousands of dollars he must assemble to clear existing liens to comply the lower court's order. His request for a stay has been denied by the lower court. In this case, justice delayed is truly justice denied. Dr. Fagan respectfully asks this Court to reconsider the denial of his petition for writ of mandamus or alternatively for prohibition, and to issue the writ to prevent the loss of his property until such time as the claims in the matter below are resolved on the merits.

VI. CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect X9 with 14 point, double spaced Times New Roman font.

2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 3095 words. Counsel has relied upon the word count application of the word processing program in this regard.

3. Finally, I hereby certify that I have read this appellate brief, 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 brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of

the Nevada Rules of Appellate Procedure

DATED: April 18, 2022

BLACK & WADHAMS

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VII. CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of April, 2022, that I served a copy of the foregoing document upon all counsel of record electronically via the Court's eflex-eFile and e-serve system, and to the following:

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