

IN THE SUPREME COURT OF THE STATE OF NEVADA

MM DEVELOPMENT COMPANY,
INC., D/B/A PLANET 13, a Nevada
Corporation,

Appellant,

vs.

TRYKE COMPANIES SO NV, LLC,
a Nevada Limited Liability Company,

Respondent.

Supreme Court Case No: 81938

Electronically Filed
Jan 25 2022 01:59 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

MM DEVELOPMENT COMPANY,
INC., a Nevada Corporation,

Appellant,

vs.

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

Respondents,

and

TRYKE COMPANIES SO NV, LLC,
a Nevada Limited Liability Company,

Real Parties in Interest.

Case No. 83920

**TRYKE COMPANIES SO NV, LLC’S OPPOSITION TO
MM DEVELOPMENT COMPANY, INC.’S
MOTION TO CONSOLIDATE APPEAL AND WRIT PETITION
AND TO POSTPONE ORAL ARGUMENT**

Respondent/Real Party In Interest Tryke Companies SO NV, LLC (“Tryke”), by and through its attorneys, hereby submits its opposition to MM Development Company, Inc. (“MM Development”)’s Motion to Consolidate Appeal and Writ Petition and to Postpone Oral Argument (“Motion”) filed January 18, 2022. This opposition is made and based upon the following points and authorities and the papers and pleadings on file herein.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The consolidation of appellate proceedings can be appropriate in some circumstances. But those circumstances are not present here. Accordingly, the Court should deny MM Development’s Motion to consolidate its appeal (Case No. 81938) with its petition for writ of mandamus (Case No. 83920) for the reasons discussed below.

First, MM Development’s consolidation request presupposes that the Court will accept MM Development’s writ petition challenging the district court’s denial of a motion for judgment on the pleadings. Such challenges are historically unsuccessful with this Court and its decision therefore may be to deny the writ petition. Thus, MM Development is not seeking to consolidate two pending

proceedings; rather, it seeks to consolidate a pending and fully briefed appeal set for oral argument on February 16, 2022 with a potential writ proceeding.

Second, the Court may conclude not to accept the recently submitted writ petition because it raises a “private right of action” issue which: (1) MM Development already has addressed in its existing appeal arising out of the same underlying district court case; and (2) was briefed multiple times before the district court, with at least three of those briefings already in the record before this Court.

Third, consolidation will hinder judicial efficiency, not promote it. A ruling by the Court following the upcoming oral argument already is legally capable of resolving the issue for the case as a whole without need for consolidation. Lastly, MM Development’s request for consolidation, which if granted will require postponement of oral argument scheduled with this Court, risks unduly delaying the proceedings on appeal and in the district court, where the pre-trial preparation of this action is stayed pending resolution of the appeal.

Therefore, Tryke respectfully requests that the Court deny the Motion and allow the oral argument on the appeal to proceed as scheduled on February 16, 2022.

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II. LEGAL ARGUMENT

A. Legal Standard

Nevada Rule of Appellate Procedure 3(b) provides that “appeals may be joined or consolidated by the court upon its own motion or upon motion of a party.” NRAP 3(b)(2). This Court has repeatedly confirmed that the goal of consolidation is to promote judicial efficiency. *Nalder v. Eighth Jud. Dist. Ct.*, 136 Nev. 200, 207, 462 P.3d 677, 685 (2020); *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 852, 124 P.3d 530, 541 (2005).

B. Consolidation Is Not Warranted

Critically, the Court has not yet determined whether it will even entertain MM Development’s recently submitted writ petition.¹ Given that the Court generally declines petitions challenging the denial of a motion for judgment on the

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¹ The district court order challenged by MM Development’s writ petition was entered October 28, 2021 and notice of entry was filed November 3, 2021. MM Development’s writ petition was submitted more than a month later, on December 16, 2021. MM Development did not request consolidation of the two matters at that time. It was only after the Court entered a Notice of Oral Argument on January 5, 2022 that MM Development moved to consolidate (and postpone oral argument).

pleadings – which is the basis for MM Development’s writ petition² – the Court may simply deny the petition outright. *See Chur v. Eighth Jud. Dist. Ct.*, 136 Nev. 68, 70, 458 P.3d 336, 339 (2020); NRAP 21(b)(1). As the Court has not yet accepted MM Development’s petition, Tryke submits that the petition is not ripe for consolidation and the Motion should be denied accordingly.

C. The Petition Is Redundant

In the Motion, MM Development concedes that its appeal and petition arise from “the same facts and legal issues.” (Motion, p. 2.) With respect to legal issues, MM Development admits that its appeal and petition both raise the same “private

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² In its October 28, 2021 Order, the district court concluded and ordered in pertinent part:

The Motion for Judgment on the Pleadings is, essentially, a repackaged motion to dismiss. The Court has reviewed the complaint in this matter, has reviewed the pertinent statutes and applicable case law, and agrees with the prior denial of Planet 13’s Motion to Dismiss. On this basis, the Court DENIES the Motion for Judgment on the Pleadings.

right of action” issue, an argument that the district court has repeatedly rejected.³

(*Id.*, p. 4.) What is more, MM Development notably concedes that “this Court’s decision in the appeal with [sic] directly affect its decision in the writ petition.”

(*Id.*, p. 5.) Indeed, a single action is pending here. This is not a situation where two separate, but related actions are pending.

To state it plainly, the petition raises the redundant “private right of action” issue that MM Development already has addressed in its appeal. (*See* Opening Brief, pp. 14-15.) Specifically, in furtherance of its argument that Tryke was allegedly not likely to prevail on the merits of its underlying claims, Planet 13 argued that “Tryke has no private right of action against MM Development for the alleged diversion of rideshare passengers by rideshare drivers.” (*Id.*, p. 14.)

In hindsight, MM Development may wish that it had addressed the issue differently in its briefing – either its opening brief filed March 25, 2021 or its reply

³ By way of background, MM Development has unsuccessfully asserted its “no private right of action” argument in conjunction with at least five different filings in the district court: (1) Motion to Dismiss, filed December 6, 2019 (*see* Appx., Vol. 1, at 16-17); (2) Motion for Reconsideration of Court Order Denying Defendant’s Motion to Dismiss, filed April 8, 2020 (*see* Appx., Vol. 1, at 79-80); (3) Opposition to Motion for Preliminary Injunction on Order Shortening Time, filed August 28, 2020 (*see* Appx., Vol. 2, at 395-97); (4) Motion for Reconsideration of Court Order Denying Defendant’s Motion for Leave to Amend Answer to Assert Counterclaims, filed September 9, 2021; and (5) Motion for Judgment on the Pleadings, filed September 9, 2021. In short, the record from the district court, which by-and-large already is before this Court through MM Development’s existing appeal, is quite ample. Tryke respectfully submits that additional briefing on the same issue will not aid the Court in any meaningful way.

brief filed July 23, 2021 – but the “private right of action” issue already is in the record before this Court. MM Development is not entitled to consolidation of a not-yet accepted writ petition simply so that it can bulk-up its existing briefing. Rather than open the door to excess briefing and delay, the proper and just result (and as discussed further below, the result which promotes judicial economy), is to deny the Motion and reject MM Development’s redundant writ petition.

D. Consolidation Is Not Judicially Efficient

This Court has repeatedly recognized that the goal of consolidation is to promote judicial efficiency. *Nalder*, 136 Nev. at 207; *Shuette*, 121 Nev. at 852. While the consolidation of appeals raising identical legal issues may generally further judicial efficiency, MM Development’s requested consolidation of the appeal brought pursuant to NRAP 3, and the writ petition brought pursuant to NRAP 21 will not do so here. Quite the opposite, the additional briefing MM Development requests is wholly unnecessary given the redundant issues and would only serve to waste the Court’s time and resources. Additionally, consolidation is not judicially efficient here because Tryke would be required to incur additional, unnecessary attorneys’ fees on a writ petition the Court may not accept. *See Nalder* 136 Nev. at 207. Thus, the Court should deny MM Development’s Motion because consolidation of the appeal and petition will frustrate judicial efficiency, not serve it.

E. Consolidation Will Unduly Delay the Proceedings

The avoidance of delay is a key consideration in determining the appropriateness of consolidation. *See, e.g.*, NRCP 42(a); 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2383 (3d ed.); *Kainz v. Lussier*, 667 P.2d 797, 803 (Haw. App. 1983); *Van Zandt v. Dance*, 827 S.W.2d 785, 787 (Tenn. App. 1991); *Abrams v. Port Auth. Trans-Hudson Corp.*, 1 A.D.3d 118, 119 (N.Y. App. Div. 2003).

Notably, the district court action is stayed during the pendency of the appeal and writ petition. (*See* Notice of Entry of Order Granting: (1) MM Development Company, Inc.’s Motion for Stay Pending Appeal; and (2) Tryke Companies SO NV, LLC’s Motion for Reconsideration of Order Denying Plaintiff’s Motion to Extend Discovery Deadlines and Trial Date (Second Request), filed November 30, 2021, p. 3, ¶ 10.)

Thus, consolidation will not only significantly delay resolution of the appeal given the markedly different procedural stages of the appeal (fully briefed with oral argument set) and the writ petition (potential only), but the district court proceeding will likewise be unduly delayed given the stay of the action pending resolution of the appeal. The Court can easily prevent such unnecessary delays by denying the Motion.

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III. CONCLUSION

For the reasons stated herein, Tryke respectfully requests that the Court deny MM Development's Motion and permit oral argument to proceed on the appeal as scheduled.

Dated this 25th day of January 2022.

HONE LAW



Eric D. Hone, NV Bar No. 8499

ehone@hone.law

Joel Z. Schwarz, NV Bar No. 9181

jschwarz@hone.law

Leslie A. S. Godfrey, NV Bar No. 10229

lgodfrey@hone.law

701 North Green Valley Parkway, Suite 200

Henderson, NV 89074

Phone 702-608-3720

Fax 702-703-1063

CONANT LAW FIRM

Paul A. Conant, AZ Bar No. 012667

paulconant@conantlawfirm.com

(Admitted *Pro Hac Vice*)

2398 East Camelback, Suite 925

Phoenix, AZ 85016

Phone 602-508-9010

Fax 602-508-9015

Attorneys for Respondent/

Real Party In Interest

Tryke Companies SO NV, LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of January 2022, I submitted the foregoing TRYKE COMPANIES SO NV, LLC'S OPPOSITION TO MM DEVELOPMENT COMPANY, INC.'S MOTION TO CONSOLIDATE APPEAL AND WRIT PETITION AND TO POSTPONE ORAL ARGUMENT for filing and service via the Court's eFlex electronic filing system.


An employee of HONE LAW