

Case No. 84699

IN THE SUPREME COURT OF NEVADA

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

Appellant,

vs.

AAL-JAY, Inc.

Respondents

Electronically Filed
Oct 19 2023 02:57 PM
Elizabeth A. Brown
Clerk of Supreme Court

APPEAL

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

PETITION FOR EN BANC RECONSIDERATION

ALLISON R. SCHMIDT, ESQ.
Nevada Bar No.
10743 Black &
Wadhams
10777 W. Twain Ave.,
Suite 300 Las Vegas,
Nevada 89135 Telephone:
(702) 869-8801 *Attorneys
for Appellants*

TABLE OF CONTENTS

| | |
|--|----|
| TABLE OF CONTENTS | i |
| TABLE OF AUTHORITIES..... | ii |
| I. INTRODUCTION | 1 |
| II. STANDARD FOR RECONSIDERATION | 2 |
| III. ARGUMENT..... | 3 |
| A. Constitutional Policy Underlying the Due Process Guarantee of Immediate Review or Orders Granting or Denying Injunctive Relief..... | 3 |
| B. The May 2022 Order Is an Order that Both Denies Injunctive Relief and Grants Injunctive Relief..... | 4 |
| C. The Panel Erred in Finding it Lacked Jurisdiction – and Fagan’s Constitutional Rights are Being Denied..... | 11 |
| IV. CONCLUSION | 12 |
| CERTIFICATE OF COMPLIANCE..... | 13 |

TABLE OF AUTHORITIES

Cases

| | |
|---|----|
| <i>United States v. Apex Oil Co., Inc.</i> , 579 F.3d 734, 736 (7th Cir. 2009)..... | 8 |
| <i>Bogosian v. Wolooohojian Realty Corp.</i> , 923 F.2d 898, 1991 U.S. App. LEXIS 482 (1st Cir. 1991)..... | 9 |
| <i>Chicago Dollar Directory Co. v. Chicago Directory Co.</i> , 65 F. 463, 1895 U.S. App. LEXIS 2233 (7th Cir. 1895)..... | 4 |
| <i>Cohen v. Bd. of Trs. of the Univ. of Med. and Dentistry of N.J.</i> , 867 F.2d 1455, 1468 (3d Cir. 1989)..... | 10 |
| <i>Cytogenix, Inc. v. Waldroff</i> , 213 S.W.3d 479, 488 (Tex. App. 2006)..... | 8 |
| <i>In re Feit & Drexler, Inc.</i> , 760 F.2d 406, 13 Bankr. Ct. Dec. (LRP) 79, Bankr. L. Rep. (CCH) ¶ 70388..... | 8 |
| <i>In re Flight Transp. Corp. Sec. Litigation</i> , 730 F.2d 1128, 12 Bankr. Ct. Dec. (LRP) 11, Bankr. L. Rep. (CCH) ¶ 69796, 1984 U.S. App. LEXIS 24193 (8th Cir. 1984), cert. denied, 469 U.S. 1207, 105 S. Ct. 1169, 84 L. Ed. 2d 320, 1985 U.S. LEXIS 861 (1985)..... | 10 |
| <i>New Park Forest Associates II v. Rogers Enterprises, Inc.</i> , 195 Ill. App. 3d 757, 761, 552 N.E.2d 1215, 142 Ill. Dec. 474 (1990) | 8 |
| <i>PlasmaCAM, Inc. v. CNCElectronics, LLC</i> , 24 F.4th 1378, 1383 (Fed. Cir. 2022)..... | 9 |
| <i>SECI, Inc. v. Chafitz, Inc.</i> , 63 Md. App. 719, 726, 493 A.2d 1100 (1985)..... | 8 |
| <i>Smith v. Vulcan Iron Works</i> , 165 U.S. 518, 17 S. Ct. 407, 41 L. Ed. 810, 1897 U.S. LEXIS 1992 (1897)..... | 3 |
| <i>Societe Internationale, etc. v. McGrath</i> , 1950, 86 U.S.App.D.C. 157, 180 F.2d 406 | 5 |
| <i>Taylor v. Board of Education</i> , 288 F.2d 600, 1961 U.S. App. LEXIS 4826 (2d Cir. 1961)..... | 5 |
| <i>Vavla v. State</i> , 130 Nev. 1257 (2014)..... | 3 |
| <i>Wendell's Alumni Grill, LLC v. Ohio State Univ.</i> , No. 09 CV 5297, 2009 Ohio Misc. LEXIS 7927, at *3 (Ct. Com. Pl. Oct. 14, 2009) | 9 |

Statutes

| | |
|------------------------|----|
| 28 USCS § 1292(a)..... | 4 |
| NRS 2.090(2)..... | 11 |
| NRS 2.090(2)..... | 1 |

Rules

| | |
|--------------------|--------|
| NRAP 3A..... | 2 |
| NRAP 3A(b)(3)..... | passim |
| NRAP 40A(a)..... | 2 |

Treatises

| | |
|---|---|
| 42 Am. Jur. 2d Mandatory Injunctions § 6, 10 (November 2022 Update) | 6 |
| Black's Law Dictionary (9th ed. 2009)..... | 6 |
| Edward D. Re, Remedies: Cases and Materials 281 (2d ed. 1987)..... | 8 |

I. INTRODUCTION

Appellant Philip J. Fagan (“Dr. Fagan”) has filed a proper appeal of an Order denying Dr. Fagan’s Motion for a Preliminary Injunction, and granting various forms of injunctive relief to AAL-JAY.

Under the rules of this Court, the Constitution of the State of Nevada, and the laws of this State, this Court has jurisdiction, and must exercise it to resolve Dr. Fagan’s appeal on the merits.

The panel issued a two-word denial of Fagan’s petition for rehearing, which fails to engage the numerous authorities Fagan provided that demonstrate that an order which:

(1) Compels Fagan to Sign *any* document presented to him by counsel for AAL-JAY;

(2) Compels Fagan to satisfy all liens on his home (totaling approximately \$1,200,000) out of his own pocket, with absolutely no payment from AAL-JAY; and

(3) Denies Fagan’s motion for an injunction to maintain the status quo of the home and require AAL-Jay to deposit rents with the Court until a decision on the merits can be reached

is undeniably an order which grants or denies injunctive relief under NRAP 3A(b)(3); NRS 2.090(2).

Fagan's liberty and property will be taken from him without due process, despite the fact that the lower court has prohibited all discovery, there has been zero discovery completed, and there has not been a single claim heard on the merits, nor a single piece of admissible evidence presented to Judge Ballou.

A review of AAL-JAY's Answering Brief reveals that AAL-Jay has never argued that this Court lacks jurisdiction to resolve all of the issues raised by Dr. Fagan on appeal. Nor did AAL-Jay claim that the operative May 2022 order was not an order that granted or denied injunctive relief. Rather, AAL-Jay merely argued that AAL-Jay could not attack the merits of the earlier Order granting AAL-Jay's "Emergency Motion for Specific Performance."

While it is clear that Dr. Fagan disagrees with the legally-infirm Order Granting Emergency Motion for Specific Performance – which will be the subject of future petitions to this court – **that fact does render the May 2022 Order any less appealable.**

The panel erred in concluding that it lacked jurisdiction over the entirety of this appeal. NRAP 3A, the Constitution of the State of Nevada, and NRS Ch. 2 all provide that this Court has jurisdiction. Respectfully, Dr. Fagan is constitutionally entitled to a substantive review of the Order.

II. STANDARD FOR REHEARING

Pursuant to NRAP 40A(a), *en banc* reconsideration is appropriate "when (1)

reconsideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) the proceeding involves a substantial precedential, constitutional or public policy issue." *Vavla v. State*, 130 Nev. 1257 (2014).

III. ARGUMENT

A. Constitutional Policy Underlying the Due Process Guarantee of Immediate Review or Orders Granting or Denying Injunctive Relief.

The manifest intent of laws and procedural rules guaranteeing appellate review of interlocutory orders granting or denying injunctive relief (28 USCS § 1292, and NRAP 3A(b)(3)), read in light of previous practice in Courts across the United States appears to have been not only to permit the appellant to obtain immediate relief from injunction, continuance of which throughout progress of cause might seriously affect his interests, but also to save both parties from expense of further litigation should appellate court be of opinion that equity did not support the grant of or denial of injunctive relief. *Smith v. Vulcan Iron Works*, 165 U.S. 518, 17 S. Ct. 407, 41 L. Ed. 810, 1897 U.S. LEXIS 1992 (1897).

Since interlocutory injunctions may prove as destructive to interests of party enjoined - as would perpetual injunction granted on final hearing - it was obvious purpose of Congress to enable party affected to have speedy review that he may be relieved from consequences of wrongful or improvident injunction.

Chicago Dollar Directory Co. v. Chicago Directory Co., 65 F. 463, 1895 U.S. App. LEXIS 2233 (7th Cir. 1895).

It has been recognized that NRAP 3A(b)(3)'s federal counterpart - 28 USCS § 1292(a) - is result of Congress' realization that rigid application of final judgment rule in all cases might inflict irreparable harm upon litigants in certain instances and might actually have effect of unnecessarily prolonging litigation. *Bachowski v. Usery*, 545 F.2d 363, 93 L.R.R.M. (BNA) 2689, 79 Lab. Cas. (CCH) ¶ 11729, 1976 U.S. App. LEXIS 6415 (3d Cir. 1976).

Dr. Fagan is about to be deprived of his liberty, forced to sign unknown documents under the threat of contempt, forced to make payments to third parties totaling over \$1.2 million, and has been stripped of all of his property rights to his home without any due process. There has been not a single shred of discovery – indeed Judge Ballou has prohibited Fagan from engaging in any discovery. There has not been a single shred of admissible evidence submitted to Judge Ballou by AAL-JAY, and there has not been a single claim considered on the merits. This case has been a complete, unprecedented denial of Fagan's constitutional rights. Reconsideration *en banc* is necessary.

B. The May 2022 Order Is an Order that Both Denies Injunctive Relief and Grants Injunctive Relief

The Second Circuit and DC Circuit Courts of Appeals have observed that the term “injunction” includes not only order prohibiting certain conduct during

pendency of litigation, but also one that commands it. *Taylor v. Board of Education*, 288 F.2d 600, 1961 U.S. App. LEXIS 4826 (2d Cir. 1961); *Societe Internationale, etc. v. McGrath*, 1950, 86 U.S.App.D.C. 157, 180 F.2d 406.

The Order appealed from in this case both grants and denies injunctive relief. In particular, it grants affirmative relief by directing Dr. Fagan to, *inter alia*:

(1) sign any document presented to him for signature by AAL-Jay's Counsel, that AAL-Jay's counsel unilaterally determined to be "in furtherance" of closing the sale of the property to AAL-Jay;

(2) pay off all liens on the property out of his own pocket within 30 days - liens which are in excess of \$1.1 million - without receiving a penny of purchase funds from the AAL-Jay;

(3) bear the expense of the ownership of the property while simultaneously being barred from accessing or enjoying his property because he, according to the order, failed to comply with unspecified terms of the specific performance order. (Vol. 2, AA00319-00321).

It further grants affirmative injunctive relief as it affirmatively directed non-party First American Title Company to disburse to AAL-Jay the escrowed earnest money funds. *Id.*

Lastly, the Order *expressly* denied the injunctive relief requested by Dr. Fagan in his countermotion. Dr. Fagan's countermotion requested Dr. Fagan asked

the lower court to, at a minimum, require AAL-Jay to pay the \$6,800 in monthly rent AAL-Jay agreed to begin paying effective March of 2021 into the Court or Trust, from which Dr. Fagan would be permitted to seek quarterly reimbursement for the expenses of owning, and maintaining the property, and resolving the materialmen's lien that AAL-Jay caused to be recorded against the property. Any remaining funds could have been held pending the final order and judgment on the claims, which would determine the distribution of the surplusage. Dr. Fagan also requested the lower court enjoin AAL-Jay from causing any further liens or encumbrances to be created on the property. Alternatively, Dr. Fagan requested that the lower court order Plaintiff to vacate the property unless and until it became the record titleholder to the property. (Vol 2, AA00272-00277).

The Order grants multiple types of injunctive relief, and also denies Dr. Fagan's motion for injunctive relief. *See* 42 Am. Jur. 2d Mandatory Injunctions § 6, 10 (November 2022 Update) (mandatory injunctions alter, rather than preserve, the status quo); Injunction, Black's Law Dictionary (9th ed. 2009) ("**A court order commanding or preventing an action.**")(emphasis added); *see also Peck v. Crouser*, 129 Nev. 120, 124, 295 P.3d 586, 588 (2013). The order commands, *inter alia*, the following actions:

- (1) For Dr. Fagan to sign any document presented to him by AAL-Jay;
- (2) For Dr. Fagan to pay off all liens on the property, out of his own pocket,

without receiving any purchase funds from AAL-Jay

(3) For First American Title Company, which held the earnest money funds in escrow to pay the funds to AAL-Jay.

Each of these is an example of a mandatory injunction. They each alter the status quo prior to any judgment on the merits of any single claim or cause of action.

Further, the Order expressly denied the injunctive relief requested by Dr. Fagan in his countermotion. It prohibits Dr. Fagan from collecting the rents he is entitled to as the owner of the property. It further prevents Dr. Fagan from obtaining the purported purchase funds that he is entitled to under the supposed purchase agreement. Specifically it finds, without further factual clues, that Dr. Fagan has no likelihood of success on the merits. (Vol. 2, AA 00345).

While this Court framed the injunctive relief request as merely a “challenge to a prior order” that is simply not the case. Until title to the property is vested in AAL-Jay (which, ostensibly would not occur until they paid the purchase funds – which AAL-Jay has admitted they cannot do), Dr. Fagan is entitled, as the titleholder, to receive the monthly rent payments to offset the gargantuan expenses of owning the property. Further, the request to bar AAL-Jay from further encumbering the property until AAL-Jay owned the property was not a “challenge to a prior order.” Rather, it was a reasonable, lawful request intended to preserve the status quo through injunctive relief. Finally, the request to exclude AAL-Jay

from the property until AAL-Jay became the owner was not a “challenge to a prior order” but rather, a request that is in harmony with the prior order. In most purchase and sale transactions on real property the purchaser is not permitted to occupy the property until they are the titleholder.

Another point that the Panel failed to apprehend, is that, to the extent the “emergency” specific performance order is an injunctive order – which it clearly is¹ – any order refusing to dissolve it or continuing the injunctive relief it provides is also appealable under NRAP 3A(b)(3), which confers jurisdiction upon this Court to consider any order “dissolving or refusing to dissolve an injunction.” NRAP 3A(b)(3); *see also In re Feit & Drexler, Inc.*, 760 F.2d 406, 13 Bankr. Ct. Dec. (LRP) 79, Bankr. L. Rep. (CCH) ¶ 70388, 13 Collier Bankr. Cas. 2d (MB) 148, 1985 U.S. App. LEXIS 29139 (2d Cir. 1985)(Court’s order continuing and refusing to modify earlier injunctive orders are immediately appealable.)

¹ Numerous Courts and treatises have held that Specific Performance is a form of injunctive relief. *See, e.g., United States v. Apex Oil Co., Inc.*, 579 F.3d 734, 736 (7th Cir. 2009); *Cytogenix, Inc. v. Waldroff*, 213 S.W.3d 479, 488 (Tex. App. 2006); *SECI, Inc. v. Chafitz, Inc.*, 63 Md. App. 719, 726, 493 A.2d 1100 (1985); *New Park Forest Associates II v. Rogers Enterprises, Inc.*, 195 Ill. App. 3d 757, 761, 552 N.E.2d 1215, 142 Ill. Dec. 474 (1990); *Gager v. Gager & Peterson, LLP*, 76 Conn.App. 552, 560, 820 A.2d 1063 (2003); *Agudas Chasidei Chabad of United States v. Russian Fed’n*, No. 1:05-cv-1548-RCL, 2020 U.S. Dist. LEXIS 268709, at *62 (D.D.C. Nov. 6, 2020); Edward D. Re, *Remedies: Cases and Materials* 281 (2d ed. 1987).

The Order finally resolved the issue of whether Dr. Fagan would be permitted to require the payment of the agreed-upon rent during the pendency of the action and which party was entitled to receive the earnest money funds – all without a shred discovery or any claim being considered on its merits.

1. Orders Compelling a Party to Sign Documents Are Mandatory Injunctions

The Order challenged by this appeal requires Fagan to execute any document presented to him by Counsel for AAL-Jay that AAL-Jay’s counsel unilaterally determines to be “in furtherance” of the specific performance order. Any order that requires a party to execute documents, under threat of contempt, is a mandatory injunction. *PlasmaCAM, Inc. v. CNCElectronics, LLC*, 24 F.4th 1378, 1383 (Fed. Cir. 2022)(an order requiring a party to execute a settlement agreement is an appealable injunction); *Bogosian v. Woloohojian Realty Corp.*, 923 F.2d 898, 1991 U.S. App. LEXIS 482 (1st Cir. 1991)(requiring a party to execute a mortgage is a mandatory injunction); *Wendell's Alumni Grill, LLC v. Ohio State Univ.*, No. 09 CV 5297, 2009 Ohio Misc. LEXIS 7927, at *3 (Ct. Com. Pl. Oct. 14, 2009)(requiring an party to sign permit applications is a mandatory injunction).

2. An Order that Requires a Party to Perform Contractual Undertakings in furtherance of Specific Performance is an Injunction

The Order issued by Judge Ballou required Dr. Fagan to pay off all liens on the property within 30 days of the date of the order, without receiving a penny of

purchase funds from AAL-JAY, in furtherance of her previous “emergency” specific performance order. As the Third Circuit has observed, an order requiring the “enforcement of contractual undertakings by an order against the person has been regarded as a classic form of equitable relief . . . and if it is granted the order falls within section 1292(a)(1)².” *Cohen v. Bd. of Trs. of the Univ. of Med. and Dentistry of N.J.*, 867 F.2d 1455, 1468 (3d Cir. 1989).

3. An Order Compelling the Distribution of Escrow Property is an Injunction.

Judge Ballou’s Order also compelled non-party First American Title Company to distribute the escrow funds to AAL-Jay – not only does this order directly violate the court’s own specific performance order – it also constitutes an injunction. An Order granting or denying a motion to disburse escrowed funds is appealable as injunctive relief. *In re Flight Transp. Corp. Sec. Litigation*, 730 F.2d 1128, 12 Bankr. Ct. Dec. (LRP) 11, Bankr. L. Rep. (CCH) ¶ 69796, 1984 U.S. App. LEXIS 24193 (8th Cir. 1984), cert. denied, 469 U.S. 1207, 105 S. Ct. 1169, 84 L. Ed. 2d 320, 1985 U.S. LEXIS 861 (1985).

4. The Order Denying Fagan’s Request for a Preliminary Injunction is Appealable Under NRAP 3A(b)(3).

The Order appealed in this case additionally (1) denied Fagan’s request that

² This is the Federal Counterpart to NRAP 3A(b)(3).

the District Court enjoin AAL-Jay from further encumbering the property until the resolution of the case on its merits (AAL-JAY previously caused a mechanic's lien to be levied against the property); (2) denied Fagan's motion which requested an injunction requiring AAL-Jay to pay the agreed-upon amount of rent for the property to the District Court Clerk during the pendency of the action; (3) denied Fagan's request that AAL-Jay be required to tender to the court the amount of the alleged purchase price for the claimed "purchase agreement" that the court was specifically enforcing; and (4) prohibited Fagan from taking any act to exclude or evict AAL-Jay from the home that Fagan owned and currently owns during the pendency of the property. Fagan has been stripped of all of his property rights, while simultaneously bearing all the burdens of ownership. The fact that the appealed order is both an order granting and denying injunctive relief is not capable of reasonable dispute.

C. The Panel Erred in Finding it Lacked Jurisdiction – and Dr Fagan's Due Process Rights are Being Denied.

This Court simply cannot ignore the plethora of affirmative injunctive relief granted by the Order, compelling numerous acts to be completed by parties and non-parties alike. The Nevada Constitution, United States Constitution, and the Rules of Appellate Procedure require that no citizen of this state be deprived of liberty or property without due process of law – which includes the appellate process guaranteed by NRAP 3A(b)(3) and NRS 2.090(2).

III. CONCLUSION

Fagan implores this Court to put a stop to the unprecedented miscarriage of justice that has been unfolding in this case since its filing in 2021. This Court should grant reconsideration *en banc* and enter an order reversing and remanding the illegal and improper injunction order entered by the District Court in in May of 2022.

DATED this 19th day of October, 2023.

Black & Wadhams

/s/ Allison R. Schmidt
ALLISON R. SCHMIDT, ESQ.
Nevada Bar No. 10743
10777 W. Twain Ave.
Suite 300 Las Vegas,
NV 89135
(702) 869-8801
Attorneys for Appellants

CERTIFICATE OF COMPLIANCE

I hereby certify that this petition for rehearing/reconsideration 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:

☒ [X] It has been prepared in a proportionally spaced typeface Times New Roman in 14pt. font or

☐ [] It has been prepared in a monospaced typeface using [state name and version of word-processing program] with [state number of characters per inch and name of type style].

I further certify that this brief complies with the page- or type-volume limitations of NRAP 40 or 40A because it is either:

☒ [X] Proportionately spaced, has a typeface of 14 points or more, and contains 2654 words; or

☐ [] Monospaced, has 10.5 or fewer characters per inch, and contains _____ words or _____ lines of text; or

☐ [] Does not exceed _____ pages.

I understand that I may be subject to sanction in the event that the accompanying brief does not meet the requirements of the Nevada Rules of Appellate Procedure.

Dated this 19th day of October 2023

Black & Wadhams

/s/ Allison R. Schmidt

ALLISON R. SCHMIDT, ESQ.

Nevada Bar No. 10743

Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 19th day of October 2023. Electronic service of the foregoing **Petition for En Banc Reconsideration** shall be made in accordance with the Master Service List.

Master Service List

/s/Diane Meeter
*an employee of Black &
Wadhams*