

IN THE SUPREME COURT OF THE STATE OF NEVADA

DEBORAH A. DRAKE;
Petitioner,

vs.

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

Respondents,

and

ALPHA REALTY SERVICES, LTD., A
NEVADA CORPORATION; LAWRENCE
D. ROBERTSON, AN INDIVIDUAL;
AND VINCE HACKETT, AN
INDIVIDUAL,

Real Parties in Interest.

No. 47441

FILED

JUL 20 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Bloom*
DEPUTY CLERK

SABRECO, INC., A NEVADA
CORPORATION,

Petitioner,

vs.

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

Respondents,

and

ALPHA REALTY SERVICES, LTD., A
NEVADA CORPORATION; LAWRENCE
D. ROBERTSON, AN INDIVIDUAL;
AND VINCE HACKETT, AN
INDIVIDUAL,

Real Parties in Interest.

No. 48082

ORDER DENYING PETITIONS FOR WRITS OF MANDAMUS OR
PROHIBITION AND VACATING STAY

These consolidated original petitions for writs of mandamus and prohibition challenge district court orders granting a motion for partial summary judgment, denying a countermotion for summary judgment (Docket No. 47441) and denying a motion to amend cross-claims (Docket No. 48082).

STANDARD OF REVIEW

Both mandamus and prohibition are extraordinary remedies and the issuance of such writs is purely discretionary with this court.¹ A writ of mandamus “is available to compel performance of an act that the law requires as a duty resulting from an ‘office, trust or station’² or to control a manifest abuse of, or an arbitrary or capricious exercise of, discretion.” The counterpart to a writ of mandate, a writ of prohibition, is available when a district court acts without or in excess of its jurisdiction.³ Neither writ will issue; however, when petitioner has a plain, speedy, and

¹NRS 34.170; See Smith v. District Court, 107 Nev. 674, 818 P.2d 849 (1991).

²NRS 34.160; See Cheung v. Dist. Ct., 121 Nev. 867, 868-69, 124 P.3d 550, 552 (2005). See also Round Hill Gen. Imp. Dist v. Newman, 97 Nev. 601, 637 P.2d 534, 536 (1981).

³State of Nevada v. Dist. Ct. (Anzalone), 118 Nev. 140, 146-47, 42 P.3d 233, 237 (2002); NRS 34.320.

adequate legal remedy in the ordinary cause of law.⁴ It is petitioner's burden to demonstrate that extraordinary relief is warranted.⁵

Upon consideration of the petitions and supporting documents, and the answers thereto, we are not satisfied, as discussed below, that our intervention by way of extraordinary relief is warranted.

Drake's petition for a writ of mandamus (Docket No. 47441)

Petitioner Deborah A. Drake presents an original petition for a writ of mandamus challenging a district court order granting a motion for partial summary judgment, denying her countermotion for summary judgment, and requesting this court to direct the district court to allow her more time to designate an expert witness. In granting the motion for partial summary judgment, the district court found that Drake had failed to identify an expert witness to testify as to Drake's claims of negligence in violation of NRS 645.252.

In her petition for mandamus relief, Drake contends that no expert testimony is necessary because real parties in interest breached a standard of conduct that can be determined by a jury. We disagree. In an action to recover damages resulting from a real estate agent's failure to perform his duties, such as the underlying action, the standard of care the agent owes his client is defined as the "degree of care that a reasonably prudent real estate licensee would exercise," as measured by "the degree of knowledge required by a real estate licensee" pursuant to certain statutory

⁴Gumm v. State, Dep't of Education, 121 Nev. 371, 375, 113 P.3d 853, 856 (2005); NRS 34.170, NRS 34.330.

⁵Pan v. Dist. Ct., 120 Nev. 222, 228, 88 P.3d 840, 844 (2004).

educational requirements.⁶ As such, we conclude that the district court did not manifestly abuse its discretion by concluding that expert testimony was required to support Drake's claim that real parties in interest violated NRS 645.252.

Drake further contends summary judgment in her favor is mandated because real party in interest Alpha Realty Services, Ltd. failed to obtain a written extension, which is a per se breach of Article 9 of the Realtors' Standard, and thus, expert testimony was not required to establish negligence. We conclude that the district court acted within its discretion by finding that Alpha's failure to obtain a written extension is not an obvious violation of Article 9. Accordingly, we perceive no manifest abuse of discretion with regard to the district court's conclusion that expert witness testimony is needed to establish the breach element of Drake's claim.

Lastly, Drake contends that the district court's denial of her motion to continue trial to allow her time to designate an expert witness constitutes a gross miscarriage of justice, warranting extraordinary relief. We disagree. Drake not only failed to seek an extension of the expert designation deadline prior to the court-ordered deadline but also failed to request an extension in her opposition to the real parties in interest's motion for partial summary judgment. Instead, Drake's counsel made a deliberate strategic decision to not retain an expert. Accordingly, we conclude the extraordinary relief of granting a writ of mandamus is not

⁶See NRS 645.257(3).

warranted as the district court's denial of Drake's motion to continue was not a manifest abuse of discretion.

Sabreco Inc's petition for a writ of mandamus or prohibition (Docket No. 48082

Sabreco seeks a writ of mandamus or, alternatively, a writ of prohibition directing the district court to permit it to amend its complaint to add various tort claims against real parties in interest. More specifically, Sabreco asserts that the district court manifestly abused its discretion by denying its motion to amend based on its erroneous finding that NRS 645.251 completely abrogates "common law, with the exception of contract claims," thus precluding Sabreco's proposed tort claims.

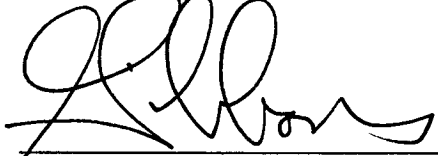
We conclude that Sabreco's petition is premature as the district court has not made a ruling as to real parties in interest's motion for reconsideration and because many of Sabreco's tort claims are found in Sabreco's new complaint. Thus, providing the relief requested would be inappropriately pre-emptive.

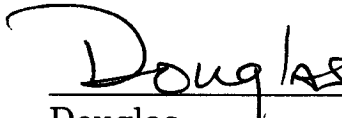
CONCLUSION

Having reviewed the petitions and their supporting documentation and the answers thereto, we conclude that both petitions

fail to warrant the extraordinary relief requested. Accordingly, we

ORDER the petitions DENIED, and we order that the underlying stay be vacated.


_____, J.
Gibbons


_____, J.
Douglas


_____, J.
Cherry

cc: Hon. Michelle Leavitt, District Judge
Marquis & Aurbach
Martin & Allison, Ltd.
Pyatt Silvestri & Hanlon
Eighth District Court Clerk