

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT D. KAHRE, D/B/A WRIGHT
PAINTING & DRYWALL,
Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK, AND THE HONORABLE
TIMOTHY C. WILLIAMS, DISTRICT
JUDGE,

Respondents,

and

PATCH CO, INC., A NEVADA
CORPORATION; AND KELLY
MUSLER, AN INDIVIDUAL,
Real Parties in Interest.

No. 48616

FILED

JAN 11 2007

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

ORDER DENYING PETITION FOR
WRIT OF PROHIBITION OR MANDAMUS

This original petition for a writ of prohibition or mandamus challenges a June 8, 2006 district court order that (1) granted real parties in interest's motion for summary judgment on their breach of contract claim, (2) granted real parties in interest's motion for summary judgment on petitioner's counterclaims, and (3) denied petitioner's motion for summary judgment.

The district court's June 8 order appears primarily premised on petitioner's invocation of his right under the Fifth Amendment to the United State Constitution not to incriminate himself.¹ Petitioner

¹See U.S. Const. amend. V; S.E.C. v. Colello, 139 F.3d 674 (9th Cir. 1998) (explaining that parties are free to invoke the Fifth Amendment in civil cases).

repeatedly invoked his Fifth Amendment right during discovery in the underlying matter, fearing that his responses to real parties in interest's written discovery requests and deposition questions could incriminate him in a criminal matter in which he is a defendant. According to the June 8 order, because petitioner, by repeatedly invoking the Fifth Amendment, could not meaningfully participate in discovery, he could neither refute certain claims, allegations, and evidence of real parties in interest nor support his counterclaims and allegations.

Both mandamus and prohibition are extraordinary remedies, and it is within this court's discretion to determine if a petition will be considered.² Writ relief generally is not available unless the district court manifestly abused its discretion or exercised its discretion arbitrarily or capriciously.³ It is petitioner's burden, moreover, to demonstrate that this court's extraordinary intervention is warranted.⁴

Having reviewed the petition and accompanying documentation, we conclude that our extraordinary intervention is not warranted. In particular, in a civil proceeding, to draw adverse inferences based on a party's invocation of the Fifth Amendment and consequent refusal to offer proof supporting or refuting the allegation in question is

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


³See State of Nevada v. Dist. Ct. (Anzalone), 118 Nev. 140, 147, 42 P.3d 233, 237-38 (2002).

⁴Pan v. Dist. Ct., 120 Nev. 222, 228, 88 P.3d 840, 844 (2004); cf. NRAP 21(a) (noting that an extraordinary writ petition "shall contain . . . copies of any . . . parts of the record which may be essential to an understanding of the matters set forth in the petition").

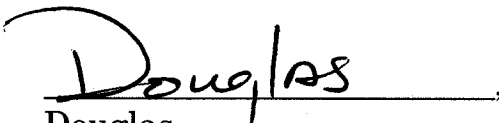
generally within a court's discretion.⁵ Petitioner has failed to demonstrate that the district court's June 8 order was an abuse of that discretion.

Accordingly, we

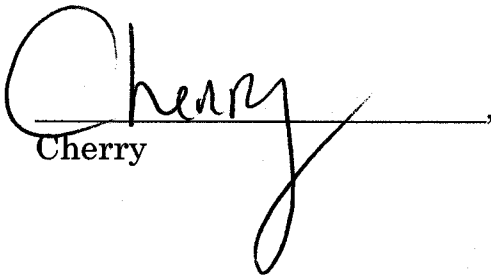
ORDER the petition DENIED.⁶



Gibbons J.



Douglas J.



Cherry J.

⁵See Colello, 139 F.3d at 677; see also Doe ex rel. Rudy-Glanzer v. Glanzer, 232 F.3d 1258, 1264 (9th Cir. 2000) (noting that any adverse inference based a party's invocation of the Fifth Amendment can only be drawn when independent, corroborating evidence supports the issue being inquired).

⁶NRAP 21(b); Smith, 107 Nev. 674, 818 P.2d 849. In addition to substantively challenging the district court's June 8 order, petitioner also requests relief in the form of (1) a stay of the underlying district court proceedings until we resolve his petition and (2) a stay of the underlying proceedings until the criminal trial in which petitioner is a defendant is completed. In light of this order, we deny his requests as moot and note that a stay should normally be sought in the district court in the first instance. See NRAP 8(a); Nelson v. Heer, 121 Nev. 832, 122 P.3d 1252 (2005).

Petitioner's failure to file the statutorily required affidavit, see NRS 34.170; NRS 34.330, constitutes an independent basis for denying this petition.

cc: Honorable Timothy C. Williams, District Judge
Cuthbert E.A. Mack
Sylvester & Polednak, Ltd.
Clark County Clerk