

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN RE: CITYCENTER CONSTRUCTION
AND LIEN MASTER LITIGATION

No. 57543

THE CONVERSE PROFESSIONAL
GROUP D/B/A CONVERSE
CONSULTANTS,
Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK; AND THE HONORABLE
ELIZABETH GOFF GONZALEZ,
DISTRICT JUDGE,

Respondents,

and

CENTURY STEEL, INC.; AND PACIFIC
COAST STEEL,
Real Parties in Interest.

FILED

NOV 15 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER GRANTING PETITION

This is an original petition for a writ of mandamus or prohibition challenging a district court order partially denying a motion to dismiss fourth-party complaints in a real property action.

This petition for extraordinary relief arises from the fourth-party litigation involving a construction contract dispute in the construction of The Harmon tower in the CityCenter Project. Petitioner The Converse Professional Group, d.b.a. Converse Consultants was retained by MGM/Mirage Design Group, the owner, to provide testing and

inspection of the construction project. Real Parties in Interest Century Steel, Inc. and Pacific Coast Steel (PCS) were subcontracted by general contractor Perini Building Company to install reinforcing steel bars (rebar) and link beams in The Harmon.

After The Harmon was partially constructed, it was discovered that rebar and link beams were improperly installed. As a result, construction was stopped and destructive testing revealed that rebar and link beams were in a substantially defective condition. After eliminating the construction of floors 26-48,¹ MGM ultimately ordered all construction stopped and ceased payments to Perini and its subcontractors.

Thereafter, Perini commenced the underlying action against MGM to recover payments owed. MGM answered and counterclaimed against Perini for defective and non-conforming work. Perini filed a third-party complaint for contractual indemnity for the alleged defective reinforcing steel work against Century and PCS. Century and PCS both filed a fourth-party complaint against Converse, alleging that Converse negligently inspected work performed on the project.

Century asserts claims against Converse for (1) implied indemnity; (2) contribution; and (3) apportionment. Century alleges that Converse failed to abide by its duties and that it improperly inspected the work performed by Century. Similarly, PCS alleges that Converse negligently performed its inspection duties, and includes claims against

¹The Harmon was originally designed to be a 48-story tower.

Converse for: (1) negligence; (2) equitable indemnity; (3) contribution/apportionment; and (4) declaratory relief.

Converse moved to dismiss PCS's and Century's complaint. The district court granted Converse's motion in part and ordered PCS's and Century's simple negligence claims dismissed. The district court, however, declined to grant the motion in its entirety by dismissing Converse from the action. Instead, the court granted PCS's and Century's request to conduct discovery concerning potential fraud or misrepresentation claims under Rocker v. KPMG LLP, 122 Nev. 1185, 148 P.3d 703 (2006), abrogated on other grounds by Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. 224, 228 n.6, 181 P.3d 670, 672 n.6 (2008). However, neither PCS nor Century pled fraud or misrepresentation as causes of actions in their complaints, rather these claims arose for the first time in their opposition to Converse's motion to dismiss.

Converse now challenges the district court's grant of Rocker discovery and claims that the district court abused its discretion in permitting discovery without the necessary Rocker averments. It claims that Century and PCS failed to plead facts supporting a strong inference of fraud or misrepresentation, that the relaxed pleading standard should apply, or that the information to be sought was peculiarly within its control. Converse now petitions this court for a writ of mandamus or prohibition directing the district court to reverse its discovery order and to dismiss PCS's and Century's complaints.

Discussion

A writ of mandamus is an extraordinary remedy, and whether a petition for extraordinary relief will be considered is solely within this

court's discretion. See Smith v. District Court, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). “[A] writ will not issue if the petitioner has a plain, speedy and adequate remedy at law.” Millen v. Dist. Ct., 122 Nev. 1245, 1250-51, 148 P.3d 694, 698 (2006). “Generally, extraordinary writs are not available to review discovery orders,” and this court will infrequently exercise its discretion to do so Wardleigh v. District Court, 111 Nev. 345, 351, 891 P.2d 1180, 1184 (1995); Clark County Liquor v. Clark, 102 Nev. 654, 659, 730 P.2d 443, 447 (1986).

However, in this case, despite the availability of an adequate remedy at law, we nevertheless exercise our discretion to entertain this writ petition in the interest of judicial economy and efficiency. See Smith v. District Court, 113 Nev. 1343, 1344-45, 950 P.2d 280, 281 (1997); Clark, 102 Nev. at 660, 730 P.2d at 447 (indicating that an appeal from a final judgment is an adequate remedy at law).

The district court abused its discretion in ordering Rocker discovery without the necessary averments.

A plaintiff alleging fraud is subject to a heightened pleading requirement and must plead the circumstances constituting fraud with particularity. NRCP 9(b); Rocker, 122 Nev. at 1192, 148 P.3d at 707. This heightened pleading requirement exists to ensure that adequate notice is given to the defendant about the nature of the charges so that it may defend the claims without merely asserting a general denial. Rocker, 122 Nev. at 1192, 148 P.3d at 707-08. To comply with NRCP 9(b), a complaint for fraud must allege the time, place, identity of the parties involved and the nature of the fraud. Id. at 1192, 148 P.3d at 708.

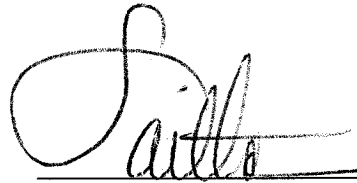
In Rocker, we recognized an exception to NRCP 9(b)'s heightened pleading requirements. Rocker, 122 Nev. at 1193-95, 148 P.3d at 708-09. We held that where the facts necessary for pleading with particularity are "peculiarly within the defendant's knowledge or are readily obtainable by him," a relaxed pleading standard may be applied because the plaintiff could not be expected to have personal knowledge of the relevant facts. Id. at 1195, 148 P.3d at 709 (quoting Neubronner v. Milken, 6 F.3d 666, 672 (9th Cir. 1993)). In such a situation, the district court may permit the plaintiff to conduct limited discovery such that an amended complaint pleading fraud with particularity may be filed. Id. at 1195, 148 P.3d at 709.

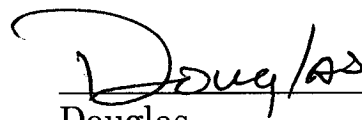
Rocker provides a limited exception that "strikes a reasonable balance between NRCP 9(b)'s stringent requirements for pleading fraud and a plaintiff's inability to allege the full factual basis concerning fraud because information and documents are solely in the defendant's possession and cannot be secured without formal, legal discovery." Id. at 1194, 148 P.3d at 709. However, before Rocker discovery may be permitted, the plaintiff must satisfy three requirements: (1) plead sufficient facts in the complaint to support a strong inference of fraud; (2) aver that a relaxed pleading standard is appropriate; and (3) show in the complaint that fraud could not be pled with more particularity because the required information is in the defendant's possession. Id. at 1195, 148 P.3d at 709.

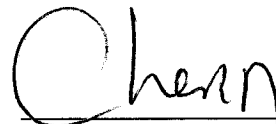
Because the district court may not authorize Rocker discovery without the necessary averments, we conclude that the district court abused its discretion by allowing Rocker discovery absent a showing by

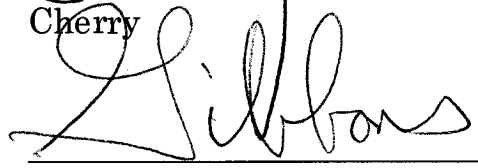
Century and PCS that their complaints contained the necessary Rocker averments. According, we

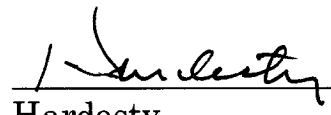
ORDER the petition GRANTED AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF PROHIBITION with instructions to the district court to vacate its Rocker discovery order and for further proceedings consistent with this order.

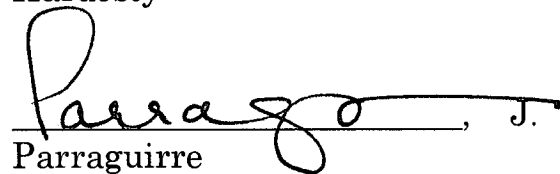

_____, C.J.
Saitta


_____, J.
Douglas


_____, J.
Cherry


_____, J.
Gibbons


_____, J.
Hardesty


_____, J.
Parraguirre

cc: Hon. Elizabeth Goff Gonzalez, District Judge
Wilson, Elser, Moskowitz, Edelman & Dicker, LLP/Las Vegas
Hutchison & Steffen, LLC
Koeller Nebeker Carlson & Haluck, LLP/Las Vegas
Gordon & Rees, LLP
Procopio, Cory, Hargreaves & Savitch, LLP
Eighth District Court Clerk