

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN RE: CITYCENTER CONSTRUCTION  
LITIGATION

No. 57559

HALCROW, INC.,  
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

PACIFIC COAST STEEL,  
Real Party in Interest.

**FILED**

**NOV 18 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 challenging a district court order denying in part a motion to dismiss a fourth-party complaint in a real property action.

This petition arises from the fourth-party litigation involving a construction contract dispute in the construction of The Harmon tower in the CityCenter Project. Petitioner Halcrow, Inc. was retained to serve as the structural engineer of record for the construction of The Harmon tower. Real Party in Interest Pacific Coast Steel (PCS) was 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,<sup>1</sup> owner MGM/Mirage Design Group 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 against PCS for contractual indemnity for the alleged defective reinforcing steel work. PCS filed a fourth-party complaint against Halcrow, alleging that it had negligently prepared the structural plans and specifications.

PCS alleges that Halcrow negligently performed its inspection duties, and includes claims against Converse for: (1) negligence; (2) equitable indemnity; (3) contribution/apportionment; and (4) declaratory relief.

Halcrow moved to dismiss PCS's complaint. The district court granted Halcrow's motion in part and ordered PCS's negligence, indemnity, contribution and declaratory relief claims dismissed but it declined to grant the motion in its entirety. Instead, the court entered an order allowing PCS to conduct discovery until January 25, 2011, on the

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<sup>1</sup>The Harmon was originally designed to be a 48-story tower.

issue of negligent misrepresentation,<sup>2</sup> although not pled, under Rocker v. KPMG LLP, 122 Nev. 1185, 148 P.3d 703 (20 06), 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).

Halcrow 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 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. Halcrow argues that these initial showings are required prior to the district court granting Rocker discovery. It now petitions this court to issue a writ of mandamus directing the district court to reverse its discovery order and dismiss PCS's fourth-party claims against it with prejudice.

#### Discussion

Writ relief 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,

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<sup>2</sup>An examination of the fourth-party complaint filed by PCS reveals that it did not assert a claim of negligent misrepresentation against Halcrow. The issue of negligent misrepresentation was first raised in PCS's opposition to Halcrow's motion to dismiss.

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 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 707-08. 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 preliminary 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 PCS that its complaint contained the necessary Rocker averments. Accordingly, we

ORDER the petition GRANTED AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the district court to vacate its Rocker discovery order.<sup>3</sup>

Douglas, J.  
Douglas

Hardesty, J.  
Hardesty

Parraguirre, J.  
Parraguirre

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<sup>3</sup>In light of this decision, we deny as moot petitioner's November 8, 2011, motion for leave to file a reply with excess pages addressing the opposition to the stay motion, and we vacate the temporary stay imposed by our October 25, 2011, order. We direct the clerk of this court to return unfiled the proposed reply attached to petitioner's November 8, 2011, motion.

cc: Hon. Elizabeth Goff Gonzalez, District Judge  
Lloyd, Gray, Whitehead & Monroe, P.C.  
Backus, Carranza & Burden  
Procopio, Cory, Hargreaves & Savitch, LLP  
Kolesar & Leatham, Chtd.  
Eighth District Court Clerk