

IN THE SUPREME COURT OF THE STATE OF NEVADA

GARY FREY,
Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK; AND THE HONORABLE
SUSAN JOHNSON, DISTRICT JUDGE,
Respondents,

and

THE GABLES CONDOMINIUM
OWNERS ASSOCIATION, A NEVADA
NON-PROFIT CORPORATION,
Real Party in Interest.

No. 59678

FILED

OCT 31 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *Tracie K. Lindeman*
DEPUTY CLERK

ORDER DENYING PETITION

This is an original petition for a writ of mandamus challenging a district court's order granting a motion to enforce a settlement agreement, an order awarding attorney fees, and a judgment against petitioner. Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

Real party in interest, The Gables Condominium Owners' Association (Association) is a non-profit entity that owns and maintains the common areas of The Gables (Property), a common interest community in Henderson, Nevada. The Association filed a construction defect action against The Gables, LLC (The Gables), a Nevada limited liability company that developed the Property. The Property was constructed by Frey Development Corporation. Petitioner Gary Frey was the manager of The Gables and the president of Frey Development. Neither Frey nor Frey Development was named in the complaint as defendants.

The Association entered into a settlement agreement with The Gables, Frey Development, and Frey to resolve its claims against The Gables. Pursuant to the agreement, the Association agreed to release its claims against The Gables upon receiving \$900,000 from The Gables' insurance policy and \$100,000 from a construction defect fund that The Gables had established upon the sale of the Property to pay the costs of its defense in a potential construction defect action. The Gables and the Association filed a joint motion approving settlement and conditions precedent and a motion for good faith settlement. The district court determined that the terms of the settlement agreement were fair and reasonable and had been made in good faith.

The insurance company paid the money it owed to the Association; however, The Gables did not make any payments.¹ The Association filed a request for an order to show cause why The Gables, Frey Development, and Frey should not be held in contempt as well as a motion for sanctions, a motion to enforce settlement agreement, a motion to reduce settlement agreement to judgment, and a motion to file a supplemental complaint (collectively, Request for OSC). The law firm that formerly represented The Gables received the Request for OSC via the e-serve list. It then issued a letter to the district court and the Association's counsel, stating that it was not authorized to accept service for Frey, who was not a party to the action. Thereafter, the Association personally served Frey with the Request for OSC. The Association argued that Frey should be held in contempt for The Gables' failure to pay money out of the

¹Frey liquidated The Gables' construction defect fund to pay expenses related to litigation.

construction defect fund and that the district court had jurisdiction over Frey based upon the settlement agreement.² Alternatively, it requested that the district court grant it permission to file a supplemental complaint naming Frey as defendant. Frey responded to the Request for OSC, arguing that the district court lacked jurisdiction over him because the Association failed to name him in the complaint. Frey also maintained that, pursuant to NRS 22.030(3), any contempt hearing should be held in another department.

At the hearing on the Request for OSC, the district court found that Frey submitted himself to its jurisdiction because he was a party to the settlement agreement, which stated that the district court retained jurisdiction to enforce the agreement. The district court granted the Association's motion to enforce the settlement agreement and reduce the settlement agreement amount to judgment against The Gables, Frey Development, and Frey. However, it denied the motion to file a supplemental complaint because it determined the issue was moot. The district court also awarded the Association its attorney fees.

Frey now petitions this court for a writ of mandamus directing the district court to reverse its order denying the Association's motion to enforce the settlement agreement and to reduce the settlement amount to

²In the Request for OSC, the Association stated that Frey's counsel had informed it that Frey had spent the \$100,000 from the construction defect fund and offered to pay the Association in installments. The Association asserted that it had accepted, provided that Frey would pay interest and personally guarantee payment. The Association further asserted that it prepared a promissory note and personal guaranty and sent it to Frey's counsel, who offered a minor change but otherwise approved of the note; however, Frey later refused to sign the note.

judgment, as well as to vacate the rulings and judgment emanating from that order.

“A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust or station, . . . or to control an arbitrary or capricious exercise of discretion.” *State v. Eighth Judicial Dist. Court*, 116 Nev. 374, 379, 997 P.2d 126, 130 (2000) (citing NRS 34.160). “Mandamus is an extraordinary remedy which ‘will not lie to control discretionary action, unless discretion is manifestly abused or is exercised arbitrarily or capriciously.’” *Mineral Cnty. v. State, Dep’t. of Conservation and Natural Res.*, 117 Nev. 235, 243, 20 P.3d 800, 805 (2001) (quoting *Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981)). Mandamus is unavailable when a “petitioner has a plain, speedy, and adequate remedy in the ordinary course of law” and is issued at the discretion of this court. *Mineral County*, 117 Nev. at 243, 20 P.3d at 805.

Here, Frey does not have a right to appeal because he is not a party to the underlying litigation. See *Washoe Cnty. Dist. Attorney v. Second Judicial Dist. Court*, 116 Nev. 629, 635, 5 P.3d 562, 566 (2000). As such, we consider the merits of this petition. In considering a writ petition, this court gives deference to a district court’s factual determinations; however, it reviews questions of law de novo. *Gonski v. Second Judicial Dist. Court*, 126 Nev. __, __, 245 P.3d 1164, 1168 (2010).

Frey argues that the district court does not have personal jurisdiction over him because he has not been named as a party or served with process pursuant to NRCP 4. While Frey concedes that the court has the authority to decide issues raised in contempt motions and to enforce agreements regarding the settlement of claims raised in pleadings, he

argues that this does not obviate the requirement that it obtain *in personam* jurisdiction over him prior to exercising its authority. Frey contends that these limitations on the district court's power are based on the individual's right to procedural due process.

"A district court is empowered to render a judgment either for or against a person or entity only if it has jurisdiction over the parties and the subject matter."³ *C.H.A. Venture v. G.C. Wallace Consulting*, 106 Nev. 381, 383, 794 P.2d 707, 708 (1990). Actual notice is not a substitute for service of process. *C.H.A. Venture*, 106 Nev. at 384, 794 P.2d at 709; *see also* NRCP 4. While there are some exceptions where a person not a party to a litigation may be bound by a judgment, none are applicable here.⁴

³While the Association argues that NRCP 71 confers personal jurisdiction over Frey on the district court, we conclude that this rule simply explains the procedure to enforce an order that it already may lawfully enforce against a party. It does not expand the district court's jurisdiction. *See* NRCP 71 ("When an order is made in favor of a person who is not a party to the action, that person may enforce obedience to the order by the same process as if the person were a party; and, when obedience to an order may be lawfully enforced against a person who is not a party, that person is liable to the same process for enforcing obedience to the order as if a party.").

⁴For example, "a judgment can bind persons not parties to the litigation in question and not subject *in personam* to the jurisdiction of the court if the persons are in privity with parties to the litigation. *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1277 (9th Cir. 1992)," Privity exists when "the relation between the party and non-party is so close that the judgment may fairly bind the non-party." *Id.* at 1277-78 (internal quotations omitted). For example, the relationship between a corporation and its sole or controlling stockholder is one of privity. The Restatement (Second) of Judgments states that

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Here, there is no dispute that Frey was neither named as a party, nor properly served process, nor found by the district court to be the alter ego of The Gables. Accordingly, the district court's exercise of *in personam* jurisdiction over Frey could not properly be based upon any

... continued

[i]f the corporation is closely held, in that one or a few persons hold substantially the entire ownership in it, the judgment in an action by or against the corporation of the holder of the ownership in it is conclusive upon . . . the holder of its ownership if he actively participated in the action on behalf of the corporation unless his interests and those of the corporation are so different that he should have opportunity to relitigate the issue.

Restatement (Second) of Judgments § 59(3)(a) (1982). Thus, courts have found an exception “in the case of non-parties who ‘assume control over litigation in which they have a direct financial or proprietary interest’” *Alman v. Danin*, 801 F.2d 1, 4 (1st Cir. 1986) (quoting *Montana v. U. S.*, 440 U.S. 147, 154 (1979)). In *Alman v. Danin*, the United States Court of Appeals for the First Circuit found that it was not a violation of due process to hold two nonparties responsible for a defunct corporation where they were the only shareholders, officers, and members of the board of directors; were on notice of all aspects of the litigation; and held ultimate and complete control over litigation strategy. 801 F.2d at 5. However, in *Alman*, there had already been a separate suit wherein the district court determined that the incorporators had shown so little respect for the corporate form that it was appropriate to pierce the corporate veil. *Id.* at 3. This comports with the holding of this court that “[a] party who wishes to assert an alter ego claim must do so in an independent action against the alleged alter ego with the requisite notice, service of process, and other attributes of due process.” *Callie v. Bowling*, 123 Nev. 181, 185, 160 P.3d 878, 881 (2007).

alleged alter ego status. Neither could its exercise of *in personam* jurisdiction be based upon Frey's participation in the settlement agreement. No case law has been identified where a court properly exercised *in personam* jurisdiction over a party, not named in the complaint but a party to a settlement agreement. Accordingly, we conclude that it was error for the district court to exercise *in personam* jurisdiction over Frey.

However, this does not end our inquiry. The Association alternatively argues that regardless of how this court rules on the personal jurisdiction issue, it should deny writ relief because Frey comes to this court with unclean hands. It asserts that Frey signed the settlement agreement and committed The Gables to pay money when he had already dissolved The Gables and liquidated its construction defect fund. The Association asserts that Frey's negotiation of a second agreement that he later refused to sign was a delay tactic that exemplifies Frey's bad faith and fraudulent conduct.

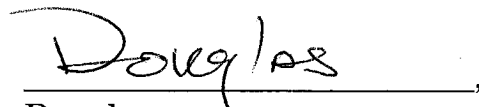
The doctrine of unclean hands "bars relief to a party who has engaged in improper conduct in the matter in which that party is seeking relief." *Truck Ins. Exch. v. Palmer J. Swanson, Inc.*, 124 Nev. 629, 637-38, 189 P.3d 656, 662 (2008). "As such, the alleged inequitable conduct relied upon must be connected with the matter in litigation, otherwise the doctrine is not available as a defense." *Id.* at 638, 189 P.3d at 662.

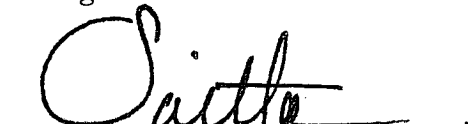
Frey comes to this court with unclean hands. Frey negotiated and signed the settlement agreement on behalf of The Gables to pay money from the construction defect fund, which he liquidated and spent instead of using to pay to the Association. We cannot grant Frey relief in

this matter when it was his own inequitable conduct that caused this situation. Accordingly, we

ORDER the petition DENIED.


_____, J.
Gibbons


_____, J.
Douglas


_____, J.
Saitta

cc: Hon. Susan Johnson, District Judge
Pengilly Robbins Slater
Jesse N. Panoff
Canepa Riedy & Rubino
Eighth District Court Clerk