IN THE COURT OF APPEALS OF THE STATE OF NEVADA

GARY WASSNER; AND CATHY WASSNER,
Petitioners,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE NANCY L. ALLF, DISTRICT JUDGE,
Respondents,
and
RICHARD A. OSHINS; AND STEVEN J. OSHINS,
Real Parties in Interest.

No. 78828-COA

FILED

NOV 21 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER GRANTING PETITION FOR WRIT OF MANDAMUS

This original petition for a writ of mandamus challenges a district court discovery order compelling Gary and Cathy Wassner to produce documents of a nonparty corporation pursuant to NRCP 34.

Petitioners Gary and Cathy Wassner (collectively, Wassner) and real parties in interest Richard and Steven Oshins (collectively, Oshins) are each co-trustees of the Ruth S. Oshins Revocable Family Trust (the Trust).[1] For approximately nine years, Ruth Oshins lived with Wassner in New York. After Ruth's passing, concerns arose about Wassner's management of the Trust. Oshins instituted an action in district court, asserting various claims against Wassner for breach of fiduciary duty. As relevant to this petition, Oshins alleged that Wassner, specifically Gary, engaged in self-dealing by

[1]We do not recount the facts except as necessary to our disposition.

loaning $500,000 in Trust assets to the Hilldun Corporation—a business in which Gary Wassner is a shareholder and corporate officer.

During discovery, Oshins requested documents from Hilldun, serving it with an NRCP 45 subpoena that was properly domesticated in New York pursuant to the Uniform Interstate Depositions and Discovery Act (UIDDA). Specifically, Oshins requested all of Hilldun's tax returns and financial records from 2007 to the present. Hilldun objected to the request, and counsel for Hilldun and Oshins exchanged correspondence in an effort to reach a compromise. Hilldun apparently complied and produced documents in accord with that compromise. Later, Oshins abandoned the NRCP 45 efforts and served Wassner with a request that was substantially similar to the one originally served on Hilldun. That request, however, was made under NRCP 34 instead of NRCP 45. Wassner did not comply with the request, and Oshins moved the district court to compel production. The district court granted the motion to compel and ordered Wassner to produce Hilldun's tax returns and all financial records from 2007 to the present. This petition for writ relief followed.

Writ relief is appropriate

This court has original jurisdiction to issue writs of mandamus. Nev. Const. art. 6, § 4(1); *see also MountainView Hosp., Inc. v. Eighth Judicial Dist. Court*, 128 Nev. 180, 184, 273 P.3d 861, 864 (2012). But "[t]he decision to entertain a writ petition lies solely within the discretion of this court." *Quinn v. Eighth Judicial Dist. Court*, 134 Nev. 25, 28, 410 P.3d 984, 987 (2018). A writ of mandamus is available to compel the performance of an act that the law requires or to control an arbitrary or capricious exercise of discretion. *Humphries v. Eighth Judicial Dist. Court*, 129 Nev. 788, 791, 312 P.3d 484, 486 (2013). Writ relief is not appropriate where a "plain, speedy, and adequate remedy" at law exists. *Id.* However, writ relief "may

be an 'appropriate remedy for the prevention of improper discovery.'" *Quinn*, 134 Nev. at 28, 410 P.3d at 987 (quoting *Valley Health Sys., LLC v. Eighth Judicial Dist. Court*, 127 Nev. 167, 171 n.5, 252 P.3d 676, 678 n.5 (2011)).

Because a pretrial order granting a motion to compel discovery of documents from a nonparty is not substantively appealable, NRAP 3A(b), and because Hilldun is not a party to the action below, NRAP 3A(a), a direct appeal is unavailable. Therefore, we exercise our discretion to entertain this writ petition because there is no plain, speedy, and adequate remedy in the ordinary course of law.[2]

The district court did not have authority to order Wassner to produce nonparty documents under NRCP 34

Wassner argues that the district court exceeded its authority when it compelled Wassner to produce corporate documents belonging to Hilldun, a nonparty corporation domiciled in New York. Specifically, Wassner contends that NRCP 34 does not permit parties to obtain discovery from nonparties, and that the proper vehicle for acquiring discovery from nonparties is a subpoena duces tecum pursuant to NRCP 45.

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[2]Generally, a writ of prohibition is a more appropriate remedy than mandamus for preventing improper discovery. *See, e.g., Wardleigh v. Second Judicial Dist. Court*, 111 Nev. 345, 350, 891 P.2d 1180, 1183 (1995) (reaffirming "that prohibition is a more appropriate remedy for the prevention of improper discovery than mandamus"); *see also Quinn*, 134 Nev. at 33, 410 P.3d at 990 (directing the issuance of a writ of prohibition and vacating the district court's discovery order). Nevertheless, we choose to entertain Wassner's petition for a writ of mandamus, as mandamus is also an appropriate remedy for curtailing improper discovery. *See Schlatter v. Eighth Judicial Dist. Court*, 93 Nev. 189, 193, 561 P.2d 1342, 1344 (1977) (granting a writ of mandamus and vacating an improper discovery order).

Under NRCP 34(a), "[a] *party* may serve on *any other party* a request" to produce "documents," "electronically stored information," or "tangible things" within the "responding party's possession, custody, or control."[3] (Emphasis added.) Furthermore, "[a]s provided in Rule 45, a *nonparty* may be compelled to produce documents, electronically stored information, and tangible things or to permit an inspection." NRCP 34(c) (emphasis added). Thus, NRCP 34 does not permit nonparty discovery and expressly indicates that NRCP 45 is the proper mechanism for doing so. Specifically, NRCP 45 permits a party to subpoena documents from a nonparty. But nonparties who are subject to an NRCP 45 subpoena are afforded certain protections, including quashing or modifying the subpoena. NRCP 45(c)(3) (enumerating grounds for quashing or modifying a subpoena).

Moreover, when a party seeks discovery from a nonparty who is an out-of-state resident, the requesting party must follow the procedures articulated in the UIDDA. *See* NRS 53.100-.200; *see also Quinn*, 134 Nev. at 30, 410 P.3d at 988. Under the UIDDA, a party seeking out-of-state discovery from a nonparty must first obtain a subpoena from the trial state (in this case, Nevada) and then submit that subpoena to the clerk of court in the discovery state (here, New York). *Quinn*, 134 Nev. at 30, 410 P.3d at 988.

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[3]The Nevada Rules of Civil Procedure were amended effective March 1, 2019. *See In re Creating a Comm. to Update & Revise the Nev. Rules of Civil Procedure*, ADKT 0522 (Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, Dec. 31, 2018). Although the unamended rules were in effect when the district court issued its order relevant to this petition, we apply the current version of NRCP 34 and NRCP 45 for two reasons. First, as relevant to this petition, the substance of these rules has not changed in any material way. And second, because we are vacating the order, the district court will have to apply the new iteration of the rules to any subsequent discovery orders related to this matter.

The clerk then domesticates and reissues the subpoena within the discovery state. *Id.* All motion practice associated with the discovery subpoena must take place in the discovery state and is governed by the law of the same, which allows the discovery state to protect its residents from overly burdensome requests. *Id.*

The district court exceeded the scope of its authority in several ways. First, the district court ignored the plain text of NRCP 34, which clearly mandates that nonparty discovery requests be made pursuant to NRCP 45, not NRCP 34. *See, e.g., Logan v. Abe,* 131 Nev. 260, 264, 350 P.3d 1139, 1142 (2015) (explaining that this court "interpret[s] unambiguous statutes, including rules of civil procedure, by their plain meaning"). Second, the district court deprived Hilldun of NRCP 45 protections, namely, Hilldun's ability to object to, quash, or modify Oshins' request. *See* NRCP 45. And last, the district court divested the New York court of its jurisdiction under the UIDDA to oversee motion practice related to a discovery request involving Hilldun, a New York resident and nonparty. *Cf. Quinn,* 134 Nev. at 31, 410 P.3d at 988 (concluding that a Nevada district court was without jurisdiction to grant a motion to compel where the subpoena was already issued by a non-Nevada court under the UIDDA). Thus, the district court exceeded its jurisdiction by granting discovery not permitted by the rules of civil procedure. *Schlatter,* 93 Nev. at 193, 561 P.2d at 1344 (holding that a "traditional use of the writ (of mandamus) . . . has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction" (alteration in original)(quotation omitted)).

The district court exceed its authority when it ordered Gary Wassner to produce Hilldun's documents

Wassner argues that because Gary is being sued in his capacity as a trustee, and not as a corporate officer, he lacks the necessary possession, custody, and control to produce Hilldun's documents under NRCP 34. Oshins contends that because Gary is a Hilldun corporate officer, he has the requisite possession, custody, or control of said documents and therefore can be compelled to produce them under NRCP 34.

Generally, a party to an action who is an officer, director, or majority shareholder of a corporation may be required to produce documents in the possession of the corporation, so long as he has been sued in his corporate capacity. *See, e.g., Gen. Envtl. Sci. Corp. v. Horsfall*, 136 F.R.D. 130, 133-34 (N.D. Ohio 1991) (compelling individual defendants who were majority owners and managing director of corporation to provide corporate documents to plaintiff). However, when a corporate officer is being sued in his noncorporate or personal capacity, and the corporation is also not a defendant, this rule is inapposite unless there is evidence that the officer is the alter ego of the corporation. *Shcherbakovskiy v. Da Capo Al Fine, Ltd.*, 490 F.3d 130, 139 (2d Cir. 2007) ("If the district court finds that . . . [the corporation] is [the defendant's] alter ego . . . such a finding could support an order to produce."); *see also Am. Maplan Corp. v. Heilmayr*, 203 F.R.D. 499, 501-02 (D. Kan. 2001) (denying plaintiff's FRCP 34 request to compel the defendant, who was the company president, to produce corporate records when he was sued individually and there was no evidence of alter ego).[4]

[4]Although Oshins cites to some caselaw in support of the argument that Gary had the requisite possession, custody, or control of Hilldun's documents, we conclude that those cases are inapposite to the instant matter as they are distinguishable on the facts and the law.

In this case, there are no allegations that Hilldun is Gary's alter ego, or vice versa, and Hilldun is not a party to the underlying proceeding. Furthermore, Oshins did not institute the instant action against Gary in his capacity as a Hilldun executive, nor would that have been appropriate considering none of Oshins' claims are related to Gary's conduct as a Hilldun officer. Indeed, all of Oshins' claims are related to Wassner's fiduciary duties as co-trustee to the Trust. In light of these facts, we conclude that the district court exceeded its authority when it ordered Gary to produce Hilldun's corporate documents under NRCP 34.[5]

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 the order granting the motion to compel discovery.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

[5]Because we conclude that discovery was improper under NRCP 34, we need not decide whether the order was too broad, yet we note it appeared to require information beyond what was necessary in this lawsuit by using the word "all." Furthermore, because the subpoena duces tecum was reissued and served on Hilldun in New York, the reissuing New York court has jurisdiction to hear all motion practice related to Oshins' NRCP 45 discovery request. *Quinn*, 134 Nev. at 30, 410 P.3d at 988 ("Any motion practice associated with the discovery subpoena . . . must take place in the discovery state and is governed by the law of the discovery state.").

cc: Hon. Nancy L. Allf, District Judge
Snell & Wilmer, LLP/Las Vegas
Snell & Wilmer, LLP/Reno
Solomon Dwiggins & Freer, Ltd.
Eighth District Court Clerk