

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

PHILLIP J. FAGAN, JR.; AND PHILLIP
J. FAGAN, JR. 2001 TRUST,
Petitioners,
vs.
THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK; AND THE HONORABLE
ERIKA D. BALLOU, DISTRICT JUDGE,
Respondents,
and
AAL-JAY, INC.,
Real Party in Interest.

No. 88378-COA

FILED

MAY 21 2024

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

*ORDER GRANTING IN PART AND DENYING IN PART
PETITION FOR WRIT OF MANDAMUS OR PROHIBITION*

This original petition for a writ of mandamus or prohibition challenges a district court order dismissing certain parties from the case, with prejudice, based on petitioner's failure to timely serve process and a district court order granting in part and denying in part a request for a preferential trial date.

In this original writ proceeding, petitioners Phillip J. Fagan, Jr. and the Phillip J. Fagan, Jr. 2001 Trust (Fagan) seek to compel the district court to vacate its decision to dismiss his counterclaims against non-parties Christano De Carlo and Lail Leonard, who are officers or employees of real party in interest AAL-JAY, Inc., with prejudice. Fagan further contends that, while the district court correctly granted his motion for a preferential trial setting under NRS 16.025, it nonetheless erred when it set trial to

occur in November 2024, beyond the 120-day trial setting required by the statute. Fagan contends that, under a proper application of NRS 16.025, trial must commence on or before June 10, 2024.

In its answer, AAL-JAY argues—among other things—that the district court properly dismissed the counterclaims with prejudice under its inherent authority, and that, while NRS 16.025 requires trial to be set within 120 days when a preferential trial date is granted, NRS 16.025(3)(b) allows the court to continue that trial date for good cause. And here, AAL-JAY maintains good cause existed given that no discovery has taken place in the underlying case, such that requiring it to proceed to trial in this shortened period would prejudice AAL-JAY and violate its due process rights. District Court Judge Erika Ballou has also filed an answer, as directed. Judge Ballou concedes that, in light of Fagan’s voluntary dismissal of his counterclaims against De Carlo and Leonard, her subsequent dismissal of Fagan’s counterclaims with prejudice was improper. With regard to the preferential trial setting, Judge Ballou—like AAL-JAY—points to NRS 16.025(3)(b), and argues that, given the complete lack of discovery in the underlying case, good cause existed to set trial for a date beyond the 120-days provided by statute.

In his reply, Fagan reiterates that the court lacked jurisdiction to dismiss his counterclaims. He further disputes the applicability of NRS 16.025(3)(b), noting that this trial setting was made in the initial preferential trial date order, not in response to a continuance request.

A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or

station or to control an arbitrary or capricious exercise of discretion. See NRS 34.160; *Int'l Game Tech., Inc. v. Second Jud. Dist. Ct.*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). A writ of prohibition may be warranted when a district court acts without or in excess of its jurisdiction. NRS 34.320; *Club Vista Fin. Servs., LLC v. Eighth Jud. Dist. Ct.*, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012). This court has discretion as to whether to entertain a petition for extraordinary relief and will not do so when the petitioner has a plain, speedy, and adequate remedy at law. NRS 34.170; NRS 34.330; *D.R. Horton, Inc. v. Eighth Jud. Dist. Ct.*, 123 Nev. 468, 474-75, 168 P.3d 731, 736-37 (2007). Petitioners bear the burden of demonstrating that extraordinary relief is warranted. See *Pan v. Eighth Jud. Dist. Ct.*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004).

Starting first with Fagan's challenge to the decision to dismiss his counterclaims against De Carlo and Leonard with prejudice, AAL-JAY argues that the district court properly utilized its inherent authority to dismiss the counterclaims with prejudice. But this argument fails in light of Judge Ballou's concession that her decision to dismiss the counterclaims was improper based on Fagan's prior voluntary dismissal of his counterclaims, without prejudice, pursuant to NRCP 41(a)(1)(A). Under these circumstances, we conclude Fagan has met his burden of demonstrating extraordinary relief is warranted as to this issue, see *Pan*, 120 Nev. at 228, 88 P.3d at 844, and we therefore grant Fagan's petition for a writ of mandamus and direct the district court to enter an order vacating its November 1, 2022, order dismissing Fagan's counterclaims against De Carlo and Leonard with prejudice. The operative dismissal order for these

counterclaims is therefore Fagan's October 7, 2022, notice of voluntary dismissal, which dismissed his counterclaims without prejudice.

Turning to the preferential trial setting issue, Fagan is correct that once the preferential trial setting motion is granted the district court is required to set the case for trial within 120 days. *See* NRS 16.025(3)(a). But as AAL-JAY and Judge Ballou point out, NRS 16.025(3)(b) provides that the district court may continue the trial date beyond the 120 days for "good cause entered on the record."

Here, in granting in part and denying in part Fagan's motion for a preferential trial date, the court essentially found that good cause existed to set trial beyond the 120-day period because no discovery has been completed in the underlying case. Indeed, it is undisputed that no discovery has taken place in this matter. The district court further found, in resolving the preferential trial setting motion, that the entire case was stayed, on Fagan's motion, in May of 2022, while Fagan's appeal proceeded before the Nevada Supreme Court. Based on these events, the district court found that 120 days was not "sufficient to conduct the necessary discovery."

In addressing the continuance provision set forth in NRS 16.025(3)(b), Fagan argues that this provision is inapplicable because the district court set the trial date beyond the 120-day period in its initial order resolving the motion, rather than in a subsequent order finding good cause existed to continue an initial 120-day trial setting.

Taking Fagan's argument on its face, had the district court set the trial date within 120 days in its initial order, the court could have subsequently granted a continuance of that date to the current November

12 trial date in a subsequent order based on a finding of good cause due to the lack of discovery. *See* NRS 16.025(3)(b). Moreover, because the decision to grant a preferential trial date itself is discretionary, *see* NRS 16.025(1) (providing that, upon the motion of a party, “the court may give preference in setting a date for trial of the action”), *Ewing v. Fahey*, 86 Nev. 604, 607, 472 P.2d 347, 349 (1970) (explaining that “[m]ay’ is of course generally permissive” when construing a statute), the court could have simply denied the motion for preferential trial setting, while still concluding that trial should nonetheless proceed on the current November 12 trial date. In essence, Fagan asks us to exalt form over substance in applying NRS 16.025(3) to this case, which we will not do. *See, e.g., Marcuse v. Del Webb Cmtys., Inc.*, 123 Nev. 278, 285, 163 P.3d 462, 467 (2007) (stating that the court will not exalt form over substance).

Thus, under the circumstances presented here, where no discovery has been conducted in the three years that this matter has been pending in the district court, we conclude that Fagan has not met his burden of demonstrating that extraordinary relief is warranted. *See Pan*, 120 Nev. at 228, 88 P.3d at 844. We therefore deny the petition with regard to Fagan’s challenge to the order granting in part and denying in part the motion for preferential trial setting. *D.R. Horton*, 123 Nev. at 475, 168 P.3d at 737.

Accordingly, as set forth above, we grant in part and deny in part, Fagan’s petition. The clerk of this court shall therefore issue a writ of

mandamus¹ instructing the district court to vacate its November 1, 2022, order dismissing Fagan's counterclaims against De Carlo and Leonard with prejudice.

It is so ORDERED.²


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Hon. Erika D. Ballou, District Judge
Black & Wadhams
Lewis Roca Rothgerber Christie LLP/Las Vegas
Eighth District Court Clerk

¹Because we conclude mandamus is the more appropriate remedy here, we deny Fagan's alternative request for a writ of prohibition.

²To extent this order does not address any of the parties' arguments, we have considered the same, and conclude they do not provide a basis for relief.