


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

PHILLIP J. FAGAN, JR. AN
INDIVIDUAL AND AS TRUSTEE OF
THE 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., A NEVADA
CORPORATION,
Real Party in Interest.

No. 88851-COA

FILED

MAR 18 2025

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER GRANTING PETITION FOR WRIT OF MANDAMUS

Phillip J. Fagan, individually and as trustee of the Phillip J. Fagan, Jr. 2001 trust, petitions for mandamus or prohibition¹ relief challenging a district court order holding petitioner in contempt and a subsequent order awarding real party in interest AAL-JAY, Inc. attorney fees and costs for bringing the contempt motion.

This matter arises from a dispute over AAL-JAY's attempt to purchase a home from Fagan. At Fagan's request, the district court entered

¹Because we conclude mandamus, rather than prohibition, is the proper vehicle for the relief Fagan seeks, we do not reach his alternate request for a writ of prohibition. *See Detwiler v. Eighth Jud. Dist. Ct.*, 137 Nev. 202, 486 P.3d 710 (2021) (granting mandamus relief to vacate a contempt sanction when presented with alternative requests for mandamus and prohibition relief).

a stay of the underlying case while Fagan had appealed one of its interlocutory decisions to the Nevada Supreme Court. Fagan subsequently sought certain discovery from a title company connected to the transaction, but the district court, on AAL-Jay's motion, quashed the request, concluding that discovery had been stayed based on the prior stay order and an agreement between the parties to waive discovery until the appeal was concluded.

When Fagan later initiated a federal court action against the title company and served subpoenas requesting discovery connected to that case, AAL-JAY moved the district court in the underlying case to hold Fagan in contempt, arguing that the subpoenas and the federal court case were brought in an effort to circumvent the district court's stay order. Fagan opposed the contempt motion arguing, among other things, that under NRS 22.030 he was entitled to an evidentiary hearing on the contempt motion "over which this Court may not preside." Without issuing a show cause order or holding a hearing, the district court decided the motion in chambers and held Fagan in contempt. The court concluded that AAL-JAY would be awarded its attorney fees and costs for bringing the contempt motion and fined Fagan \$500 payable to the Legal Aid Center of Southern Nevada. In holding Fagan in contempt, the district court did not acknowledge or address Fagan's objection to the court hearing the contempt issue.

AAL-JAY subsequently moved for an award of its attorney fees and costs, which the district court granted, over Fagan's opposition. The court subsequently awarded AAL-JAY \$11,618.10 in attorney fees and costs. Thereafter, the district court entered an order—on AAL-JAY's

motion, and over Fagan's opposition—setting a deadline for Fagan to pay the fees and costs award. This petition followed.

In his petition, Fagan challenges the contempt order, the resulting award of fees and costs, and the order setting a deadline for payment of these awards. He argues, among other things, that because the underlying contempt motion involved indirect contempt, and he made a timely demand to have the contempt motion heard by another judge under NRS 22.030(3), the district court manifestly abused its discretion in granting the motion and holding him in contempt. As a result, Fagan asserts that the subsequent orders must also be vacated. AAL-JAY was directed to file an answer, but its counsel withdrew and, despite multiple orders directing it to retain new counsel, no counsel appeared, and no answer has been filed. For the reasons set forth below, we grant Fagan's petition.

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). Mandamus is an extraordinary remedy, and it is within the discretion of this court to determine if a petition will be considered. *Smith v. Eighth Jud. Dist. Ct.*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). Petitioner bears the burden to show that extraordinary relief is warranted, and such relief is proper only when there is no plain, speedy, and adequate remedy at law. *Pan v. Eighth Jud. Dist. Ct.*, 120 Nev. 222, 224, 228, 88 P.3d 840, 841, 844 (2004).

NRS 22.030(3) states that, “[e]xcept as otherwise provided in this subsection, if a contempt is not committed in the immediate view and

presence of the court, the judge of the court in whose contempt the person is alleged to be shall not preside at the trial of the contempt over the objection of the person.”² And our supreme court has recognized that the “district court has no discretion to deny a timely and proper motion for a new judge under NRS 22.030(3).” *See NuVeda, LLC v. Eighth Jud. Dist. Ct.*, 137 Nev. 533, 539, 495 P.3d 500, 506 (2021).

As detailed above, AAL-JAY sought to hold Fagan in contempt for filing the federal court action and seeking discovery therein that purportedly violated the district court’s stay in the underlying case. Thus, the contempt motion sought to hold Fagan in contempt for actions that took place outside “the immediate view and presence of the court” such that NRS 22.030(3) applied to the underlying motion. Further, in his opposition to the contempt motion, Fagan asserted that the district court judge assigned to the case could not preside over the contempt issue, and thus, he set forth his objection to the assigned judge hearing this matter. Fagan’s opposition was filed four days after the filing of the contempt motion, such that he timely made his NRS 22.030(3) peremptory challenge. This is particularly true given that the district court never issued a show cause order before holding him in contempt. *See NuVeda*, 137 Nev. at 537, 495 P.3d at 504 (stating that “a party accused of contempt should be aware that a peremptory challenge is available under NRS 22.030(3) as soon as he or she receives the order to show cause” (internal quotations omitted)).

Under these circumstances, the district court manifestly abused its discretion in deciding the contempt motion in the face of Fagan’s timely peremptory challenge, and thus we conclude our extraordinary

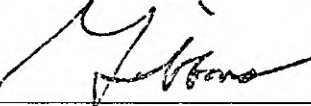
²While NRS 22.030(3) provides certain exceptions to this peremptory challenge rule, they are not applicable in this matter.

intervention is warranted. *See NuVeda*, 137 Nev. at 539, 495 at 503 (stating that the “district court has no discretion to deny a timely and proper motion for a new judge under NRS 22.030(3)”). Our decision in this regard is further supported by AAL-JAY’s failure to file an answer in this matter, which we can elect to treat as a confession of error. *See Orme v. Eighth Jud. Dist. Ct.*, 105 Nev. 712, 714, 782 P.2d 1325, 1326 (1989) (recognizing that “it is within the proper prerogative of [the] court to elect to treat [real party in interest’s] failure to answer as a confession of error”).

Accordingly, we grant Fagan’s petition for a writ of mandamus. The clerk of this court is directed to issue a writ of mandamus instructing the district court to vacate its August 21, 2023, order holding Fagan in contempt, as well as the resulting December 5, 2023, order awarding AAL-JAY attorney fees and costs for bringing the contempt motion and the May 22, 2024, order setting a deadline for payment of the attorney fees and costs award. The writ of mandamus shall further instruct the district court that the contempt proceedings must be reassigned to a different district court judge for resolution.

It is so ORDERED.


_____, C.J.
Bulla


_____, J.
Gibbons


_____, J.
Westbrook

cc: Chief Judge, Eighth Judicial District Court
Hon. Erika D. Ballou, District Judge
Black & Wadhams
AAL-Jay, Inc.
Eighth District Court Clerk