

IN THE SUPREME COURT OF THE STATE OF NEVADA

CLAIRE GUNN,
Appellant,
vs.
HYATT REGENCY AND CUT THROAT
SALOON,
Respondents.

No. 44203

FILED

JUL 06 2006

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. P. [Signature]*
CHIEF DEPUTY CLERK

This is an appeal from a district court order dismissing a personal injury action. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

Appellant Claire Gunn argues the district court improperly dismissed her action against respondents Hyatt Regency and Cut Throat Saloon (collectively Hyatt) for not serving the complaint and summons within NRCP 4(i)'s 120-day deadline. The parties are familiar with the facts, and we do not recount them except as pertinent to our disposition.

Standard of Review

Under NRCP 4(i), a plaintiff must serve the complaint and summons upon a defendant within 120 days of the complaint being filed unless he or she can show good cause why service was not made. This court reviews the district court's dismissal of a complaint for failure to serve process for an abuse of discretion.¹ The district court twice dismissed Gunn's complaint pursuant to this provision; each dismissal is discussed below.

¹Scrimmer v. Dist. Ct., 116 Nev. 507, 513, 998 P.2d 1190, 1193-94 (2000).

Sua sponte dismissal

Gunn argues at length that the district court abused its discretion in dismissing her complaint on March 1, 2004, without first providing her with notice. At the time the district court sua sponte dismissed Gunn's complaint, NRCP 4(i) provided that a complaint could be dismissed "upon the court's own initiative with notice to such party or upon motion."² Thus, the rule explicitly required that notice be given to the plaintiff before a complaint is dismissed. However, the district court's failure to provide notice was clearly harmless because the court reinstated Gunn's complaint a few days later; as a result, Gunn was not aggrieved by the district court's decision.³

Grant of Hyatt's motion to dismiss

When the district court reinstated Gunn's complaint, it extended the deadline for Gunn to serve the summons and complaint until May 6, 2004. As of August 10, 2004—over ninety days after this deadline had expired—Gunn still had not properly served Hyatt. As a result, Hyatt filed a motion to dismiss, which the district court granted. Gunn argues that, because she had demonstrated good cause for not serving Hyatt within NRCP 4(i)'s 120-day deadline, the district court abused its discretion in dismissing her complaint. We conclude that Gunn's claims lack merit and thus affirm.

²NRCP 4(i) (1986) (amended 2005) (emphasis added).

³NRAP 3A(a); See Valley Bank of Nevada v. Ginsburg, 110 Nev. 440, 446, 874 P.2d 729, 734 (1994) (recognizing that the right of appeal is limited to parties aggrieved by a district court's decision).

In Scrimmer v. District Court, we listed ten factors that courts should consider when determining whether good cause exists under NRCP 4(i): (1) difficulties in locating the defendants; (2) whether the defendants had attempted to evade service or conceal improper service; (3) the plaintiff's diligence in attempting to serve the defendants; (4) difficulties encountered by counsel; (5) the running of the applicable statute of limitations; (6) the parties' good faith attempts to settle; (7) the lapse of time between the end of the 120-day period and the actual service of process on the defendants; (8) prejudice caused to the defendants because of plaintiff's delay in serving process; (9) the defendants' knowledge of the lawsuit; and (10) whether the district court had previously granted any extensions of time for service.⁴ Gunn argues that a finding of good cause is justified based on the parties' alleged settlement negotiations and her previous unsuccessful attempts to serve Hyatt.

We have previously held that "[n]egotiations with an eye to settlement, undertaken in good faith in a serious effort to settle the litigation during the 120-day period, may constitute good cause for untimely service under NRCP 4(i)."⁵ However, Gunn has presented no convincing evidence that serious negotiations were occurring. No authority supports Gunn's assertion that this court must accept her allegations of negotiations, particularly when Hyatt continually maintains there were none. Furthermore, although settlement negotiations may constitute good cause for untimely service, they do not constitute a replacement for actual service. Thus, even if negotiations were ongoing,

⁴Scrimmer, 116 Nev. at 516, 998 P.2d at 1195-96.

⁵Id. at 517, 998 P.2d at 1196.

Gunn was still required to properly serve Hyatt at some point during the 15-month period between when she filed her complaint and Hyatt filed its motion to dismiss.

In addition, we conclude that Gunn's unsuccessful attempts to serve Hyatt do not justify a finding of good cause. Gunn did not attempt to serve Hyatt until May 3, 2004—three days before the district court's extension had expired and nearly a year after the complaint was filed. After being notified that this service was ineffective, Gunn did not attempt to re-serve Hyatt before the court's May 6 deadline nor did she seek an extension under NRCP 6(b). Her lack of diligence in attempting service despite already being granted an extension distinguishes this case from those relied upon by Gunn.⁶

In addition, two other Scrimmer factors strongly support the district court's decision. The first is the length of time between the end of NRCP 4(i)'s 120-day period and actual service upon the defendant.⁷ Here, nearly eight months had passed between the original deadline and Gunn's first service attempt. Gunn, in fact, never actually served Hyatt. The second relevant factor is that the district court had previously granted

⁶See Electrical Specialty v. Road and Ranch Supply, 967 F.2d 309, 310-12 (9th Cir. 1992) (affirming a district court's denial of motion to dismiss where plaintiffs immediately attempted to serve the original complaint and, when notified service was deficient, immediately re-served defendants); see also Roberts v. Michaels, 219 F.3d 775, 777-78 (8th Cir. 2000) (reversing a district court's grant of motion to dismiss where no previous extensions had been granted and mistake in service was reasonable based on defendant's representations).

⁷See Dallman v. Merrell, 106 Nev. 929, 931, 803 P.2d 232, 233 (1990) (affirming the district court's dismissal when service was 108 days past NRCP 4(i)'s deadline).

Gunn one extension of time. Including this extension, Gunn was given almost a full year to properly serve Hyatt and failed to do so.

Given these facts, we cannot conclude that the district court's dismissal was an abuse of discretion. Instead, this case appears to be precisely the type that NRCP 4(i)'s service requirement is intended to prevent from lingering in the judicial system.⁸ Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Douglas, J.
Douglas

Becker, J.
Becker

Parraguirre, J.
Parraguirre

cc: Hon. Steven R. Kosach, District Judge
Richard F. Cornell
Perry & Spann/Reno
Washoe District Court Clerk

⁸See Scrimmer, 116 Nev. at 516, 998 P.2d at 1196 (noting that the policy behind NRCP 4(i) is "to encourage the diligent prosecution of complaints.").