

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL CHARLES MOORE; AND
FEDEX GROUND PACKAGE
SYSTEMS, INC.,
Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK; AND THE HONORABLE
JAMES M. BIXLER, DISTRICT JUDGE,
Respondents,
and
SONDRA DUNN,
Real Party in Interest.

No. 58272

FILED

JUN 21 2012

TRAGIE K. LINDEMAN
CLERK OF SUPREME COURT
BY Angela
DEPUTY CLERK

ORDER DENYING PETITION

This is an original petition for a writ of mandamus challenging a district court order denying a motion to dismiss pursuant to NRCP 4(i). Eighth Judicial District Court, Clark County; James M. Bixler, Judge.

Real party in interest Sondra Dunn filed an action in district court, alleging various tort claims against petitioners Michael Moore and Federal Express Ground Package Systems, Inc. (collectively, petitioners).¹ Two months before trial, petitioners moved for the first time to dismiss Dunn's claim for insufficiency of service of process under NRCP 4(i), arguing that Dunn's motions to enlarge should be invalidated in light of this court's recent decision in Saavedra-Sandoval v. Wal-Mart Stores, 126 Nev. ___, 245 P.3d 1198 (2010). The district court denied their motion.

¹The parties are familiar with the facts, and we do not recount them further except as necessary to our disposition.

Petitioners now seek writ relief, asking this court to direct the district court to grant their motion to dismiss pursuant to NRCP 4(i).² As explained below, we deny their request.

Standard for writ relief

“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, NRS 34.160, or to control an arbitrary or capricious exercise of discretion.” Scrimmer v. Dist. Ct., 116 Nev. 507, 512, 998 P.2d 1190, 1193 (2000). This court has original jurisdiction to issue a writ of mandamus, and it is entirely within this court’s discretion to determine if such petitions will be considered. Id.

Writ relief is inappropriate

After reviewing the documents submitted in this matter, we conclude that writ relief is not warranted, as petitioners waived their insufficiency-of-process defense in district court by not raising it in their first responsive pleading. “To avoid waiver of a defense of untimely service of process under NRCP 4(i), a defendant must raise the defense in its first responsive pleading or pre-answer motion to dismiss.” Scrimmer, 116 Nev. at 511 n.2, 998 P.2d at 1193 n.2; see also NRCP 12(b), 12(g), 12(h) (setting forth procedures for objecting to insufficiency of service of process).

²Petitioners also argue that Moore should be dismissed from the complaint as there is no indication that he knew of the lawsuit until service was completed in 2008. In this respect, the petition fails to set forth any reference to legal authority or cite to the record for support. See NRAP 28(a)(8). Thus, without further support for this argument, we decline to grant this request for writ relief.


Here, petitioners did not challenge the sufficiency of service of process under NRCP 4(i) until March 2011, which was two years after filing their responsive pleading. Although petitioners did oppose Dunn's third motion to enlarge time for service, their arguments in opposition revolved around whether Dunn had good cause to enlarge time—not that she lacked good cause for filing the untimely motion. Nothing in the record suggests that petitioners ever challenged the cause of Dunn's late filing pursuant to NRCP 4(i) until after the Saavedra-Sandoval ruling. See 126 Nev. ___, 245 P.3d 1198 (clarifying that when a motion to enlarge time is filed after the 120-day limit, a district court may grant an extension only if there is both good cause for the delay in filing the motion and good cause for the extension).

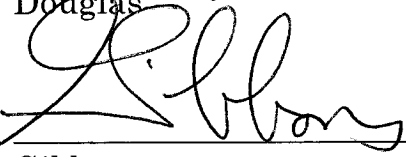
In Saavedra-Sandoval, this court simply interpreted a 2004 amendment to NRCP 4(i). Accordingly, the ground to challenge Dunn's motions for extension and the district court's decisions based on NRCP 4(i) existed at the time the motions were filed. Therefore, petitioners had an ample opportunity to bring these challenges to the district court as early as May 2007, when Dunn brought her first untimely motion to enlarge the time for service.³

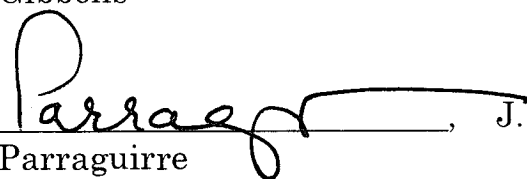
³We also decline Dunn's request that petitioners' counsel be sanctioned under NRAP 28.2 and NRAP 21(a)(C)(3). Because petitioners base their argument on a case that would otherwise be directly on point, and because all facts necessary for compliance with NRCP 4(i) were included in the petition, we conclude that sanctions are not warranted.

Thus, the district court did not manifestly abuse its discretion in denying petitioners' motion to dismiss pursuant to NRCP 4(i). Accordingly, we

ORDER the petition DENIED.


_____, J.
Douglas


_____, J.
Gibbons


_____, J.
Parraguirre

cc: Hon. James M. Bixler, District Judge
Woodburn & Wedge
George E. Graziadei, Chtd.
Sean Claggett & Associates, Inc.
Eighth District Court Clerk