

IN THE SUPREME COURT OF THE STATE OF NEVADA

VERNON SMITH, M.D.,  
INDIVIDUALLY,  
Petitioner,  
vs.

THE EIGHTH JUDICIAL DISTRICT  
COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF  
CLARK; AND THE HONORABLE  
KENNETH C. CORY, DISTRICT  
JUDGE,

Respondents,  
and

JOSEPH KOTLYN, INDIVIDUALLY  
AND AS SPECIAL ADMINISTRATOR  
OF THE ESTATE OF AMADA KOTLYN;  
AND MICHELLE BURNETT,  
INDIVIDUALLY,  
Real Parties in Interest.

No. 59300

**FILED**

NOV 29 2012

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY: *H. Anderson*  
DEPUTY CLERK

ORDER GRANTING IN PART  
PETITION FOR WRIT OF MANDAMUS

This original petition for a writ of mandamus challenges a district court order extending the time for service of process under NRCPC 4(i) and authorizing service by publication in the underlying tort action.<sup>1</sup>

<sup>1</sup>In opposing this motion, petitioner brought a countermotion to dismiss real parties in interest's complaint as to petitioner. Although the challenged order does not expressly deny that motion, in granting real parties in interest additional time to effect service on petitioner, the district court effectively denied that motion. See Rooney v. Rooney, 109 Nev. 540, 542 n.2, 853 P.2d 123, 124 n.2 (1993) (concluding that, although the district court had not expressly denied a motion, it had effectively done so, when it had analyzed the parties' moving papers in reaching its decision to decline to entertain the motion).

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; International Game Tech. v. Dist. Ct., 124 Nev. 193, 197, 179 P.3d 556, 558 (2008), if the petitioner does not have a plain, speedy, and adequate remedy at law. See NRS 34.170; International Game Tech., 124 Nev. at 197, 179 P.3d at 558. Although this court will generally decline to consider writ petitions challenging district court orders denying motions to dismiss, we will consider such petitions if no factual dispute exists and the district court was obligated to dismiss the action pursuant to clear authority. International Game Tech., 124 Nev. at 197-98, 179 P.3d at 558-59.

NRCP 4(i) requires the district court to dismiss an action as to any defendant upon whom service of the summons and complaint is not made within 120 days after the filing of the complaint, unless the party who was required to serve process “shows good cause why such service was not made within that period.” In order to properly serve process outside of the 120-day period, the party required to serve process must file a motion to enlarge the time for service. NRCP 4(i); Saavedra-Sandoval v. Wal-Mart Stores, 126 Nev. \_\_\_, \_\_\_, 245 P.3d 1198, 1200-01 (2010). Moreover, if the motion is made after the expiration of the 120-day period, the party must demonstrate good cause for failing to file a timely motion for an enlargement of time. Saavedra-Sandoval, 126 Nev. at \_\_\_, 245 P.3d at 1201.

Petitioner contends that the district court abused its discretion in granting real parties in interest’s motion to extend the time for service because, among other things, real parties in interest failed to file their motion within the 120-day period set forth in NRCP 4(i) and failed to demonstrate good cause for their failure to timely file this motion.

As a result, petitioner contends that the district court was required to dismiss real parties in interest's complaint against him. Real parties in interest disagree, arguing that the office turnover and health issues experienced by their counsel justified their failure to file the motion within this period and that, under these circumstances, the district court properly granted the motion for additional time.

In Saavedra-Sandoval, 126 Nev. at \_\_\_, 245 P.3d at 1201, this court held that NRCP 4(i) creates "a threshold question for the district court, requiring it to first evaluate whether good cause exists for a party's failure to file a timely motion seeking enlargement of time. Failure to demonstrate such good cause ends the district court's inquiry." In addressing this threshold question, the district court must consider factors, including those set forth in Scrimmer v. District Court, 116 Nev. 507, 998 P.2d 1190 (2000), relating to difficulties or other impediments to the plaintiffs' attempts at service, which could "result in the filing of an untimely motion to enlarge the time to serve the defendant with process." Saavedra-Sandoval, 126 Nev. at \_\_\_, 245 P.3d at 1201. Only if the district court concludes, following such an examination, that good cause exists for the untimely filing of the motion for additional time to effect service, should the district court complete a full Scrimmer analysis to determine whether good cause exists for granting additional time to complete service under NRCP 4(i). Id.


Our review of the documents before us reveals that, at the hearing regarding the motion for additional time to serve petitioner, the district court was initially inclined to deny the motion. Thus, presumably, the district court intended to grant petitioner's countermotion to dismiss real parties in interest's complaint against him, before ultimately directing the parties to provide supplemental filings addressing the health

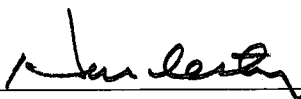
issues experienced by real parties in interest's counsel for its in camera review, after which the district court would render a decision on these motions without further hearing. Following the parties' supplemental filings, the district court entered an order granting the motion for additional time to serve petitioner without explanation.<sup>2</sup>

Under these circumstances, it is not possible to discern the basis for the district court's decision to grant the motion for additional time to serve petitioner and whether the district court performed the full analysis required by this court's decision in Saavedra-Sandoval, 126 Nev. at \_\_\_, 245 P.3d at 1201. We therefore conclude that the petition should be granted in part. The clerk of this court is directed to issue a writ of mandamus instructing the district court to vacate its order, which granted the motion for additional time to serve and effectively denied petitioner's motion to dismiss, to reexamine these motions in accordance with the analysis required by Saavedra-Sandoval, and to enter an order that clearly explains the basis for its decision.

It is so ORDERED.

 \_\_\_\_\_, J.  
Saitta

 \_\_\_\_\_, J.  
Pickering

 \_\_\_\_\_, J.  
Hardesty

<sup>2</sup>The district court's order also granted real parties in interest's motion to serve petitioner by publication. Because petitioner acknowledges that he was personally served following the entry of the district court's order, we do not consider petitioner's challenge to the grant of leave to serve by publication.

cc: Hon. Kenneth C. Cory, District Judge  
Cotton, Driggs, Walch, Holley, Woloson & Thompson/Las Vegas  
Ales & Bryson  
Eighth District Court Clerk