

IN THE SUPREME COURT OF THE STATE OF NEVADA

JEREMY F. MAURIELLO,  
Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT  
COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF  
CLARK; AND THE HONORABLE  
KATHY A. HARDCASTLE, DISTRICT  
JUDGE,

Respondents,

and

DAKOTA HAWKE,

Real Party in Interest.

No. 59664

**FILED**

JUL 27 2012

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *Angela*  
DEPUTY CLERK

ORDER GRANTING PETITION FOR WRIT OF MANDAMUS

This original petition for a writ of mandamus or prohibition challenges a district court order denying a motion to dismiss a tort action for failure to timely effect service of process. Real party in interest Dakota Hawke has filed an answer, as directed, and petitioner Jeremy F. Mauriello has filed a reply.

“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,” International Game Tech. v. Dist. Ct., 124 Nev. 193, 197, 179 P.3d 556, 558 (2008); NRS 34.160, if the petitioner does not have a plain,

speedy, and adequate remedy at law.<sup>1</sup> 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, if no factual dispute exists and the district court was obligated to dismiss the action pursuant to clear authority, we will consider such petitions. International Game Tech., 124 Nev. at 197, 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.” The rule “does not give the district court discretion to enlarge the time for service in the absence of a showing of good cause’ and ‘the district court is limited to enlarging the time for service only upon a motion to enlarge the 120-day service period.” Saavedra-Sandoval v. Wal-Mart Stores, 126 Nev. \_\_\_, \_\_\_, 245 P.3d 1198, 1201 (2010) (quoting NRCP 4(i) drafter’s note). Moreover, if the motion to enlarge time is made after the expiration of the 120-day period, the movant must demonstrate good cause for failing to file a timely motion for an enlargement of time. Id. at \_\_\_, 245 P.3d at 1201.

NRS 14.070 permits service of process in certain situations through the Department of Motor Vehicles. Such substituted service is not complete merely by delivering the process and \$5 fee to the DMV. By

---

<sup>1</sup>Because we conclude that a writ of mandamus is the appropriate form of relief, we deny petitioner’s alternative request for a writ of prohibition.

its express terms, NRS 14.070(2) provides that this form of service is only “deemed sufficient upon the operator if notice of service and a copy of the process is sent by registered or certified mail by the plaintiff to the defendant . . . .” See generally Mitchell v. District Court, 82 Nev. 377, 381, 418 P.2d 994, 996 (1966) (suggesting this component of the statute is required by due process).

In the district court, Hawke defended the sufficiency of service based on an “affidavit of compliance” from counsel dated May 13, 2011, and filed May 18, 2011, that states that “Affiant . . . attempted to mail Defendant a copy of the Summons, Complaint and Notice of Service by Department of Motor Vehicles and Public Safety, by Certified Mail, #7009 2820 0001 3026 6512,” and that “[s]aid attempt was returned to sender.” The 120-day period for effectuating service under NRCP 4(i) expired on April 7, 2011, but the certified mail envelope bearing #7009 2820 0001 3026 6512, submitted to the district court later as an errata, indicates that this mailing was not accomplished until sometime in May 2011, apparently on or after May 10.<sup>2</sup> Thus, service under NRS 14.070(2) was not accomplished timely. Moreover, Hawke did not file a motion to enlarge the time to serve process, as required by NRCP 4(i) and Saavedra-Sandoval, 126 Nev. at \_\_\_, 245 P.3d at 1200-01.

---

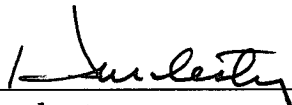
<sup>2</sup>Hawke submitted two affidavits dated January 11, 2012, to this court attempting to establish timely service. This court will not consider evidence that was not submitted to or considered by the district court. Cf. Carson Ready Mix v. First Nat’l Bk., 97 Nev. 474, 476, 635 P.2d 276, 277 (1981) (“The attempt by appellant’s counsel to supply the missing predicate for appellate review by affidavit and by a document not appearing in the record is of no avail. We cannot consider matters not properly appearing in the record on appeal.”).

As Hawke failed to properly complete service of process within the allotted time, the district court was obligated to dismiss this action on Mauriello's timely motion, making writ relief appropriate. See International Game Tech., 124 Nev. at 197, 179 P.3d at 558-59. Accordingly, we

ORDER the petition GRANTED AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the district court to vacate its order denying the motion to dismiss and instead enter an order dismissing the underlying action.

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

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

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

cc: Hon. Kathy A. Hardcastle, District Judge  
McCormick, Barstow, Sheppard, Wayte & Carruth, LLP/Las Vegas  
Pisanelli Bice, PLLC  
Benson & Bingham  
Eighth District Court Clerk