

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 35506

MARIA S. HILDEBRAND,

Petitioner,

vs.

THE FIFTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA, IN AND FOR
THE COUNTY OF NYE, AND THE
HONORABLE JOHN P. DAVIS, DISTRICT
JUDGE,

Respondents,

and

MARY E. EATON,

Real Party in Interest.

FILED

JUN 14 2000

JANETTE M. BLOOM
CLERK OF SUPREME COURT

BY *J. Richard*
CHIEF DEPUTY CLERK

ORDER GRANTING PETITION FOR WRIT OF MANDAMUS

This original petition for a writ of mandamus challenges a district court order denying petitioner's motion to dismiss the complaint for failure to serve the complaint within 120 days under NRCP 4(i).

On January 6, 1998, the real party in interest Mary Eaton filed a complaint in the district court against the petitioner Maria Hildebrand. NRCP 4(i) provides that service of the complaint and summons must be made within 120 days after the complaint is filed, or the complaint will be dismissed without prejudice absent a showing of good cause. Thus, the time for service expired on May 6, 1998.

On September 16, 1999, approximately one year and four months after the 120-day period expired, Eaton filed an ex parte motion to extend the time to serve the complaint and summons. On September 17, 1999, the district court granted the motion, and extended the time for an additional 120 days. On November 9, 1999, within the extended time period, Eaton served the complaint and summons on Hildebrand's counsel, who

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was authorized to accept service. On November 15, 1999, Hildebrand filed a motion to dismiss the complaint pursuant to NRCPC 4(i). Eaton opposed the motion. The district court denied the motion, concluding that good cause had been shown.

Petitioner filed the instant petition for a writ of mandamus, and an answer was filed pursuant to this court's order. 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. See Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981). Mandamus is an extraordinary remedy, and it is within the discretion of this court to determine if a petition will be considered. See State ex rel. Dep't Transp. v. Thompson, 99 Nev. 358, 662 P.2d 1338 (1983). An order denying a motion to dismiss under NRCPC 4(i) is not appealable, and this court may grant mandamus relief to correct a district court's manifest abuse of discretion in appropriate instances. See Scrimmer v. District Court, 116 Nev. __, __ P.2d __ (Adv. Op. No. 60, May 8, 2000); Smith v. District Court, 113 Nev. 1343, 950 P.2d 280 (1997).

Several factors govern an analysis of good cause for failure to serve a complaint and summons within 120 days after the filing of the complaint pursuant to NRCPC 4(i):

- (1) difficulties in locating the defendant,
- (2) the defendant's efforts at evading service or concealment of improper service until after the 120-day period has lapsed,
- (3) the plaintiff's diligence in attempting to serve the defendant,
- (4) difficulties encountered by counsel,
- (5) the running of the applicable statute of limitations,
- (6) the parties' good faith attempts to settle the litigation during the 120-day period,
- (7) the lapse of time between the end of the 120-day period and the actual service of process on the defendant,
- (8) the prejudice to the defendant caused by the plaintiff's delay in serving process,
- (9) the defendant's knowledge of the existence of the lawsuit, and
- (10) any extensions of time for service granted by the district court.

Scrimmer v. District Court, 116 Nev. __, __ P.2d __ (Adv. Op. No. 60, May 8, 2000) at 10-11. No one factor is controlling, and the policy of adjudicating cases on their merits should be considered. Id.


In applying the factors to the instant case, we conclude that Hildebrand's motion to dismiss should have been granted. Eaton served the complaint and summons one year and six months after the 120-day period expired.¹ Further, Eaton did not sufficiently demonstrate that she exercised due diligence in attempting to serve Hildebrand, or had difficulty locating Hildebrand during the time in question. Moreover, there is no indication that the parties were attempting to settle their case during the 120-day period. Rather, Eaton was waiting for the outcome of a prior case filed in Clark County involving these parties and similar issues, before pursuing the underlying litigation. This does not constitute good cause.

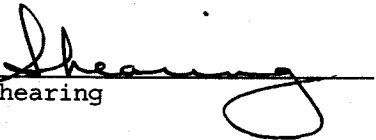
We recognize that dismissal of the complaint will be highly prejudicial to Eaton, as the statute of limitations has expired. However, considering the significant delay of one and one-half years in serving the complaint and summons, and the absence of any evidence that Eaton exercised due diligence in attempting to serve Hildebrand with the complaint and summons, or that the parties were attempting to settle the matter, we conclude that dismissal of the complaint was warranted. We therefore conclude that the district court manifestly abused its discretion in denying petitioner's motion to dismiss.

¹While we recognize that process was served within the additional 120-day period allowed by the district court's order granting Eaton's motion to extend the time, Eaton did not seek an extension until one year and four months after the 120-day period expired, and we conclude that the district court abused its discretion in granting the extension.

Accordingly, we grant the petition. We direct the clerk of this court to issue a writ of mandamus compelling the district court to vacate its order denying petitioner's motion to dismiss in District Court Case No. CV14530, and grant petitioner's motion to dismiss the action.

It is so ORDERED.


Maupin J.


Shearing J.


Becker J.

cc: Hon. John P. Davis, District Judge
Nye County District Attorney
Christopherson Law Offices
Rawlings Olson Cannon Gormley & Desruisseaux
Nye County Clerk