

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE ESTATE OF ANTONIO VARGAS
ARROYO,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK; AND THE HONORABLE
ALLAN R. EARL, DISTRICT JUDGE,
Respondents,
and
GENEVA SPENCER,
Real Party in Interest.

No. 60043

FILED

SEP 13 2012

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

ORDER GRANTING PETITION FOR WRIT OF MANDAMUS

This is an original petition for a writ of mandamus challenging a district court order denying a motion to dismiss in a tort action.

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, or to control an arbitrary or capricious exercise of discretion. See NRS 34.160; International Game Tech. v. Dist. Ct., 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). Although this court generally will not 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, 179 P.3d at 558-59.

FACTS

In the district court, real party in interest filed four separate motions for enlargements of time, all of which the district court granted.

The first three motions were filed during the service period, as provided for by statute and extended by the first two orders granting the motions. The fourth motion, however, was filed after the service period, as extended by the third order granting an enlargement, had expired. Additionally, in the third and fourth motions, real party in interest also moved for, and was granted, permission to serve process by publication pursuant to NRS 14.040. Prior to real party in interest's fourth motion for an enlargement, petitioner moved to dismiss the complaint for failure to timely serve process, and the district court denied that motion.

In this writ petition, petitioner argues that the district court was required by law to deny the fourth motion for an enlargement of time and permission to serve by publication and to dismiss the complaint. In particular, petitioner contends that the district court should not have granted permission to serve process by publication because real party in interest failed to demonstrate that she had exercised diligence in attempting to locate the heirs of the alleged tortfeasor after he died while this action was pending. Additionally, petitioner asserts that the district court was required to dismiss the complaint for lack of timely service of process because real party in interest's fourth and final motion for an enlargement of the service period was untimely and did not establish good cause for real party in interest's failure to timely complete service of process or file a motion for an enlargement within the period for service.

DISCUSSION

Initially, with regard to the propriety of permitting service by publication, other than a single telephone call to the probate court, real party in interest failed to identify any steps that she undertook in attempting to identify and locate the proper defendants in this case. Thus,

real party in interest failed to demonstrate that she exercised sufficient diligence in attempting to identify and locate the proper defendants to support allowing service by publication. See NRS 14.040 (permitting service by publication on a showing that the plaintiff has unsuccessfully exercised due diligence in attempting to identify and locate a defendant's heirs that are to be substituted in place of the defendant in an action); cf. Browning v. Dixon, 114 Nev. 213, 218, 954 P.2d 741, 744 (1998) (concluding, in the context of substituted service through the Department of Motor Vehicles pursuant to NRS 14.070, that a plaintiff had not exercised due diligence in attempting to locate a defendant when the plaintiff had ignored reasonable methods for locating the defendant). In the absence of evidence of due diligence, the district court was required to deny the motion to serve process by publication.

Moreover, as to the timeliness of service, 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). Additionally, if a motion to enlarge the time for service is made after the 120-day period has expired, the movant must also 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.

Here, real party in interest does not dispute that the attempt at service by publication pursuant to the order granting her third motion for an enlargement of time was ineffective insofar as it was not completed until after the expiration of the time for serving process under the third order. Having considered the appendix and the parties' arguments, we conclude that the district court manifestly abused its discretion by granting the fourth motion for an enlargement of time. Real party in interest filed the fourth motion after she had unsuccessfully attempted to serve process pursuant to the order granting the third motion and after petitioner had filed the motion to dismiss. In the fourth motion, real party in interest did not establish good cause for failing to file a timely motion for an enlargement of time, particularly when she had waited 77 days after receiving petitioner's April 27, 2011, letter identifying defects in the service before filing the fourth enlargement motion.¹ See id.


CONCLUSION

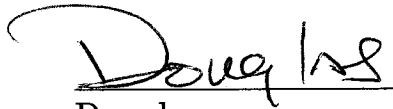
Because the fourth motion for an enlargement should have been denied, the district court was required, pursuant to NRCP 4(i), to dismiss the complaint for failure to timely serve process. Accordingly, writ relief is appropriate in this instance, see International Game Tech., 124 Nev. at 197, 179 P.3d at 558-59, and we

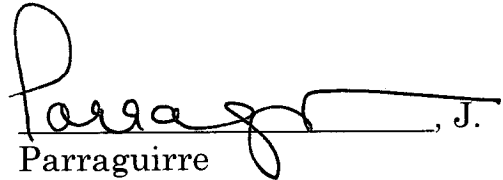
ORDER the petition GRANTED AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the

¹Although real party in interest disputed whether she had received the April 27 letter, the district court stated when deciding the motion that it had assumed that real party in interest had received the letter.

district court to vacate its order granting the fourth motion for an enlargement of time and denying petitioner's motion to dismiss and to enter an order dismissing the underlying action.


_____, J.
Gibbons


_____, J.
Douglas


_____, J.
Parraguirre

cc: Hon. Allan R. Earl, District Judge
David L. Riddle & Associates
Aaron & Paternoster, Ltd.
Eighth District Court Clerk