

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOHN B. FISHER, IN HIS CAPACITY  
AS THE PRINCIPAL BROKER OF AND  
DOING BUSINESS AS RE/MAX  
REALTY AFFILIATES,

Petitioner,

vs.

THE FIRST JUDICIAL DISTRICT  
COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF  
CARSON CITY; AND THE

HONORABLE JAMES E. WILSON,  
DISTRICT JUDGE,

Respondents,

and

ROBERT ENGLER,

Real Party in Interest.

No. 72307

**FILED**

MAR 13 2017

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

*ORDER DENYING PETITION FOR WRIT OF MANDAMUS*

This is an original petition for a writ of mandamus challenging district court orders denying motions to dismiss under NRCP 16.1(e)(2) and NRCP 41(e).

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; *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). Whether to entertain a writ petition is within this court's discretion, and we generally will not consider writ petitions challenging district court orders denying motions to dismiss, unless no factual dispute exists and the district court was obligated to

dismiss the action pursuant to clear authority or an important issue of law needs clarification. *See Int'l Game Tech.*, 124 Nev. at 197-98, 179 P.3d at 558-59. And petitioner bears the burden of demonstrating that extraordinary relief is warranted. *See Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004).

Having considered the petition and supporting documents, we conclude that petitioner has not met his burden of demonstrating that writ relief is warranted based on either NRCP 41(e) or NRCP 16.1(e). *See id.* In particular, while the district court is generally required to dismiss any action not brought to trial within five years under NRCP 41(e), real party in interest's claims against petitioner were all dismissed under NRCP 16.1(e)(2) prior to the expiration of the five-year period. *See Monroe v. Columbia Sunrise Hosp. & Med. Ctr.*, 123 Nev. 96, 101, 158 P.3d 1008, 1011 (2007) (recognizing that an action involving multiple plaintiffs "may be brought to trial between a single plaintiff and defendant for the purposes of NRCP 41(e), so long as the disposition completely resolves all claims between those two parties"). And, contrary to petitioner's arguments otherwise, once this court reversed the dismissal on appeal and remanded the matter to the district court, real party in interest had three years from the date the remittitur was filed in the district court to bring his case to trial. *See Carstarphen v. Milsner*, 128 Nev. 55, 62-63, 270 P.3d 1251, 1256 (2012) (explaining that, following the reversal of an erroneous pretrial dismissal, the plaintiff must bring his or her case to trial within three years of the filing of the remittitur in the district court). Thus, petitioner's arguments in this regard do not demonstrate that writ relief is warranted.

As to petitioner's argument that, on remand, the district court improperly reversed its original decision to dismiss the underlying complaint under NRCP 16.1(e)(2), the district court did not reverse its original decision. To the contrary, this court reversed that decision based on our conclusion that the district court had abused its discretion by dismissing real party in interest's complaint under NRCP 16.1(e)(2) without addressing the factors set forth in *Arnold v. Kip*, 123 Nev. 410, 415-16, 168 P.3d 1050, 1053 (2007). See *Engler v. Fisher*, Docket No. 69546 (Order of Reversal and Remand, September 27, 2016). Because our reversal did not comment on the merits of the underlying action, the district court was free on remand to either grant or deny the motion to dismiss the complaint under NRCP 16.1(e)(2) based on its consideration of the *Arnold* factors.

Finally, while petitioner also argues that the *Arnold* factors required the district court to grant the motion to dismiss, dismissal under NRCP 16.1(e)(2) is generally a matter within the district court's discretion, see 123 Nev. at 414, 168 P.3d at 1052 (providing that an order granting a motion to dismiss under NRCP 16.1(e)(2) is reviewed for an abuse of discretion), and petitioner has not demonstrated that dismissal was required under clearly established law.<sup>1</sup> See *Int'l Game Tech.*, 124 Nev. at

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<sup>1</sup>For the same reason, petitioner's assertion that the district court should have exercised its discretion under NRCP 41(e) by dismissing the action for failure to bring it to trial within two years does not demonstrate that writ relief is warranted.

197-98, 179 P.3d at 558-59. Thus, petitioner also has not demonstrated that writ relief is warranted based on NRCP 16.1(e)(2).

Accordingly, we deny the petition. See NRAP 21(b)(1); *Int'l Game Tech.*, 124 Nev. at 197-98, 179 P.3d at 558-59.

It is so ORDERED.

  
\_\_\_\_\_, C.J.  
Silver

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. James E. Wilson, District Judge  
Alling & Jillson, Ltd.  
Julie Bachman  
Carson City Clerk