

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

PERCY LAVAE BACON,
Appellant,
vs.
THE STATE OF NEVADA, EX REL.
STATE BOARD OF PRISON
COMMISSIONERS; HOWARD
SKOLNIK; BRIAN WILLIAMS;
DWIGHT NEVEN; CLARENCE KING;
JOHN DOE JENSEN; JOHN DOE
LANCE; JOHN DOE DIET COOK;
JOHN DOE INMATE DIET COOK;
ROBERT BANNISTER; CHERYL
BURSON; FRANCISCO SANCHEZ;
ROMEO ARANAZ; DAVID MUMFORD;
JANE DOE FOOD MANAGER; JOHN
DOE FOOD MANAGER,
Respondents.¹

No. 67599

FILED

APR 28 2017

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

ORDER OF AFFIRMANCE

Appellant Percy Lavae Bacon appeals from a district court order dismissing his civil rights and torts action and a post-judgment order denying relief under NRCP 60(b). Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Senior Judge.²

Bacon, an inmate, sued respondents asserting numerous torts and civil rights claims in connection with his incarceration. Respondents moved for dismissal arguing, as relevant here, that Bacon failed to exhaust his administrative remedies and did not timely serve process.

¹We direct the clerk of the court to amend the caption of this case to conform to the caption on this order.

²With regard to the orders giving rise to this appeal, Senior Judge Joseph T. Bonaventure decided the motion to dismiss and District Judge Richard Scotti decided the post-judgment motion for NRCP 60(b) relief.

Following the reversal and remand of an initial dismissal of the underlying case by the Nevada Supreme Court, the district court dismissed this action a second time, concluding that Bacon had failed to exhaust his administrative remedies and that he had failed to timely serve the complaint upon respondents within the time set by NRCP 4(i). On the latter point, the court held that service on respondent the State of Nevada was not properly completed, as Bacon failed to perfect service on the State by serving the head of the agency being sued as required by NRS 41.031(2), and that he did not serve any of the other named defendants within NRCP 4(i)'s 120-day period. This appeal followed.

On appeal, Bacon maintains that his complaint should not have been dismissed as to the State under NRCP 4(i), arguing that the State was a proper defendant in the underlying action and that he timely served his complaint on the State. Preliminarily, while Bacon contends that he could bring an action against the State pursuant to NRS 35.010, that statute designates the circumstances in which an action may be brought *in the name of the State*. In order to bring his claims *against* the State, Bacon was required to comply with the requirements set forth in NRS 41.031, which governs the State's waiver of its sovereign immunity. In particular, to the extent Bacon brought such claims, he was required to serve both the Attorney General, or a person designated by the Attorney General, and "[t]he person serving in the office of administrative head of the named agency [whose actions were the basis for his suit]." NRS 41.031(2). Here, while the record reflects that Bacon timely served the person designated by the Attorney General with the summons and complaint, nothing in the record demonstrates that he timely effected service on the administrative head of the appropriate agency.

And to the extent that Bacon's complaint can be construed as setting forth claims against the remaining respondents under 42 U.S.C. §§

1983 and 1985, see *Hafer v. Melo*, 502 U.S. 21, 27-28 (1991) (explaining that § 1983 actions may be maintained against state officials in their individual capacities, even if the actions in question were taken as part of their official duties); see also *Sturdza v. United Arab Emirates*, 281 F.3d 1287, 1307 (D.C. Cir. 2002) (recognizing that “[42 U.S.C. §§] 1983 and 1985 are interpreted consistently with each other”), on appeal, Bacon does not dispute the district court’s finding that he did not serve any of these parties with the summons or complaint. See NRCP 4(i) (contemplating service of the summons and complaint on each defendant named in an action). As a result, Bacon has waived any such argument. See *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (providing that arguments not raised on appeal are deemed waived).

Instead, Bacon attempts to overcome this deficiency by arguing that the district court lacked jurisdiction to dismiss his complaint on service grounds and that it failed to address his motion for an enlargement of time to serve process on respondents.³ With regard to Bacon’s jurisdictional argument, he asserts the district court could not dismiss his case on service grounds because the supreme court’s September 16, 2014, order of reversal and remand only directed the district court to make the findings necessary for full consideration of the

³Although Bacon also baldly asserts that service on the State somehow tolled the time for serving the remaining respondents, he failed to provide an argument or explanation as to this position. See *Edwards v. Emperor’s Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that appellate courts need not address issues that are not supported by cogent argument). And as our research failed to identify any authority supporting this unexplained assertion, we conclude that this argument fails to provide a basis for reversing the district court’s dismissal as to these parties.

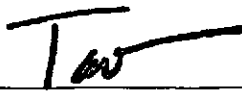
exhaustion of remedies issue. But this argument is belied by the supreme court's September 16 order, which expressly noted the district court's failure to address whether dismissal was warranted on service grounds as leaving the court "unable to determine whether . . . dismissal . . . was warranted" in the course of remanding the case for further proceedings. *See Bacon v. State*, Docket No. 60511 (Order of Reversal and Remand, September 16, 2014). Thus, Bacon's jurisdiction-based argument is without merit.

Turning to Bacon's assertion that the district court failed to address his request to extend the service period, we likewise reject this contention as being without merit. Notably, the district court did address Bacon's request in the written order dismissing his case, concluding that no extension was warranted as he failed to show good cause for his delay in serving process. *See* NRCP 4(i) (authorizing the district court to grant an enlargement of time for service of process based on a showing of good cause for the failure to timely effect service). And Bacon does not present any argument on appeal to challenge that conclusion. *See Powell*, 127 Nev. at 161 n.3, 252 P.3d at 672 n.3.

Thus, based on the foregoing, Bacon has failed to demonstrate that the district court abused its discretion in dismissing his action for failure to effect service within the period set forth in NRCP 4(i). *See Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 595, 245 P.3d 1198, 1200 (2010) (reviewing a dismissal for failure to timely serve process for an abuse of discretion). Accordingly, we affirm the district court's

order dismissing Bacon's complaint.⁴

It is so ORDERED.⁵


_____, J.
Tao


_____, J.
Gibbons

cc: Chief Judge, Eighth Judicial District Court
Hon. Joseph T. Bonaventure, Senior Judge
Hon. Richard Scotti, District Judge
Percy Lavae Bacon
Attorney General/Carson City
Attorney General/Las Vegas
Eighth District Court Clerk

⁴In light of our resolution of this matter, we need not address Bacon's remaining arguments.

To the extent Bacon challenges the district court's post-judgment order denying his request for relief under NRCP 60(b), we affirm that decision, as he relies entirely on the same arguments that he presented to challenge the dismissal of his complaint. While Bacon also challenges the district court's denial of his request for relief under NRCP 59(e), which we may review in the context of an appeal from the final judgment, *see AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010), relief is not warranted for the same reason discussed above.

⁵The Honorable Abbi Silver, Judge, voluntarily recused herself from participation in the decision of this matter.