

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DAVID HOWELL,
Appellant,
vs.
MAIZIE W. PUSICH,
Respondent.

No. 75905-COA

FILED

DEC 13 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

David Howell appeals from a district court order dismissing his complaint in a civil rights and torts action. Second Judicial District Court, Washoe County; Barry L. Breslow, Judge.

Howell, an inmate, sued respondent Maizie W. Pusich, alleging that she represented him in a separate criminal proceeding and that, following a disagreement between the parties, she retaliated against him by disclosing a confidential communication to the State. Based on those allegations, Howell asserted various state tort and constitutional claims against Pusich. Pusich moved for dismissal under NRCP 12(b)(5), arguing, among other things, that she was entitled to discretionary act immunity, that Howell's state tort claims therefore failed, and that he otherwise failed to assert a valid state or federal constitutional claim. Over Howell's opposition, the district court subsequently granted Pusich's motion for the reasons set forth therein. This appeal followed.

On appeal, Howell initially contends that the district court failed to consider certain unidentified claims in his complaint. But Howell's complaint only asserted state tort and constitutional claims, and in its written order, the district court rejected the state tort claims based on the


discretionary-act-immunity doctrine and further determined that Howell failed to state a valid state constitutional claim. And although Howell's complaint did not expressly assert a federal constitutional claim, the district court nevertheless considered Howell's allegations in the context of the federal constitution, but determined that they failed based on *Polk Cty. v. Dodson*, 454 U.S. 312, 325 (1981), which held that, for purposes of 42 U.S.C. § 1983, "a public defender does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." Howell further challenges these decisions on the grounds that the district court disregarded Nevada law and failed to provide adequate legal analysis or support for its decision. But these challenges fail since Howell did not identify what law the district court purportedly disregarded, *see Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (declining to consider issues that are not supported by cogent argument), and because Nevada law generally permits summary dismissal orders. *See* NRCP 52(a) (providing that orders granting NRCP 12 motions need not state the district court's conclusions of law except for when the court renders a judgment on partial findings in a trial without a jury); *compare* NRCP 56(c) (providing that summary judgment orders must state the undisputed material facts and be supported with the legal determinations on which the district court relied), *with* NRCP 41 (omitting any such requirement for dismissal orders).


Nevertheless, Howell contends that dismissal was inappropriate in the present case because Pusich did not file an answer or otherwise refute the factual allegations in his complaint. But while Pusich did not answer or otherwise respond to Howell's factual allegations, she responded to his complaint by asserting one of the defenses set forth in

NRCP 12(b), as she was permitted to do under NRCP 12(a) and (b). And although service of a summons and complaint triggers certain timing requirements with respect to a defendant's obligations to file an answer or assert one of the defenses set forth in NRCP 12(b), *see* NRCP 12(a), (b), Howell failed to provide any proof of service in the record that would allow this court to evaluate whether Pusich satisfied those timing requirements. *See* NRCP 4(g) (requiring the person who serves process to provide proof of service to the district court); *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) (holding that the appellant is responsible for making an adequate appellate record, and explaining that, when "appellant fails to include necessary documentation in the record, we necessarily presume that the missing [documents] support[] the district court's decision").

Because Howell does not otherwise argue or explain why Pusich was not entitled to discretionary act immunity or why his constitutional claims were valid, we conclude that he failed to demonstrate that the district court erred in dismissing his complaint. *See Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008) (reviewing a district court's order granting a motion to dismiss under NRCP 12(b)(5) *de novo*). Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Barry L. Breslow, District Judge
David Howell
Washoe County District Attorney
Washoe County District Attorney/Civil Division
Washoe District Court Clerk

¹Insofar as Howell raises arguments that are not specifically addressed in this order, they either do not present a basis for relief or need not be addressed given our disposition of this appeal.