

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CORRECTIONS CORPORATION OF
AMERICA, A/K/A CORECIVIC, INC.,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK; AND THE HONORABLE
MARK R. DENTON, DISTRICT JUDGE,
Respondents,
and
MICHAEL ESPINOSA, AN
INDIVIDUAL,
Real Party in Interest.

No. 76767-COA

FILED

DEC 21 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  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 based on failure to timely effect service. At the direction of this court, real party in interest filed an answer to the petition and petitioner has filed a reply.

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). This court 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 if an important issue of

law needs clarification. *Int'l Game Tech.*, 124 Nev. at 197-98, 179 P.3d at 558-59.

Here, real party in interest Michael Espinosa failed to serve the underlying complaint within the 120 period, apparently because petitioner Corrections Corporation of America, A/K/A CoreCivic, Inc., was incorrectly identified as Corrections Corporation A/K/A CoreCivil in the complaint. Rather than seek an extension of time to effect service, Espinosa filed an amended complaint to reflect CoreCivic's correct name shortly after the 120-day period expired and later served a summons and the amended complaint on CoreCivic. CoreCivic subsequently moved to dismiss the complaint based on Espinosa's failure to timely perfect service, but the district court denied that motion. This petition followed. Because we conclude that clear authority required the district court to dismiss the underlying complaint based on Espinosa's failure to timely perfect service, our consideration of this petition is warranted and, for the reasons set forth below, we conclude the petition should be granted. *Id.*

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 moves to enlarge the service period and "shows good cause why such service was not made within that period." Absent a motion to extend the service period and a showing of good cause, the district court lacks discretion to enlarge the service period. See *Saavedra-Sandoval v. Wal-Mart Stores*, 126 Nev. 592, 596, 245 P.3d 1198, 1201 (2010). Moreover, a party filing a motion to enlarge the time to serve process after the service period has elapsed must also demonstrate good

cause for failing to file a timely motion for an enlargement of time. *See id.* at 597, 245 P.3d at 1201.

Here, Espinosa had until April 3, 2018, to serve the summons and complaint on petitioner, *see* NRCP 4(i), but failed to perfect service or move for an extension of time to do so within the 120-day period. Instead, Espinosa filed an amended complaint after the 120-day period expired that corrected the typographical error in CoreCivic's name. When presented with this issue, the district court determined that this amendment constituted the addition of a new party that reset the 120-day service period. While our supreme court has held that the filing of an amended complaint that adds a new defendant starts a new 120-day service period as to that defendant, the "[s]ubstitution of the true name of a defendant is not considered to be the addition of a new party to the action." *See Lacey v. Wen-Neva, Inc.*, 109 Nev. 341, 349 n.5, 849 P.2d 260, 265 n.5 (1993) (explaining that the filing of an amended complaint does not toll the period for serving the original defendant), *overruled in part on other grounds by Scrimmer v. Eighth Judicial Dist. Court*, 116 Nev. 507, 517, 998 P.2d 1190, 1196 (2000). Thus, under *Lacey*, the time for Espinosa to serve CoreCivic ran from the filing of the original complaint, and the filing of the amended complaint has no bearing on the service period.

With regard to service of the initial complaint, it is undisputed that service was not completed within the 120-day period. In responding to CoreCivic's assertion that dismissal was mandatory under these circumstances, as Espinosa never moved to extend the service period, Espinosa argues that the district court had authority to extend the period

and that an extension was warranted based on the *Scrimmer* factors.¹ But these arguments fail in light of clear supreme court precedent recognizing that, under the 2004 amendments to NRCP 4(i), the filing of a motion to extend the service period is “required” before the service period can be enlarged. See *Saavedra-Sandoval*, 126 Nev. at 596, 245 P.3d at 1201 (noting that the district court does not have discretion to enlarge the service period in the absence of a motion to extend the period and a showing of good cause). And because the 120-day period had expired, the required motion would have had to show good cause not only for failing to serve within the applicable period, but for failing to even seek an extension of time to do so before the period expired. See *id.* at 597, 245 P.3d at 1201. But here, no such motion was filed.

In the absence of such a motion and the accompanying showing of good cause for failure to seek an extension within the 120-day period, the district court should not have even considered whether petitioner had demonstrated good cause for failing to timely serve process. See *id.* (“[O]nly upon a showing of good cause to file an untimely motion to enlarge time for service should the district court then apply [the good-cause factors set forth in *Scrimmer v. Eighth Judicial Dist. Court*, 116 Nev. 507, 998 P.2d 1190 (2000)] for the delay in service.”). Instead, the court was required to dismiss the complaint for failure to timely serve process. See NRCP 4(i).


As the district court was required to dismiss the complaint, we grant the petition for a writ of mandamus and direct the clerk of the court


¹To the extent Espinosa’s answer suggests that an extension was requested at the hearing on the motion to dismiss, that argument is without merit.

to issue a writ of mandamus instructing the district court to vacate its order denying CoreCivic's motion to dismiss and enter an order dismissing the underlying action.

It is so ORDERED.²


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Mark R. Denton, District Judge
Dennett Winspear, LLP
Struck Love Bojanowski & Acedo, PLC
Mueller Hinds & Associates
Eighth District Court Clerk

²In light of this order, we deny as moot CoreCivic's motion to stay the underlying case pending our resolution of this matter.