

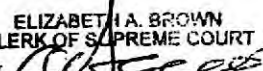
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ZACHARY LONG,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK; AND THE HONORABLE
CARLI LYNN KIERNY, DISTRICT
JUDGE,
Respondents,
and
GAMO OUTDOOR USA, INC.,
Real Party in Interest.

No. 83256-COA

FILED

SEP 22 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY: 
DEPUTY CLERK

ORDER DENYING PETITION FOR WRIT OF MANDAMUS

This original petition for a writ of mandamus challenges a district court order denying, in part, a motion for leave to amend a complaint 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; *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). This court has discretion as to whether to entertain a petition for extraordinary relief and will not do so when the petitioner has a plain, speedy, and adequate remedy at law. NRS 34.170; *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 123 Nev. 468, 474-75, 168 P.3d 731, 736-37 (2007). 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).

In the underlying case, petitioner Zachary Long's claims against Industrias El Gamo, S.A. (Gamo Spain), were dismissed without prejudice for insufficient service of process. Long later moved to amend his complaint, seeking to, as relevant here, once again assert claims against Gamo Spain prior to the expiration of the relevant statute of limitations.¹ The district court denied the motion to amend, reasoning that the filing of an amended complaint would be futile because it would not restart Long's period for serving Gamo Spain pursuant to the supreme court's decision in *Scrimmer v. Eighth Judicial Dist. Court*, 116 Nev. 507, 515, 998 P.2d 1190, 1195 (2000). See *Nutton v. Sunset Station, Inc.*, 131 Nev. 279, 289, 357 P.3d 966, 973 (2015) (providing that the district court need not allow futile amendments). Nevertheless, the district court indicated that Long could assert his claims against Gamo Spain by filing a separate action. Long subsequently initiated a separate action against Gamo Spain, but he also brought this original petition for mandamus relief challenging the denial of his motion to amend his complaint in the original action to include his claims against Gamo Spain that were previously dismissed for the failure to serve Gamo Spain with the initial complaint.

Although the supreme court has held that "filing an amended complaint against the same party does not restart the 120-day period for service," *Scrimmer*, 116 Nev. at 515, 998 P.2d at 1195 (citing *Lacey v. Wen-Neva, Inc.*, 109 Nev. 341, 349, 849 P.2d 260, 265 (1993), *overruled in part on other grounds by Scrimmer*, 116 Nev. at 517, 998 P.2d at 1196)), the court

¹The operative complaint included claims against multiple defendants who were not dismissed with Gamo Spain, meaning that when Gamo Spain moved to amend the complaint, there was still a complaint that could be amended.

has recognized that, when an amended complaint adds a new party to an action, the period for serving the new party runs from the date of filing of the amended complaint. *Lacey*, 109 Nev. at 348-49, 849 P.2d at 264-65. In the present case, because Gamo Spain was dismissed from the underlying proceeding, it would have been a new party to the action if re-added, and the district court therefore erred by relying on *Scrimmer* as a basis to deny Long's motion to amend as futile based on the failure to serve the initial complaint within 120 days. *See Anderson v. Mandalay Corp.*, 131 Nev. 825, 832, 358 P.3d 242, 247 (2015) (reviewing the denial of a motion to amend on futility grounds de novo); *Int'l Game Tech.*, 124 Nev. at 198, 179 P.3d at 559 (recognizing that questions of law are "review[ed] de novo, even in the context of a writ petition").

But despite the district court's misapplication of *Scrimmer*, extraordinary writ relief is unavailable here, as Long has a plain, speedy, and adequate legal remedy. NRS 34.170; *D.R. Horton*, 123 Nev. at 474, 168 P.3d at 736. Here, Long has already initiated a new action against Gamo Spain, which Long can move to consolidate with the underlying case once Gamo Spain is properly served in the separate action and answers Long's complaint. *See* EDCR 2.50(a)(1) (providing that a motion to consolidate "two or more cases must be heard by the judge assigned to the case first commenced" and that such a motion is premature if filed before the answer in the case to be consolidated).

And although Long observes that the district court in the underlying proceeding might not allow consolidation, this speculative observation does not satisfy Long's burden of demonstrating that our

extraordinary intervention is warranted at this time.² *See Pan*, 120 Nev. at 228, 88 P.3d at 844. Thus, for the reasons set forth above, we deny Long's petition. *See* NRAP 21(b)(1); *D.R. Horton*, 123 Nev. at 475, 168 P.3d at 737.

It is so ORDERED.³


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Carli Lynn Kierny, District Judge
Eckley M. Keach, Chtd.
Murdock & Associates, Chtd.
Lincoln, Gustafson & Cercos
Pisciotti Lallis Erdreich
Eighth District Court Clerk

²If Long properly seeks to consolidate the underlying case with his new action against Gamo Spain and the district court denies that motion, nothing in this order precludes Long from filing a new writ petition challenging that decision.

³Insofar as Long raises arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this petition.