

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANGEL DELAFUENTES,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK; AND THE HONORABLE
MICHAEL CHERRY, DISTRICT
JUDGE,

Respondents,

and

IMAD KATTAN AND MARIE KATTAN,

Real Parties in Interest.

No. 38135

FILED

DEC 13 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

ORDER GRANTING PETITION
FOR WRIT OF MANDAMUS OR PROHIBITION

This original petition for a writ of mandamus or prohibition challenges a district court order denying petitioner's motion to dismiss for failure to bring an action to trial within the mandatory five-year period set forth in NRCP 41(e). We conclude that dismissal was mandatory and therefore grant this petition.

The Kattans, appearing in proper person, filed a civil complaint against Angel DeLafuentes on May 13, 1996. Pursuant to NRCP 41(e), the action had to be brought to trial within five years of the filing date, i.e., by May 14, 2001.¹ On February 5, 2001, the Kattans requested a continuance of the trial set for February 12, 2001. The district court granted the continuance, in consideration of the reasons given by the Kattans and its own busy calendar. DeLafuentes did not oppose the motion, but neither did he join in it. Trial was then set for September 10, 2001, almost four months past the five-year deadline. The Kattans did not object.

¹Because May 13, 2001, fell on a Sunday, the five-year period expired on May 14, 2001. See NRCP 6(a).

On May 15, 2001, DeLafuentes moved to dismiss the complaint under NRCP 41(e). Following a hearing, the district court denied the motion, apparently believing that it was responsible for the trial continuance that deprived the Kattans of their day in court. DeLafuentes now challenges that decision.

It is well established that dismissal under NRCP 41(e) is mandatory, unless a written stipulation expressly extends the time limit.² The parties in this case signed no written stipulation for an extension, and we are not persuaded by the Kattans' contention that DeLafuentes' mere acquiescence to the trial continuance in open court constituted such a stipulation.³

The Kattans also claim that the district court's purported encouragement of the trial continuance should bar the application of NRCP 41(e) in their case. This contention lacks merit; even if the court sua sponte had vacated the trial date and set trial outside the five-year period, NRCP 41(e) would still have required dismissal.⁴ It is always the plaintiff's duty, not the court's, to diligently prosecute a case and prevent entry of a Rule 41(e) dismissal.⁵ We must also reject the Kattans'

²See, e.g., Prostack v. Lowden, 96 Nev. 230, 606 P.2d 1099 (1980); Great W. Land & Cattle v. District Ct., 86 Nev. 282, 467 P.2d 1019 (1970); Lindauer v. Allen, 85 Nev. 430, 456 P.2d 851 (1969).

Otherwise, we have held on only two occasions that certain time periods are excluded from the calculation of the five-year period under NRCP 41(e). See Baker v. Noback, 112 Nev. 1106, 922 P.2d 1201 (1996) (time during which a medical malpractice claim is pending before a medical screening panel excluded); Boren v. City of North Las Vegas, 98 Nev. 5, 638 P.2d 404 (1982) (time during which a judicial stay is in effect excluded).

³The Kattans' reliance on Prostack is misplaced. In Prostack, we stated that "an oral stipulation, entered into in open court, approved by the judge, and spread upon the minutes, is the equivalent of a written stipulation for the purposes of [NRCP 41(e)]." See Prostack, 96 Nev. at 231, 606 P.2d at 1099-1100. We held, however, that an oral stipulation which is silent as to the expiration of the five-year period does not satisfy this rule. Id. at 231, 606 P.2d at 1100. Such is the case here; the transcript of the February 5, 2001 hearing is devoid of any discussion regarding the five-year period, and thus does not evince a stipulation, oral or written, to extend the mandatory dismissal period.

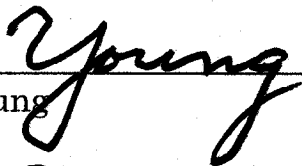
⁴See Johnson v. Harber, 94 Nev. 524, 582 P.2d 800 (1978).

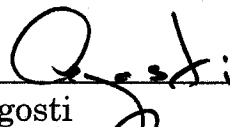
⁵Id. at 527, 582 P.2d at 801.


contention that other equitable considerations should prevent their case from being dismissed. "Rule 41, as written and construed, does not contemplate an examination of the equities."⁶ Nor can the Kattans' status as proper person litigants shield them from the rule's mandate; proper person litigants share the same basic duty as parties with counsel to comply with the rules of civil procedure, and cannot escape the consequences of a mandatory rule based solely on their proper person status.

A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust or station,⁷ or to control an arbitrary or capricious exercise of discretion.⁸ Because the district court was obliged to dismiss the Kattans' complaint upon a motion under NRCP 41(e), we grant this petition and direct the clerk of this court to issue a writ of mandamus compelling the district court to dismiss the underlying action.⁹

It is so ORDERED.¹⁰


_____, J.
Young


_____, J.
Agosti


_____, J.
Leavitt

cc: Hon. Michael A. Cherry, District Judge
Fitzgibbons & Anderson
Kerr & Associates
Clark County Clerk

⁶Great W. Land & Cattle, 86 Nev. at 285, 467 P.2d at 1021.

⁷NRS 34.160.

⁸See Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981).

⁹See Thran v. District Court, 79 Nev. 176, 178, 380 P.2d 297, 298-99 (1963) (stating that mandamus is available to compel a district court to dismiss an action for failure to prosecute).

¹⁰We deny as moot DeLafuentes' motion for leave to file a reply to the Kattans' answer.