


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DEBORAH MCLEA,  
Appellant,  
vs.  
WOLFGANG PUCK BAR & GRILL,  
(SUMMERLIN, NEVADA) WOLFGANG  
PUCK CORPORATE OFFICE &  
HEADQUARTERS,  
Respondent.

No. 87651-COA

FILED  
JAN 23 2025  
ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Deborah McLea appeals from a district court order dismissing her case under NRCP 41(e)'s five-year rule. Eighth Judicial District Court, Clark County; Jessica K. Peterson, Judge.

McLea initiated a civil complaint on August 2, 2017, against respondent Wolfgang Puck Bar & Grill, after an alleged food poisoning that occurred after eating at respondent's restaurant. On August 24, respondent was purportedly served by a process server, with the affidavit of service indicating that the process server personally delivered a copy of the summons and complaint to the manager of the Wolfgang Puck Bar & Grill. Based on the record, Wolfgang Puck Bar & Grill never appeared in the case.

On October 19, 2017, McLea filed and served a three-day notice of intent to enter default, and a clerk's entry of default was entered on December 8, 2017. No action was taken after this point, such as initiating a prove-up hearing to obtain a judgment, however, and on December 10,

2018, the district court dismissed the complaint because “no action has been taken for more than six (6) months preceding the date of this order.” Shortly thereafter, on December 28, 2018, McLea filed a motion to set aside the dismissal order under NRCP 60(b). McLea argued that there was no notice of possible dismissal and that she still desired to pursue her claims and was gathering all her medical records. The district court granted McLea’s motion and the order setting aside the dismissal was entered on April 3, 2019. However, the matter purportedly remained closed on the district court’s docket and was allegedly not reinstated by the district court clerk after the order setting aside the dismissal was entered.

On January 8, 2020, an amended complaint was filed correcting the legal name of respondent to Srg Associates, LLC dba Wolfgang Puck Bar & Grill. The case was subsequently reassigned multiples times to different departments. On August 7, 2023, McLea filed a motion to correct the record, confirm the case remains open, and confirm service of process. The motion requested that the court clearly identify for the record that the case was open despite the docket being closed, and, due to the prior default being entered against respondent, that the court confirm the service of process of the original complaint was proper.

Subsequently, in September 2023, the district court held a hearing and denied McLea’s motion and dismissed the case. The court found, among other things, that the five-year rule expired and McLea failed to bring the case to trial before the expiration of the rule. The court also noted that there was no applicable stay in this matter due to any COVID-related orders. The court further found that it was not compelled by

McLea's argument that any delay in the case was "caused by the administrative failure to reopen the case." Thus, the court denied the motion and dismissed the case. This appeal followed.

On appeal, McLea asserts, among other things, that the district court erred in dismissing appellant's complaint for failure to bring the case to trial prior to the expiration of the five-year rule.

We review de novo a district court's dismissal for failure to prosecute under NRCP 41(e)'s five-year rule. *Power Co., Inc. v. Henry*, 130 Nev. 182, 186, 321 P.3d 858, 860-61 (2014). Generally, the district court must dismiss an action for want of prosecution when "a plaintiff fails to bring the action to trial within 5 years after [it] was filed." NRCP 41(e)(2)(B). NRCP 41(e)'s five-year rule "is clear and unambiguous and requires no construction other than its own language." *D.R. Horton, Inc. v. Eighth Jud. Dist. Ct.*, 131 Nev. 865, 872, 358 P.3d 925, 929 (2015) (internal quotation marks omitted). Under the five-year rule, "where a case has not been brought to trial after five years, dismissal is mandatory, affording the district court no discretion." *Id.* It is the plaintiff's obligation to ensure compliance with NRCP 41(e)'s five-year rule. *Morgan v. Las Vegas Sands, Inc.*, 118 Nev. 315, 321, 43 P.3d 1036, 1040 (2002).

On appeal, McLea suggests that the district court improperly dismissed her case under NRCP 41(e) without first issuing a show cause order. But we need not address whether this constituted error because any potential error is deemed harmless as, on appeal, McLea has failed to demonstrate the existence of any grounds that would have allowed her to avoid dismissal under the five-year rule. Thus, she cannot show that she

was prejudiced by the court's failure to issue a show cause order prior to dismissing her case. *See Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010) (explaining that, to establish an error is not harmless and reversal is warranted, "the movant must show that the error affects the party's substantial rights so that, but for the alleged error, a different result might reasonably have been reached"). Furthermore, McLea failed to provide this court with a transcript from the district court's hearing on her motion to correct the record, confirm the case remains open, and confirm service of process, at which McLea asserts the court determined her case must be dismissed under NRCP 41(e). As a result, we presume that the missing transcripts support the district court's decision to dismiss the case. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) (noting that it is appellant's burden to ensure that a proper appellate record is prepared and that, if the appellant fails to do so, "we necessarily presume that the missing [documents] support[ ] the district court's decision").

Next, McLea asserts that the underlying case remained administratively closed on the district court's docket despite the entry of an order setting aside the initial dismissal of her case, which she contends prevented her from bringing the case to trial within the five-year period. But it is well established that "[i]t is the obligation of the plaintiff to ensure compliance with the NRCP 41(e) prescriptive period," *Morgan*, 118 Nev. at 321, 43 P.3d at 1040; *see also De Santiago v. D and G Plumbing, Inc.*, 65 Cal. Rptr. 3d 882, 887 (Ct. App. 2007) ("The exercise of reasonable diligence includes a duty 'to monitor the case in the trial court to ascertain whether

any filing, scheduling or calendaring errors have occurred.” (quoting *Tamburina v. Combined Ins. Co. of America*, 54 Cal. Rptr. 3d 175, 184 (Ct. App. 2007))). And this sequence of events does not fall into one of the limited “exceptions to the mandatory nature of NRCP 41(e),” such as the entry of a stay order, *D.R. Horton, Inc.*, 131 Nev. at 872, 358 P.3d at 930, or a stipulation to extend the five-year period, *Prostack v. Lowden*, 96 Nev. 230, 231, 606 P.2d 1099, 1099-1100 (1980).<sup>1</sup> Thus, this argument does not provide a basis for relief.

And to the extent McLea asserts that the district court should have considered whether good cause existed for failure to prosecute the action, an NRCP 41(e) dismissal for failure to bring a matter to trial within five years is mandatory and the equities are not considered. *See Johnson v. Harber*, 94 Nev. 524, 526, 582 P.2d 800, 801 (1978) (stating that while the appellant in that matter appeared “to be the victim of unfortunate circumstances” dismissal for failure to bring a matter to trial within five years was mandatory and that NRCP 41(e) does not contemplate an examination of the equities). Thus, this argument likewise fails to provide a basis for relief.

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<sup>1</sup>Additionally, our supreme court has recognized that a clerk’s entry of default does not constitute bringing the action to trial so as to avoid the running of the five-year prescriptive period. *See, e.g., Kochanski v. Dakota Tech, LLC*, No. 644712, 2015 WL 2454114 (Nev. May 20, 2015) (Order of Affirmance) (determining that an entry of default did not constitute bringing the action to trial and dismissal was appropriate under NRCP 41(e)).

Given the foregoing, we conclude that the district court did not err in dismissing McLea's case.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>2</sup>

  
\_\_\_\_\_, C.J.  
Bulla

  
\_\_\_\_\_, J.  
Gibbons

  
\_\_\_\_\_, J.  
Westbrook

cc: Hon. Jessica K. Peterson, District Judge  
Skane Mills LLP/Las Vegas  
Wolfgang Puck Bar & Grill, (Summerlin, Nevada)  
Eighth District Court Clerk

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<sup>2</sup>Insofar as McLea raises arguments that are not specifically addressed in this order, we have considered the same and conclude that they do not present a basis for relief.