

IN THE SUPREME COURT OF THE STATE OF NEVADA

JANET FELLHAUER,
Appellant,
vs.
SHERRY HALLEY,
Respondent.

No. 50341

FILED

JAN 15 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a motion to set aside the judgment in a tort action. Eighth Judicial District Court, Clark County; Elizabeth Halverson, Judge.

On December 18, 2006, appellant Janet Fellhauer filed a district court complaint for personal injuries allegedly suffered in a March 1, 2005, automobile accident with respondent Sherry Halley. The complaint was not served nor was an extension of time for service sought within the 120-day period prescribed by NRCP 4(i). On June 1, 2007, respondent specially appeared in the action and filed a motion to dismiss under NRCP 4(i). On June 25, 2007, appellant filed an opposition to the motion and filed a countermotion to enlarge the time for service. On July 10, 2007, the district court granted the motion to dismiss for failure to timely serve under NRCP 4(i). A notice of entry of the order was filed on July 12, 2007.

Citing NRCP 59 and 60(b), appellant filed a July 27, 2007, motion to set aside the judgment due to mistake, inadvertence, or excusable neglect; respondent opposed the motion. On September 25, 2007, the district court entered an order denying appellant's motion to set aside the judgment, from which appellant now appeals.

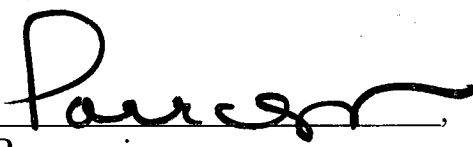
In reviewing the September order, we note that the district court has wide discretion in resolving an NRCP 60(b)(1) motion for relief from a judgment due to mistake, inadvertence, surprise, or excusable neglect. See Durango Fire Protection v. Troncoso, 120 Nev. 658, 662, 98 P.3d 691, 693 (2004) (concluding that a party's repeated failure to appear was inexcusable neglect when he and his counsel had received notice of scheduled hearings). Barring an abuse of discretion and if there is competent evidence in support, the district court's determination will not be disturbed on appeal. Cook v. Cook, 112 Nev. 179, 912 P.2d 264 (1996). Here, appellant showed no mistake, inadvertence, or excusable neglect to warrant relief from her failure to serve the summons and complaint within 120 days as required by NRCP 4(i). Despite the professional process server's purported difficulty in locating respondent, the latter ultimately received notice of the complaint via certified mail sent to her address listed on the police report. Appellant showed no good cause for her counsel's sole reliance upon the process server, who failed to timely serve respondent, or her counsel's failure to calendar the 120-day deadline for service and to determine the status of the process server's efforts to serve respondent during the 120-day period.

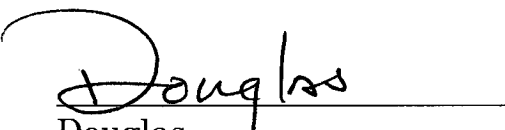
If service is not effectuated within the 120-day period, then NRCP 4(i) requires dismissal without prejudice, unless a motion to enlarge the time for service is filed and good cause is shown. In determining good cause for an extension of time, NRCP 4(i) requires the district court to take into consideration a party's failure to file a motion to enlarge time before the 120-day period expires. Here, appellant did not serve respondent or file a motion seeking enlargement of the time to serve the complaint until approximately two months after the time for service

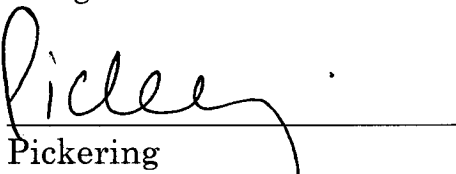
had expired and after respondent had specially appeared to move to dismiss the case. Because Rule 4(i) requires both the filing of a motion to enlarge the time for service and a showing that good cause exists for not serving the complaint within the 120-day period, appellant's failure to file a motion to enlarge the time for service required the district court to dismiss the case under the mandatory language of the rule. Having failed to satisfy the first of Rule 4(i)'s requirements by filing a motion to enlarge the time for service, there was no need to determine whether good cause for the delay existed and the factors listed in Scrimmer v. District Court, 116 Nev. 507, 516, 998 P.2d 1190, 1195-96 (2000), are inapplicable to this case. Consequently, NRCP 4(i) required dismissal without prejudice of appellant's complaint.

As the appellant failed to provide competent evidence of mistake, inadvertence, surprise, or excusable neglect to warrant relief from NRCP 4(i)'s 120-day service requirement, we conclude that the district court did not abuse its wide discretion in denying appellant's motion to set aside the judgment under NRCP 60(b). Accordingly, we

ORDER the district court's judgment AFFIRMED.


_____, J.
Parraguirre


_____, J.
Douglas


_____, J.
Pickering

cc: Eighth Judicial District Court Dept. 23, District Judge
William F. Buchanan, Settlement Judge
Victor Lee Miller
Atkin Winner & Sherrod
Eighth District Court Clerk