

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

FERRILL JOSEPH VOLPICELLI,
Appellant,
vs.
DAVID L. CARPENTER; JAMES G.
COX; MICHAEL DITTENBERG;
TIMOTHY GARRETT; ROBERT
LEGRAND, D. E. REED; AND THE
STATE OF NEVADA,
Respondents.

No. 78241-COA

FILED

DEC 27 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Ferrill Joseph Volpicelli appeals from a district court order dismissing a civil rights complaint. Eleventh Judicial District Court, Pershing County; Jim C. Shirley, Judge.

Volpicelli filed a civil rights complaint against respondents on May 21, 2013. Respondents ultimately moved to dismiss the complaint for failure to bring the matter to trial within five years as required by NRCP 41(e). On February 11, 2019, the district court granted the motion and dismissed the case with prejudice. This appeal followed.

As an initial matter, Volpicelli did not oppose respondents' motion to dismiss below and therefore, has waived any arguments against granting it. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court . . . is deemed to have been

waived and will not be considered on appeal.”). Regardless, as set forth below, Volpicelli’s arguments on appeal fail.

First, Volpicelli argues that his continuous diligence negates any dismissal. But, 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 fails.

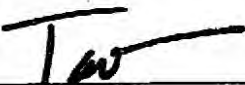
Next, Volpicelli argues that the matter has been brought to trial because respondents moved for summary judgment well in advance of the five year deadline. But the fact that a motion for summary judgment was filed does not, without more, constitute bringing the matter to trial. *See United Ass’n of Journeymen & Apprentices of the Plumbing & Pipe Fitting Indus. v. Manson*, 105 Nev. 816, 819, 783 P.2d 955, 957 (1989). It is only when a motion for summary judgment is filed prior to the five year deadline and is granted that the case is considered to have been brought to trial. *Id.* at 819-20, 783 P.2d at 957. And since the motion for summary judgment was not granted, this argument also fails.


Lastly, to the extent Volpicelli argues that dismissal should have been without prejudice, we discern no abuse of discretion in the district

court's decision to dismiss with prejudice. *See Saticoy Bay LLC Series 2021 Gray Eagle Way v. JP Morgan Chase Bank, N.A.*, 133 Nev. 21, 24, 388 P.3d 226, 230 (2017) (providing that a district court has broad discretion in determining whether an NRCP 41(e) dismissal should be with or without prejudice). Based on the foregoing, we

ORDER the judgment of the district court AFFIRMED.¹


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Jim C. Shirley, District Judge
Ferrill Joseph Volpicelli
Attorney General/Carson City
Attorney General/Las Vegas
Pershing County Clerk

¹To the extent Volpicelli raises arguments not specifically addressed herein, we have considered the same and conclude they do not provide a basis for relief.