IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TIMOTHY TOM,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE KERRY LOUISE EARLEY, DISTRICT JUDGE,
Respondents,
and
INNOVATIVE HOME SYSTEMS, LLC; AND OLD REPUBLIC SURETY,
Real Parties in Interest.

No. 81547-COA

FILED

SEP 23 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER DENYING PETITION FOR WRIT OF MANDAMUS

This is an original petition for a writ of mandamus challenging a district court order denying a motion to dismiss under NRCP 41(e).

Real party in interest Innovative Home Systems, LLC (IHS) initiated the underlying action in April 2013 by filing a complaint asserting various claims against petitioner Timothy Tom. Tom filed an answer and counterclaim against IHS, and a third-party complaint against real party in interest Old Republic Surety (ORS). In July 2014, the district court granted IHS summary judgment on its primary claims and dismissed all other outstanding claims, thereby completely resolving the case. Tom appealed from the final judgment, and this court reversed and remanded that decision. *See Tom v. Innovative Home Sys., LLC*, 132 Nev. 161, 368 P.3d 1219 (Ct. App. 2016). The remittitur for that decision was filed with the district court in September 2016.

On remand, the case was stayed while an issue regarding IHS's supposed failure to obtain a proper license was pending before the Nevada State Contractor's Board (NSCB), but the district court lifted the stay after the NSCB concluded that it did not have authority to address the issue. Later, in February 2020, Tom filed a motion to dismiss the action for want of prosecution under NRCP 41(e), arguing that the mandatory three-year period to bring the case to trial after the filing of the remittitur in the district court—accounting for the time that the case was stayed—had run.

In its opposition, IHS argued that even though the three-year period had run, there was still time remaining to bring the case to trial under the five-year rule and that, pursuant to NRCP 41(e)(5), when two time periods requiring mandatory dismissal apply, the longer period controls. In reply, Tom argued that the standard five-year period no longer applied because the case was brought to trial for purposes of that rule by the district court's 2014 summary judgment and dismissal order. Thus, Tom reasoned that IHS had "satisfied" the five-year rule such that only the three-year period could apply on remand and the rule requiring application of the longer time period when two periods apply was inapplicable.

Following a hearing, the district court denied Tom's motion to dismiss, concluding that the five-year period controlled and that there was time remaining to bring the case to trial. This petition followed.

In his petition, Tom again argues that this case should be dismissed under NRCP 41(e)(4)(B)'s three-year rule. He cites *United Ass'n of Journeymen v. Manson*, 105 Nev. 816, 783 P.2d 955 (1989), *Allyn v. McDonald*, 117 Nev. 907, 34 P.3d 584 (2001), and *Monroe v. Columbia Sunrise Hospital & Medical Center*, 123 Nev. 96, 158 P.3d 1008 (2007), in support of the proposition that when an action is completely resolved

between a plaintiff and defendant by way of summary judgment, it is "brought to trial" for purposes of the mandatory time periods set forth in NRCP 41(e). And because this action was "brought to trial" in 2014, Tom contends that the five-year rule was "satisfied" such that only the post-remittitur three-year rule remains. Accordingly, Tom argues that NRCP 41(e)(5)—which provides that when two time periods requiring mandatory dismissal apply, the longer period controls—does not apply to this case, and the district court erred in relying on it and applying the five-year rule.

A writ of mandamus will generally not issue if the petitioner has an adequate and speedy legal remedy. *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 131 Nev. 865, 869, 358 P.3d 925, 928 (2015). But because this petition implicates the parties' trial rights and raises concerns of sound judicial economy and administration, we choose to entertain it on its merits. *See id.* at 866-67, 358 P.3d at 926 (reaching the merits of—and denying—a writ petition challenging a district court's denial of a motion to dismiss the action under the five-year rule).

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). But "[i]f a party appeals a judgment and the judgment is reversed on appeal and remanded for a new trial," the district court must dismiss the action "if a plaintiff fails to bring [it] to trial within 3 years after the remittitur was filed in the trial court." NRCP 41(e)(4)(B). Although the text of NRCP 41(e)(4)(B) refers only to cases remanded for a new trial rather than a trial in the first instance, our supreme court has held that the three-year period nevertheless applies in cases remanded following reversal of a pretrial judgment or dismissal order. *See Carstarphen v. Milsner*, 128 Nev. 55, 62, 270 P.3d 1251, 1256 (2012).

While existing precedent discussing the post-remittitur three-year rule does not address situations where applying that rule would give a plaintiff less time to bring a case to trial than if the five-year rule were applied, the pertinent supreme court opinions suggest that the rule was not meant to shorten the five-year period, but was instead intended to operate as an extension of it. *See Monroe*, 123 Nev. at 102, 158 P.3d at 1012 (describing the post-remittitur rule as a "three-year extension"); *Massey v. Sunrise Hosp.*, 102 Nev. 367, 369, 724 P.2d 208, 209 (1986) (noting that the three-year rule "extends the 'five-year' rule when an appeal is taken"). This intent was confirmed in the recent amendment to NRCP 41(e)—which applies in this matter—providing that "[i]f two time periods requiring mandatory dismissal apply, the longer time period controls." NRCP 41(e)(5) & advisory committee's note to 2019 amendment (noting that the new Rule 41(e)(5) "*clarifies* that if two time periods requiring mandatory dismissal apply, the longer period controls" (emphasis added)).

Here, Tom does not dispute that if two time periods applied, the longer period would control under NRCP 41(e)(5), nor does he dispute that applying the five-year rule in this matter would afford more time to bring the action to trial. Rather, he contends that the five-year rule does not apply under these circumstances because precedent from our supreme court provides that the entry of a complete summary judgment between a plaintiff and a defendant constitutes bringing the case to trial for purposes of NRCP 41(e). *See, e.g., Monroe*, 123 Nev. at 101-02, 158 P.3d at 1011. From there, Tom contends that once the case was brought to trial by the 2014 judgment, the five-year rule was forever satisfied such than only the three-year rule could remain after the filing of the remittitur in the district court following this court's reversal and remand. We disagree.

Although Tom is correct that the 2014 judgment brought the underlying action to trial for purposes of the five-year rule, nothing in NRCP 41(e) indicates that the five-year rule simply goes away once it is first satisfied. *See In re Execution of Search Warrants*, 134 Nev. 799, 804, 435 P.3d 672, 676 (Ct. App. 2018) ("In the end, the scope of [a statute] is defined not by a few words taken from isolated cases, but rather by the words of the statute itself."); *see also Vanguard Piping Sys., Inc. v. Eighth Judicial Dist. Court*, 129 Nev. 602, 607, 309 P.3d 1017, 1020 (2013) ("Nevada's Rules of Civil Procedure are subject to the same rules of interpretation as statutes."). Nor do the cases on which Tom relies support his proffered interpretation of what it means to "satisfy" the rule, as they simply provide that a summary judgment that completely resolves an action between two parties spares the action from the strict penalty of mandatory dismissal; they do not indicate that such a judgment necessarily bars application of the five-year rule after that judgment is reversed. *See Monroe*, 123 Nev. at 99-102, 158 P.3d at 1010-11 (discussing *United Ass'n of Journeymen*, 105 Nev. 816, 783 P.2d 955, and *Allyn*, 117 Nev. 907, 34 P.3d 584, while explaining the relationship between a summary judgment and NRCP 41(e)).

Finally, although NRCP 41(e) does not explicitly speak to the circumstances at issue here—at least as framed by Tom—or specifically explain how it is that two time periods requiring mandatory dismissal could apply at one time, reading the rule in the manner Tom suggests would not be consistent with its purpose. *Cf. Nelson v. Heer*, 123 Nev. 217, 224, 163 P.3d 420, 425 (2007) (holding that when a statute "does not speak to the issue before the court," the court examines "the context and the spirit of the law or the causes which induced [its] enact[ment]"). Although "NRCP 41(e) was enacted as a measure of preventing unreasonable and unnecessary

delays in the prosecution of a lawsuit," *Home Sav. Ass'n v. Aetna Cas. & Sur. Co.*, 109 Nev. 558, 563, 854 P.2d 851, 854 (1993), "[t]he spirit of the law contemplates a trial on the merits," *Massey*, 102 Nev. at 369, 724 P.2d at 209. And our supreme court has said that the "[three-year] extension is necessary in order to assure that plaintiffs are treated fairly" and that parties are not "penalized for exercising a right to challenge the trial judge['s decision]." *Id.* at 369, 370, 724 P.2d at 209, 210. In circumstances like those at issue here, adopting Tom's interpretation of NRCP 41(e) would unfairly reduce the amount of time that parties have to bring their claims to trial. Thus, we decline to read the rule in this way.

Given the foregoing, we conclude the district court correctly applied NRCP 41(e)(5) in denying Tom's motion to dismiss. Accordingly, we deny Tom's petition for a writ of mandamus. *See* NRS 34.160; NRAP 21(b)(1).

It is so ORDERED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Kerry Louise Earley, District Judge
Howard & Howard Attorneys PLLC
Mead Law Group
Eighth District Court Clerk