

1 **IN THE SUPREME COURT FOR THE STATE OF NEVADA**

2
3 PHILLIP J. FAGAN, JR. an individual
4 and as Trustee of the PHILLIP J.
5 FAGAN, FR. 2001 TRUST

6 Appellant,

7 vs.

8 AAL-JAY, INC., a Nevada corporation

9 Respondent.
10

Appeal No. 84699

Electronically Filed
Dec 22 2022 05:10 PM
Elizabeth A. Brown
Clerk of Supreme Court
**NOTICE AS TO WHETHER
CHRISTIANO DECARLO AND
LAIL LEONARD ARE PROPER
PARTIES TO THIS APPEAL**

11 Appellants PHILLIP J. FAGAN, JR. an individual and as Trustee of the
12 PHILLIP J. FAGAN, FR. 2001 TRUST (hereinafter “D. Fagan”) hereby file this
13 notice re: whether Christiano DeCarlo and Lail Leonard are proper parties to this
14 appeal.

15 Counsel for Dr. Fagan attempted to add third-party claims against Christiano
16 DeCarlo and Lail Leonard vis-à-vis its answer and counterclaim, filed on May 18,
17 2022. DeCarlo and Lail Leonard were never served.

18 On June 3, 2022, the Court entered an order granting Dr. Fagan’s motion to
19 stay execution of several orders pending the outcome of this appeal. In response to
20 Plaintiff’s efforts to evade all discovery, the lower court later issued a minute order
21 on August 19, 2022, wherein the lower court inexplicably stated that it “was the
22 Courts understanding that this matter would be stayed until a decision was made on
23 appeal.” *See* Minute Order, **Exhibit A**. The court reached this conclusion despite
24 the fact that (1) Dr. Fagan never moved for and was never granted a stay of the
25 litigation and (2) discovery will need to be completed irrespective of the outcome of
26 this appeal.
27
28

1 During the stay, Counsel for AAL-Jay, DeCarlo and Leonard filed a motion
2 to dismiss Leonard and DeCarlo for failure to serve within 120 days. The motion
3 did not request dismissal with prejudice. *See* Motion, **Exhibit B**.

4 Counsel for Fagan, deeming the motion to be meritorious and wishing to
5 obviate the need and expense of a hearing filed a notice of dismissal of the claims
6 pursuant to NRCP 41. *See* Notice of Dismissal, **Exhibit C**.

7 The lower court's clerk contacted counsel for Dr. Fagan on Friday October
8 14, 2022 to request a stipulation to vacate the hearing, which was rendered moot. In
9 response to this request, a stipulation was immediately prepared and circulated. *See*
10 **Exhibit D**. Counsel for Plaintiff, Decarlo and Leonard never responded, despite
11 follow-ups. *Id.*

12 At the date of the hearing, Plaintiff's counsel requested, for the first time,
13 dismissal with prejudice based on the failure to serve within 120 days. Counsel for
14 Defendants was shocked by this surprise request, and stated that the applicable rule
15 mandates dismissal without prejudice, that the claims had already been dismissed
16 pursuant to NRCP 41, and that the court cannot exercise jurisdiction to enter a
17 dismissal with prejudice, when the basis for the dismissal was lack of service, which
18 equates to a lack of personal jurisdiction over the parties. *See* Transcript, **Exhibit**
19 **E**.

20 The lower court read Rule 4(m), and recognized that it mandated dismissal
21 without prejudice. Similarly, counsel for Plaintiff agreed that the rule mandated
22 dismissal without prejudice. *Id.* Nonetheless, in blatant defiance of the rules of civil
23 procedure, ignoring the notice of dismissal that already effectuated dismissal of the
24 claims without prejudice, and in excess of its jurisdiction, the lower court decided,
25 without providing any legal basis, that it was granting dismissal *with prejudice* and
26 told Dr. Fagan to "[t]ake it up to the Court of Appeals or the Supreme Court." *Id.* at
27 6:4.
28

1 Dr. Fagan ultimately disagrees with the actions of the lower court.
2 Nonetheless, that is for another appeal, another day. For the purposes of this appeal,
3 Dr. Fagan agrees that Christiano DeCarlo and Lail Leonard are not parties to this
4 appeal.

5 DATED this 22nd day of December, 2022

6 BLACK & WADHAMS

7
8 s/ Allison R. Schmidt
9 Allison R. Schmidt, Esq. (#10743)
10 10777 West Twain Avenue, Suite
11 300 Las Vegas, Nevada 89135
12 ATTORNEYS FOR APPELLANT

13 **CERTIFICATE OF SERVICE**

14 I hereby certify that on the 22nd day of December, 2022, that I served a copy
15 of the foregoing document upon all counsel of record electronically via the Court's
16 eflex-eFile and e-serve system:

17
18 Ogonna Brown, Esq.,
19 Lewis Roca Rothberger Christie, LLP
20 3993 Howard Hughes Parkway, Suite 600,
21 Las Vegas, Nevada 89169
22 (702) 474-2622
obrown@lewisroca.com

23 /s/ Diane Meeter
24 An Employee of Black & Wadham's
25
26
27
28

EXHIBIT A

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Contract

COURT MINUTES

August 19, 2022

A-21-832379-C AAL-JAY, INC., Plaintiff(s)
vs.
Philip Fagan, Jr., Defendant(s)

August 19, 2022 11:45 AM Minute Order

HEARD BY: Ballou, Erika

COURTROOM: Chambers

COURT CLERK:
Ro'Shell Hurtado

RECORDER:

REPORTER:

**PARTIES
PRESENT:**

JOURNAL ENTRIES

- The Court having considered all papers and pleadings and having determined that no hearing is necessary hereby VACATES the hearing on the Motion to Quash and Objection to Defendant/Counterclaimants Issuance of Subpoena to First American Title Company for August 23, 2022. The Motion to Quash and Objection to Defendant/Counterclaimants Issuance of Subpoena to First American Title Company is hereby GRANTED.

On June 6, 2022, this Court granted in part Defendant s Motion to Stay Pending Appeal. This Court imposed the stay to maintain the status quo pending the adjudication of the appeal. It was the Courts understanding that this matter would be stayed until a decision was made on appeal.

Further, in the Joint Case Conference Report that was submitted to the Court on January 13, 2022, both parties stipulated to:

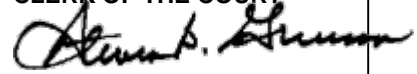
The Nevada Supreme Court s ruling on Defendant s Emergency Petition for Writ of Mandamus, or in the Alternative, Writ of Prohibition under 21(a)(6) is pending. In an effort to foster judicial efficiency and keep attorneys fees and costs from rising while the appeal is pending, the Parties

PRINT DATE: 08/19/2022

Page 1 of 2

Minutes Date: August 19, 2022

EXHIBIT B



MDSM
OGONNA BROWN, ESQ.
Nevada Bar No. 7589
ADRIENNE BRANTLEY-LOMELI, ESQ.
Nevada Bar No. 14486
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
Telephone (702) 949-8200
Facsimile: (702) 949-8398
E-Mail: OBrown@lewisroca.com
E-Mail: ABrantley-Lomeli@lewisroca.com
*Attorneys for Plaintiff AAL-JAY, INC. and limited
appearance for Christiano De Carlo and Lail Leonard*

**DISTRICT COURT
COUNTY OF CLARK, NEVADA**

AAL-JAY, INC., a Nevada Corporation.
Plaintiff,
v.

Case No. A-21-832379-C
Dept. No. 24

PHILIP J. FAGAN, JR., an individual, and
as Trustee of the PHILIP J. FAGAN, JR.
2001 TRUST; DOES I through X, inclusive,
and ROE CORPORATIONS I through X,
inclusive,
Defendants.

**MOTION TO DISMISS FOR
INSUFFICIENT SERVICE**

[HEARING REQUESTED]

Judge: Hon. Erika Ballou

PHILIP J. FAGAN, JR., as Trustee of the
PHILIP J. FAGAN, JR. 2001 TRUST,
Counterclaimant,

v.

AAL-JAY, INC., a Nevada corporation;
CHRISTIANO DE CARLO, an individual;
and LAIL LEONARD, an individual,
Counter-Defendants

Counterdefendants Christiano De Carlo and Lail Leonard,¹ by and through a limited
appearance by Lewis Roca Rothgerber Christie LLP, hereby submit this Motion to Dismiss for
Insufficient Service pursuant to Rule 12(b)(4) of the Nevada Rules of Civil Procedure (“Motion”).

¹ The Fagan Defendants’ Counterclaim is also procedurally defective. In order to properly add Mr.
DeCarlo and Ms. Leonard as non-party defendants, the Fagan Defendants were required to join the
individual counterdefendants through NRCP 19 governing required joinder or NRCP 20 governing
permissive joinder. The Fagan Defendants never moved or plead any of the required elements for
required or permissive joinder.

This Motion is made and based on the papers and pleadings on file, the following Memorandum of Points and Authorities, and any oral argument entertained by the Court at the hearing on the Motion.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

One of the oldest and most fundamental concepts in American jurisprudence is that a court does not obtain jurisdiction over a defendant who is not properly served. To ensure due process of law, NRCP 4(d)(1) mandates that individual defendants be personally served with a copy of the summons and complaint. In this case, AAL-Jay filed its Complaint against the Fagan Defendants on April 6, 2021, and its First Amended Complaint of May 2, 2021. On May 18, 2021, the Fagan Defendants answered and asserted counterclaims against nonparty individuals Christiano De Carlo and Lail Leonard. Thus, the Fagan Defendants were required to timely effectuate personal service upon Mr. De Carlo and Ms. Leonard. To this day, the Fagan Defendants have never served these nonparties individuals. Further, Mr. De Carlo and Mr. Leonard have never appeared or otherwise waived service. Indeed, in the Nevada Supreme Court, Mr. De Carlo and Ms. Leonard did not appear, consistent with the lack of service in this Court. Accordingly, dismissal of the counterclaims against them is warranted arising from the Fagan Defendants' failure to timely serve Mr. De Carlo and Ms. Leonard within the 120-day service deadline set forth under NRCP 4(i).

II. PROCEDURAL HISTORY

On April 6, 2021, AAL-Jay filed a Complaint and asserted claims against Philip J. Fagan individually and the Philip J Fagan Kr. 2001 Trust. On May 2, 2021, AAL-Jay filed its First Amended Complaint. The Fagan Defendants Answered the First Amended Complaint on May 18, 2021. In the First Amended Answer the Fagan Defendants asserted counterclaims against two nonparty individuals, Christiano De Carlo and Lail Leonard. The Fagan Defendants never sought the issuance of the summonses to serve Mr. De Carlo and Ms. Leonard, and never made a single attempt to serve the newly added individuals since May 18, 2021. Mr. De Carlo and Ms. Leonard never appeared or otherwise waived service. The Fagan Defendants had 120 from the date of the filing of the counterclaims, until September 15, 2021, to serve Mr. De Carlo and Ms. Leonard. To date, neither individual has been served.

III. LEGAL ARGUMENT

A. Standard for Dismissal

Pursuant to NRCP 13, Rules 19 (required joinder) and 20 (permissive joinder) of the Nevada Rules of Civil Procedure govern the addition of a person as a party to a counterclaim or crossclaim. Claims made under Rule 13, including both permissive and compulsory counterclaims against nonparties, are subject to the same obligations as original claims. NRCP 4(i) specifically allows a plaintiff only 120 days from the date of the filing of a complaint, to serve defendants. The Court has ruled that “[d]ismissal is mandatory unless there is a legitimate excuse for failing to serve within the 120 days.” *Scrimmer v. District Court.*, 116 Nev. 507, 998 P.2d 1190, 1193 (2000). NRCP 12(b)(4) states in relevant part: “the following defenses may at the option of the pleader be made by motion:... (4) insufficiency of service of process...”

Here, not only did the Fagan Defendants fail to comply with NRCP 19 or NRCP 20, but they also failed to personally serve the nonparty individuals whom they asserted counterclaims against. Mr. De Carlo and Ms. Leonard did not answer, appear, or otherwise waive service.

B. Dismissal Is Warranted Under Rule 12(b)(4)

When a plaintiff fails to personally serve a defendant, courts uniformly hold that dismissal of the complaint is proper. *See, e.g., Mende v. Milestone Technology, Inc.*, 269 F.Supp.2d 246, 252 (S.D. N.Y. 2003)(court granted defendant's motion to dismiss for insufficient service of process because the plaintiff failed to properly serve the defendant as required by Rule 4); *see also Bucholz v. Hutton*, 153 F.Supp. 62, 68-69 (D. Mont. 1957) (court granted defendant's motion to dismiss because plaintiff failed to personally deliver a copy of the summons and complaint to the defendant).

Even if a defendant has notice or knowledge of a suit, that does not cure defective service. *See, e.g., Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987)(“[B]efore a court may exercise personal jurisdiction over a defendant, there must be more than notice to the defendant ...”); *Grand Entm't Group, Ltd. v. Star Media Sales, Inc.*, 988 F.2d. 476, 492 (3rd Cir. 1993)(“Notice to a defendant that he has been sued does not cure defective service, and an appearance for the limited purpose of objecting to service does not waive the technicalities of the rule”); *Amen v. City*

1 of Dearborn, 532 F.2d 554, 557 (6th Cir. 1976)(“[D]ue process requires proper service of process
2 in order to obtain in personam jurisdiction.”).

3 Here, the Fagan Defendants cannot argue that merely because Mr. De Carlo and Ms.
4 Leonard had notice of their complaint, that they have been properly served. Rather, the Fagan
5 Defendants electronically filed their Answer and Counterclaims on May 18, 2021, and failed to
6 personally serve the nonparty individuals by the expiration of the 120-day deadline on September
7 15, 2021. It has been well over 120 days since the Fagan Defendants filed the complaint against
8 Mr. De Carlo and Ms. Leonard on May 18, 2021, and the deadline for service expired one year ago.
9 Accordingly, this Court should dismiss the counterclaims against them.

10 **IV. CONCLUSION**

11 For the foregoing reasons, this Court should grant the Motion to Dismiss for Insufficient
12 Service.

13 DATED the 14th day of September, 2022.

14
15 LEWIS ROCA ROTHGERBER CHRISTIE LLP

16 By: /s/ Ogonna Brown

17 OGONNA BROWN, ESQ.

18 Nevada Bar No. 7589

19 ADRIENNE BRANTLEY-LOMELI, ESQ.

20 Nevada Bar No. 14486

21 3993 Howard Hughes Parkway, Suite 600

22 Las Vegas, Nevada 89169

23 *Attorneys for Plaintiff AAL-JAY, Inc. and limited*
24 *appearance for Christiano De Carlo and Lail*
25 *Leonard*
26
27
28

CERTIFICATE OF SERVICE

Pursuant to NEFCR 9, NRCP 5(b), and EDCR 7.26, I certify that on September 14, 2022, I served a copy of “**MOTION TO DISMISS FOR INSUFFICIENT SERVICE**”, on all parties as follows:

☒ Electronic Service – By serving a copy thereof through the Court’s electronic service system via the Odyssey Court e-file system

Attorneys for Defendant Philip Fagan JR, Philip J. Fagan Jr. 2001 Trust and The Trustee for Philip J. Fagan Jr. 2001 Trust

Jerri Hunsaker - jhunsaker@blackwadhams.law
Diane Meeter - dmeeter@blackwadhams.law
Chris V. Yergensen - cyergensen@blackwadhams.law
Allison Schmitt - aschmidt@blackwadhams.law

☐ E-mail – By serving a copy thereof at the email addresses listed below; and

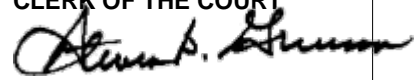
☐ U.S. Mail—By depositing a true copy thereof in the U.S. mail, first class postage prepaid and addressed as listed below.

By: /s/ Gabriela Mercado

An employee of

LEWIS ROCA ROTHGERBER CHRISTIE LLP

EXHIBIT C



NVDM
Allison R. Schmidt, Esq.
BLACK & WADHAMS
Nevada Bar No. 10743
10777 West Twain Avenue, 3rd Floor
Las Vegas, Nevada 89135
Telephone: (702) 869-8801
Facsimile: (702) 869-2669
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Attorney for Defendants/Counterclaimants

DISTRICT COURT
CLARK COUNTY, NEVADA

<p>AAL-JAY, INC., a Nevada corporation,</p> <p>Plaintiff,</p> <p>v.</p> <p>PHILIP J. FAGAN, JR., an individual, and as Trustee of the PHILIP J. FAGAN, JR. 2001 TRUST,</p> <p>Defendants.</p>	<p>Case No. A-21-832379-C Dept. No.: 24</p> <p>NOTICE OF VOLUNTARY DISMISSAL PURSUANT TO NRCP 41(a)(1)(A)</p>
<p>PHILIP J. FAGAN, JR., as Trustee of the PHILIP J. FAGAN, JR. 2001 TRUST,</p> <p>Counterclaimant,</p> <p>v.</p> <p>AAL-JAY, INC., a Nevada corporation; CHRISTIANO DE CARLO, an individual; and LAIL LEONARD, an individual,</p> <p>Counter-Defendants.</p>	

TO: ALL PARTIES AND THEIR COUNSEL OF RECORD

PLEASE TAKE NOTICE THAT Defendants/Counterclaimants PHILIP J. FAGAN, JR.,
as Trustee of the PHILIP J. FAGAN, JR., 2001 TRUST (hereinafter "Fagan" or "Defendants"),

1 by and through its attorneys of record of the law firm of Black & Wadhams, dismiss, without
2 prejudice, the claims asserted against CHRISTIANO DE CARLO, an individual; and LAIL
3 LEONARD, an individual, pursuant to NRCP 41(a)(1)(A), with each party to bear its own fees
4 and costs. Neither DE CARLO nor LEONARD has filed an answer or motion for summary
5 judgment in this matter.
6

7 DATED this 7th day of October, 2022

8 **BLACK & WADHAMS**

9 s/ Allison R. Schmidt
10 Allison R. Schmidt, Esq.
11 Nevada Bar No. 10743
12 10777 West Twain Avenue, Suite 300
13 Las Vegas, Nevada 89135
14 Telephone: (702) 869-8801
15 Facsimile: (702) 869-2669
16 E-mail: aschmidt@blackwadhams.law
17 *Attorney for Defendants/Counterclaimants*
18
19
20
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25
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CERTIFICATE OF SERVICE

I certify that I am an employee of BLACK & WADHAMS and that on the 7th day of October, 2022, I caused the above and foregoing document entitled NOTICE OF VOLUNTARY DISMISSAL PURSUANT TO NECP41(a)(1)(A) to be served as follows:

☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and

☒ by electronic service through Odyssey, Clark County Eighth Judicial District Court's electronic filing/service system;

☐ pursuant to EDCR 7.26, to be sent via facsimile;

☐ hand delivered

to the party or their attorney(s) listed on the Master filing list with the court for this case

Ogonna Brown, Esq.
Nevada Bar No. 7589
3993 Howard Hughes Parkway, Ste. 600
Las Vegas, NV 89169
Attorneys for Plaintiff/Counterdefendant
OBrown@lewisroca.com

/s/ Diane Meeter
An Employee of Black & Wadhams

EXHIBIT D

Allison Schmidt

From: Allison Schmidt
Sent: Monday, October 17, 2022 10:22 AM
To: Brown, Ogonna
Cc: Diane Meeter
Subject: URGENT - Fw: Fagan/AAL-Jay - SAO to obviate 10/18 hearing
Attachments: Fagan - SAO to dismiss decarlo and leonard and to vacate hearing.doc; Fagan - SAO to dismiss decarlo and leonard and to vacate hearing.pdf

Following up - the court asked me to have this submitted by 11:00am

From: Allison Schmidt
Sent: Friday, October 14, 2022 3:15 PM
To: Brown, Ogonna <OBrown@lewisroca.com>
Cc: Diane Meeter <dmeeter@blackwadhams.law>
Subject: Fagan/AAL-Jay - SAO to obviate 10/18 hearing

Hi Ogonna,

The law clerk from the department just called and asked that, rather than us just submitting the notice of voluntary dismissal of decarlo and leonard, that we submit a stipulation and order that also calls for the 10/18/2022 hearing to be vacated.

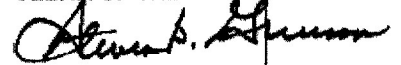
I have attached a proposed SAO, dismissing Decarlo and Leonard, as we do not dispute that they have not been served. If it is approved for submission with your e-signature, kindly let us know and we will get it submitted and save us both a trip to court on Tuesday.

Allison R. Schmidt, Esq.
Attorney



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EXHIBIT E



1 RTRAN

2
3
4
5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

7
8 AAL-JAY, INC.,) CASE NO. A-21-832379-B
9 Plaintiff,) DEPT. NO. XXIV
10 vs.)
11 PHILIP J. FAGAN, JR.,)
12 Defendant.)

13
14 BEFORE THE HONORABLE ERIKA BALLOU,
15 DISTRICT COURT JUDGE

16 TUESDAY, OCTOBER 18, 2022

17 **RECORDER'S TRANSCRIPT OF HEARING:**

18 **COUNTERDEFENDANTS CHRISTIANO DE CARLO AND LAIL**
19 **LEONARD'S MOTION TO DISMISS FOR INSUFFICIENT SERVICE**
20

21 **APPEARANCES:**

22 For the Counter Defendant, Plaintiff: OGONNA M. BROWN, ESQ.,

23
24 For the Counter Claimant Defendant: ALLISON SCHMIDT, ESQ.,

25
RECORDED BY: DELORIS SCOTT, COURT RECORDER

1 Las Vegas, Nevada; Tuesday, October 18, 2022

2 [Hearing commenced at 9:36 a.m.]

3
4 THE COURT: Page number 16, AAL-Jay, Inc. versus Philip
5 Fagan. Case number A-21-832379-C. Ms. Brown is present, she is in
6 court. And who else do I have?

7 MS. SCHMIDT: Good morning, Your Honor. This is Allison
8 Schmidt on behalf of the Defendant's Phil Fagan and the trust.

9 THE COURT: Thank you. And so this was the -- Ms. Brown's
10 request for the counter defendant's Christiano De Carlo and Lail
11 Leonard be dismissed due to improper service. And the Defendant's
12 filed a voluntary dismissal but they didn't --

13 MS. BROWN: On October 7th.

14 THE COURT: -- I'm sorry?

15 MS. BROWN: On October 7th, Your Honor.

16 THE COURT: Right. But it didn't look like they agreed to
17 whether it was with or without prejudice. But it appeared to me that
18 without proper service it'd have to be -- it has to be with prejudice
19 because it's long after the 120 days.

20 MS. BROWN: That's precisely right, Your Honor. As we set
21 forth in our motion to dismiss for insufficient service, the time to serve,
22 120 days, expired on September 15th, 2021.

23 THE COURT: Right.

24 MS. BROWN: So it's been quite a bit of time. That was over
25 a year ago. And the initial claims that were alleged by the Defendant's

1 were on May 18th, 2021. The rule is clear, Your Honor. And there was
2 oddly no opposition filed to our motion. We filed this motion on
3 September 14th. There was no opposition filed. And, in fact, the notice
4 of dismissal was filed after the opposition deadline on October 7.

5 And so we're simply -- we're fine with the dismissal but we just
6 need it with prejudice not without prejudice because I don't think it's
7 appropriate to hijack the process while a motion like this is pending. I
8 think the proper procedure should have been, not giving advice,
9 obviously, but to file an opposition to at least try to salvage this. They
10 did not do that. The time has come and gone. We have no opposition
11 to our motion to dismiss for insufficient service.

12 So we're simply requesting that their claims be dismissed with
13 prejudice.

14 THE COURT: Ms. Schmidt.

15 MS. SCHMIDT: Your Honor, the rule on this is clear. It's
16 NRCP 4(e)(2). The rule says that if service isn't made within the 120
17 days the Court must dismiss without prejudice. So, I'm confused as to
18 where they're even getting with prejudice. And it makes sense because
19 on the one the hand when you say you've not been served, you're
20 specially appearing essentially in saying the Court doesn't have
21 jurisdiction over these claims. But to ask for a what amounts to a
22 judgement on the merits which is with prejudice would be invoking the
23 Court's jurisdiction.

24 So, if you look at NRCP 4(e)(2) which is the exact situation
25 were in here, it -- it says, you know, it's black letter law without -- it must

1 be without prejudice. And that's why we didn't oppose because, you
2 know, I looked back, it hadn't been served. And so we try to obviate
3 those hearings by filing the voluntary dismissal which we filed about 10
4 days ago or 11 days ago. And I also sent stipulations to Ms. Brown at
5 the suggestion of the law clerk and heard nothing back on that. So this
6 is all kind of a surprise to me and, I guess, kind of an affront to the rules
7 of civil procedure to ask for something that's contradicted by the rule
8 itself.

9 THE COURT: I've been looking at NRCP 4(1) but let me look
10 at 4(e)(2).

11 [pause in proceedings]

12 It does say -- Ms. Brown, it does say without prejudice. And I
13 hadn't looked at that one. I'd look some of the others. So.

14 MS. BROWN: Your Honor, I'm seeing that. But there was no
15 opposition filed to this motion and because of the time that has lapsed,
16 it's well beyond the time of 120 days. And you'll note under subsection 4
17 --

18 THE COURT: Right.

19 MS. BROWN: -- failure to make a timely motion to extend
20 time. So they should have done that before September 15th of 2021,
21 they didn't do that. If they filed a motion after September 15th, the
22 standard is very different under subsection 4, failure to make a timely
23 motion. If a Plaintiff files a motion for an extension after the 120 days or
24 an extension thereof expires, the Court must first determine whether
25 good cause exists for the Plaintiff's failure to timely file the motion for an

1 extension before the Court considers whether good cause exists for
2 granting extension of the service period. And if the Plaintiff shows that
3 good cause exists for Plaintiff's failure to timely file the motion and for
4 granting an extension of the service period, the Court must extend the
5 time for service and set a reasonable date by which service should be
6 made.

7 They simply sat on the rights --

8 THE COURT: Right.

9 MS. BROWN: -- it's been quite a bit of time. And so, again, I
10 think the proper procedure should have been just to file an opposition
11 and invoke, I think under subsection 4, the ability to show cause and
12 they just simply sat on their rights.

13 And so, I believe, that the goal here is for them to dismiss it
14 and also stating the fact that it's been over a year and a half.

15 THE COURT: Right.

16 MS. BROWN: And then they'll just refile and say, okay, we'll
17 serve it. I think that's -- that's playing games with the rules, Your Honor.
18 It's improper.

19 MS. SCHMIDT: Your Honor, I disagree that we're playing
20 games with the rules. We saw their motion, we said, okay, this should
21 be dismissed because we haven't served. It should be dismissed
22 pursuant to the rule. And the rule is very clear, it said must, it's
23 mandatory, be without prejudice. It doesn't matter if it's 900 days
24 beyond the 120 deadline. That -- that goes to an issue of whether or not
25 the [indiscernible - audio distortion] expires whether you can refile.

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In this case --

THE COURT: But, Ms. Schmidt, here's where I am. Ms. Schmidt, I'm going to dismiss it with prejudice. Take it up to the Court of Appeals or the Supreme Court.

MS. SCHMIDT: Okay. We will do that. Thanks, Your Honor.

THE COURT: Thank you.

MS. BROWN: Your Honor, I'll submit an order.

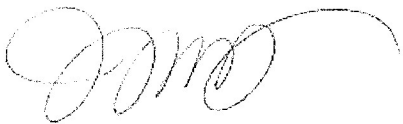
THE COURT: Thank you.

MS. BROWN: And I'll run it by Ms. Schmidt, of course.

THE COURT: Thank you.

[Hearing concluded at 9:43 a.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.



Velvet Wood
Court Recorder/Transcriber