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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0771**

Andre Agee,
Appellant,

vs.

City of Minneapolis, et al.,
Respondents.

**Filed April 20, 2020
Affirmed
Slieter, Judge**

Hennepin County District Court
File No. 27-CV-18-11375

Albert Turner Goins, Sr., Minneapolis, Minnesota (for appellant)

Erik Nilsson, Interim Minneapolis City Attorney, Sarah McLaren, Rebecca Krystosek,
Assistant City Attorneys, Minneapolis, Minnesota (for respondents)

Considered and decided by Johnson, Presiding Judge; Slieter, Judge; and Smith,
John, Judge.*

UNPUBLISHED OPINION

SLIETER, Judge

Appellant Andre Agee appeals from the district court's judgment (1) deeming
Agee's complaint dismissed pursuant to Minn. R. Civ. P. 5.04(a); (2) denying Agee's

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

motion to vacate dismissal pursuant to Minn. R. Civ. P. 60.02(a) and (f); and (3) denying Agee's motion to amend his complaint.¹ Because the law dictates that Agee's complaint is deemed dismissed pursuant to Minn. R. Civ. P. 5.04(a), and that a remedy pursuant to Minn. R. Civ. P. 60.02(a) and (f) is not available, we affirm.

FACTS

Agee alleges that he was assaulted in an alley by two Minneapolis police officers on May 3, 2003, and was again assaulted by one of the same officers in May 2004. Agee served a summons and complaint on the respondent city of Minneapolis on May 2, 2005 claiming: (1) assault, (2) battery, (3) intentional infliction of emotional distress, and (4) negligent infliction of emotional distress.²

Agee did not file his complaint in district court until July 13, 2018. The city moved to dismiss, asserting that Agee's complaint did not comply with the filing requirements of Minn. R. Civ. P. 5.04(a). Agee moved to vacate the dismissal of his complaint and to amend his complaint. He argued that his failure to comply with Minn. R. Civ. P. 5.04(a) was a result of excusable neglect or extraordinary circumstances and that dismissal should be vacated under Minn. R. Civ. P. 60.02(a) or (f). He also argued that dismissal under

¹ The city also filed a motion for summary judgment based on their rule 5.04 and rule 60.02 arguments. For the reasons set forth in this opinion, specifically, that Agee's complaint was deemed dismissed and there exists no basis to vacate that dismissal, we need not analyze the dismissal pursuant to our summary-judgment jurisprudence.

² Agee also named the two officers and the police chief in his complaint. He did not serve the complaint on the two officers until 2018, however, and it does not appear that he ever served the police chief.

rule 5.04(a) violates his right to due process, and he asked the district court to enlarge the filing deadlines.

The district court granted the city's motion to dismiss. It concluded that Agee's complaint was deemed dismissed on July 1, 2014, pursuant to Minn. R. Civ. P. 5.04(a), and that his motion to vacate for excusable neglect pursuant to Minn. R. Civ. P. 60.02(a) was untimely. Further, the district court held that Agee had no basis to vacate the dismissal pursuant to Minn. R. Civ. P. 60.02(f) nor to amend the complaint. The district court also held that it did not have authority to enlarge the filing deadline and rejected Agee's due-process argument.

This appeal follows.

D E C I S I O N

I. Agee's complaint was deemed dismissed pursuant to Minn. R. Civ. P. 5.04(a).

One way civil actions in Minnesota are commenced is by service of the summons. Minn. R. Civ. P. 3.01(a). The filing of a civil action is controlled by Minn. R. Civ. P. 5.04(a). The supreme court amended Minn. R. Civ. P. 5.04(a) in 2013 such that any non-family action not filed with the court within one year of commencement "is deemed dismissed with prejudice against all parties unless the parties within that year sign a stipulation to extend the filing period," or one year from July 1, 2013. *Order Promulgating Corrective Amendments to the Rules of Civil Procedure & General Rules of Practice Relating to Civil Justice Reform Task Force*, Nos. ADM10-8051, ADM09-8009, ADM04-8001 (Minn. Feb. 12, 2013). The amendment took effect July 1, 2013. *Id.*

On May 8, 2013, the supreme court issued an order providing that, notwithstanding the July 1, 2013 effective date, “no action shall be involuntarily dismissed pursuant to Minn. R. Civ. P. 5.04 until one year after the effective date.” *Order Relating to the Civil Justice Reform Task Force, Authorizing Expedited Civil Litigation Track Pilot Project, & Adopting Amendments to Rules of Civil Procedure & General Rules of Practice*, Nos. ADM10–8051, ADM09-8009, ADM04-8001 (Minn. May 8, 2013).

Because Agee served the summons and complaint in May 2005 and did not file his complaint until July 2018, and there was no stipulation for an extension, the district court correctly concluded that Agee’s claims were deemed dismissed with prejudice against all parties in July 2014. A case is deemed dismissed with prejudice if a plaintiff does not file the summons and complaint or obtain a stipulation for a deadline extension within the one-year timeframe provided under the amended rule. *Gams v. Houghton*, 884 N.W.2d 611, 617 (Minn. 2016).

II. The district properly denied Agee’s Minn. R. Civ. P. 60.02 motion.

“The decision whether to grant Rule 60.02 relief is based on all the surrounding facts of each specific case, and is committed to the sound discretion of the district court. As such, a district court will not be reversed on appeal except for a clear abuse of discretion.” *Id.* at 620 (citations and quotations omitted). Agee asserts that the district court abused its discretion by failing to vacate the dismissal pursuant to Minn. R. Civ. P. 60.02(a) or (f). The law compels our disagreement.

Agee filed his motion to vacate the dismissal³ on December 26, 2018. Minn. R.

Civ. P. 60.02 provides:

[T]he court may relieve a party or the party's legal representatives from a final judgment (other than a marriage dissolution decree), order, or proceeding and may order a new trial or grant such other relief as may be just for the following reasons:

(a) Mistake, inadvertence, surprise, or *excusable neglect*;

...

(f) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a *reasonable time, and for reasons (a), (b), and (c) not more than one year after the judgment, order, or proceeding was entered or taken.*

(Emphasis added.)

Agee claims he is entitled to relief based upon excusable neglect because his counsel was hospitalized in November and December of 2016 and received ongoing medical treatment into 2017. Because of his counsel's medical condition, Agee argues he could not comply with the filing requirements of rule 5.04(a). Alternatively, he contends that these same reasons entitle him to relief pursuant to Minn. R. Civ. P. 60.02(f).

The district court concluded that Agee's counsel's hospitalization was an allegation of excusable neglect pursuant Minn. R. Civ. P. 60.02(a), and because claims for excusable neglect shall be made "not more than one year after the judgment, order, or proceeding was entered," the district court denied Agee's motion. The district court reasoned that the

³ Agee stated in his motion that he moved to "vacate any judgment under Rule 5.04" and stated in his supporting memorandum that he "moved to vacate any purported Rule 5.04 judgment," seemingly recognizing his complaint had been deemed dismissed.

deadline for filing pursuant to rule 60.02(a) was one year from the end of the one-year grace period. The district court also rejected Agee's claim that the judgment of dismissal should be vacated under rule 60.02(f), concluding that rule 60.02(f) cannot be used as a basis to avoid the one-year time limit for bringing a rule 60.02(a) motion and that Agee did not demonstrate additional circumstances to justify re-opening the case under rule 60.02(f).

We agree with the district court's analysis that Agee missed the deadline to bring a claim for excusable neglect. *See Johnson v. City of Duluth*, 903 N.W.2d 1, 6 (Minn. App. 2017) (holding that rule 60.02's one-year motion-filing deadline begins on the date the claim was deemed dismissed). Moreover, as the record indicates, Agee's counsel's health issues did not arise until late 2016, over one year after the deadline for bringing such a claim.

The district court also properly denied relief pursuant to rule 60.02(f) which is "designed only to afford relief in those circumstances exclusive of the specific areas addressed by clauses (a) through (e)." *Chapman v. Special Sch. Dist. No. 1*, 454 N.W.2d 921, 924 (Minn. 1990). Relief pursuant to rule 60.02(f) is available only under exceptional circumstances and then, only if the basis for the motion is other than that specified under clauses (a) and (e). *Buck Blacktop, Inc. v. Gary Contracting & Trucking Co.*, 929 N.W.2d 12, 20 (Minn. App. 2019). Agee has not shown that the district court abused its discretion by classifying his claims as excusable neglect, which rule 60.02(a) is intended to address.

Agee therefore does not have a valid claim to vacate the dismissal pursuant to Minn. R. Civ. P. 60.02.⁴

III. The district court properly denied Agee's motions to amend the complaint and Agee's claim that Minn. R. Civ. P. 5.04(a) violated his right to due process.⁵

Agee contends that the district court erred by denying his motions to amend the complaint. However, as already stated, Agee's complaint was properly deemed dismissed pursuant to Minn. R. Civ. P. 5.04(a). Agee cannot amend a complaint that has been dismissed.

Finally, Agee asserts that dismissal pursuant to Minn. R. Civ. P. 5.04(a) violates his right to due process because it limits his ability to bring a claim. The Minnesota Supreme Court addressed this very issue in *Gams*, stating that "because Gams had notice of the consequences of his failure to adhere to rule 5.04(a)'s filing requirement, we hold that Gams's due process argument fails." 884 N.W.2d at 609. As in *Gams*, Agee had sufficient notice of the consequences of failure to file before the end of the one-year grace period and

⁴ The district court also properly denied Agee's additional argument for enlargement of motion timelines. Pursuant to Minn. R. Civ. P. 6.02, a court "may not extend the time for taking any action under Rule[] . . . 60.02 except to the extent and under the conditions stated" in the rule.

⁵ Agee asserts for the first time in his brief that dismissal pursuant to Minn. R. Civ. P. 5.04 violates the Remedies Clause of the Minnesota Constitution, Minn. Const. art. I, § 8. An appellate court generally will not consider matters not argued to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988); *see also In re Welfare of C.L.L.*, 310 N.W.2d 555, 557 (Minn. 1981) (declining to address a constitutional issue raised for the first time on appeal from a termination of parental rights). We therefore decline to consider this claim.

had an opportunity to seek timely relief under rule 60.02. He did not do so. Agee's right to due process was not violated.

Affirmed.