

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

SDC-HOA, INC.,

Plaintiff-Appellant,

v.

**CASA ENCANTADA CONDOMINIUMS,
LLC, a New Mexico Limited Liability
Company; ROBERT M. DRAPER;
MICHAEL MCGOWEN; and
DOES 1-5 Inclusive,**

Defendants-Appellees.

**APPEAL FROM THE DISTRICT COURT OF TAOS COUNTY
Emilio Chavez, District Court Judge**

Modrall, Sperling, Roehl, Harris & Sisk, P.A.
Elizabeth A. Martinez
Celina C. Baca
Albuquerque, NM

for Appellant

O'Brien & Padilla, P.C.
William R. Anderson
Albuquerque, NM

for Appellees Robert M. Draper and Michael McGowen

Natelson Law Firm
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for Appellee Casa Encantada Condominiums, LLC

Court of Appeals of New Mexico
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Mark Reynolds

No. A-1-CA-42691

MEMORANDUM OPINION

IVES, Judge.

{1} Plaintiff attempts to appeal from the district court's grant of Defendant's motion to dismiss under Rule 1-041(E)(1) NMRA for failure to prosecute, its denial of Plaintiff's first motion to reconsider that order, and its denial of Plaintiff's second motion to reconsider that order or to set aside the judgment under Rule 1-060(B)(4) NMRA. This Court issued a calendar notice proposing to summarily affirm. Plaintiff filed a memorandum in opposition and motion to amend, and Defendant filed a memorandum in support, both of which we have duly considered. Unpersuaded by Plaintiff's appeal, we affirm. We deny Plaintiff's motion to amend because we agree with Plaintiff that its docketing statement adequately raised the issue identified by the motion.

{2} Plaintiff's memorandum in opposition does not challenge this Court's proposed determination that Plaintiff's appeal is untimely insofar as it relates to the district court's September 6, 2024 order, granting Defendant's motion to dismiss, and its January 24, 2025 order, denying Plaintiff's motion to reconsider the dismissal. [MIO 1-2 n.1] Thus, Plaintiff's appeal as to those issues are abandoned. *See Taylor v. Van Winkle's IGA Farmer's Mkt.*, 1996-NMCA-111, ¶ 5, 122 N.M. 486, 927 P.2d 41; *see also Hennessy v. Duryea*, 1998-NMCA-036, ¶ 24, 124 N.M. 754, 955 P.2d 683 ("Our courts have repeatedly held that, in summary calendar

1 cases, the burden is on the party opposing the proposed disposition to clearly point
2 out errors in fact or law.”).

3 {3} Plaintiff’s memorandum in opposition continues to contend that the district
4 court erred in denying Plaintiff’s February 28, 2025, Rule 1-060(B) motion for relief
5 from judgment. The memorandum in opposition does not appear to challenge this
6 Court’s determination that Plaintiff’s docketing statement failed to demonstrate that
7 the related district court’s order erroneously denied Plaintiff relief for excusable
8 neglect. [CN 5-7] *See Taylor*, 1996-NMCA-111, ¶ 5; *Hennessey*, 1998-NMCA-036,
9 ¶ 24. Instead, Plaintiff argues that this Court’s proposed analysis “overlooks a
10 critical error” in the district court’s order. [MIO 8] According to Plaintiff, the
11 primary basis for the district court’s denial was based on an outdated application of
12 law as set forth in *Schall v. Burks*, 1964-NMSC-232, 74 N.M. 583, 396 P.2d 192,
13 which Plaintiff argues has been subsequently overruled. [MIO 8-13] In particular,
14 Plaintiff argues that the district court erroneously deprived Plaintiff of the
15 opportunity to be heard before it granted Defendant’s motion to dismiss. [Id.]

16 {4} Plaintiff’s memorandum in opposition acknowledges that Plaintiff did not
17 preserve this argument in the district court, but asserts that any such argument “did
18 not need to be preserved” because the district court first referenced *Schall* in its April
19 7, 2025 order. [MIO 13] Thus, Plaintiff claims that it may raise the issue for the first
20 time in this Rule 1-060(B) appeal because it did not have the opportunity to address

1 the district court’s error—dismissing Plaintiff’s claims pursuant to Rule 1-041(E)(1)
2 without a hearing—prior to filing this appeal. [MIO 13] We disagree.

3 {5} Defendant filed its Rule 1-041(E) motion to dismiss for failure to prosecute
4 on July 11, 2024. [MIO 4] Absent a response from Plaintiff’s counsel, the district
5 court granted that motion without a hearing on September 6, 2024. As we explained
6 in our calendar notice, Plaintiff failed to timely appeal from this order, as well as the
7 district court’s January 24, 2025 order denying Plaintiff’s timely motion to
8 reconsider the September 6, 2024 order. [CN 2-3] As a result, any challenges to the
9 underlying merits of the district court’s dismissal for failure to prosecute and its
10 denial of Plaintiff’s motion to reconsider the dismissal are not properly before this
11 Court. [CN 2-3] *See Trujillo v. Serrano*, 1994-NMSC-024, ¶¶ 15-19, 117 N.M. 273,
12 871 P.2d 369 (reaffirming that the timely filing of a notice of appeal is a mandatory
13 precondition to our exercise of jurisdiction to hear an appeal). This includes
14 Plaintiff’s current argument that the district court erroneously deprived Plaintiff of
15 an opportunity to be heard prior to dismissing the case pursuant to Rule 1-041(E).
16 [MIO 8-13] *See id.*; *Deerman v. Bd. of Cnty. Comm’rs*, 1993-NMCA-123, ¶ 16, 116
17 N.M. 501, 864 P.2d 317 (“Rule [1-0]60(B) is not to be used as a substitute for
18 appeal.”).

19 {6} The instant appeal is instead limited to the propriety of the district court’s
20 order denying Plaintiff’s request for relief pursuant to Rule 1-060(B). However,

1 Plaintiff's Rule 1-060(B) motion argued only excusable neglect, and, as we
2 discussed in the calendar notice [CN 3], it was filed after the expiration of time for
3 appeal. Thus, if Plaintiff contends that the district court erroneously denied it relief
4 under Rule 1-060(B) due to legal error, the contention lacks merit. *See Deerman*,
5 1993-NMCA-123, ¶ 16 ("A motion pursuant to Rule [1-0]60(B)(1) to correct an
6 error of law by the district court must be filed before the expiration of the time for
7 appeal."); Rule 12-321(A) NMRA ("To preserve an issue for review, it must appear
8 that a ruling or decision by the trial court was fairly invoked."); *see also Deerman*,
9 1993-NMCA-123, ¶ 23 ("Relief should not be granted to a party who has failed to
10 do everything reasonably within [their] power to achieve a favorable result before
11 the judgment becomes final." (internal quotation marks and citation omitted)).

12 {7} Plaintiff's memorandum in opposition has not otherwise asserted any fact,
13 law, or argument that persuades us that our notice of proposed disposition was
14 erroneous. *See Hennessey*, 1998-NMCA-036, ¶ 24; *State v. Mondragon*, 1988-
15 NMCA-027, ¶ 10, 107 N.M. 421, 759 P.2d 1003 (stating that a party responding to
16 a summary calendar notice must come forward and specifically point out errors of
17 law and fact, and the repetition of earlier arguments does not fulfill this requirement),
18 *superseded by statute on other grounds as stated in State v. Harris*, 2013-NMCA-
19 031, ¶ 3, 297 P.3d 374. Accordingly, for the reasons stated in our notice of proposed
20 disposition and herein, we affirm.

1 {8} IT IS SO ORDERED.

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3 
ZACHARY A. IVES, Judge

4 WE CONCUR:

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6 JACQUELINE R. MEDINA, Chief Judge

7 
8 JENNIFER L. ATTLER, Judge