This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2006).

STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1797

Megan Gordon,
Appellant,

Gregory Sutton,
Appellant,

vs.

First Franklin Financial,
Respondent.

Filed August 26, 2008
Affirmed
Kalitowski, Judge

Ramsey County District Court
File No. 62-C3-04-1782

Megan Gordon, Gregory L. Sutton, 785 Cook Avenue East, St. Paul, MN 55106 (pro se appellants)

Mark G. Schroeder, Daniel N. Moak, Briggs and Morgan, P.A., 2200 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402 (for respondent)

Considered and decided by Johnson, Presiding Judge; Kalitowski, Judge; and Shumaker, Judge.

U N P U B L I S H E D O P I N I O N

KALITOWSKI, Judge

Pro se appellants Megan Gordon and Gregory Sutton challenge the district court's judgment dismissing their complaint against respondent First Franklin Financial with prejudice for failure to prosecute pursuant to Minn. R. Civ. P. 41.02(a). We affirm.

D E C I S I O N

Appellants argue that the district court abused its discretion by dismissing their complaint against respondent with prejudice for failure to prosecute. We disagree.

"The [district] court may . . . upon motion of a party, and upon such notice as it may prescribe, dismiss an action or claim for failure to prosecute . . . ." Minn. R. Civ. P. 41.02(a). An involuntary dismissal pursuant to this rule is reviewed for abuse of the district court's discretion. *Modrow v. JP Foodservice, Inc.*, 656 N.W.2d 389, 395 (Minn. 2003). Although this discretion is broad, it "should be tempered by the well-settled tenet that a Rule 41.02 dismissal is a severe remedy because it operates as an adjudication on the merits." *Id.* at 397 (quotation omitted); *see also Minn. Humane Soc'y v. Minn. Federated Humane Soc'ys*, 611 N.W.2d 587, 590 (Minn. App. 2000) (noting "[b]ecause a dismissal with prejudice is the most punitive sanction that can be imposed for failure to prosecute, it should be granted only under exceptional circumstances").

Rule 41.02 is applicable when "a party does not cooperate with the litigation process by failing to comply with the rules of procedure." *Lampert Lumber Co. v. Joyce*, 405 N.W.2d 423, 425 (Minn. 1987). Generally, a party must respond to discovery requests within 30 days. *See* Minn. R. Civ. P. 33.01(b) (interrogatories), 34.02

(document requests), 36.01 (requests for admission). A rule 41.02 dismissal is appropriate only when (1) the delay prejudices the defendant and (2) the plaintiff's delay was unreasonable and inexcusable. *Modrow*, 656 N.W.2d at 394-95; *see also Ed H. Anderson Co. v. A.P.I., Inc.*, 411 N.W.2d 254, 256 (Minn. App. 1987) (explaining prejudice is the primary factor to be considered and must be more than the ordinary expense and inconvenience of trial preparation; it should not be presumed because of delay), *review denied* (Minn. Oct. 30, 1987). And, because a defendant may "have made a tactical decision to wait" under the theory that a plaintiff may abandon his or her claim, "the [district] court should not ignore what role, if any, the defendant played in causing the delay." *Modrow*, 656 N.W.2d at 396.

On this record, we cannot conclude that the involuntary dismissal was an abuse of the district court's discretion. Although appellants argue that any delay on their part is tempered by respondent's delay in answering the complaint, the record indicates that the summons and complaint were served upon a third party, and not respondent. *See* Minn. R. Civ. P. 3.01 (stating that a civil action is commenced against a defendant "when the summons is served upon that defendant"); *see also* Minn. R. Civ. P. 3.02 (stating that the complaint shall be served on the defendant with the summons), 12.01 (stating a defendant "shall serve an answer within 20 days after service of the summons upon that defendant").

The record indicates that respondent served the following discovery requests on appellants: (1) three interrogatories; (2) four requests for admission; and (3) sixteen specific document requests and one general request for "[a]ll other documents concerning

your contentions in this action." Eighteen months later, because appellants had not answered these requests, respondent filed a motion requesting appellants' complaint be dismissed for failure to prosecute and comply with procedural rules and, in the alternative, for summary judgment.

Appellants did not file any evidence with the district court in opposition to respondent's motion to dismiss. And appellants did not request that a copy of the motion-hearing transcript be prepared for their appeal. *See Truesdale v. Friedman*, 267 Minn. 402, 404, 127 N.W.2d 277, 279 (1964) (stating the record must be "sufficient to show the alleged errors and all matters necessary for consideration of the questions presented"); *see also Heinsch v. Lot 27, Block 1 For's Beach*, 399 N.W.2d 107, 109 (Minn. App. 1987) ("Pro se litigants are generally held to the same standards as attorneys."). Thus, without any evidence in the record, we cannot credit appellants' argument that they did in fact cooperate with respondent's discovery requests and, therefore, that affidavits filed by respondent in support of its motion were made in bad faith in violation of Minn. R. Civ. P. 56.07. Moreover, the district court specifically found that appellants did not answer respondent's discovery requests and that their 18-month delay (1) prejudiced respondent because, although appellants had not made mortgage payments since October 2003, respondent could not foreclose on their mortgage while this action was pending and (2) was unreasonable and unexcused.

Appellants argue that this dismissal violates their due-process rights. "Generally, due process requires adequate notice and a meaningful opportunity to be heard." *Staeheli v. City of St. Paul*, 732 N.W.2d 298, 304 (Minn. App. 2007) (citing *Mathews v. Eldridge*,

424 U.S. 319, 333, 96 S. Ct. 893, 902 (1976)). The record indicates that appellants had both. And appellants' arguments relating to the merits of their claims against respondent are not properly before this court because the district court did not consider these arguments when determining whether a dismissal for failure to prosecute was appropriate. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating an appellate court's review is limited to issues raised and considered below).

Finally, appellants allege they have newly discovered evidence and argue that they are entitled to relief under Minn. R. Civ. P. 60.02. But appellants failed to follow the proper procedure under this rule because they did not file a motion with the district court. Moreover, appellants failed to provide evidence supporting this claim.

We conclude that, on this record, dismissal with prejudice was within the district court's discretion. And because the dismissal was proper, there is no basis for this court to award appellants the punitive damages they request. *See* Minn. Stat. § 549.20, subd. 1(a) (2006) ("Punitive damages shall be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others."). Finally, because we affirm the district court, we need not address respondent's alternative argument that because appellants presented no evidence to challenge respondent's motion for summary judgment, the district court should have granted this motion.

Affirmed.