STATE OF MINNESOTA
IN COURT OF APPEALS
A10-189

Webster Grading, Inc. d/b/a Rud Excavating of Webster,
Plaintiff,

vs.

Niles-Wiese Construction Co., Inc.,
Respondent,

Eagles Rest Development, LLC, et al.,
Appellants,

American Bank of St. Paul, et al.,
Defendants.

Filed August 3, 2010
Reversed and remanded
Halbrooks, Judge

Freeborn County District Court
File No. 24-CV-07-3315

Aaron J. Glade, Farrish Johnson Law Office, Chtd., Mankato, Minnesota (for respondent)

Richard I. Diamond, Richard I. Diamond, P.A., Minnetonka, Minnesota (for appellants)

Considered and decided by Worke, Presiding Judge; Halbrooks, Judge; and Johnson, Judge.

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

HALBROOKS, Judge

Appellants Eagles Rest Development, LLC and Scott LaFavre challenge a district court order dismissing their cross-claim against respondent Niles-Wiese Construction Co., Inc., as a discovery sanction. Because respondent did not provide proper notice of the motion hearing to appellants and because there was no prejudice on the part of respondent to justify dismissal with prejudice, we reverse and remand for proceedings on appellants' cross-claim.

FACTS

This case arises out of a mechanic's lien foreclosure action brought in 2007 by plaintiff Webster Grading, Inc. against appellants, the developer and owner of a golf course it was in the process of developing as residential property, and respondent, the general contractor. During the course of the litigation, appellants brought a cross-claim against respondent, alleging eight causes of action. On May 29, 2008, respondent served appellants with interrogatories and a request for production of documents. Over the next two months, counsel for respondent sent three letters to appellants' counsel seeking discovery responses. When appellants failed to comply, respondent moved to compel discovery. In an order dated September 2, 2008, the district court granted respondent's motion. The district court gave appellants ten days to respond to respondent's discovery requests and ordered appellants to pay $800 to respondent's counsel within 14 days. The district court also stated that "[f]ailure to comply with this Order will result in sanctions pursuant to Minn. R. Civ. P. 37.02."

Although appellants did provide answers to interrogatories at an August 17, 2009 pretrial conference, they were incomplete. And appellants' response to the request for documents included notations indicating "see attached documents," and no documents were attached. In addition, many of appellants' interrogatory responses referred to the non-existent documents.

Because of appellants' continued noncompliance, respondent moved for a continuation of trial, which was scheduled to begin on December 15, 2009. Respondent served its motion by U.S. Mail on Tuesday, November 24, 2009. Thanksgiving occurred two days later on Thursday, November 26, and the hearing was scheduled for the following Monday, November 30, 2009. Appellants did not appear at the hearing. In an order dated December 1, 2009, the district court denied respondent's motion for a continuance and sua sponte dismissed appellants' cross-claim with prejudice.

Appellants requested reconsideration, arguing that they did not receive timely notice of the motion and that the district court did not have the jurisdiction to order sanctions. The district court denied appellants' request for reconsideration. The district court entered partial judgment on its December 1, 2009 order, and appellants petitioned this court for a writ of prohibition. We denied appellants' petition. *In re Eagles Rest Dev.*, No. A09-2220 (Minn. App. Dec. 29, 2009). In lieu of a jury trial, the parties agreed to stipulated facts, and the district court entered judgment in favor of respondent. This appeal follows.

D E C I S I O N

Minn. R. Civ. P. 37.02(b) authorizes a district court to dismiss a party's claims with prejudice for failing to comply with a discovery order. A district court has broad discretion to issue discovery orders that will not be disturbed on appeal absent a clear abuse of that discretion. *Shetka v. Kueppers, Kueppers, Von Feldt & Salmen*, 454 N.W.2d 916, 921 (Minn. 1990). Dismissal with prejudice is the most severe sanction available and runs contrary to the objective of the law to decide cases on their merits. *Firoved v. Gen. Motors Corp.*, 277 Minn. 278, 283, 152 N.W.2d 364, 368 (1967). Therefore, it should be granted in only exceptional circumstances. *Id.* As a result, this court has applied a heightened standard of scrutiny when reviewing dismissals with prejudice. *See Chicago Greatwestern Office Condo. Ass'n v. Brooks*, 427 N.W.2d 728, 731 (Minn. App. 1988) (stating that a district court's discretion is to be viewed more narrowly when the sanction imposed is dismissal).

Appellants contend that the district court did not properly specify a deadline for compliance or provide an adequate warning that dismissal would result for noncompliance. *See Jadwin v. City of Dayton*, 379 N.W.2d 194, 196 (Minn. App. 1985) (emphasizing that an order compelling discovery should contain: "(1) a date certain by which compliance is required, and (2) a warning of potential sanctions for non-compliance"). We disagree. The district court's September order granting respondent's motion to compel discovery clearly required appellants to comply with respondent's discovery requests within ten days of the order. Further, the district court adequately warned appellants that their continued noncompliance would result in sanctions pursuant

to rule 37.02(b). The district court was not obligated to list the specific sanctions in the order—citation to the rule containing the sanctions was sufficient. Therefore, we are not persuaded that the district court's order compelling discovery was improper in any respect.

The district court relied on rule 37.02(b) in its order dismissing appellants' cross-claim as a discovery sanction. Dismissal under this rule is appropriate when a party willfully fails to comply with a discovery order without justification or excuse. *Breza v. Schmitz*, 311 Minn. 236, 237, 248 N.W.2d 921, 922 (1976). But a district court must weigh the prejudice the parties will incur by a dismissal before dismissing claims with prejudice. *Housing & Redevelopment Auth. v. Kotlar*, 352 N.W.2d 497, 499 (Minn. App. 1984). The supreme court has stated that the

> ordinary expense and inconvenience of preparation and readiness for trial, which can be adequately compensated by the allowance of costs, attorney's fees, or the imposition of other reasonable conditions, are not prejudice of the character which would justify either a refusal to permit plaintiff to dismiss without prejudice or a dismissal with prejudice.

Beal v. Reinertson, 298 Minn. 542, 544, 215 N.W.2d 57, 58 (1974) (quotation omitted).

We have held that a district court abuses its discretion by dismissing a party's claims with prejudice under Minn. R. Civ. P. 37.02(b) when the moving party fails to demonstrate any prejudice beyond that which could be remedied by additional time or monetary sanctions. *See Brooks*, 427 N.W.2d at 732 (reversing a dismissal when the district court did not address the prejudice due to the failure to comply with discovery and counsel for the moving party could not identify any prejudice "other than the type of

prejudice which would be cured by ordering additional attorney fees"); *Hoyland v. Kelly*, 379 N.W.2d 150, 152-53 (Minn. App. 1985) (reversing a dismissal when the record failed to demonstrate that the moving party would have suffered "imminent or permanent harm by another short delay" and the only alleged prejudice to the moving party was delay and inconvenience), *review denied* (Minn. Feb. 19, 1986); *cf. Kotlar*, 352 N.W.2d at 500 (affirming a dismissal when the failure to produce discovery was significantly prejudicial to the moving party).

Here, respondent did not allege and the district court did not find that respondent would suffer the type of prejudice that could not be compensated by a lesser sanction. Respondent's memorandum in support of its motion for a continuance describes its prejudice as follows: "[Appellants] are asserting a multi-million dollar claim against [respondent], but have not provided [respondent] with a single document to support their claims. It would be unfairly prejudicial to [respondent] for this matter to proceed as scheduled." We do not have a transcript of the hearing on respondent's motion for a continuance, so it is unknown whether respondent alleged additional prejudice at that time. But the available record demonstrates that respondent's assertion of prejudice is limited to added expense and inconvenience. This is not the type of prejudice required by caselaw to justify imposing dismissal with prejudice as a discovery sanction.

Appellants also argue that the district court abused its discretion because they did not have adequate notice of the November 30, 2009 hearing or the possibility that the district court would dismiss their cross-claim as a discovery sanction at that time. We agree. Minn. R. Civ. P. 6.04 requires a party to serve a notice of motion and motion no

later than five days before the date of the hearing. When computing time periods of fewer than seven days prescribed by the rules, "intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation." Minn. R. Civ. P. 6.01. Legal holidays for purposes of the rules are those designated by Minn. Stat. § 645.44, subd. 5 (2008), which include Thanksgiving and the Friday following Thanksgiving. Therefore, respondent's service by mail on Tuesday, November 24, 2009, occurred only two days before the hearing and did not comply with rule 6.04. Because of the late service and the intervening holiday, appellants' counsel, whose office is in Minnetonka, did not appear at the hearing in district court in Albert Lea on Monday, November 30, 2009.

Because the record contains no indication that respondent will suffer the type of prejudice justifying dismissal with prejudice as a discovery sanction and because appellants did not receive proper notice of the hearing at which their cross-claim was dismissed, we conclude that the district court abused its discretion by dismissing appellants' claim with prejudice.

Reversed and remanded.