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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2323**

Walker Properties of Woodbury II, LLC,
Appellant,

vs.

City of Woodbury,
Respondent.

**Filed August 26, 2013
Affirmed
Willis, Judge***

Washington County District Court
File No. 82-C2-07-000377

Jon Erik Kingstad, Oakdale, Minnesota (for appellant)

Pierre N. Regnier, Leonard J. Schweich, Mark K. Hellie, Jardine, Logan & O'Brien,
P.L.L.P., Lake Elmo, Minnesota (for respondent)

Considered and decided by Larkin, Presiding Judge; Halbrooks, Judge; and Willis,
Judge.

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

UNPUBLISHED OPINION

WILLIS, Judge

Appellant challenges the district court's dismissal of its claim with prejudice under Minn. R. Civ. P. 41.02(a). Because the district court's findings and the record support dismissal, we affirm.

FACTS

In October 2005, appellant Walker Properties of Woodbury II, LLC, entered into a developer's agreement with respondent City of Woodbury for the development of a subdivision of single-family homes.¹ The agreement distinguished between "Plan A Activities," which would be undertaken by Walker, and "Plan B Improvements," to be constructed by the city and financed through assessments on the property. The agreement required Walker to waive any challenge to the validity of the assessments. Under the agreement, Walker had to provide the city with two irrevocable letters of credit, one for the estimated cost of Plan A Activities and one for Plan B Improvements. The letters of credit were for the benefit of the city, and the city could draw on the letters of credit if Walker defaulted on the agreement. Construction Mortgage Investors Company (CMIC) issued the letters of credit.

The city completed the Plan B Improvements in July 2006. In September 2006, the city served Walker with a notice of assessment for the final cost of Plan B

¹ See *Walker Props. Of Woodbury II, LLC v. City of Woodbury*, No. A10-0940, 2010 WL 5156116 (Minn. App. Dec. 21, 2010), for the history of this matter.

Improvements. Walker objected to the assessments and challenged them in a lawsuit, which was dismissed, based on Walker's waiver in the developer's agreement.

In August 2007, Walker filed this lawsuit against the city when the city refused to release the letters of credit. Walker alleged that the developer's agreement is an illegal contract, or alternatively, that the city had breached the agreement.

In September 2008, after Walker had failed to pay the assessments on its property for two years, the city sent Walker a notice of default. Walker failed to cure the default, and the city notified CMIC that it intended to draw on the letters of credit. Walker sought a temporary injunction to prevent the city from drawing on the letters of credit. In January 2009, the district court granted Walker a temporary injunction and required Walker to post a \$500 cost bond.

In March 2010, the city moved to dissolve the temporary injunction; alternatively, the city argued that the \$500 bond was inadequate. The district court denied the city's motion to dissolve the injunction and failed to address the city's argument regarding the adequacy of the bond. The city appealed, and this court reversed and remanded to the district court with instructions to consider the adequacy of the bond. On remand, the district court determined that "[i]n order to protect the [c]ity a bond is to be posted in the amount of \$684,079.08 . . . within 60 days of the entry of judgment." Judgment was entered on October 25, 2011. Walker failed to post the bond.

In February 2012, the city moved to dismiss Walker's complaint for failure to comply with the district court's order. The district court found that Walker violated the court order by failing to post the bond ordered and that the city has been prejudiced by

Walker's failure because the city paid for the Plan B Improvements with city funds. The district court also found that the letters of credit do not adequately protect the city because the city's exposure is greater than the security provided by the letters of credit and because CMIC had filed for bankruptcy. The district court dismissed Walker's complaint against the city with prejudice. This appeal follows.

D E C I S I O N

Walker argues that the district court abused its discretion by dismissing Walker's complaint under Minn. R. Civ. P. 41.02(a), for failure to comply with the court order requiring Walker to post a bond. Under rule 41.02(a) the district court may "dismiss an action or claim for failure to prosecute or to comply with these rules or any order of the court." The purpose of the rule is to "let the [district] court manage its docket and eliminate delays and obstructionist tactics by use of the sanction of dismissal. If a party . . . fail[s] to comply with . . . an order of the court, the judge may dismiss the case with or without prejudice." *Lampert Lumber Co. v. Joyce*, 405 N.W.2d 423, 425 (Minn. 1987). This court reviews the district court's dismissal of a complaint under Minn. R. Civ. P. 41.02(a) for an abuse of discretion. *Bonhiver v. Fugelso, Porter, Simich & Whiteman, Inc.*, 355 N.W.2d 138, 144 (Minn. 1984).

Walker argues that the district court failed to make necessary findings of prejudice to the city arising from the delay and that Walker's delay was unreasonable and inexcusable. The supreme court has held that in order for a district court to dismiss an action for failure to prosecute, "it must be shown: (1) that the delay prejudiced the [other party], and (2) that the delay was unreasonable and inexcusable." *Modrow v. JP*

Foodservice, Inc., 656 N.W.2d 389, 394 (Minn. 2003) (quotation omitted). The city asserts that these two prongs need be established only in a failure-to-prosecute case and that here, in a case of failure to comply with a court order, dismissal is supported by showing that Walker intentionally failed to comply with the court order and that the city was prejudiced. But the supreme court has held that while prejudice to the moving party is the primary factor to be considered, the district court must also consider the length of the delay and the reasons for the delay in deciding whether to dismiss a lawsuit for failure to comply with a court order. *See Firoved v. General Motors Corp.*, 277 Minn. 278, 283-84, 285, 152 N.W.2d 364, 368-69, 369-70 (1967) (concluding that district court's dismissal based on attorney's refusal to proceed with trial was a "refusal to proceed as directed rather than a failure to prosecute" and analyzing prejudicial effect of delay on the moving party and the length of and reasons for delay).

Prejudice

The district court found that Walker had until December 27, 2011, to post the court-ordered bond, but failed to do so and that Walker also failed to seek modification or vacation of the order requiring the posting of the bond. The district court concluded that "[t]he [c]ity has been prejudiced by [Walker's] failure to post a security bond" because the city paid contractors and bond holders with city funds. The district court also found that the letters of credit do not adequately protect the city because the city's exposure is well in excess of the amount of the letters of credit based on Walker's failure over several years to pay assessments, resulting in the accrual of penalties, taxes, and fees.

The record supports the district court's finding of prejudice to the city. In its agreement with the city, Walker agreed that Plan B Improvements would be constructed by the city and financed through assessments on the property. But while the city completed the improvements and financed them with city funds, Walker admits that it has not paid the assessments. Additionally, CMIC, the issuer of the letters of credit, filed for bankruptcy, and Walker concedes that it is unsure whether the letters of credit are valid.

Unreasonable and Inexcusable Delay

In considering the length of delay and the reasons for delay, "a broad measure of discretion must be left to [district court] judges to enforce calendar rules, to prevent unnecessary and inexcusable delays, and to promote the public interest in keeping court dockets free of stale claims." *Firoved*, 277 Minn. at 284, 152 N.W.2d at 369.

The district court's findings regarding Walker's actions and inactions since entering into the agreement with the city show that Walker's delay was unreasonable and inexcusable. The parties entered into the agreement in October 2005. The city completed the Plan B Improvements in July 2006 and served Walker with a notice of assessment. Walker failed to pay the assessments and then, despite having waived any challenge to the assessments, filed a lawsuit challenging their validity. The lawsuit was dismissed based on the waiver, but bringing the lawsuit caused delay. Walker then sought release of the letters of credit. When the city refused because Walker was not entitled to a release under the agreement, Walker filed this action challenging the legality of the agreement. Walker's second suit caused further delay.

In 2008, the city determined that Walker had defaulted on the agreement because it had failed to pay the assessments against its property for two years. The city intended to draw on the letters of credit, but Walker was granted a temporary injunction preventing that action. During this time, Walker made no effort to complete the development. Walker also paid none of the assessments. In late 2011, the court ordered Walker to post a bond. Walker failed to do so. A year later, the district court dismissed Walker's complaint. Walker's delay since 2005 is manifestly unreasonable. Walker's delay is also inexcusable; Walker asserts only that it cannot post the court-ordered bond because it "has no way to provide adequate security for a bond."

Walker's Additional Arguments

Finally, Walker argues that the district court abused its discretion by dismissing its claim without considering "whether the action presents substantial constitutional issues or substantial issues of statutory construction, and the likelihood of a party prevailing on these issues." This court considers "only those issues that the record shows were presented and considered by the [district] court in deciding the matter before it." *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (quotation omitted). Because Walker presents these arguments for the first time on appeal, we decline to address them.

Affirmed.