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**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1062**

Leora M. Johns,
Appellant,

Connie L. Neal,
Appellant,

vs.

Maria Jacobson, et al.,
Respondents.

**Filed January 13, 2014
Affirmed; motion denied
Worke, Judge**

Brown County District Court
File No. 08-CV-11-19

Leora M. Johns, New Ulm, Minnesota (pro se appellant)

Connie L. Neal, New Ulm, Minnesota (pro se appellant)

Joel J. Dahlgren, Black Dog Co-op Law, New Ulm, Minnesota (for respondents)

Considered and decided by Stauber, Presiding Judge; Worke, Judge; and
Bjorkman, Judge.

UNPUBLISHED OPINION

WORKE, Judge

Appellants challenge the district court's dismissal of their lawsuit under Minn. R. Civ. P. 41.02(a). Appellants also move to strike respondents' brief. We affirm the dismissal and deny appellants' motion.

FACTS

Appellant Leora M. Johns owns a farm and lives there with her daughter, appellant Connie L. Neal. Respondents Maria and Michael Jacobson own property west of Johns's farm. In January 2011, pro se Johns and Neal filed a complaint against the Jacobsons, seeking a declaration that the common property line is marked by a barbed-wire fence establishing the boundary through acquiescence. Johns and Neal also filed a notice of lis pendens. A scheduling order set a pretrial conference for November 17, 2011, and scheduled trial for December 7, 2011.

Johns and Neal then began filing objections and motions. They first objected to the Jacobsons' answer and moved to disqualify the Jacobsons' attorney, claiming that he violated the rules of professional conduct and was a necessary witness. Although the district court afforded Johns and Neal 30 days in which to depose the Jacobsons' attorney, on the 30th day, they requested an extension. The issue was not revisited.

Johns and Neal next objected to the Jacobsons' requests to partially discharge the notice of lis pendens, because the sale of a portion of their property was contingent on the discharge, and to inspect the property line with surveyors. The district court granted the Jacobsons' request to partially discharge the notice of lis pendens after concluding that it

unjustifiably affected title to all of the Jacobsons' realty.¹ The district court also granted their request to inspect the fence with surveyors.

Johns and Neal also attempted to remove the district court judge, arguing that the district court was impatient, discourteous, and failed to accommodate Johns's hearing loss.² Neal claimed that the district court, among other things, was "haughty and dismissive," which intimidated her to silence, "fearful of becoming the victim of even more offensive courtroom conduct or retribution."³

Following a pretrial conference, trial was rescheduled to December 21, 2011. Then, less than two weeks before trial, it was revealed that the parties were not prepared for trial, and it was rescheduled to May 31 or June 1, 2012. On April 30, 2012, Johns and Neal moved for a continuance, claiming that they needed to conduct further discovery. On May 22, the district court denied the motion. But the next day, the district court received a letter from Johns's physician stating that the stress of the lawsuit caused 87-year-old Johns's health to suffer and urging the district court to delay the trial two months. Trial was continued to October 18, 2012.

On October 18, 2012, Johns and Neal did not appear for trial. Neal informed court administration that she had a medical emergency and submitted a letter from her physician. The district court, noting that Neal's physician suggested that Neal would not

¹ On October 16, 2012, Johns and Neal filed a notice of appeal challenging the order granting the partial discharge of the lis pendens. On November 30, this court dismissed the appeal, stating: "It appears that appellants have abandoned the appeal" because they failed to correct filing deficiencies or respond to a directive to file certain papers.

² Around October 31, 2012, Johns and Neal filed a complaint in federal court against the district court and others seeking relief under the Americans with Disabilities Act.

³ The district court ruled that Johns and Neal failed to show any basis for removal.

be available for trial until after October 25, rescheduled the trial to November 2. On October 30, Neal's physician submitted a letter stating that Neal was not able to withstand prolonged speaking and would require nebulizer treatments every 2-4 hours. The district court determined that Neal would not be required to engage in prolonged speaking and agreed to accommodate the nebulizer treatments.

On November 2, 2012, Johns and Neal did not appear for trial. Neal sent an e-mail to court administration, stating:

My breathing worsened again last night as a result of all the stress [the district court] caused me by intentionally refusing to reasonably accommodate my pulmonary/respiratory disability. . . . As a result of a significant increase in my breathing problems because of the deliberate stress caused by [the district court and the Jacobsons' attorney], I am forced to go to the emergency room this morning. My physician . . . made it very clear to me that I was to go to the emergency room immediately if at any time my breathing got worse, which it has.

The district court allowed the Jacobsons to make a record regarding a continuance. Avery Grochow, a licensed surveyor, testified that he was subpoenaed to appear on October 18. When Grochow discussed the subpoena with Neal, she told him that she did not intend to appear for trial because she sued the district court and believed that the district court judge would be removed. Grochow requested a subpoena to appear on November 2, because Neal told him that she would not attend trial that day and he wanted to confirm that he was expected to appear.

The district court denied a continuance, stating that Johns inexcusably failed to appear for trial. Additionally, the district court found Neal not to be credible, explaining

that Neal's physician instructed her to go to the emergency room when her breathing worsened; however, her breathing allegedly worsened the night before trial, but she waited and went the morning of trial.

On November 19, 2012, the district court dismissed the matter after determining that the delay caused by Johns and Neal was unreasonable and inexcusable because Johns simply failed to appear for trial and Neal did not have a legitimate medical justification for her absence. The district court found Grochow to be "credible in all respects." The court also found that the Jacobsons were prejudiced by the delay because they had to prepare for trial three times and the *lis pendens* eliminated the ability to sell their property. Johns and Neal moved to vacate the dismissal. At a hearing, Johns stated that she missed trial because she drove Neal to the emergency room. Neal argued several reasons for vacating the dismissal: she had breathing problems, was stressed, did not receive notice, and should have been able to cross-examine Grochow.

On April 9, 2013, the district court denied the motion to vacate the dismissal. The district court ruled that Johns accompanying Neal to the emergency room was not a legitimate excuse for failing to appear. The district court ruled that "Neal's strategy reflected an abuse of the legal process and [that] she is trying to delay resolution on the merits as long as possible using whatever tactic is appropriate to that end." The court then analyzed whether Johns and Neal would prevail on the merits, concluding that Neal would not prevail because she has no legal interest in the property.⁴ The court also

⁴ Although Neal does not have record ownership of the property, her standing has not been challenged.

determined that Johns most likely would not prevail on the merits because the Jacobsons did not acquiesce to a boundary and were not aware of the fence remnants.

After this appeal was filed, Johns and Neal moved this court to strike the Jacobsons' brief.

DECISION

Dismissal

Johns and Neal argue that the district court erred by dismissing their action. Under Minn. R. Civ. P. 41.02(a) “[t]he [district] court may upon its own initiative, or upon motion of a party, and upon such notice as it may prescribe, 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.” *Lampert Lumber Co. v. Joyce*, 405 N.W.2d 423, 425 (Minn. 1987). We review the district court’s dismissal under rule 41.02(a) for an abuse of discretion. *Bonhiver v. Fugelso, Porter, Simich & Whiteman, Inc.*, 355 N.W.2d 138, 144 (Minn. 1984).

Notice

Johns and Neal argue that the district court dismissed their case without notice, citing to *Chisholm v. Foley*, in which this court stated that a district court may not dismiss a case without notice to the other party. 427 N.W.2d 278, 281 (Minn. App. 1988). But in *Chisholm*, a party moved to dismiss the case, and this court determined that, under Minn. R. Civ. P. 7.02, motions require written notice. *Id.*

Here, Johns and Neal failed to appear for trial. The district court stated: “Rule 41.02 provides for dismissal for failure to prosecute I stated on the record my reason for denying the continuance. . . . But I am considering dismissing the matter for failure to prosecute.” This matter is unlike *Chisholm* because this is not an issue with motion practice; instead, the district court, “upon its own initiative,” dismissed an action for failure to prosecute. Under these circumstances, the district court may prescribe notice that it deems is required. Johns and Neal had notice of the hearing because it was a trial date. Neither appeared, but both were aware that this was the first day of trial.

Johns and Neal further argue that they should have been granted an opportunity to be heard, but, again, they could have been heard had they appeared for trial. Even if Neal had been medically unable to attend the trial, Johns failed to provide an excuse other than claiming, after dismissal, that she drove Neal to the emergency room. As the district court noted, Neal stated that her physician “made it very clear” that she “was to go to the emergency room immediately if at any time [her] breathing got worse.” Neal claimed in her e-mail to court administration that her “breathing worsened again last night.” The district court found that Neal should have sought emergency care on the evening of November 1, yet she waited until the morning of trial. Johns and Neal’s opportunity to be heard occurred on the date of trial. But they did move to vacate the dismissal, and the district court held a hearing on the motion. At that time, Neal presented several arguments regarding why dismissal was inappropriate. Still, the district court denied the motion. Johns and Neal were afforded notice and an opportunity to be heard.

Ex parte hearing

Johns and Neal argue that the district court improperly conducted an ex parte hearing on whether to dismiss their claim. The district court did not conduct such a hearing. After reading Neal's e-mail to court administration regarding her absence, the district court stated:

So [Neal] is not here. . . . Johns is not here either, and there has been nothing from her at all. So what I propose we do . . . [Jacobsons], you can make whatever record you want regarding the last continuance, any argument you wish to make concerning this one, and I'll make a ruling on this matter.

The district court denied a continuance and then stated that it was "considering dismissing the matter for failure to prosecute," and that it would take its "sua sponte [power] to dismiss the matter under advisement." The district court made a record regarding a continuance; it did not conduct a hearing regarding dismissal.

Notice of sanctions

Johns and Neal argue that the district court should not sua sponte dismiss a case without warning of that sanction. Johns and Neal cite to two cases that they claim support this position. The supreme court held in *Beal v. Reinertson*, that the party failed to show prejudice to support dismissal when the other party merely failed to provide tax returns. 298 Minn. 542, 543-44, 215 N.W.2d 57, 58-59 (1974). The court stated that dismissal was too drastic when the district court could have fixed a deadline for production and then could have warned the party that failure to meet the deadline would result in dismissal. *Id.* at 544, 215 N.W.2d at 58. *Beal* does not support Johns and Neal's

argument because it dealt with failure to produce documents. Johns and Neal also cite to *Jadwin v. City of Dayton*, but *Jadwin* did not address dismissal; rather, it dealt with the appropriateness of sanctions imposed, under Minn. R. Civ. P. 37.02, for failure to comply with a discovery order. 379 N.W.2d 194, 195 (Minn. App. 1985).

Johns and Neal inexcusably failed to appear for trial. Grochow's testimony demonstrated that Neal never intended to appear. And Neal's e-mail revealed that she was disingenuous because her alleged medical condition emerged the night before trial, yet she did not seek medical care until the morning of trial. It appears that Johns and Neal assumed that they could just not appear for trial and the district court would automatically grant a continuance. But parties should understand that if they do not appear for a scheduled trial date, that the matter could be dismissed.

Test for dismissal

Johns and Neal argue that dismissal was not appropriate because the Jacobsons failed to show prejudice and they did not unreasonably or inexcusably cause the delay.

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). 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 v. Gen. Motors Corp.*, 277 Minn. 278, 284, 152 N.W.2d 364, 369 (1967).

The district court found that the ongoing litigation limited the likelihood of sale of the Jacobsons' property because of the pendency of the lis pendens, which established prejudice. Additionally, the district court found that the preparation for trial three times and coming to court with witnesses only to have the matter continued without any notice prejudiced the Jacobsons. The district court specifically found that Johns and Neal inexcusably caused delay. Johns failed to appear for trial without any excuse. Neal sent an e-mail, but the district court did not find Neal to be credible. The district court made requisite findings regarding dismissal and did not abuse its discretion.

Continuance

Johns and Neal further argue that the district court should have granted a continuance because Neal was ill.

“A [district] court has discretion in ruling on a request for a continuance and should base its decision on the facts and circumstances surrounding the request.” *Hamilton v. Hamilton*, 396 N.W.2d 91, 94 (Minn. App. 1986). A party's medical incapacity may be grounds for a continuance, but a district court is not precluded from making its own observations of a party's ability to proceed. *Chahla v. City of St. Paul*, 507 N.W.2d 29, 32 (Minn. App. 1993), *review denied* (Minn. Dec. 14, 1993). We review a district court's denial of a motion for a continuance for an abuse of discretion. *See Maranda v. Maranda*, 449 N.W.2d 158, 167 (Minn. 1989).

The district court granted a continuance when Johns was ill and her physician recommended a continuance. It granted a continuance when Neal was ill and her physician recommended a continuance. The district court granted continuances when the

request was supported with medical documentation. Neal's physician recommended that she not appear in court until after October 25. The district court accommodated that request. Neal's physician then stated that Neal would require nebulizer treatments every 2-4 hours. The district court agreed to accommodate Neal's treatments.

The final request for a continuance was not supported by medical documentation. Additionally, the district court determined that Neal was not credible in asserting her medical condition. *See Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) (stating that appellate courts defer to district court credibility determinations). And Johns provided no excuse for her failure to appear. The district court did not abuse its discretion by denying Johns and Neal's request for another continuance.

Motion

Johns and Neal's motion to strike the Jacobsons' brief, in whole or in part, was not hand-delivered to this court until November 7, 2013, a mere five days before our consideration of this matter. Therefore, the timeliness of this motion is questionable. Nonetheless, we thoroughly reviewed and considered Johns and Neal's motion and conclude that the motion is without merit.

Affirmed; motion denied.