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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1542**

Glendalough Homeowners' Association,
Respondent,

vs.

Jovani Nassar,
Appellant.

**Filed May 1, 2017
Affirmed
Reyes, Judge**

Dakota County District Court
File No. 19HA-CV-13-2194

Rachel B. Beauchamp, Cousineau Van Berge, McNee & Malone, P.A., Minnetonka,
Minnesota (for respondent)

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appellant)

Considered and decided by Larkin, Presiding Judge; Connolly, Judge; and Reyes,
Judge.

UNPUBLISHED OPINION

REYES, Judge

Appellant challenges the district court's denial of his attorney-fees request under
Minn. R. Civ. P. 37.02 and 37.03. We affirm.

FACTS

In December 2012, respondent Glendalough Homeowners' Association (Glendalough) brought suit against appellant Jovani Nassar, seeking a lien on Nassar's property due to his failure to sod the property. The underlying facts and procedure are discussed in detail in this court's prior opinion. *Glendalough Homeowners' Ass'n v. Nassar*, No. 15-0230, 2015 WL 7357196 (Minn. App. Nov. 23, 2015), *review denied* (Minn. Feb. 16, 2016).

As it relates to this appeal, Nassar filed with the district court a motion to compel supplemental discovery responses after Glendalough responded to some of Nassar's requests for admissions with boilerplate objections. The district court granted Nassar's motion to compel and ordered Glendalough to pay Nassar \$2,052 in costs and attorney fees in bringing the motion. When Glendalough failed to comply, Nassar brought a motion for an order to show cause, which the district court granted, along with an additional award of \$1,902 in attorney fees. Glendalough subsequently provided Nassar with supplemental discovery responses and paid the nearly \$4,000 in attorney fees and costs awarded to Nassar for the motions.

When Glendalough filed a motion to dismiss its complaint with prejudice, Nassar requested \$65,939.92 in attorney fees as sanctions under Minn. R. Civ. P. 37.02 and 37.03, which the district court denied. Nassar appealed, and this court affirmed in part and remanded on the issue of attorney fees under rule 37 because the district court had erroneously determined that Nassar attempted to use the attorney-fees request as a Minn. R. Civ. P. 11 sanction. *Id.* at *10. On remand, the district court determined that Nassar

was not entitled to attorney fees under rule 37.02 because Nassar did not present sufficient evidence that Glendalough failed to comply with a discovery order and that Nassar was not entitled to attorney fees under rule 37.03 because Nassar did not prove the truth of the matters denied by Glendalough in the supplemental discovery responses. This appeal follows.

D E C I S I O N

“The district court’s decision to order fees and costs as a sanction is within [its] discretion.” *Frontier Ins. Co. v. Frontline Processing Corp.*, 788 N.W.2d 917, 922 (Minn. App. 2010). Absent an abuse of that discretion, we will not reverse. *Carlson v. SALA Architects, Inc.*, 732 N.W.2d 324, 331 (Minn. App. 2007), *review denied* (Minn. Aug. 21, 2007). We will not set aside the district court’s factual findings unless they are clearly erroneous. Minn. R. Civ. P. 52.01.

I. The district court did not abuse its discretion in denying Nassar’s attorney-fees request under Minn. R. Civ. P. 37.02.

Nassar argues that the district court abused its discretion in denying his request for attorney fees under rule 37.02(b) because the district court applied the incorrect legal standard. Nassar further asserts that Glendalough’s supplemental responses were not in compliance with the district court’s prior order granting Nassar’s motion to compel and order to show cause because Glendalough did not acknowledge “(1) that, pursuant to Glendalough’s Declarations, Nassar was entitled to certain procedures before Glendalough could assess fines against him[] and (2) that Glendalough failed to follow those procedures.” We disagree.

Under Minn. R. Civ. P. 37.02(b), the district court “shall require the party failing to obey [an order to provide discovery] . . . to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.”

On appeal, the responses at issue are requests for admissions 10 through 14, which concern the procedures Glendalough followed before imposing a fine against Nassar. In its supplemental responses, Glendalough replaced the boilerplate responses with denials primarily asserting that “the Board has granted Nassar ample due course in its dealings,” where, during the course of the disagreement over sodding fines, Glendalough’s board met with Nassar in October 2010, and Glendalough scheduled a separate hearing on the matter in June 2011. On these facts, the district court’s determination that Glendalough provided sufficient responses to Nassar’s requests for admissions was not clearly erroneous. Thus, the district court did not abuse its discretion in denying Nassar attorney fees under rule 37.02 because Glendalough complied with the discovery orders.¹

¹ Nassar also argues, through citations to nonbinding and unpersuasive authority, that the district court erred in declining to make a finding as to whether Glendalough’s failure to comply with discovery was substantially justified or that other circumstances made an award of expenses unjust. Because Glendalough complied with the district court’s discovery orders, we need not consider this issue. We note, however, that the district court determined that the circumstances made an award of expenses unjust, reasoning that granting Nassar’s request for attorney fees would encourage future parties who learn damaging and dispositive information to continue to litigate rather than dismiss the complaint due to “fear that the opposing party will seek to recover attorney fees based on that dismissal.” This determination was not clearly erroneous, and it was not an abuse of the district court’s discretion to deny Nassar’s attorney-fees request under rule 37.02.

II. The district court did not abuse its discretion in denying Nassar's attorney-fees request under Minn. R. Civ. P. 37.03.

Nassar argues that the district court abused its discretion in denying his request for attorney fees under Minn. R. Civ. P. 37.03(b) because (1) Glendalough failed to admit the truth in response to Nassar's requests for admissions 7, 8, 10 through 14, and 30 and (2) Nassar proved the truth of those requests for admissions.² The requests for admissions at issue concern whether Glendalough suffered damages and the relationship between any damages and the fine imposed on Nassar, the procedures Glendalough followed in imposing the fine, and whether it was impracticable for Nassar to sod his property. In support of his argument, Nassar cites only to nonbinding caselaw. We are not persuaded.

Under rule 37.03(b):

If a party fails to admit . . . the truth of any matter . . . , and if the party requesting the admissions thereafter proves . . . the truth of any such matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36.01, or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (4) there was other good reason for the failure to admit.

² Nassar also contends that the district court abused its discretion in denying Nassar's request for attorney fees under Minn. R. Civ. P. 37.03(a). Nassar did not present an argument under rule 37.03(a) in his memorandum in support of his request for attorney fees, and the district court did not address rule 37.03(a) in its order. Thus, this court need not consider Nassar's rule 37.03(a) argument. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

Nassar relies in part on the deposition of Glendalough's former community manager (the community manager), where the following exchanges occurred:

Q. Do you recall communicating to the board that [Nassar's prior attorney] had requested a hearing?

A. The details of it, no, but sharing the documentation with the board, yes.

Q. Do you recall whether the board ever decided to reject that request? Was there a formal discussion to say, We're not going to give them a hearing?

A. I don't recall those details.

....

Q. If Mr. Nassar testifies at trial that no hearing was given prior to June 29, 2010, would you have any evidence or understanding that would contradict that?

A. I don't have that, no.

....

Q. Let's go back to Exhibit 9.

Look at the second paragraph. It says, "At the outset, the board is deviating from the process that it proposed by imposing fines starting on June 15, 2010, without allowing my client the opportunity to be heard on this matter."

Did I read that correctly?

A. Yes.

Q. Based on this letter, [Nassar's prior attorney] is saying you're fining us without a hearing. Do you have any reason to believe that that's not true?

A. No.

At the hearing on Glendalough's motion to dismiss its claims with prejudice, Glendalough's counsel stated the following:

After depositions, I informed [Nassar's] counsel that I believe that this case—early on, I told—after we completed the depositions, that I believed this case needed to go away because I think we did have a notice issue. We had these discussions and ultimately we did what we said we were going to do and dismissed the lawsuit as it relates to the fees.

Despite the notice issue, Glendalough's counsel thought that Glendalough's claims still could have been litigated and were not frivolous.

We do not find persuasive Nassar's argument that he proved the truth of the matters Glendalough denied in the requests for admissions through the community manager's deposition and Glendalough's counsel's statement. The community manager did not recall whether Glendalough's board decided to reject Nassar's hearing request and asserted that she did not have evidence to prove whether Nassar received a hearing. Further, Glendalough's counsel admitted only that there may have been a notice issue and did not address any of the requests for admissions that Glendalough denied. And, Nassar cites no caselaw supporting the proposition that he proved the truth of the matters Glendalough denied through the community manager's qualified deposition testimony or Glendalough's counsel's statement. Moreover, the deposition and statement upon which Nassar relies do not concern whether Glendalough suffered damages, the relationship between any damages and the fines Glendalough imposed on Nassar, or whether it was impracticable for Nassar to sod his property.

In dismissing Glendalough's claims, the district court did not make any findings of fact. Nor did Glendalough make any admissions. In addition, no other court granted judgment as a matter of law based on the facts included in the requests for admissions and no jury returned a special-verdict form finding any of the facts Nassar alleged were proved. Accordingly, the district court's determination that Nassar failed to prove the truth of the matters that Glendalough denied in the requests for admissions was not

clearly erroneous.³ Thus, the district court did not abuse its discretion in denying Nassar's attorney-fees request under rule 37.03(b).

Affirmed.

³ Because Nassar did not prove the truth of the matters Glendalough failed to admit, we need not consider whether the district court made findings on the four exceptions to an award of expenses under rule 37.03(b).