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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1690**

Larson Ventures, Inc.,
Appellant,

vs.

Jason P. Hoffman,
Respondent.

**Filed May 8, 2017
Reversed and remanded
Bratvold, Judge**

Goodhue County District Court
File No. 25-CV-15-2480

James T. Hanvik, Timothy J. Nolan, Bassford Hanvik, PLLC, St. Louis Park, Minnesota
(for appellant)

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(for respondent)

Considered and decided by Kirk, Presiding Judge; Schellhas, Judge; and Bratvold,
Judge.

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

BRATVOLD, Judge

Appellant challenges two district court decisions: (a) the dismissal of its legal-malpractice complaint for failure to serve an expert-disclosure affidavit within 180 days of the commencement of discovery as required by Minn. Stat. § 544.42, subd. 4(a) (2016);

and (b) the denial of appellant's motion to extend the 180-day period for excusable neglect under Minn. R. Civ. P. 6.02. We conclude that effective appellate review is not possible because the district court did not make findings on all relevant factors for determining excusable neglect; therefore, we reverse and remand to the district court for additional findings and reconsideration of its rule 6.02 decision consistent with this opinion.

FACTS

Appellant Larson Ventures, Inc. (Larson) sued respondent-attorney Jason Hoffman, claiming legal malpractice, breach of fiduciary duty, and breach of contract. The complaint alleged that Hoffman represented Larson in connection with the lease and sale of agricultural property and negligently failed to give notices of first refusal "to the immediately preceding former owner" under Minn. Stat. § 500.245, subd. 1(a) (2016).¹ The complaint alleged that, as a result of Hoffman's negligence, Larson suffered financial harm; the property sale was delayed and Larson defended a lawsuit against a previous landowner that sued Larson for noncompliance with section 500.245.

With the complaint, Larson's attorney served an expert-review affidavit certifying that he reviewed the claims in the complaint with a legal expert before filing the lawsuit, and the expert opined that Hoffman "deviated from the applicable standard of care in representing" Larson. The expert-review affidavit satisfied Minn. Stat. § 544.42, subd. 3 (2016). The affidavit also stated that Larson's attorney would provide an expert-disclosure

¹ Minnesota Statutes section 500.245, subdivision 1(a), states that a corporation "may not lease or sell agricultural land or a farm homestead before offering or making a good faith effort to offer the land for sale or lease to the immediately preceding former owner at a price no higher than the highest price offered by a third party."

affidavit “required under Minn. Stat. § 544.42, [s]ubd. 4, within 180 days after commencement of this case.”²

Before expiration of the 180-day period, the district court amended the scheduling order and extended the deadline for filing expert reports, including the expert-disclosure affidavit, to May 2, 2016. On April 27, 2016, Larson served Hoffman with a copy of its expert report and enclosed a cover letter and a notarized affidavit of service signed by Larson’s attorney.

On May 26, 2016, Hoffman moved to dismiss Larson’s complaint with prejudice under Minn. Stat. § 544.42, subd. 6(c) (2016), which allows a defendant to seek “mandatory dismissal” when a plaintiff fails to comply with the expert-disclosure requirements in section 544.42, subdivision 4. In the motion, Hoffman argued that Larson’s April 27 submission was procedurally and substantively deficient because it did not contain an expert-disclosure affidavit signed by Larson’s attorney, and the expert report did not contain sufficient details establishing a prima facie case of legal malpractice.

After receiving notice of Hoffman’s motion, Larson’s attorney filed an affidavit on May 31, 2016, identifying Larson’s expert witness, providing a summary of the expert’s anticipated testimony, and attaching a copy of the same expert report served on April 27. In the affidavit, Larson’s attorney acknowledged that he “should have provided this

² Subdivision 4 provides that plaintiff’s attorney in a professional-malpractice lawsuit must sign an expert-disclosure affidavit, which identifies expert witnesses who will testify at trial about “negligence, malpractice, or causation,” and states the facts and opinions to which the witnesses will testify and the grounds supporting the experts’ opinions. Minn. Stat. § 544.42, subd. 4(a). The plaintiff must serve the expert-disclosure affidavit within 180 days of the commencement of discovery. *Id.*, subd. 2(2) (2016).

affidavit with production of the expert report . . . which was produced on April 27, 2016,” and requested permission to supplement the April 27 disclosure to the extent it was deficient.

Larson also opposed Hoffman’s motion to dismiss, arguing that it had complied with section 544.42, and, to the extent there were any technical deficiencies, it was entitled to cure under section 544.42’s safe-harbor provision.³ Alternatively, Larson requested that the court extend the 180-day deadline for excusable neglect under Minn. R. Civ. P. 6.02. To support the extension request, Larson’s attorney submitted an affidavit, which stated that he “should have attached an affidavit of expert disclosure to [the expert] report when I served it on April 27, 2016.” Larson’s attorney also stated that “[a]s soon as I learned of Defendant’s claim of deficiency in the expert disclosure affidavit, on May 31, 2016, I served and filed electronically a formal affidavit identifying [the expert] as Plaintiff’s expert and summarizing his opinions.” At a hearing on the motions, Larson’s attorney admitted that he “was focused on the Court’s scheduling order” when he served the April 27 documents, and “it was [his] error to not have that accompanied by an affidavit.” Larson’s attorney also acknowledged that “a formal affidavit from” him was absent at the time he served the April 27 expert report.

³ The safe-harbor provision applies when the defendant’s motion to dismiss is “based upon claimed deficiencies of the” expert-disclosure affidavit. Minn. Stat. § 544.42, subd. 6(c). If the safe-harbor provision applies, then, before granting the motion to dismiss, the district court must provide “specific findings as to the deficiencies of the affidavit” and give the plaintiff 60 days to cure the deficiencies. *Id.*

The district court granted Hoffman's motion, dismissing the complaint with prejudice under Minn. Stat. § 544.42, subd. 6(c). The district court determined that Larson's April 27 submissions did not comply with the requirements in Minn. Stat. § 544.42, subd. 4, because they did not include an expert-disclosure affidavit signed by Larson's attorney. Because Larson did not serve an expert-disclosure affidavit within the 180-day statutory period, the district court concluded that there was no deficient affidavit to cure; therefore, the statute's safe-harbor provision did not apply and dismissal was mandatory. Additionally, the district court declined to extend the 180-day period for excusable neglect under Minn. R. Civ. P. 6.02 because Larson gave no reasonable excuse for its noncompliance with section 544.42, subdivision 4. The district court later denied Larson's motion for reconsideration. Larson appeals.

D E C I S I O N

As framed by the parties, this appeal presents two issues: whether the district court abused its discretion in dismissing Larson's complaint under Minn. Stat. § 544.42, subd. 6(c), for failure to timely serve an expert-disclosure affidavit, and whether the district court abused its discretion in declining to extend the 180-day statutory period for excusable neglect under Minn. R. Civ. P. 6.02. Because we conclude that the district court made insufficient findings regarding its rule 6.02 decision, effective appellate review is not possible. Therefore, we reverse and remand to the district court for additional findings and reconsideration of its rule 6.02 decision.

Minnesota Rule of Civil Procedure 6.02(2) provides:

When by statute, by these rules, by a notice given thereunder, or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion, . . . upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

Rule 6.02 grants a district court authority to extend the 180-day period for serving an expert-disclosure affidavit under section 544.42, subdivision 4. *Lake Superior Ctr. Auth. v. Hammel, Green & Abrahamson, Inc.*, 715 N.W.2d 458, 470–71 (Minn. App. 2006), review denied (Minn. Aug. 23, 2006); see also Minn. Stat. § 544.42, subd. 4(b) (permitting extension of the 180-day period upon the parties’ agreement or by court order for good cause shown).

Hammel holds that a court should evaluate four factors to determine whether excusable neglect supports granting a rule 6.02 extension, including: (1) whether the moving party has a reasonable case on the merits; (2) whether the moving party has a reasonable excuse for the failure to act; (3) whether the moving party acted with due diligence after noticing the error; and (4) whether the opposing party will suffer any substantial prejudice from granting an extension. 715 N.W.2d at 471. We review a district court’s denial of a rule 6.02 motion for an abuse of discretion. *Id.* A district court abuses its discretion when it misapplies the law or bases its decision on facts not contained within the record. *Foster v. Foster*, 802 N.W.2d 755, 757 (Minn. App. 2011).

The district court denied Larson an extension because there was no reasonable excuse for its noncompliance with section 544.42, subdivision 4. Specifically, the district

court determined that “there doesn’t appear to be any unusual or unique circumstances in this case which prevented Plaintiff’s counsel from a timely submission of the expert disclosure affidavit.” Larson argues that the district court abused its discretion because excusable neglect existed, and the district court did not consider all four *Hammel* factors. Hoffman responds that the district court did not abuse its discretion because Larson requested the extension in its memorandum and did not file a separate written motion.

We first address whether Larson followed the proper procedure for seeking a rule 6.02 extension. Initially, we note that we need not address this issue because Hoffman did not raise it in the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (declining to address new issues raised for the first time on appeal). Even so, we conclude Hoffman’s argument lacks merit. Minnesota Rule of Civil Procedure 7.02(a) provides that all motions must be made in writing, “unless made during a hearing or trial.” Here, Larson made a written request in its memorandum opposing Hoffman’s motion to dismiss and also orally requested an extension at the motion-to-dismiss hearing.

In *Stern v. Dill*, the Minnesota Supreme Court considered whether an oral rule 6.02 extension motion complied with rule 7.02(a) motion procedure in the context of a medical-malpractice lawsuit under similar facts. 442 N.W.2d 322 (Minn. 1989); *see Fontaine v. Steen*, 759 N.W.2d 672, 676 (Minn. App. 2009) (borrowing from medical-malpractice precedent in legal-malpractice case). The supreme court held that the plaintiff’s oral motion was proper under rule 7.02 because it was made during a pretrial hearing, with the proceedings recorded, and the motion was “related to the matter then under consideration by the court.” *Stern*, 442 N.W.2d at 325. Similarly, Larson’s oral rule 6.02 motion was

made at the motion-to-dismiss hearing, which was recorded, and it related to the issues discussed at the hearing. Thus, Larson complied with rule 7.02, and we will address the merits.

While the district court recited all *Hammel* factors, it discussed only one factor—reasonable excuse—and found it dispositive. Keeping in mind that a district court has discretion to resolve a rule 6.02 motion, the issue for this court is whether a district court abuses its discretion when it denies the motion without considering all four *Hammel* factors. We rely on two supreme court cases addressing a similar issue in the context of granting relief from judgment under Minn. R. Civ. P. 60.02(a). We note that the district court did not have the benefit of these opinions because the supreme court released them after the district court’s decision.

In *Gams v. Houghton* and *Cole v. Wutzke*, the supreme court considered two district courts’ decisions to deny relief from judgments entered against plaintiffs who failed to timely file their complaints under Minn. R. Civ. P. 5.04. *Gams*, 884 N.W.2d 611, 614 (Minn. 2016); *Cole*, 884 N.W.2d 634, 636 (Minn. 2016); see Minn. R. Civ. P. 5.04(a) (“Any action that is not filed with the court within one year of commencement against any party is deemed dismissed with prejudice.”). In both cases, the plaintiffs moved for relief under rule 60.02(a) based on excusable neglect. *Gams*, 884 N.W.2d at 619; *Cole*, 884 N.W.2d at 637; see Minn. R. Civ. P. 60.02(a) (providing that a party may move for relief from judgment for, among other things, excusable neglect). The rule 60.02 test for excusable neglect is nearly identical to the *Hammel* test because it considers four factors, including a reasonable case on the merits, reasonable excuse, due diligence in remedying

the error, and any substantial prejudice to the opposing party. *Gams*, 884 N.W.2d at 620 (citing *Finden v. Klaas*, 268 Minn. 268, 271, 128 N.W.2d 748, 750 (1964)).

Gams and *Cole* held that a district court must consider and make findings on all four factors to allow effective appellate review. *Gams*, 884 N.W.2d at 619–21; *Cole*, 884 N.W.2d at 639. A district court’s failure to analyze all four factors is an abuse of discretion, requiring reversal and remand to the district court for additional findings. *Gams*, 884 N.W.2d at 621; *Cole*, 884 N.W.2d at 639.

Cole is particularly apposite because, like the district court in this case, the district court in *Cole* applied only the reasonable-excuse factor in denying rule 60.02 relief. 884 N.W.2d at 639. Noting the “fact intensive” nature of a rule 60.02 motion, the supreme court held that the district court abused its discretion by relying on just one factor. *Id.* *Cole* also noted “a strong policy favoring the granting of relief when judgment is entered through no fault of the client,” and “courts are loath to ‘punish’” an innocent client for errors that are the responsibility of counsel. *Id.* at 638 (quotation omitted).

Similarly, here, the district court’s reliance on one *Hammel* factor does not provide sufficient factual findings for effective appellate review. Following the reasoning from *Gams* and *Cole*, we conclude that the district court was required to make findings on each *Hammel* factor in light of all the circumstances to provide an adequate record for appellate review. Accordingly, we reverse and remand to the district court for additional findings and reconsideration of Larson’s rule 6.02 motion consistent with this opinion.

Reversed and remanded.