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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1724**

County of Sherburne,
Respondent,

vs.

Steven D. Weese,
Appellant,

vs.

County of Sherburne, et al.,
Respondents.

**Filed June 17, 2019
Affirmed
Jesson, Judge**

Sherburne County District Court
File No. 71-CV-17-838

Kathleen Heaney, Sherburne County Attorney, Tim Sime, Assistant County Attorney, Elk River, Minnesota (for respondent Sherburne County)

Steven D. Weese, Clear Lake, Minnesota (pro se appellant)

Andrew A. Wolf, Paul D. Reuvers, Iverson Reuvers Condon, Bloomington, Minnesota (for respondents County of Sherburne, et al.)

Considered and decided by Schellhas, Presiding Judge; Jesson, Judge; and Smith, Tracy M., Judge.

UNPUBLISHED OPINION

JESSON, Judge

Appellant Steven Weese built a structure on his property that he contends is a fish house. But respondent Sherburne County disagrees, classifying it as a shed or storage building, which subjects it to building code and zoning requirements. After several attempts to informally resolve the dispute, Sherburne County sought a declaratory judgment. In response, Weese filed several counterclaims against the county. Weese appeals the district court's grant of summary judgment in favor of the county and the dismissal of his counterclaims as a discovery sanction. Because the district court correctly determined that no genuine issue of material fact exists and did not abuse its discretion by dismissing Weese's counterclaims, we affirm.

FACTS

Appellant Steven Weese owns property in Sherburne County. On that property, Weese built a structure, the classification of which is disputed. The structure—which Weese contends is a fish house and respondent Sherburne County (the county) classifies as a shed or storage structure—is about 300 square feet in size, appears to be built on wooden boards, and resembles a metal storage building. Weese did not apply for or receive a building permit from the county before building the structure.

In 2014, the county informed Weese that the structure on his property required a building permit. Further, the county told Weese that his structure was too close to the roads and did not comply with setback requirements. Despite this warning, Weese did not make any adjustments to the structure. Instead, Weese asserted to county officials that his

structure was a fish house licensed with the Minnesota Department of Natural Resources and therefore not subject to building code and zoning requirements. County officials made several attempts to informally resolve the dispute about the structure over the next few years. Weese took no action.

After Weese failed to apply for a building permit or make any adjustments to the structure on his property, the dispute was referred to the county attorney's office. The county filed an enforcement action against Weese, seeking a declaratory judgment stating that Weese's structure violated the building code by not having a permit and the zoning ordinance by not following setback requirements. The county further sought an injunction requiring Weese to remove the structure and for an award of costs and fees. Weese filed counterclaims against the county and various county officials, including claims of racial and economic discrimination and abuse of process.¹

As the litigation entered the discovery phase, Weese did not comply with discovery requirements. Specifically, Weese did not adequately respond to interrogatories, document requests, and requests for admissions. And although Weese attended his deposition, he did not answer the vast majority of questions. Due to Weese's lack of cooperation, the county filed a motion to compel discovery, which the district court granted. In its order, the district court directed Weese to provide the requested discovery within two weeks and ordered him to appear for and answer questions at a second deposition. The district court also ordered Weese to pay the county's costs associated with bringing the motion and incurred during

¹ Weese also asserted counterclaims for perjury, racketeering, mail fraud, and violations of the Sixth Amendment, all of which the district court dismissed with prejudice.

the deposition and stated that “failure to comply with [the court’s order] will result in dismissal with prejudice of [Weese’s] counterclaims against [the county].”

Weese failed to comply with the district court’s order. As a result, the district court concluded that “dismissal [of the counterclaims was] the appropriate remedy for [Weese’s] flagrant disregard” of the district court’s order. Accordingly, the district court dismissed Weese’s counterclaims with prejudice and entered judgment in favor of the county. Additionally, the district court concluded that no genuine issues of material fact existed with respect to the county’s enforcement action and granted summary judgment in favor of the county. Weese appeals.

D E C I S I O N

Weese contends that the district court erred in two ways. First, he maintains that the district court incorrectly granted summary judgment in favor of the county because genuine issues of material fact exist related to whether his structure is a fish house. Second, Weese argues that it was an abuse of discretion for the district court to dismiss his counterclaims as a discovery sanction. We address each argument in turn.

I. The district court did not err by granting summary judgment in favor of the county.

Weese, who is self-represented, first appears to contend that the district court erroneously granted the county’s motion for summary judgment because factual questions exist regarding whether his structure is a fish house. We review a district court’s grant of summary judgment de novo, evaluating whether genuine issues of material fact exist and whether the district court properly applied the law. *Montemayor v. Sebright Prods., Inc.*,

898 N.W.2d 623, 628 (Minn. 2017). In doing so, we view the evidence in the light most favorable to Weese. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76 (Minn. 2002).

A genuine issue of fact exists if reasonable persons could draw different conclusions from the evidence presented. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997). And a material fact is one whose “resolution will affect the outcome of the case.” *O’Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn. 1996). But no genuine issue of material fact exists “when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue.” *DLH, Inc.*, 566 N.W.2d at 71. Rather, the nonmoving party must present specific facts to satisfy its burden and may not rely upon “mere averments in the pleadings or unsupported allegations.” *Bebo v. Delander*, 632 N.W.2d 732, 737 (Minn. App. 2001), *review denied* (Minn. Oct. 16, 2001).

To determine if the district court properly granted summary judgment, we first evaluate whether there is a genuine issue of material fact regarding whether Weese’s structure is a fish house. We then turn to examine the district court’s legal conclusion that the structure violated building code and zoning requirements.

Here, the district court determined that no genuine issue of material fact existed because “no evidence” supported Weese’s assertion that his structure is a fish house. The district court found that the record established that Weese’s structure had never been moved off of his property, never been used as a fishing shelter, and that “there [was] ample evidence that the shed could not be transported to a frozen lake and used as a fish house should [Weese] ever make such an attempt.” We agree.

Very little evidence in the record—other than his own assertion that he built the structure and intended for it to be a fish house—supports Weese’s claim that his structure is a fish house. Weese stated during his deposition that he had previously moved the structure “several feet” on his property and submitted photos that the structure had holes in the floor as would be expected in an ice-fishing house. But even viewing this evidence in the light most favorable to Weese, it does not create a genuine issue of material fact. As the district court noted, the structure has never moved off of Weese’s property.² Never been used as an ice-fishing shelter. Further, Weese has only ever utilized the structure for storage. As the district court aptly stated, “[Weese’s] classification of the shed as a fish house does not make it so.” The evidence supporting Weese’s assertion that the structure is a fish house does little more than create a “metaphysical doubt,” and does not present a genuine issue of material fact. *DLH, Inc.*, 566 N.W.2d at 70, 71.

Because the structure is not a fish house arguably exempt from local controls, we turn to the district court’s legal conclusions that the structure did not comply with local ordinances.³ Counties have the authority to enact zoning ordinances. Minn. Stat. § 394.21, subd. 1 (2018). The county’s zoning ordinance defines “building” as “[a]ny structure designed or intended for the support, enclosure, shelter or protection of persons, animals

² The district court noted that a county building official opined that it was not structurally sound enough to be moved off of the property.

³ Weese contends that there is a question about whether fish houses are regulated under the Minnesota Building Code or the Sherburne County Zoning Ordinance. But the district court correctly concluded that there was no genuine issue of material fact regarding whether the structure was a fish house. Because the district court determined the structure is not a fish house, it is irrelevant which body of law properly governs fish houses.

or property” and requires a permit before constructing, altering, or moving any building. Sherburne County, Minn., Zoning Ordinance (SCZO) §§ 5, subd. 2 (2019) (defining building), 18, subd. 7(1)(A) (2017). Accordingly, the county zoning ordinance requires that, for Weese’s property, the minimum setback from township roads is 67 feet. SCZO § 7, subd. 6(3) (2015).

It is undisputed that Weese did not have a permit for his structure and that, at the nearest point, the structure was only 43.4 feet from a township road. And the structure meets the definition of building outlined in the county’s zoning ordinance, meaning that Weese was required to comply with its regulations. He did not do so. As such, the district court correctly concluded that Weese’s structure violated the zoning ordinance. Because the district court correctly determined that no genuine issue of material fact existed and correctly applied the law, summary judgment was appropriate.

Still, Weese contends that the 67-foot setback requirement found in the county’s zoning ordinance is unconstitutional.⁴ Weese argues that Minnesota Statutes section 463.01 (2018) establishes a not-greater-than 50-foot building line, and that because the county’s zoning ordinance requiring a 67-foot setback is longer than the one outlined in the statute, the county’s ordinance is unconstitutional.

⁴ The county argues that Weese did not raise this issue. But it is included in his answer and counterclaims filed with the district court. The district court’s order did not address this argument.

This argument is misplaced. Minnesota Statutes section 463.01 reads, in relevant part:

The council of *any city*, . . . may establish along any street or highway within such city a building line upon the land adjoining such street or highway, or any portion thereof, and distant not more than 50 feet from the margin of such street or highway, and may, [on] behalf of the city, acquire an easement in the land between such line and exterior street line, such that no buildings or structures shall be erected or maintained upon this land.

(Emphasis added.) As the county notes, the identified statute discusses the authority of *cities*. But the ordinance in question here is a *county* ordinance. Authority for *counties* to establish setback requirements derives from Minnesota Statutes section 394.25, subdivision 3 (2018). And that provision does not identify a maximum distance for setback requirements. As such, Weese's argument that the county's zoning ordinance is unconstitutional because it conflicts with Minnesota Statutes section 463.01 is not persuasive.

Because no genuine issue of material fact exists and because the district court correctly applied the law, we affirm the district court's grant of summary judgment in favor of the county with respect to the enforcement action.

II. The district court did not abuse its discretion by dismissing Weese's counterclaims as a discovery sanction.

Weese appears to argue that the district court improperly dismissed his counterclaims as a discovery sanction. We review a district court's dismissal of claims for an abuse of discretion. *Modrow v. JP Foodservice, Inc.*, 656 N.W.2d 389, 395 (Minn. 2003).

Under rule 41.02(a) of the Minnesota Rules of Civil Procedure, a district court “may upon its own initiative . . . dismiss an action or claim for failure to prosecute or to comply with these rules or any order of the court.” This authority also applies to the dismissal of counterclaims. Minn. R. Civ. P. 41.03. And a district court has wide discretion to determine whether dismissals are with or without prejudice. *Falkenstein v. Braufman*, 88 N.W.2d 884, 889 (Minn. 1958). But dismissal with prejudice “is the most punitive sanction which can be imposed for noncompliance with the rules or order of the court” and should only be granted under “exceptional circumstances.” *Firoved v. Gen. Motors Corp.*, 152 N.W.2d 364, 368 (Minn. 1967). When determining whether to dismiss a claim with prejudice, the primary factor a district court should consider is the prejudicial effect on the parties. *Id.*

Here, after the county filed a motion to compel Weese to participate in discovery, the district court ordered Weese to provide the requested discovery and answer questions at a deposition. And in that order, the district court explicitly stated that “failure to comply with [the order would] result in dismissal with prejudice of [Weese’s] counterclaims against [the county].” Weese did not comply with this order. Accordingly, the district court found that “dismissal [was] the appropriate remedy for [Weese’s] flagrant disregard of the [c]ourt’s [o]rder.”

The district court’s decision to dismiss Weese’s counterclaims is within the court’s authority. Minn. R. Civ. P. 41.02(a), 41.03; *see also Sudheimer v. Sudheimer*, 372 N.W.2d 792, 795 (Minn. App. 1985) (stating that “existence of a clear warning by the trial court that dismissal or a similar sanction would automatically result if the party did not comply

with a discovery deadline has been a significant factor in determining on appeal whether such a sanction was appropriate”). And although the district court did not discuss how Weese’s failure to comply with the discovery order prejudiced the county, it is evident that his refusal to participate in discovery effectively prohibited the county from being able to litigate its case.⁵ As such, it was not an abuse of discretion for the district court to dismiss Weese’s counterclaims.

Weese contends that he could not comply with the district court’s discovery order because doing so would require him to commit perjury. We are not persuaded. The district court noted in its order granting the motion to compel that Weese had the privilege against self-incrimination, but stated that if he intended to invoke that privilege, he needed to do so in a clear, oral fashion. And it is unclear how responding to interrogatories and requests for admissions or document production would require Weese to commit perjury.⁶

In sum, the district court properly granted summary judgment in favor of the county with respect to the enforcement action. And because Weese failed to comply with the district court’s discovery order, the district court did not abuse its discretion by dismissing Weese’s counterclaims.

Affirmed.

⁵ Weese does not argue the issue of prejudice on appeal.

⁶ Weese also argues the merits of his abuse-of-process claim. But because the district court did not abuse its discretion by dismissing the claim as a result of Weese’s failure to comply with the discovery order, we do not reach the question of whether the abuse-of-process claim is meritorious.