STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1422

Kathleen M. Krupke,
Appellant,

vs.

North Star Mutual Insurance Company,
Respondent.

Filed March 25, 2013
Affirmed
Bjorkman, Judge

Stearns County District Court
File No. 73-CV-11-10822

Kathleen M. Krupke, Sauk Rapids, Minnesota (pro se appellant)

Marcus J. Christianson, Jorun Groe Meierding, Maschka, Riedy & Ries, Mankato, Minnesota (for respondent)

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

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

BJORKMAN, Judge

Appellant challenges the dismissal of her property-insurance claim, arguing that (1) the district court judge abused her discretion by not recusing and (2) summary judgment was improper. We affirm.

FACTS

On November 28, 2005, a heat exchanger was installed in the furnace of the home that appellant Kathleen Krupke was renting. When the furnace was restarted, the heat exchanger emitted a thick cloud of smoke into the residence. The smoke lingered for nearly four hours, leaving a residue on Krupke's personal property and a yellowish hue on the walls. Krupke maintains that the smoke resulted from Cosmoline, an anti-rust chemical used in heat exchangers, which becomes toxic when burned.

At the time of the incident, respondent North Star Mutual Insurance Company (North Star) insured Krupke's personal property. Krupke filed a claim for smoke damage. North Star hired Cardinal Adjusting Service, Inc. (Cardinal) to investigate the claim, and Krupke hired SAFE AIR to inspect her residence. In its December 16, 2005 report, Cardinal noted there was very light soot on Krupke's possessions, which could be wiped or washed off. Cardinal contacted a cleaning service that estimated the cleaning cost would be $3,899.34. SAFE AIR detected soot and a high-sheen oil residue on Krupke's property and recommended that she hire professionals to clean the residence. After receiving Cardinal's report, North Star sent Krupke a check for $3,649.34[1] to cover the cost of cleaning her property.

Krupke contended that North Star is obligated to replace her property because the smoke caused permanent damage. On May 2, 2006, North Star retained AirTech Environmental (AirTech) to further inspect and evaluate Krupke's claim. AirTech took tape-lift and wipe samples from several surfaces and items in Krupke's home. AirTech

[1] This amount represents the estimated cleaning cost less Krupke's $250 deductible.

found no evidence of an oily residue on Krupke's property, and the tape-lift samples only contained ordinary household dust and debris.[2] AirTech concluded that if any petroleum residue or metal-forming oil had been emitted into the residence, cleaning would have removed some or most of it. Based on AirTech's report, North Star refused to pay Krupke further benefits.

On November 29, 2011, Krupke initiated this action, alleging North Star breached its obligations under the insurance policy. North Star moved for summary judgment. At the summary-judgment hearing, Krupke asked the district court judge to recuse herself because, at the time of the incident, Krupke's landlord worked for the judge's spouse. The district court judge declined to recuse and granted North Star's motion. This appeal follows.

D E C I S I O N

I. The district court judge did not abuse her discretion by not recusing.

A judge cannot preside over a case if the judge has an interest in its determination or may be excluded from acting as a juror in the case for bias. Minn. R. Civ. P. 63.02. A judge who has presided at any proceeding cannot be removed except upon an affirmative showing of prejudice or bias on the part of the judge. Minn. R. Civ. P. 63.03. A party waives his or her right to remove a judge for prejudice or bias by failing to bring a motion for removal in the district court. *Ag Servs. of Am., Inc. v. Schroeder*, 693 N.W.2d 227, 236 (Minn. App. 2005). A district court judge has the discretion to honor or deny a

[2] AirTech did not submit the wipe samples for chemical analysis, but microscopic analysis of a portion of the wipe samples revealed findings consistent with the tape-lift samples.

request for recusal. *Haefele v. Haefele*, 621 N.W.2d 758, 766 (Minn. App. 2001), *review denied* (Minn. Feb. 21, 2001); *Durell v. Mayo Found.*, 429 N.W.2d 704, 705 (Minn. App. 1988), *review denied* (Minn. Nov. 16, 1988).

Krupke first argues that the district court judge should have recused because Krupke's landlord worked at one time for the judge's spouse. We disagree. We initially note that Krupke did not file a removal motion. When she attempted to raise the issue of bias during the summary-judgment hearing, the district court judge advised Krupke to file a motion seeking her removal. Because Krupke did not do so, her removal argument is waived. *See Baskerville v. Baskerville*, 246 Minn. 496, 500-01, 75 N.W.2d 762, 766 (1956) (concluding defendant waived her removal argument after not taking appropriate action to remove the judge). Krupke's recusal argument also fails on its merits because she has not made an affirmative showing of prejudice or bias. The judge's spouse did not work with Krupke's landlord at the time of the proceedings. Moreover, neither Krupke's landlord nor the company for which he and the judge's spouse once worked is a party to this action. On this record, we discern no bias or prejudice related to the district court judge's spouse.

Krupke's next assertion, that specific aspects of the district court proceedings demonstrate bias or prejudice, likewise fails. Krupke cites as evidence of bias the fact that (1) her summary-judgment hearing was scheduled at the same time as small-claims hearings; (2) the initial judgment she received was not signed by the court administrator; (3) the order granting Krupke's petition to proceed in forma pauperis was filed without being mailed to Krupke; and (4) the judge failed to carry out her duty to establish the

truth. We are not persuaded. Both parties attended the same hearing; although Krupke may have felt uncomfortable arguing in front of others, nothing suggests that the scheduling reflects bias against her. And the failure to initially sign the judgment[3] and to send Krupke a copy of her in forma pauperis petition are minor clerical errors that did not prejudice Krupke. Finally, Krupke mischaracterizes a judge's duty. Judges are required to apply the law fairly and impartially in the matters brought before them. Minn. Code Jud. Conduct Rule 2.2. The record demonstrates that the district court judge followed the law, complied with the rules governing summary-judgment motions, and exhibited no conduct suggesting partiality or prejudice.

Finally, Krupke argues that she was denied her day in court, essentially alleging that the district court judge deprived her of due process. These arguments are unavailing. Due process requires a litigant to have "'the opportunity to be heard at a meaningful time and in a meaningful manner.'" *Smith v. Minn. Dep't of Human Servs.*, 764 N.W.2d 388, 392 (Minn. App. 2009) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 902 (1976)). Hearings must be "'fair, practicable, and reasonable.'" *Haefele*, 621 N.W.2d at 764 (quoting *Saturnini v. Saturnini*, 260 Minn. 494, 498, 110 N.W.2d 480, 483 (1961)). This standard was met here. Krupke had the opportunity to present her arguments in writing and in oral argument. While she may have preferred a longer summary-judgment hearing, we conclude that the hearing was fair and reasonable and

[3] The court administrator entered a corrected judgment on June 12, 2012, and sent Krupke an amended notice of entry of judgment.

that the district court carefully reviewed Krupke's submissions before deciding North Star's motion.

We also reject Krupke's argument that she was denied equal protection of the law because the "cards are invariably stacked against [pro se litigants]." To establish an equal-protection claim, a party must demonstrate that he or she has been treated differently from similarly situated persons. *Haugen v. Superior Dev., Inc.*, 819 N.W.2d 715, 721 (Minn. App. 2012). Pro se litigants are held to the same standard as attorneys and other litigants. *Fitzgerald v. Fitzgerald*, 629 N.W.2d 115, 119 (Minn. App. 2001). Our careful review of the record indicates Krupke was not treated differently from similarly situated persons. In sum, we conclude that Krupke has not made an affirmative showing of prejudice or bias to warrant removal of the district court judge and that she was afforded due process and equal protection under the law.[4]

II. North Star is entitled to summary judgment.

On appeal from summary judgment, we review de novo whether there are genuine issues for trial and whether the district court erred in applying the law. *Dahlin v. Kroening*, 796 N.W.2d 503, 504 (Minn. 2011). We view the evidence in the light most favorable to the party against whom judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). The nonmoving party cannot "rest upon the mere averments or denials of the adverse party's pleading but must present specific facts

[4] Krupke also asserts that North Star's attorney committed misconduct by telling Krupke that she could not refuse to answer several questions during her deposition. Because Krupke did not raise this argument to the district court, it is waived. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating appellate courts may generally only consider issues presented to and considered by the district court).

showing there is a genuine issue for trial." Minn. R. Civ. P. 56.05. No genuine issue for trial exists when "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (quotation omitted).

The insurance policy obligates North Star to pay the lesser of "1) the cost to repair or replace the property with materials of like kind and quality to the extent practicable; or 2) the actual cash value of the property at the time of loss." North Star moved for summary judgment on the ground that its payment to Krupke for repair costs fully met its coverage obligations. The district court concluded that Krupke did not submit competent evidence of uncompensated covered loss. We agree.

In support of summary judgment, North Star presented Cardinal's report, which indicates that the smoke damage to Krupke's possessions could be repaired at an estimated cost of $3,899.34. North Star also submitted the report Krupke obtained from SAFE AIR, which similarly indicates that any soot or other residue on Krupke's property could be professionally cleaned. Finally, North Star offered AirTech's report that found no evidence of any oil-based residue on Krupke's property. AirTech's report further states that even if the smoke left such a residue, cleaning would effectively remedy the situation.

Krupke presented no evidence, besides her own allegations and theories, to oppose summary judgment. Krupke submitted e-mails from two purported experts on Cosmoline, the notes of two University of Minnesota library assistants, and two articles on Cosmoline. None of these items was in the form of an affidavit. And while these

submissions generally describe Cosmoline and note that it is commonly used in heat exchangers, they do not show that the soot or other residue on Krupke's property contained Cosmoline. Moreover, Krupke did not present any competent evidence that her property could not be restored through cleaning.[5] On this record, a rational trier of fact could not conclude that Krupke's property was permanently damaged. Because Krupke did not demonstrate a genuine issue for trial, North Star is entitled to summary judgment.[6]

Affirmed.

[5] In the appendix to her brief, Krupke included a letter from RestoreTech regarding attempts to clean her property. Because Krupke did not submit this letter to the district court, it is outside the record on appeal. *See* Minn. R. Civ. App. P. 110.01 (stating the record on appeal consists of the papers, exhibits, and transcripts filed in the district court).

[6] Krupke also argues that North Star denied her claim in bad faith. Because Krupke did not amend her complaint to seek recovery of taxable costs under Minn. Stat. § 604.18, subd. 4(a) (2012), the argument is waived. *See* Minn. Stat. § 604.18, subd. 4(a) (requiring a litigant to amend her complaint to seek recovery for bad-faith denial of first-party insurance claims); *Thiele*, 425 N.W.2d at 582 (stating appellate courts can only consider issues presented to and considered by the district court).