

NOT DESIGNATED FOR PUBLICATION

No. 105,892

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

RONALD ANJARD, JR.,
Appellant,

v.

TONYA ANJARD-HILLARD, BRUCE W. BEYE, DEANNA GORDON,
CHRISTIAN PULLEY, and GREGORY CHIRPICH,
Appellees.

MEMORANDUM OPINION

Appeal from Johnson District Court; JAMES CHARLES DROEGE, judge. Opinion filed May 18, 2012. Affirmed.

Ronald Anjard, Jr., appellant pro se.

Louis A. Cohn, of Caldwell & Moll, L.C., of Overland Park, for appellee Deanna Gordon, *Brian L. Smith*, of The Smith Law Group, P.C., of Shawnee, for appellee Christian Pulley, *Kenton E. Snow*, of Douthit, Frets, Rouse, Gentile & Rhodes, L.L.C., of Kansas City, Missouri, for appellee Gregory Chirpich, *Bruce W. Beye*, appellee pro se, and *Tonja Anjard-Hillard*, appellee pro se.

Before STANDRIDGE, P.J., MCANANY and ATCHESON, JJ.

Per Curiam: Ronald Anjard, Jr., pro se, appeals the district court's decision to dismiss his petition for declaratory relief and monetary damages. For the reasons stated below, the decision of the district court is affirmed.

FACTS

The following facts primarily come from this court's opinion in *In re Marriage of Anjard*, No. 103,426, 2011 WL 5389679 (Kan. App. 2011) (unpublished opinion), *pet. for rev.* filed December 5, 2011 (pending), but are supplemented with facts taken from pleadings and documents submitted to the district court in this case as well.

When Tonya Anjard-Hillard filed a petition for divorce from her husband Ronald Anjard, they jointly owned several properties. The parties agreed early in the case that the marital residence (the Lamar property) needed to be sold. After a year on the market, however, the Lamar property became subject to foreclosure and eventually was sold at a sheriff's sale. The divorce case was still pending when this happened; thus, Ronald and Tonya had 90 days to sell or redeem the property themselves before the winning bid at the sheriff's sale became final.

The parties actively sought buyers in hopes of realizing some profit from the Lamar property. A buyer, Christian Pulley, was secured for a \$350,000 purchase price along with a waiver of half the real estate fees. Although Pulley offered to purchase the property within a few weeks of the end of the redemption period at a price approximately \$100,000 above the redemption price, Ronald was not in favor of selling the house to Pulley because he believed the property was worth more than the amount of Pulley's offer. At Ronald's request, the district court gave Ronald a week to present a bona fide purchaser to the court. Ronald submitted an offer from a buyer to purchase the house for \$380,000 before the week's end, but there were some contingencies attached to the offer.

Unbeknownst to Ronald or his attorney, the district court judge and Tonya's attorney, Bruce Beye, met to review Ronald's new offer. The district court ultimately decided that the offer presented by Ronald contained unacceptable contingencies. Because of these contingencies, the district court determined that Pulley's offer was

superior to the offer Ronald secured and ordered the property sold to Pulley pursuant to the \$350,000 contract.

Prior to the final distribution in the case, the district court held a 2-day evidentiary hearing regarding the marital assets. A new judge provided Ronald with a full opportunity to present evidence on the value of the Lamar property. At the trial, Ronald presented testimony regarding the ex parte discussion and order. The district court, at the time of the final decision on the case, reviewed the factual circumstances surrounding the ex parte discussion and resulting order and reviewed Ronald's testimony and copies of both the contracts previously considered by the court. After considering all the evidence, the district court found that evidence in the form of exigent circumstances related to pending foreclosure and loss of marital equity in the real estate fully supported the court's decision to order the Lamar property sold to Pulley for \$350,000.

On appeal, Ronald argued, among other things, that the Lamar property was sold for less than it should have been and that the ex parte communication deprived him of procedural due process. He argued that he should have been given an opportunity to persuade the court that accepting the \$380,000 offer was the more practical course of action to pursue given it would have increased the value of the marital assets. But a panel of this court determined that Ronald was not deprived of his right to procedural due process. Acknowledging that the judge's ex parte communications with Beye likely were inappropriate, the panel reasoned that the district court's order to sell the property pursuant to the \$350,000 contract was an interlocutory order in the divorce proceedings and that Ronald was given an opportunity prior to a final disposition of the case to be heard at a meaningful time and in a meaningful manner regarding the value of the Lamar property and the distribution of the proceeds from the sale. With regard to substance, the panel found the district court's findings of fact were supported by the evidence presented at the hearing and thus the court's decision to order the Lamar property sold to Pulley for

\$350,000 was not arbitrary, fanciful, or unreasonable. *In re Marriage of Anjard*, 2011 WL 5389679, at *2-3.

While the direct appeal in the divorce case was pending, Ronald filed a new lawsuit naming Tonya, Beye, Pulley, Deanna Gordon (the real estate agent who represented Tonya in the sale of the Lamar property), and Gregory Chirpich (the real estate agent who represented Pulley in the purchase of the Lamar property) as defendants. The district court judge assigned to this suit had no involvement in the divorce action. The petition included a claim for declaratory relief and a claim for monetary damages based on the sale of the Lamar property to Pulley. In support of declaratory relief, Ronald alleged:

- "38. That an actually [*sic*] controversy has arisen regarding the title of [the Lamar property]
- "39. There exist a substantial controversy to warrant the issuance of a declaratory judgment where [Ronald] was denied due process, and an unlawful *ex parte* interlocutory Court order that ordered the sale of [the Lamar property] without [Ronald's] signature or approval prior to final judgment or a decree of divorce of the property that [Ronald] had title to.
- "40. A judicial declaration is necessary and appropriate at this time so that [Ronald's] rights regarding the title of [the] Lamar property may be determined with certainty.
- "41. Quit Claim Title of the . . . Lamar property to [Ronald]."

In support of monetary damages, Ronald alleged he sustained a loss of \$78,000, which he claimed was the difference between the \$428,000 price they could have received for the sale of the Lamar property and the \$350,000 price they actually received from the sale. In his prayer for relief, Ronald asked the district court to (1) declare that the sale of the Lamar property was unlawful; (2) declare that he had title to the Lamar property; (3) quit claim the title of the Lamar property to him and/or award damages to

him in excess of \$50,000 plus other amounts determined in the course of discovery; and (4) be granted all other relief that may be deemed just and proper.

Each of the named defendants filed a motion to dismiss Ronald's petition. In support of dismissal, the defendants argued res judicata and collateral estoppel precluded Ronald from relitigating any issue related to the sale of the Lamar property. The defendants also claimed that Ronald's lawsuit was barred by the applicable statute of limitations. Ronald filed a brief in opposition to dismissal, arguing res judicata and collateral estoppel did not preclude the claims set forth in his petition for relief. The court held a hearing on defendants' motions and thereafter determined res judicata and collateral estoppel precluded Ronald from bringing the current lawsuit. As such, the district court dismissed Ronald's petition with prejudice.

STANDARD OF REVIEW

In granting defendants' motion to dismiss, the district court concluded as a matter of law that res judicata and collateral estoppel precluded Ronald from going forward with his cause of action. In support of this legal conclusion, the district court found that the issues and claims presented by Ronald already had been decided against him in the underlying divorce action. The court's finding in this regard necessarily was based—at least in part—on a journal entry from the underlying divorce case relating to the authorized disposition and sale of the Lamar property. This journal entry was presented by defendant Gordon as an attachment to the brief she filed in support of her motion to dismiss and by Ronald as an attachment to his brief opposing dismissal.

Because matters outside of the pleadings were presented to and considered by the district court in ruling on the motion to dismiss, we must construe the district court's decision as one granting summary judgment rather than a motion to dismiss. K.S.A. 2011 Supp. 60-212(d); see *Odette Family Ltd. Partnership v. AGCO Finance*, 35 Kan. App. 2d

1, 5, 129 P.3d 95 (2005). The extensive briefing and arguments presented at the hearing demonstrate that Ronald had a reasonable opportunity to present all material that was pertinent to deciding the defendants' motions, which is a statutory prerequisite to construing a motion to dismiss as one for summary judgment. See K.S.A. 2011 Supp. 60-212(d).

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Osterhaus v. Toth*, 291 Kan. 759, 768, 249 P.3d 888 (2011). The question of whether collateral estoppel or res judicata applies to the facts in this case is a question of law subject to de novo review. *Rhoten v. Dickson*, 290 Kan. 92, 106, 113, 223 P.3d 786 (2010).

ANALYSIS

A. *Collateral Estoppel*

As framed by the petition, the issue presented in this lawsuit is whether the Lamar property was improperly sold to Pulley for \$350,000 without Ronald's permission, which necessarily deprived Ronald of the opportunity to realize a higher selling price from the buyer he had found. The district court determined collateral estoppel precluded Ronald from bringing this lawsuit because the issue presented already had been decided by the court in the divorce case. Ronald disagrees, arguing that the legal elements required to establish collateral estoppel are not present in this case. For the reasons stated below, we are not persuaded by Ronald's argument.

As a general rule, collateral estoppel applies to preclude subsequent litigation when (1) there has been a prior judgment on the merits that arose from the same factual

circumstances and determined the rights and liabilities of the parties; (2) the parties to the first suit and the subsequent suit are the same or are in privity with each other; and (3) the issue litigated must have been determined and necessary to support the judgment. *In re Tax Appeal of City of Wichita*, 277 Kan. 487, 506, 86 P.3d 513 (2004).

1. *Prior Judgment on the Merits*

The record in this matter reflects that the district court rendered a final judgment in the divorce case that determined the value of Ronald's ownership interest in the Lamar property and such judgment arose from the same factual circumstances that are now at issue in Ronald's current legal action—specifically, the circumstances surrounding the sale of the Lamar property to Pulley for \$350,000. As such, we find there has been a prior judgment on the merits that arose from the same factual circumstances and determined the rights and liabilities of the parties.

2. *Identical Parties or Parties in Privity*

The parties to the underlying divorce were Ronald and Tonya. The parties to the current lawsuit are Ronald, Tonya, Beye, Pulley, Gordon, and Chirpich. Obviously, Ronald and Tonya are identical parties for purposes of collateral estoppel because they are named parties to both lawsuits. Thus, the issue presented is whether Beye, Pulley, Gordon, and Chirpich—individuals who were not named in the divorce suit but are named in the current suit—should be considered "in privity" with Tonya for purposes of applying collateral estoppel to Ronald's claims against them.

"There is no generally prevailing definition of 'privity' which can be automatically applied to all cases. A determination of the question as to who are privies requires careful examination into the circumstances of each case as it arises." *Goetz v. Board of Trustees*, 203 Kan. 340, 350-51, 454 P.2d 481 (1969). To that end, we find it helpful to examine

the relationships between the parties in the divorce case and the current case under the legal standards for privity set forth by the Tenth Circuit Court of Appeals, which we find instructive:

"Privity requires, at a minimum, a substantial identity between the issues in controversy and showing the parties in the two actions are really and substantially in interest the same. [Citation omitted.] Privity has been held to exist in the following relationships: concurrent relationship to the same property right (*i.e.*, trustee and beneficiary); successive relationship to the same property or right (*i.e.*, seller and buyer); or representation of the interests of the same person. [Citation omitted.]" *Lowell Staats Min. Co. v. Philadelphia Elec. Co.*, 878 F.2d 1271, 1275 (10th Cir. 1989).

Applying the legal standards set forth above to the facts presented in this case, we necessarily conclude that

- Beye is in privity with Tonya because—as Tonya's attorney—he represents Tonya's interests to the exclusion of any other;
- Gordon is in privity with Tonya because—as Tonya's real estate agent—she represents Tonya's interests to the exclusion of any other;
- Pulley is in privity with Tonya based on their successive relationship to the same property (*i.e.*, seller and buyer); and
- Chirpich is in privity with Pulley (and thus Tonya) because—as the real estate agent representing the successor in interest to the property—he represents the successor in interest to the exclusion of any other.

3. Prior Determination Litigated and Necessary to Support Judgment

We already have acknowledged the existence of a prior judgment on the merits that arose from the same factual circumstances that are now at issue in Ronald's current legal action. We now must determine whether the issue litigated in the prior suit was

finally resolved and whether resolution of the litigated issue was necessary to support the judgment.

Among the many issues litigated in the divorce suit was whether the Lamar property was improperly sold to Pulley for \$350,000 without Ronald's permission. The district court considered and decided this issue two separate times during pendency of the divorce action. The first time was after the ex parte meeting between the district court and Beyé. The second time was after the evidentiary hearing during which Ronald testified at length about the sale of the Lamar property and the ex parte nature of the decision. As set forth in the fact section above, the district court found that evidence in the form of exigent circumstances related to pending foreclosure and loss of marital equity in the real estate fully supported the court's decision to order the Lamar property sold to Pulley for \$350,000. A panel of this court affirmed the district court's decision regarding the validity of the sale. In doing so, the panel rejected many of the arguments that Ronald continues to raise in this current lawsuit—namely, that ex parte communications and orders violated his due process rights and rendered the sale of Lamar property invalid. *In re Marriage of Anjard*, 2011 WL 5389679, at *2-3. These facts readily establish that the issue litigated in the prior suit—whether the Lamar property was improperly sold—was finally resolved and that the resolution of this issue was necessary to support the judgment distributing assets from the sale of the Lamar property based on a selling price of \$350,000.

Because the three legal elements required to establish collateral estoppel are satisfied, Ronald is prevented from going forward with his legal claims against the defendants in this lawsuit. As such, we conclude the district court did not err in granting the defendants' motions for summary judgment. Given this conclusion, it is unnecessary to determine whether the doctrine of res judicata and/or the applicable statute of limitations also bars Ronald's lawsuit from moving forward.

B. *Attorney Fees*

Gordon filed a motion for appellate attorney fees under Supreme Court Rule 7.07(b) and (c) (2011 Kan. Ct. R. Annot. 64). "Appellate courts may award attorney fees for services on appeal in any case in which the trial court had authority to award attorney fees." Rule 7.07(b). Rule 7.07(c) allows an assessment of fees when "an appeal has been taken frivolously, or only for the purposes of harassment or delay." A frivolous appeal is "one in which no justiciable question has been presented and the appeal is readily recognized as devoid of merit in that there is little prospect that it can ever succeed." *Peoples Nat'l Bank of Liberal v. Molz*, 239 Kan. 255, 257, 718 P.2d 306 (1986).

In support of her request for fees, Gordon claims Ronald (1) made claims of fraud and unethical conduct against the defendants that have no merit and (2) failed to comply with a variety of appellate rules in bringing this appeal. Gordon alleges these facts readily establish that the district court had the authority to award fees and that Ronald's appeal is "frivolous," "devoid of merit," and has "little prospect' for success." We disagree. Gordon's factual claims are unrelated to the legal standard for awarding fees. Merely reciting the legal standard for an award of fees without providing facts to establish the standard has been met is insufficient to support such an award.

For the reasons stated above, the district court's decision to dismiss Ronald's petition for declaratory relief and monetary damages is affirmed, and Gordon's motion for attorney fees is denied.