NOT DESIGNATED FOR PUBLICATION

No. 107,197

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

MARK ALLEN FRALEY,
Appellant,

v.

DIXIE MARIE BRADFIELD FRALEY,
Appellee.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; TERRY L. PULLMAN, judge. Opinion filed September 7, 2012. Affirmed.

Mark Allen Fraley, appellant pro se.

Janice A. Doran, of Powell, Brewer & Reddick, L.L.P., of Wichita, for appellee.

Before MCANANY, P.J., HILL, J., and BUKATY, S.J.

Per Curiam: Mark Allen Fraley and Dixie Marie Bradfield Fraley were married in 1989. They apparently divorced in February 2002. Dixie was awarded the marital home that the parties had owned jointly for several years. On April 29, 2011, Mark filed a pro se petition in the district court seeking a declaratory judgment against Dixie determining that in February 2000 Dixie had fraudulently signed Mark's name to a deed to the marital home which transferred his interest in the home to Dixie. Dixie filed a motion to dismiss the action and the district court granted it on the basis that the statute of limitations had run and the action was barred by the doctrine of res judicata. Mark appeals contending the district court erred in three respects: (1) it applied the wrong statute of limitations, (2)

it ruled that res judicata barred his action, and (3) it addressed Dixie's motion to dismiss before it addressed his motion requesting a default judgment.

After Mark filed his petition, he filed several other motions including one for a default judgment. Dixie then filed several motions including her motion to dismiss on June 29, 2011. Apparently, she never did file an answer.

The district court held a hearing at which Mark appeared by telephone since he was in the custody of the Kansas Department of Corrections. After hearing the arguments of each party, the court granted Dixie's motion to dismiss and essentially ruled that all other motions by both parties were moot. As we stated, in granting Dixie's motion to dismiss, the court specifically ruled that the statute of limitations and the doctrine of res judicata barred Mark's action.

As to the statute of limitations, the district court stated:

> "By your own statement, Mr. Farley, this action is based on fraud that you alleged was committed by Ms. Fraley back in 2000. By your own statement you were aware of this alleged fraud on Ms. Fraley's part before the 2002 divorce, . . . even if the action occurred on December 31 of 2000. K.S.A. 60-513 provides a two year statute of limitations for cause of action based on fraud."

The court further stated that even if Mark did not discover the alleged fraudulent conveyance until the 2002 divorce and the statute of limitations was tolled until then, his action was still time barred because it was not filed until April 29, 2011.

As to res judicata, the district court stated essentially that because Dixie had been awarded the marital home at the time of the divorce and that award was never appealed, Mark's action was also barred under that doctrine.

Statute of Limitations

Mark first argues on appeal that the district court erred when it determined that K.S.A. 60-513(a)(3) is the statute of limitations applicable here: "The following actions shall be brought within two years: . . . (3) An action for relief on the ground of fraud, but the cause of action shall not be deemed to have accrued until the fraud is discovered." He argues the court should have applied K.S.A. 60-507 instead, which states: "No action shall be maintained for the recovery of real property or for the determination of any adverse claim or interest therein, not provided for in this article, after fifteen (15) years from the time the cause of action accrued."

Dixie filed a motion to dismiss Mark's suit. *Zimmerman v. Board of Wabaunsee County Comm'rs*, 293 Kan. 332, 356, 264 P.3d 989 (2011), sets out our standard of review of a ruling on such a motion:

> "When a district court has granted a motion to dismiss for failure to state a claim, an appellate court must accept the facts alleged by the plaintiff as true, along with any inferences that can reasonably be drawn therefrom. The appellate court then decides whether those facts and inferences state a claim based on plaintiff's theory or any other possible theory. If so, the dismissal by the district court must be reversed. [Citation omitted.]"

If matters outside the pleadings are presented and not excluded by the court, "a motion to dismiss [under K.S.A. 60-212(b)(6)] will be treated as one for summary judgment. [Citation omitted.]" *Underhill v. Thompson*, 37 Kan. App. 2d 870, 874, 158 P.3d 987 (2007).

In this case, the district court made factual findings based, at least in part, on statements that Mark made during the hearing on Dixie's motion to dismiss. In determining our standard of review then, we will treat the ruling on the motion as a ruling

on a motion for summary judgment. 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 the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. The court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. To preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case. On appeal, the same rules apply; summary judgment must be denied if reasonable minds could differ as to the conclusions drawn from the evidence. *Osterhaus v. Toth*, 291 Kan. 759, 768, 249 P.3d 888 (2011).

On the issue of whether the statute of limitations has run on Mark's cause of action, there are no material facts in dispute. That leaves the only issue then as the legal conclusion to be drawn from those undisputed facts.

Mark's argument that the district court should have applied K.S.A. 60-507 instead of K.S.A. 60-513 fails. "'[T]he mere fact that an action pertains to real estate does not necessarily constitute it an action for the recovery of real estate.' [Citation omitted.]" *Sutton v. Sutton*, 34 Kan. App. 2d 357, 359-60, 118 P.3d 700 (2005). The facts here are similar to *Sutton* where a wife challenged the validity of a deed, arguing that her signature was procured by undue influence and misrepresentations. After the trial court granted summary judgment in favor of the husband, the wife argued on appeal that because her action was for the recovery of real property, the trial court should have applied the 15-year statute of limitations under K.S.A. 60-507. This court determined that the trial court "correctly held that [the wife] was required to bring . . . her action alleging a fraudulent conveyance within 2 years from the point the fraud was discovered or should have been discovered." 34 Kan. App. 2d at 361.

As the wife did in *Sutton*, Mark also argues that the district court should have applied a 15-year statute of limitation to his action to determine the validity of his signature on a deed executed many years ago. Because Mark argued that Dixie's transfer of the property was fraudulent, he was required to bring his action within 2 years from when he either discovered or should have discovered the fraud. The court correctly noted that because Mark knew about the alleged fraud sometime before his divorce in early 2002, the statute of limitations began to run from that time. As a result, he needed to file his action at the latest, sometime in early 2004. Mark did not file his action until April 29, 2011. Mark's filing occurred well beyond the 2-year requirement under K.S.A. 60-513 and, therefore, is barred by the statute of limitations.

Because the district court properly ruled that the applicable statute of limitations barred Mark's cause of action, the propriety of the district court's ruling that the action was also barred by the doctrine of res judicata is rendered moot. We need not consider it.

The Sequence in Which the District Court Addressed Several Motions Before It

Lastly, Mark appears to argue that the district court erred when it ruled on Dixie's motion to dismiss before it ruled on a motion that he had filed captioned as "Default Judgment Motion." In support, he cites only K.S.A. 2011 Supp. 60-255(a) generally and without any elaboration:

> "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, the party is in default. On request and a showing that a party is entitled to a default judgment, the court must render judgment against the party in default for the remedy to which the requesting party is entitled. . . . If the party against whom a default judgment is sought has appeared personally, or by a representative, that party or its representative must be served with written notice of the request for judgment at least seven days before the hearing."

Mark's argument again fails. Nowhere in the statute that he cites does it state that a motion for default judgment must be heard before motions filed by the other party are heard even if those motions are filed after the one filed by the party requesting a default judgment. Mark cites no other authority for his argument, nor are we aware of any. "Simply pressing a point without pertinent authority, or without showing why it is sound despite a lack of supporting authority or in the face of contrary authority, is akin to failing to brief an issue." *McGinty v. Hoosier*, 291 Kan. 224, 244, 239 P.3d 843 (2010) (quoting *State v. Torres*, 280 Kan. 309, 321, 121 P.3d 429 [2005]). An issue not briefed by the appellant is deemed waived or abandoned. See *Kingsley v. Kansas Dept. of Revenue*, 288 Kan. 390, 395, 204 P.3d 562 (2009).

Additionally, we note that while Dixie never filed an answer to Mark's petition, her motion to dismiss for failure to state a claim did constitute a response to the petition that is authorized in K.S.A. 2011 Supp. 60-212(b)(6): "Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: . . . (6) failure to state a claim upon which relief can be granted."

We find nothing unfair or unlawful in the order in which the district court addressed the motions before it. We also find it doubtful that any award of a default judgment by the court before it addressed Dixie's defense under the facts of this case would likely survive a subsequent challenge either in the district court or on appeal. "Default judgments are frowned upon. It is said a default judgment becomes necessary only when the inaction of a party frustrates the orderly administration of justice; their value lies in deterrence of the use of delay as a trial strategy. [Citations omitted.]" *Kansas Turnpike Authority v. Jones*, 7 Kan. App. 2d 599, 601, 645 P.2d 377 (1982). Also,"[d]efault judgment as a sanction should be imposed only as a last resort when lesser sanctions are clearly insufficient to accomplish the desired end." *Canaan v. Bartee*, 272 Kan. 720, Syl. ¶ 4, 35 P.3d 841 (2001).

It appears that Dixie's motion to dismiss was not filed until a few weeks after the date a responsive pleading by her was required to be filed. This, of course, rendered her potentially subject to a default judgment. Apparently, Dixie realized this because at the time she filed her motion to dismiss, she also filed a motion to answer out of time and noticed this motion for hearing on the same date for the hearing on her motion to dismiss. Also, the record appears to be devoid of any request by Mark for a hearing on his motion for a default judgment prior to the hearing date on Dixie's motion to dismiss. Obviously, the district court had all these motions before it at the time it granted Dixie's motion to dismiss. As we stated, Mark has cited no authority for his argument that his motion for judgment had to be addressed first. While Dixie was late in filing her response to Mark's petition, she did respond and asked the court to dismiss it. We do not discern any frustration of the orderly administration of justice or the use of delay as a trial strategy on the part of Dixie. Once the court had determined the statute of limitations had run on Mark's claim, the other motions became moot.

The district court did not err in addressing Dixie's motion to dismiss before it addressed Mark's motion for a default judgment.

Affirmed.