Affirmed and Memorandum Opinion filed July 13, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00308-CV

DENNIS C. DEACETIS, Appellant

V.

RODNEY C. WISEMAN, Appellee

On Appeal from the 239th District Court
Brazoria County, Texas
Trial Court Cause No. 54766

MEMORANDUM OPINION

Marianne Whitley divorced her husband, appellant Dennis DeAcetis, in 2003, and was awarded the marital home. Although DeAcetis did not appeal the property division, he has spent the past seven years asserting an interest in the property, first, by refusing to vacate the property until he was jailed for contempt, and second, by suing virtually everyone else with an interest in the property or the proceeds of its sale. Here, he sued the attorney who represented his ex-wife in her successful forcible detainer action, asserting claims of common-law and statutory fraud, conversion, and conspiracy, and seeking title to the property and a declaration voiding every real estate transaction since his divorce. Once again, we affirm based on res judicata.

I. FACTUAL AND PROCEDURAL BACKGROUND

This litigation is based on DeAcetis's claimed interest in his former home; we detailed the factual and procedural background of his claim in *DeAcetis v. Whitley*, No. 14-08-00429-CV, 2010 WL 1077904, at *1–2 (Tex. App.—Houston [14th Dist.] Mar. 25, 2010, pet. filed) (mem. op). In brief, DeAcetis and Marianne Whitley held beneficial title to their marital home, while legal title was held by a corporation owned by their two children. The family court awarded the home to Whitley in its final decree of divorce on May 29, 2003. DeAcetis did not appeal the decision, but he refused to vacate the property. Whitley therefore retained attorney Rodney Wiseman and assigned him a portion of the property's sales proceeds in an amount equal to the fees for his representation. Wiseman obtained an order for enforcement of the divorce decree and successfully prosecuted a forcible detainer action against DeAcetis in the justice court, but DeAcetis still refused to vacate the property. Ultimately, DeAcetis was jailed for contempt of the family court's orders and released only when, pursuant to a Rule 11 agreement, he agreed to vacate the property and execute all documents needed to clear Whitley's title. In March 2005, nearly two years after the divorce decree, Whitley conveyed the property to James and Kimberly Gary; approximately one year later, the Garys conveyed the property to Martha Fonke.

DeAcetis sued them all: his two children, his ex-wife, his ex-wife's former attorney, the couple who purchased the property from his ex-wife, and the person to whom that couple subsequently sold the property. He pleaded the same causes of action against Whitley and Wiseman; specifically, he asserted claims for (a) declaratory judgment that every real estate transaction since his divorce is void, and that he owns the property or the proceeds from its sales; (b) trespass to try title; (c) common-law fraud; (d) statutory fraud; (e) conversion of his "entitlements to the proceeds" from the sales of the property; and (f) "aiding, abetting and conspiracy."

Whitley successfully moved for summary judgment on the ground that DeAcetis's claims were barred by res judicata, and we affirmed the trial court's judgment. *Id.*, 2010 WL 1077904, at *3. Wiseman moved for summary judgment on the same grounds, and in addition, Wiseman asserted that (1) he was immune from liability for actions taken in the course of representing Whitley, (2) DeAcetis lacked standing to bring this suit, and (3) there was no evidence to support DeAcetis's claims for declaratory judgment, trespass to try title, statutory fraud, conversion, or "aiding, abetting and conspiracy." The trial court granted the motion and severed the claims against him, thus rendering the summary judgment final.

In two issues, DeAcetis contends that the trial court erred in granting summary judgment, whether the judgment was based on no-evidence grounds or on the affirmative defense of res judicata. Because the latter issue is dispositive, we address only the motion, response, and evidence concerning Wiseman's res judicata defense. *See* TEX. R. APP. P. 47.1.

II. STANDARD OF REVIEW

We review summary judgments de novo,[1] and where the trial court grants the judgment without specifying the grounds, we affirm the summary judgment if any of the grounds presented are meritorious. *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872 (Tex. 2000). In a traditional motion for summary judgment, the movant bears the burden to show that there is no genuine issue of material fact and it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997). To be entitled to traditional summary judgment, a defendant must conclusively negate at least one essential element of each of the plaintiff's causes of action or conclusively establish each element of an affirmative defense. *Sci.*

[1] *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005).

Spectrum, Inc. v. Martinez, 941 S.W.2d 910, 911 (Tex. 1997). "Evidence is conclusive only if reasonable people could not differ in their conclusions . . . ." *City of Keller v. Wilson*, 168 S.W.3d 802, 816 (Tex. 2005). Once the defendant establishes its right to summary judgment as a matter of law, the burden shifts to the plaintiff to present evidence raising a genuine issue of material fact. *City of Houston v. Clear Creek Basin Auth*., 589 S.W.2d 671, 678–79 (Tex.1979). In reviewing the judgment, we take as true all evidence favorable to the nonmovant, indulging every reasonable inference and resolving any doubts in the nonmovant's favor. *See Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 157 (Tex. 2004).

III. ANALYSIS

"Res judicata precludes relitigation of claims that have been finally adjudicated, or that arise out of the same subject matter and that could have been litigated in the prior action." *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 652 (Tex. 1996) (citing *Barr v. Resolution Trust Corp*., 837 S.W.2d 627, 628 (Tex. 1992)). Thus, a defendant who moves for summary judgment based on the affirmative defense of res judicata must prove (1) a prior final judgment on the merits by a court of competent jurisdiction, (2) identity of parties or those in privity with them, and (3) a second action based on the same claims that were or could have been raised in the first action. *Travelers Ins. Co. v. Joachim*, No. 08-0941, 2010 WL 1933022, at *1 (Tex. May 14, 2010). Wiseman has met that burden.

First, the divorce decree is a prior final judgment on the merits by a court of competent jurisdiction, and the decree reflects that ownership of the property was awarded to Whitley. *Whitley*, 2010 WL 1077904, at *3 (citing *Baxter v. Ruddle*, 794 S.W.2d 761, 762 (Tex. 1990)). Second, Wiseman derives his claim to a portion of the home's sales proceeds from Whitley, who assigned such an interest to him after the district court awarded the home to her. Thus, Wiseman is privy to the prior judgment. *See Amstadt*, 919 S.W.2d at 653 ("'[A]ll persons are privy to a judgment whose succession to the rights

of property therein adjudicated are derived through or under one or the other of the parties to the action, and which accrued subsequent to the commencement of the action.'" (quoting *Kirby Lumber Corp. v. S. Lumber Co.*, 145 Tex. 151, 154, 196 S.W.2d 387, 388 (1946))). And third, DeAcetis's claims against Wiseman are based on claims that were or could have been raised in the divorce action. *See Whitley*, 2010 WL 1077904, at *3.

In appealing this ground for summary judgment, DeAcetis argues that the divorce proceeding could not be a "prior suit" for the purposes of res judicata because the trial court in that action did not and could not divest the corporation of title to the property and award such title to Whitley. But in making this argument, DeAcetis fails to distinguish between legal title and equitable title, even though his own claim to the property is based on that same distinction.

In these proceedings, DeAcetis represented to the trial court that his children's corporation purchased the property in 1997, but that he provided the $70,000 down payment for the property as well as $40,000 for improvements.[2] He did not contend that these funds were his separate property. According to DeAcetis, his son Peter promised him on the day before the divorce was granted that Peter would convey his interest in the corporation to DeAcetis.[3] DeAcetis asserts that the money paid for the down payment and improvements to the property were consideration for this exchange, but that Peter failed to convey his interests as promised. Based on this alleged promise, DeAcetis claims that he

[2] DeAcetis provided no evidence of such payments, but instead attached to his response an affidavit in which he attested that the factual assertions in the response were "true and correct to the best of my knowledge." This statement is insufficient to raise a fact issue. *See Kerlin v. Arias*, 274 S.W.3d 666, 668 (Tex. 2008) (per curiam) (holding that respondent to a motion for summary judgment failed to raise a fact issue by producing an affidavit in which the affiant attested that her factual assertions were "true and correct to the best of my knowledge and belief").

[3] We note with interest that two weeks after oral argument in this case—and contrary to his position in the trial court and in this court—DeAcetis repeatedly represented to the Texas Supreme Court in a companion case that the divorce already had been granted at the time Peter allegedly made such a promise. *See* Petition for Review at 3, 6, and 14, *DeAcetis v. Whitley*¸ No. 10-0340 (Tex. June 3, 2010).

"equitably has been granted a superior title" to the property. Thus, where his own claim to the property is concerned, DeAcetis appears to recognize the well-established principle that equitable title can pass even when legal title has not.

But evidence that such payments were made (and DeAcetis offered none) also would be evidence that a resulting trust arose in favor of the marital estate when the title was conveyed to the children's corporation. *See Cohrs v. Scott*, 161 Tex. 111, 117, 338 S.W.2d 127, 130 (1960) ("A resulting trust arises by operation of law when title is conveyed to one person but the purchase price or a portion thereof is paid by another."). Under such circumstances, the corporation would be considered to hold legal title to the property, while the marital estate would be considered to hold beneficial or equitable title. *See id.* ("The parties are presumed to have intended that the grantee hold title to the use of him who paid the purchase price and whom equity deems to be *the true owner*.") (emphasis added); *Winkle v. Winkle*, 951 S.W.2d 80, 88 (Tex. App.—Corpus Christi 1997, pet. denied) (explaining that the characterization of property as separate or community property is determined by the inception of title which "occurs when a party first has right of claim to the property by virtue of which title is finally vested"); *Whitley*, 2010 WL 1077904, at *1 (explaining that family court awarded beneficial title to Whitley). Thus, proof of DeAcetis's factual allegations would have established only that the marital estate was "the true owner," even though legal title was held by another. *See Cohrs*, 161 Tex. at 117; 338 S.W.2d at 130; *Winkle* (holding that real property purchased during the marriage with community funds and intended as a home for the community is community property). Because the characterization of property and the division of the marital estate were matters to be resolved in the divorce proceedings, DeAcetis's claimed interest in the property was an issue that could have been raised in the earlier action. *See Adams v. Adams*, 214 S.W.2d 856, 858 (Tex. Civ. App.—Waco 1948, writ ref'd n.r.e.) (explaining that the legal effect of the property division in a divorce decree was to adjudicate the parties' property rights).

Although DeAcetis assumes that the family court could not characterize or divide marital property for which neither of the parties held legal title, he cites no authority for this proposition. Contrary to DeAcetis's assumption, the family court could characterize Whitley and DeAcetis's respective equitable interests, if any, as community or separate property; the court also could include equitable community property in the division of the marital estate even if neither held legal title to the property. *See Jones v. Jones*, 804 S.W.2d 623, 625 (Tex. App.—Texarkana 1991, no writ) (concluding that evidence supported a finding that equitable title to real estate was community property even though record title was in the name of husband's brother); *see also* TEX. FAM. CODE ANN. § 4.001(2) (Vernon 2006) (defining "property," as that term is used in statutes governing premarital and marital property agreements, to include equitable interests in real property).

Finally, DeAcetis contends that the family court did not award ownership of the property but instead directed him only to provide Whitley's attorney with information about a lease of the property. This argument is contradicted by the record. The divorce decree records that Whitley and DeAcetis were awarded the property identified in an exhibit attached to the decree. The first item listed on the exhibit is the former marital home, and it is conspicuously recorded that "ownership" of the property was awarded to "wife." The same court later issued an order of enforcement by contempt in which it found DeAcetis guilty of violating the divorce decree in that Whitley "was awarded the residence" and DeAcetis failed to turn the property over to her. Plainly, as between Whitley and DeAcetis, ownership of the property not only could have been litigated, it *was* litigated.

We conclude that the trial court did not err in granting traditional summary judgment based on Wiseman's affirmative defense. We therefore overrule DeAcetis's second issue, and do not reach his first issue. *See* TEX. R. APP. P. 47.1.

IV. CONCLUSION

Just as we previously held that Whitley can successfully raise res judicata as a defense to DeAcetis's attempts to relitigate his claimed interest in the former marital home, *see Whitley*, 2010 WL 1077904, at *3, so we now hold that Wiseman, who succeeded to a portion of Whitley's rights in the property, can similarly rely on the preclusive effect of the final judgment in the divorce to defeat DeAcetis's claims. *See Shanks v. Treadway*, 110 S.W.3d 444, 449 (Tex. 2003) (stating that husband's remedy for the trial court's alleged substantive error of law in dividing property was by direct appeal of the divorce decree, not by collateral attack); *Atkinson v. Atkinson*, 560 S.W.2d 200, 201–02 (Tex. Civ. App.—Amarillo 1977, no writ) (holding that a party who did not appeal a divorce decree could not collaterally attack the judgment by raising contractual defenses to the property settlement incorporated into the decree). We therefore affirm the trial court's judgment.

/s/ Tracy Christopher
Justice

Panel consists of Justices Brown, Sullivan, and Christopher.