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STATE OF MINNESOTA
IN COURT OF APPEALS
A11-448
A11-707

Kevin E. Burns,
Appellant,

vs.

Ward Einess, in his capacity as Commissioner,
Minnesota Department of Revenue,
Respondent.

Filed November 21, 2011
Affirmed
Kalitowski, Judge

Ramsey County District Court
File No. 62-CV-10-11323

Kevin E. Burns, Eden Prairie, Minnesota (pro se appellant)

Lori Swanson, Attorney General, Mark B. Levinger, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Stoneburner, Presiding Judge; Kalitowski, Judge; and Peterson, Judge.

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

KALITOWSKI, Judge

In this consolidated appeal from orders denying temporary injunctive relief and dismissing his claims, pro se appellant Kevin E. Burns argues that the district court erred by (1) granting respondent's motion for judgment on the pleadings; (2) dismissing

appellant's claims with prejudice; (3) failing to disclose conflicts and recuse itself; (4) denying appellant an opportunity to join an indispensable party; and (5) denying appellant an opportunity to amend his complaint. We affirm.

D E C I S I O N

In 2009, the Minnesota Tax Court affirmed a determination by the Commissioner of Revenue that appellant owes the state $1,145 plus interest for an improperly claimed 2003 property tax refund. *Burns v. Comm'r of Revenue*, No. 7929-R, 2009 WL 363997, at *2 (Minn. Tax Ct. Feb. 10, 2009). Appellant sought review and the Minnesota Supreme Court affirmed. *Burns v. Comm'r of Revenue*, 787 N.W.2d 164, 167 (Minn. 2010). Shortly thereafter, respondent notified appellant that collection efforts would begin.

In December 2010, appellant filed a pro se complaint in the district court seeking to vacate the 2009 tax court order because the judgment was "void" and "procured through fraud." Appellant also sought an injunction against collection claiming that his wages are exempt from garnishment under Minn. Stat. § 550.37, subd. 14 (2010). Respondent moved for judgment on the pleadings for failure to state a claim. Before the district court heard arguments on respondent's motion, appellant received notice that wage garnishment would begin and moved for a temporary restraining order to suspend garnishment. The district court denied appellant's motion on February 4, 2011, and dismissed appellant's claims with prejudice on March 30, 2011. Appellant sought review of the February 4 and March 30 orders as well as other rulings made during a hearing on March 22, 2011.

I.

Appellant contends that the district court abused its discretion by denying his motion for a temporary restraining order against wage garnishment. But appellant has not cited any caselaw or provided any legal argument in support of this position. An assignment of error based on mere assertion is generally waived unless prejudicial error is obvious. *Schoepke v. Alexander Smith & Sons Carpet Co.*, 290 Minn. 518, 519-20, 187 N.W.2d 133, 135 (1971). None is apparent here. Appellant's motion for a temporary restraining order rested on his unsupported assertion that his wages are exempt from garnishment. Because appellant's motion failed to offer any explanation for his exemption claim, the district court did not abuse its discretion by concluding that appellant had not established his likelihood to succeed on the merits. *See Metro. Sports Facilities Comm'n v. Minn. Twins P'ship*, 638 N.W.2d 214, 226 (Minn. App. 2002) (holding that a party seeking a temporary restraining order must demonstrate a likelihood of prevailing on the merits), *review denied* (Minn. Feb. 4, 2002).

II.

Appellant argues that the district court erred by granting respondent's motion for judgment on the pleadings. On appeal from dismissal on the pleadings, this court reviews de novo whether the complaint sets forth a legally sufficient claim. *Zutz v. Nelson*, 788 N.W.2d 58, 61 (Minn. 2010). "When considering a motion for judgment on the pleadings, the court must accept the allegations contained in the pleading under attack as true, and assumptions made and inferences drawn must favor the non-moving party." *Lorix v. Crompton Corp.*, 736 N.W.2d 619, 623 (Minn. 2007).

Vacate tax court order

We first consider appellant's claim seeking to vacate the 2009 tax court order as "void," based on "fundamental error," and "procured through fraud." Appellant's complaint offered no facts or explanation to support these assertions. The district court concluded that appellant's claim was an attempt to relitigate the tax court case, and was therefore barred by the doctrine of res judicata.

Res judicata is a finality doctrine, which provides that there must be an end to litigation. *Hauschildt v. Beckingham*, 686 N.W.2d 829, 840 (Minn. 2004). We review its application de novo. *Id.* Pursuant to res judicata, a judgment on the merits in one lawsuit is a bar to a second lawsuit for the same claim, or any other matter that could have been litigated in the first lawsuit. *Hauser v. Mealey*, 263 N.W.2d 803, 807 (Minn. 1978). "[A] party is required to assert all alternative theories of recovery in the initial action." *Hauschildt*, 686 N.W.2d at 840 (quotations omitted). We apply res judicata where (1) the cause of action or claim involved the same set of factual circumstances; (2) the cause of action or claim involved the same parties or their privies; (3) there was a final judgment on the merits; and (4) the estopped party had a full and fair opportunity to litigate the matter. *Id.*

Appellant argues that res judicata is inapplicable because the tax court judgment impermissibly relied on two Dakota County judgments that he asserts are void for lack of subject-matter jurisdiction. The Dakota County judgments established that appellant did not own the property that was the subject of the disputed property tax refund at the time he claimed the refund. Appellant is correct that res judicata does not bar a later attack on

jurisdiction. *Hauser*, 263 N.W.2d at 808. But appellant's complaint seeks to vacate the tax court judgment, not the Dakota County judgments. Because he has not alleged a jurisdictional flaw in the tax court proceeding, he cannot avoid the application of res judicata with respect to that judgment.

Applying res judicata, we find that all four factors are met here. This claim rests squarely on the same set of facts and circumstances that were presented to the tax court and affirmed by the supreme court. Both cases involved appellant and respondent. The tax court and the supreme court each issued final judgments on the merits. And appellant had ample opportunity and incentive to litigate his claim at both levels. If there were any deficiencies in the tax court proceeding, appellant should have raised them in that court or on appeal.

The district court also dismissed this claim on the alternative ground that it lacked subject-matter jurisdiction to review decisions of the tax court under Minn. Stat. § 271.09, subd. 1 (2010). But because we conclude dismissal was proper based on the doctrine of res judicata we need not address whether dismissal was proper on alternative grounds. *See Reed v. Univ. of N.D.*, 543 N.W.2d 106, 109 (Minn. App. 1996), *review denied* (Minn. Mar. 28, 1996) (holding that an appellate court will affirm the district court if the district court's decision can be sustained on any grounds).

Injunction and exemption from garnishment

Appellant's second claim generated confusion. The complaint requested "an order to enjoin actions by the Respondent . . . in enforcing the judgment of the Minnesota Tax Court, including, but not limited to, levy of [appellant's] wages and assets in violation of

Minn. Stat. [§] 550.37(14), et seq. and Minn. Stat. [§] 563.01, et seq. . . . ." It appears that respondent and the district court initially interpreted this claim as a request for injunctive relief flowing from appellant's first claim that the tax court judgment was void. But as appellant filed additional motions explaining his legal theory, it appears that appellant intended to seek an exemption from wage garnishment. In its March 30 order, the district court addressed both variations of this claim, dismissing each on separate grounds with prejudice.

To the extent appellant sought injunctive relief, the district court concluded that the anti-injunction provision in Minn. Stat. § 270C.25 (2010) barred appellant's claim. Section 270C.25, subdivision 1, states:

> No suit to restrain assessment or collection of a tax, fee, penalty, or interest, imposed by a law administered by the commissioner, including a declaratory judgment action, can be maintained in any court by any person except pursuant to the express procedures in (1) this chapter, (2) chapter 271, (3) chapter 289A, and (4) any other law administered by the commissioner for contesting the assessment or collection of taxes, fees, penalties, or interest.

This provision is a statutory expression of the general rule that "relief against erroneous or illegal assessments will not be granted by a court of equity, if the [taxpayer] has an adequate remedy at law." *Village of Edina v. Joseph*, 264 Minn. 84, 100, 1 N.W.2d 809, 819 (1962). The availability of the tax court to hear appellant's assessment appeal supplanted his ability to seek injunctive relief in the district court. *See M.A. Mortenson Co. v. Minn. Comm'r of Revenue*, 470 N.W.2d 126, 130-31 (Minn. App. 1991). Because

none of the statutory exceptions contained in section 270C.25 apply, the district court did not err in determining that it was deprived of jurisdiction to issue an injunction.

Appellant maintains, however, that the district court erred in dismissing his exemption claim on the pleadings. In support of exemption, the complaint cited Minn. Stat. § 550.37, subd. 14, which exempts certain property from garnishment, including the salary or earnings of a debtor who has been "a recipient of government assistance based on need" within the previous six months. The complaint also cited Minn. Stat. § 563.01 (2010), which grants low-income litigants in forma pauperis (IFP) status in the courts. In a later motion to the district court, appellant attached copies of several court orders granting him IFP status, arguing that IFP status qualified him as "a recipient of government assistance based on need" and thus exempted his wages from garnishment.

The district court dismissed appellant's exemption claim on the pleadings because appellant had not completed an exemption form and he had not "presented . . . any evidence that he qualifies for an exemption from wage garnishment." Appellant argues that his complaint was sufficient and he should have been granted a hearing to present evidence. We disagree.

We note that appellant's failure to complete an exemption form was not fatal to his claim. A creditor that intends to garnish earnings must serve notice on the debtor and inform the debtor that some or all of the debtor's earnings may be exempt. Minn. Stat. § 571.924, subd. 1 (2010). This notice must substantially conform to the form provided in Minn. Stat. § 571.925 (2010). The form in section 571.925 includes a statement for the debtor to complete and return to the creditor claiming exemption from garnishment.

Id. Rather than completing the form, appellant filed a complaint directly in the district court. But nothing in the garnishment statutes establishes the exemption form as the exclusive means of pursuing an exemption claim. Indeed, "[f]ailure of the debtor to serve a statement does not constitute a waiver of any right the debtor may have to an exemption." Minn. Stat. § 571.926 (2010). Therefore, appellant's failure to file an exemption form did not constitute a proper ground for dismissing his complaint.

Because the issue was properly before the district court, it was immaterial to respondent's motion for judgment on the pleadings whether appellant had actually presented proof of his claim. *See Lorix v. Crompton Corp.*, 736 N.W.2d 619, 623 (Minn. 2007) ("It is immaterial at the pleadings stage whether the plaintiff can prove the facts alleged."). But on a motion for judgment on the pleadings, if "matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment." Minn. R. Civ. P. 12.03. In addition to his pleadings, appellant filed numerous motion papers with the district court. And here the district court specifically referenced the weakness of the evidence appellant presented in concluding that appellant had not presented proof of his eligibility for an exemption. Thus, we will treat the district court's decision as a grant of summary judgment.

A district court must grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. On appeal from summary judgment, we look to see whether there are any genuine issues of

material fact and whether the district court erred in its application of the law. *Dahlin v. Kroening*, 796 N.W.2d 503, 504 (Minn. 2011). A genuine issue of material fact exists if a rational trier of fact, considering the record as a whole, could find for the nonmoving party. *Frieler v. Carlson Mktg. Grp., Inc.*, 751 N.W.2d 558, 564 (Minn. 2008). We review a grant of summary judgment de novo, and we view the evidence in the light most favorable to the nonmoving party. *Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 364 (Minn. 2009).

The only relevant question for the district court was whether appellant presented evidence that he qualifies as receiving government assistance based on need. *See* Minn. Stat. § 550.37, subd. 14. Section 550.37, subdivision 14, provides a nonexclusive list of government benefits that qualify a recipient for exemption from garnishment. *Id.* All of the programs listed provide direct payments or subsidies to address the basic economic needs of low-income recipients. *Id.* (listing Minnesota family investment program, general assistance medical care, Supplemental Security Income, and other programs for comparison).

In the district court and on appeal, the only evidence presented by appellant is his IFP status. Although IFP status is awarded based on need, its purpose is to provide access to the courts and not to address basic economic needs. *See* Minn. Stat. § 563.01 (authorizing the waiver of fees and the payment of litigation expenses by the state for qualifying litigants). Moreover, the evaluation of an IFP application is significantly less rigorous than the evaluation of qualifications for the assistance programs listed in section 550.37, subd. 14. Minn. Stat. § 563.01, subd. 2 (requiring the filing of an affidavit stating

the nature of the action, a belief that the affiant is entitled to redress, and that the affiant is unable to pay the fees, costs and security for costs). Thus appellant's IFP status does not satisfy the statutory requirement for exemption from garnishment and the district court did not err in dismissing appellant's exemption claim.

III.

Appellant argues that the district court abused its discretion by dismissing his claims with prejudice. We disagree. Whether to dismiss a complaint with or without prejudice is within the sound discretion of the district court. *Wessin v. Archives Corp.*, 592 N.W.2d 460, 467 (Minn. 1999).

Appellant claims that because the district court cited a lack of subject-matter jurisdiction as an alternative ground for dismissing his claims, dismissal should have been without prejudice. *See Hauser*, 263 N.W.2d at 808 ("[J]udgment rendered by a court which lacks jurisdiction to hear a case does not have the effect of res judicata."); *see also* 1 David F. Herr & Roger S. Haydock, *Minnesota Practice* § 12.5 (5th ed. 2009) ("A dismissal for lack of subject-matter jurisdiction is not an adjudication on the merits, and the dismissal is therefore made without prejudice . . . ."). But it is immaterial whether the district court dismissed his challenge to the tax court order with or without prejudice because his claim is barred by res judicata and cannot be refiled in the district court. And because we hold that the district court properly dismissed appellant's exemption claim on summary judgment, the district court's order is a judgment on the merits of that claim. Thus, dismissal with prejudice was appropriate on both claims.

IV.

Appellant argues that the district court erred by denying his motion for removal on the basis of bias or prejudice. "No judge shall sit in any case if that judge is interested in its determination or if that judge might be excluded for bias from acting therein as a juror." Minn. R. Civ. P. 63.02. A judge must be disqualified from a proceeding in which "the judge's impartiality might reasonably be questioned." Minn. Code Jud. Conduct, Canon 2.11A (2010). "[T]he question is whether an objective examination of the facts and circumstances would cause a reasonable examiner to question the judge's impartiality." *State v. Burrell*, 743 N.W.2d 596, 601 (Minn. 2008). But "[t]he mere fact that a party declares a judge partial does not in itself generate a reasonable question as to the judge's impartiality." *Id.* at 601. Whether a judge has violated the Code of Judicial Conduct is a question of law, which we review de novo. *State v. Dorsey*, 701 N.W.2d 238, 246 (Minn. 2005).

Because appellant removed the judge initially assigned to this case as of right, he was required to make an affirmative showing of prejudice to remove the district court judge who ultimately presided over the matter. *See* Minn. R. Civ. P. 63.03. As evidence of implied actual bias, appellant cites the fact that the governor, who oversees respondent, also appointed the district court judge's wife as chair of the Metropolitan Council. Appellant claims that this relationship between the district court and respondent created an appearance that the district court would be inclined to favor respondent over appellant. Additionally, appellant makes unsupported assertions that the district court engaged in

substantive ex parte communication with respondent, and that a district court law clerk told appellant that the court was predisposed to rule against appellant.

Appellant's arguments lack merit. On the record, the district court denied that his remote personal connection with respondent would influence his decisions in this case, and no reasonable examiner would question the district court's impartiality on this basis. Taken to its logical conclusion, appellant's argument would disqualify any judge appointed by a sitting governor from hearing a dispute involving a state agency. The district court also denied having any inappropriate ex parte communication with respondent or having prejudged the case. Moreover, appellant's credibility is diminished because he filed removal motions alleging bias against all three district court judges who were assigned to his case. Therefore, we conclude that appellant failed to demonstrate any credible basis for removal.

V.

Appellant also challenges the district court's failure to rule on his motions for joinder of his ex-wife as an indispensable party and for leave to amend his complaint to include additional tort claims. To prevail on appeal, appellant must show both error and prejudice resulting from the error. *Midway Ctr. Assocs. v. Midway Ctr., Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975).

The district court's failure to rule on joinder, even if erroneous, could not have been prejudicial because the complaint was dismissed. *See* Minn. R. Civ. P. 61 (providing that harmless error must be disregarded). And with regard to amendment, a district court may deny a motion to amend a complaint to add new claims when the

additional claims cannot withstand summary judgment. *Ag Servs. of Am., Inc. v. Schroeder*, 693 N.W.2d 227, 235 (Minn. App. 2005). Appellant's new claims sought damages against respondent for pursuing collection of appellant's tax debt through statutory garnishment procedures. If it had ruled, the district court may very well have determined that appellant's claims were frivolous and denied appellant's motion to amend as futile. Therefore, appellant has not been prejudiced.

Affirmed.