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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1376**

Sandra M. McDonald, et al.,
Appellants,

vs.

Robert Lyle Cahlander, et al.,
Respondents.

**Filed August 12, 2008
Affirmed
Schellhas, Judge**

Goodhue County District Court
File No. 25-CV-06-84

Lance R. Heisler, Lampe, Swanson, Morisette, Heisler & Arnold, LLP, 105 East Fifth Street, P.O. box 240, Northfield, MN 55057 (for appellants)

George L. May, May & O'Brien, LLP, 204 Sibley Street, Suite 202, Hastings, MN 55033 (for respondents)

Considered and decided by Schellhas, Presiding Judge; Shumaker, Judge; and Hudson, Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellants challenge the district court's findings that properties titled in appellant-cohabitant's name were held in a constructive trust, that appellant-cohabitant and respondent-cohabitant were entitled to equal shares of the proceeds of the sale of the

properties, and that rent that appellant-LLC owed respondent-LLC should not be offset by funds that appellant-LLC claimed it had paid respondents. Because we conclude that the district court's findings were not clearly erroneous, we affirm.

FACTS

Appellant Sandra McDonald and respondent Robert Cahlander met in 1996, began living together in June 2001, and maintained a romantic and sexual relationship until May 2005. When they met, Cahlander was owner and sole shareholder of respondent Loving Residence, Inc., which operated an assisted-living facility of the same name in Red Wing, Minnesota. When McDonald moved in with Cahlander, they originally lived together in Cahlander's apartment at the facility. McDonald began working at Loving Residence as office manager on or about August 1, 2001, at a salary of \$50,000 per year. The district court found that McDonald's salary was commensurate with her job responsibilities, but also reflected her "personal relationship with Cahlander, with whom McDonald was residing and sharing expenses." McDonald had no experience in caring for elderly persons, but undertook training in the field with funding from Cahlander and Loving Residence, Inc. McDonald has never had an ownership interest in Loving Residence, Inc. During their relationship, McDonald and Cahlander maintained their own private accounts, maintained joint checking and savings accounts, and filed income taxes separately.

On December 3, 2001, Cahlander was disqualified by the Minnesota Department of Human Services from having any direct contact with persons served by his business, and his access to the facility was greatly restricted. Subsequently, in January 2002,

McDonald became the sole administrator of the Loving Residence business, responsible for overseeing the building and the business with limited assistance from Cahlander. McDonald organized appellant LOVRESKO, L.L.C. (Lovresko) for the purpose of operating the Loving Residence business and continued to administer the facility through Lovresko. Cahlander never had an ownership interest in Lovresko. Lovresko rented the Loving Residence business from Loving Residence, Inc., per a five-year lease agreement that took effect March 24, 2004. Lovresko obtained, and maintained at the time of trial, a license from the Minnesota Department of Human Services allowing it to operate the facility. At Cahlander's request, McDonald continued to act as agent for Loving Residence, Inc., after the lease was executed. McDonald resigned as agent for Loving Residence, Inc., in November 2005.

In addition to operating the Loving Residence business, McDonald and Cahlander invested in real property in Red Wing. In October 2001, McDonald and Cahlander purchased a five-acre property on Ide Lane in Red Wing. Cahlander could not qualify for financing, so McDonald obtained financing in her name and both parties signed an amendment at closing that removed Cahlander as co-purchaser of the property. A year later, on or about October 1, 2002, Cahlander sold a property he owned at Buchanan Street in Red Wing, which resulted in net proceeds to him of \$62,679.16. Cahlander deposited these funds into his personal account and later wrote two checks to McDonald, one for \$20,000 and one for \$2,200. Cahlander maintains that the proceeds of the sale of the Buchanan Lane property funded the renovation of the property at Ide Lane. Cahlander also testified that it was his practice to write checks to McDonald when he had

extra money, because “she did better record keeping than I did,” and “we were a team.” Cahlander further testified that McDonald “wrote out all the checks.”

In spring 2003, Cahlander located a property at Pine Street in Red Wing; McDonald eventually agreed to buy it with Cahlander. Cahlander again failed to qualify for financing, and McDonald again obtained financing in her name alone. Cahlander again signed an amendment to the purchase agreement assigning his interest to McDonald. Later, the Pine Street property was refinanced, and two additional loans totaling \$75,000 were taken out to fund improvements and repairs to the property; McDonald is the sole obligor on these loans. Cahlander and McDonald purchased another property on Green Street in Red Wing, which the parties agreed was purchased as an investment property. Both parties are obligated on the loan and mortgage on this property, and joint ownership of the Green Street property is not in dispute.

Over the course of their relationship, Cahlander wrote additional checks to McDonald, including one for \$40,000 on September 4, 2003, and one for \$1,000 on March 24, 2003. The district court found that none of Cahlander’s cash contributions was earmarked for any specific purpose, but all cash contributions by Cahlander were to be used generally for improvements and “other joint expenses.” Cahlander estimates that he invested 3,635 hours of labor into the couple’s real estate interests.

The personal relationship between McDonald and Cahlander ended in early 2005. On July 14, 2005, McDonald claimed that Cahlander had assaulted her and obtained an Order for Protection that prevented Cahlander from entering the Loving Residence facility and both the Ide Lane and Pine Street properties. Appellants McDonald and

Lovresco filed a complaint against respondents Cahlander and Loving Residence, Inc., asking the court in relevant part (1) to determine what rent, if any, was due from Lovresco to Loving Residence, Inc.; (2) to offset expenses Lovresco paid against any rent due; and (3) to determine that Cahlander had no interest in the Ide Lane or Pine Street properties. Respondents filed an answer and counterclaim, asking the court (1) to find that a joint venture existed between Cahlander and McDonald; (2) to impose a constructive trust over the Ide Lane and Pine Street properties; and (3) to determine Lovresco's rent obligations without appellants' requested offsets.

The district court found that both the Ide Lane and Pine Street properties were purchased jointly, subject to an oral joint venture/partnership agreement between McDonald and Cahlander where both were equal partners, and that the property titles were placed solely in McDonald's name in order to obtain financing. The court also found that there was an oral agreement whereby McDonald and Cahlander would "purchase and sell residential properties, holding them long enough to avoid capital gains taxes." The court concluded that the Ide Lane, Pine Street, and Green Street purchases were all made "pursuant to the oral joint venture/partnership agreement entered into by McDonald and Cahlander." The court awarded Cahlander and McDonald each a "one-half interest" in the Ide Lane, Pine Street, and Green Street properties and ordered that the properties be held by McDonald under a constructive trust on behalf of both parties.

The district court also found that Lovresco owed \$85,500 in rent to Loving Residence, Inc., but paid only \$73,071.86, resulting in rent arrearages in the amount of \$12,428.14. Appellants claimed that Lovresco satisfied this obligation by making

payments that Cahlander owed to other parties. But the district court found that “both parties participated and acquiesced in the arrangement between the parties whereby personal expenses, including attorney’s fees, were paid out of various accounts including those of [Lovresco],” and that such payments were part of the “business/personal plan and joint venture of the parties.” For example, Lovresco paid \$5,523.70 in personal expenses for Cahlander, and \$6,332.92 to a law firm in return for its work in helping the business comply with state law and in drafting the lease agreement. The district court did find, however, that the lease required Lovresco and Loving Residence, Inc. to pro rate the property taxes for the first half of 2004, but that Lovresco paid \$3,669.96 to satisfy the entire first-half payment. As a result, Loving Residence, Inc., owed one half of this amount (\$1,816.98) to Lovresco, and the district court found that Lovresco’s rent obligation should be offset by this amount and thus lowered Lovresco’s rent obligation to \$10,611.16.¹ The court also offset Lovresco’s rent obligation by the balances of two accounts that appellants claimed Lovresco had transferred to Loving Residence, Inc., amounting to \$5,912.45 in total, and calculated the total that Lovresco owed Loving Residence, Inc. to be \$4,698.71.

Appellants filed a posttrial motion for a new trial and amended findings, in which appellants challenged the district court’s findings and order. Respondents filed a responsive memorandum, and a hearing on the motion occurred March 30, 2007.

¹ The district court order calculated this amount as \$10,611.15, an error of \$.01 in appellants’ favor. We determine that this error is insignificant, and we decline to correct it here. *See Wibbens v. Wibbens*, 379 N.W.2d 225, 227 (Minn. App. 1985) (refusing to remand for de minimis error).

Particularly important to their posttrial proceeding was respondents' argument that the rent Lovresco owed should not be offset by accounts appellants claimed had been turned over to Loving Residence, Inc., because there had been no showing that the funds had been turned over to Loving Residence, Inc. The district court agreed and increased the amount of Lovresco's rent arrearages to \$10,611.16. The court also ruled that "the party inhabiting each property from May of 2005 shall be responsible for all debts associated with the property" and that any debts or profits from the Ide Lane property since the parties' separation in May 2005 should be shared equally between the parties.

Appellants challenge the district court's orders, maintaining that a constructive trust over the Ide Lane and Pine Street properties is inappropriate, that an equal split of the sale proceeds from the property unfairly fails to compensate McDonald for cash advances she made toward the properties, and that Loving Residence, Inc. is not entitled to any portion of the rent that Lovresco owed under its lease.

D E C I S I O N

Appellants challenge certain findings of fact. On review, findings of fact will not be set aside unless they are clearly erroneous. Minn. R. Civ. P. 52.01. An appellate court, in reviewing findings of fact, views the record in the light most favorable to the findings, and it will not set aside a finding merely because it views the evidence differently. *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999). A finding of fact is clearly erroneous only if we are "left with the definite and firm conviction that a mistake has been made," and we will not disturb a finding if "there is reasonable evidence to support the district court's findings." *Id.* (quotation omitted).

Constructive Trust

A constructive trust is an equitable remedy, which the court imposes to prevent unjust enrichment. *Dietz v. Dietz*, 244 Minn. 330, 334, 70 N.W.2d 281, 285 (1955). Whether a constructive trust should be imposed is a question of fact for the district court, *Freundschuh v. Freundschuh*, 559 N.W.2d 706, 711 (Minn. App. 1997), *review denied* (Minn. Apr. 24, 1997). The district court must find, through clear and convincing evidence, that the imposition of a constructive trust is justified to prevent unjust enrichment. *Peterson v. Holiday Recreational Indus., Inc.*, 726 N.W.2d 499, 507 (Minn. App. 2007), *review denied* (Minn. Feb. 28, 2007). This court will accept the district court's findings unless they are clearly erroneous and will affirm the application of even an incorrect standard if the result is correct. *Moore v. Sordahl*, 389 N.W.2d 748, 749 (Minn. App. 1986).

At issue are the Ide Lane and Pine Lane properties, which are titled in McDonald's name alone. No written agreement exists establishing that the parties intended to share ownership in these properties. The district court determined that a "joint venture/partnership agreement" existed between McDonald and Cahlander, which was predicated not solely on their personal relationship but on their plan to increase their wealth by buying, investing in, and selling real property. The court found that the properties were therefore jointly owned and that the properties were only placed in McDonald's name alone because Cahlander could not qualify for financing. The court concluded that "any properties held in [McDonald's] name are pursuant to a constructive trust on behalf of herself and Cahlander."

Appellants argue that under Minnesota’s anti-palimony statutes,² an agreement concerning these properties is only enforceable if written, citing *In re Estate of Eriksen*, 337 N.W.2d 671, 674 (Minn. 1983), and *Hollom v. Carey*, 343 N.W.2d 701, 704 (Minn. App. 1984). But in *Eriksen*, the supreme court held that these statutes will not apply unless the sexual relationship between parties constitutes “the *sole* consideration for the agreement.” 337 N.W.2d at 674 (emphasis added). Here, the district court found that “[t]he sexual and romantic relationship between McDonald and Cahlander was not the sole consideration for the joint venture/partnership agreement” between the parties. In *Hollom*, this court chose not to disturb the district court’s findings that the property was never jointly owned and that there were “no extenuating circumstances justifying the lack of a written agreement between the parties” as to joint ownership of the house. 343 N.W.2d at 704. We affirm the observation in *Hollum* that a district court’s findings “are a product of first hand observation, they possess a certain integrity not contained in the written record alone,” and that they “should not be disturbed unless, upon review of the entire evidence, the reviewing court is left with a definite and firm conviction that a mistake has been made.” *Id.* We are left with no such conviction here. The district court

² “If sexual relations between the parties are contemplated, a contract between a man and a woman who are living together in this state out of wedlock . . . is enforceable as to . . . the property and financial relations of the parties only if . . . the contract is written and signed by the parties.” Minn. Stat. § 513.075 (2006). Furthermore, without such a contract, “the courts of this state are without jurisdiction to hear and shall dismiss as contrary to public policy any claim by an individual . . . if the claim is based on the fact that the individuals lived together in contemplation of sexual relations and out of wedlock” Minn. Stat. § 513.076 (2006).

made no mistake when it concluded that the establishment of a constructive trust over the properties is essential to protect Cahlander's interest in them.

Existence of Joint Venture/Partnership

The district court predicated its imposition of a constructive trust over the properties on the existence of a joint venture between McDonald and Cahlander, which appellants dispute. The existence of a joint venture is generally a question of fact, *Duxbury v. Spex Feeds, Inc.*, 681 N.W.2d 380, 389 (Minn. App. 2004), *review denied* (Minn. Aug. 25, 2004), and “[f]indings of fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses,” Minn. R. Civ. P. 52.01.

“A joint venture ordinarily is created where two or more persons agree to combine their money, property, time, or skill in a business operation and share in the profits of the enterprise in some fixed proportion.” *Tate v. Ballard*, 243 Minn. 353, 356, 68 N.W.2d 261, 264 (1955). “No definite rule has been formulated for identifying the joint adventure relationship in all cases. Each case depends on its own peculiar facts. It is recognized, however, that an enterprise does not constitute a joint adventure unless each of the . . . four elements are present” *Rehnberg v. Minn. Homes*, 236 Minn. 230, 235, 52 N.W.2d 454, 457 (1952). The four prerequisites essential to the creation of a joint venture are: (1) contribution of money, property, time, or skill by each of the parties, although not necessarily equally; (2) joint proprietorship and mutual control of the venture's subject matter; (3) an agreement for sharing of profits from the venture,

although not necessarily the losses; and (4) an express or implied contract establishing the joint venture relationship. *Id.* at 235-36, 52 N.W.2d at 457.

The record establishes that Cahlander contributed significant money and time to the joint venture; he deposited funds into the account from which McDonald made payments for the properties, including the proceeds of the sale of his own property, personally worked to improve the properties, and negotiated for their purchase. Cahlander's contributions to the purchase of these properties supports the district court's finding that the properties were purchased jointly and that title to them was kept in McDonald's name solely so that the pair could obtain financing. The record also shows that McDonald did not exercise sole control over the properties; Cahlander was responsible for instigating the improvements to both properties and sometimes did so without McDonald's prior knowledge or consent.

Although no written agreement established a joint venture between McDonald and Cahlander, an implied contract formed through mutual assent or conduct suffices to establish a joint venture. *Carlson v. Olson*, 256 N.W.2d 249, 254 (Minn. 1977). Cahlander testified, albeit against appellants' objection, that there was an oral agreement to share ownership in the properties. While appellants argue that the properties were purchased as long-term residences instead of investments, Cahlander testified that he had discussed with McDonald their plan to acquire property, improve it and live on it for two years, and sell after that time so as to avoid capital gains taxes. Adequate evidence exists that each of the prerequisites for a joint venture between the parties exists in this case. Thus, the district court's findings that an agreement existed between the parties to invest

in the properties as a joint venture/partnership and to share the profits equally are not clearly erroneous.

Equal Distribution of Sale Proceeds

Appellants argue that even if a joint venture existed between the parties, the district court erred in awarding each party half the proceeds from the sale of the properties. McDonald argues that she should have been reimbursed for payments she made on the properties. In Minnesota, the rules applicable to partnerships govern and control the rights, duties, and obligations of parties to a joint venture. *Rehnberg*, 236 Minn. at 235, 52 N.W.2d at 457. Before profits are paid out after termination of a partnership, each partner is entitled to reimbursement of the expenses paid by that partner on behalf of the partnership. Minn. Stat. § 323A.0401(a)(2)(c) (2006); *see also Schaefer v. Bork*, 413 N.W.2d 873, 877 (Minn. App. 1987) (citing Minn. Stat. § 323.17 (1) (1986), a precursor to Minn. Stat. § 323A.0401), *review denied* (Minn. Dec. 22, 1987). Cash contributions documented by a partner are considered to be debts of the partnership due the partner. *Burnett v. Hopwood*, 187 Minn. 7, 14, 244 N.W. 254, 256 (1932).

Appellants argue that the documented payments McDonald made on the Pine Street and Ide Lane properties were advances, and thus loans, McDonald made to the partnership that must be repaid with interest before any profits are distributed. But appellants' argument ignores the district court's reasoning in its decision on this issue: that payments made from McDonald's account do not necessarily represent McDonald's funds. The district court found, and the record shows, that McDonald and Cahlander commingled their funds; that Cahlander wrote checks to McDonald; and that McDonald

managed the finances for the couples' interests, including the payment of personal and business expenses. Appellants have not shown that the district court's findings as to the source of McDonald's funds is clear error. *See Rogers*, 603 N.W.2d at 656 (requiring a showing of clear error to set aside a district court's findings). The district court's findings that McDonald's payments were not advances, but instead reflected the couple's payment practices, is supported by the record.

Posttrial Modification

After the district court issued its order, appellants moved for amended findings, asking the court to offset against Lovresco's rent arrearages to Loving Residence, Inc., amounts paid by appellants for Cahlander's expenses. The district court amended its original findings. In reviewing a district court's amended findings, we will not reverse a finding unless it is clearly erroneous. *McCauley v. Michael*, 256 N.W.2d 491, 500 (Minn. 1977).

Upon respondents' request, the district court amended its original findings by striking its finding that Lovresco had transferred two accounts containing \$5,912.45 to Loving Residence, Inc. The court apparently agreed with respondents that no evidence had been admitted at trial proving that the funds had actually been received by Loving Residence, Inc. An examination of the trial record supports the district court's modification. While appellants did introduce exhibits that purported to reflect the funds remaining in the accounts in question, and McDonald did testify that the accounts were transferred to Loving Residence, Inc., appellants offered no other evidence that the money was actually transferred. Appellants' trial exhibits about the accounts consisted

only of reports McDonald compiled; they did not include bank statements or other objective evidence showing the account balances or proof of transfer to Loving Residence, Inc.

Appellants argue that the district court improperly considered respondents' posttrial request for modification about the offsets because respondents never brought a motion for such posttrial relief. Instead, appellants observe, respondents simply argued in their memorandum of law in response to appellants' posttrial motion that appellants had not turned over the accounts in question to respondents. And respondents did not file their posttrial responsive memorandum until two days before the posttrial hearing. Appellants argue that under Minn. R. Civ. P. 6.04, requiring service of a written motion no later than five days before the hearing, respondents' request for relief was untimely.

But the supreme court has held that the five-day notice requirement in rule 6.04 is not jurisdictional and that orders made by a court pursuant to a motion not timely served are nonetheless valid. *Differt v. Rendahl*, 306 N.W.2d 813, 814 n.2 (Minn. 1981) (citing *Bowman v. Pamida, Inc.*, 261 N.W.2d 594, 596 n.1 (Minn. 1977)). The rule may be enforced if the nonmoving party can show prejudice, *Sudheimer v. Sudheimer*, 372 N.W.2d 792, 794 (Minn. App. 1985), but prejudice does not exist when a nonmoving party is present in court, objects to short notice, and does not move for a continuance, but instead argues the merits of the motion, *Cavegn v. Cavegn*, 378 N.W.2d 636, 638 (Minn. App. 1985). At the hearing, appellants did object to short notice but did not request a continuance. We conclude that the district court's consideration of respondents' request

for relief was not improper. Further, the district court's amended findings are not clearly erroneous, and we uphold them.

Appellants also argue that the district court erred in not offsetting against Lovresco's rent arrearages to Loving Residence, Inc., Cahlander's personal expenses paid by appellants. Appellants argue that as agent for Loving Residence, McDonald was expressly authorized to decide on Loving Residence's behalf to withhold rent as reimbursement for paying Cahlander's expenses. Appellants argue that because the district court did not find that McDonald exceeded her authority, she was entitled to make these financial decisions as a matter of law. But appellants did not present this argument to the district court at trial or in their posttrial motion. Rather, at the posttrial motion hearing, appellants argued that appellants should not be punished for exercise of McDonald's discretion in paying Cahlander's expenses from the Lovresco account rather than the account of Loving Residence, Inc. Appellants argued at the posttrial motion hearing that it is unfair to make them "pay the expenses twice . . . both on behalf of the parties and the second time as rent." Appellants did not argue that McDonald had intentionally chosen to offset rent payments to Loving Residence, Inc., by paying Cahlander's expenses, or that she had the authority to do so. As appellants' new argument was not raised prior to this appeal, we do not consider it. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that issues not raised in district court generally may not be considered for first time on appeal). Even if this argument had been presented at the hearing on appellants' posttrial motion, appellants' failure to present it at trial precludes us from considering it. *See Wear v. Buffalo-Red River Watershed Dist.*,

621 N.W.2d 811, 816 (Minn. App. 2001) (“Because the district court was faced with the arguments for the first time in a post-trial brief, we conclude they were not adequately raised in the district court and are not properly before us.”), *review denied* (Minn. May 15, 2001). The district court’s amended findings, eliminating the offsets against Lovresco’s rent arrearages and refusing to grant offsets for amounts appellants claim were paid for Cahlander’s expenses, are not clearly erroneous and are supported by evidence in the record before us. We therefore affirm the district court’s posttrial amendments to its original order.

Affirmed.