STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2185

Jerald Alan Hammann,
Appellant,

vs.

Donald Deyo,
Respondent,

Burnet Realty LLC,
Respondent,

Kamper Realty LLC,
Respondent,

Falls/Pinnacle, LLC,
Respondent.

Filed January 19, 2010
Affirmed
Wright, Judge

Hennepin County District Court
File No. 27-CV-07-22502

Jerald A. Hammann, Eden Prairie, Minnesota (pro se appellant)

Brian S. McCool, Matthew B. Millis, Fredrikson & Byron, Minneapolis, Minnesota (for respondent Deyo)

William L. Davidson, Lind, Jensen, Sullivan & Peterson, Minneapolis, Minnesota (for respondent Burnet Realty)

Kamper Realty, St. Louis Park, Minnesota (respondent)

Dean B. Thomson, Theodore V. Roberts, Fabyanske, Westra, Hart & Thomson, Minneapolis, Minnesota (for respondent Falls/Pinnacle)

Considered and decided by Wright, Presiding Judge; Ross, Judge; and Crippen, Judge.*

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

WRIGHT, Judge

In this pro se appeal from appellant's fourth lawsuit arising from the same real-estate transactions, appellant challenges the district court's award of summary judgment in favor of respondents; the denial of his motion to amend the complaint to add a punitive-damages claim; and the determination that he is a frivolous litigant, along with the imposition of preconditions pursuant to Minn. R. Gen. Pract. 9 before he can file any new claims, motions, or requests. We affirm.

FACTS

A. Hammann I

In 2005, respondent Falls/Pinnacle, LLC, et al., purchased The Falls and Pinnacle apartment buildings and began converting the apartments into condominiums. It hired respondent Kamper Realty LLC to act as its exclusive broker.

In April 2005, representatives of Falls/Pinnacle and Kamper Realty met with the apartment residents to discuss the planned conversion, and appellant Jerald Hammann attended the meeting. Hammann had signed a residential lease for one of the apartments, although he never lived in it, because he wanted to obtain the earliest possible notice of

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

the conversion and to qualify for statutory rights available to tenants of converted apartment buildings. Hammann, who had a real-estate license, claims that, at this meeting and again a few days later, a Kamper Realty broker told him that a 2.7 percent commission would be paid to all purchasers' agents or brokers. The purchase agreements distributed to tenants at the meeting indicated that Falls/Pinnacle would pay a commission to purchasers' brokers as set forth in a broker-registration form.

Hammann sent letters to all of the apartment residents and met or otherwise had contact with a number of them to try to persuade them that he should be their purchasing broker for the condominiums. Under the terms of the broker-registration form, brokers for current residents of the apartments were not eligible for commissions, and brokers who represented nonresidents qualified only if they followed specified procedures. Hammann became involved with the sales or attempted sales of certain units and then unsuccessfully sought real-estate commissions from Falls/Pinnacle for allegedly acting as the purchasers' broker.

In April 2006, Hammann sued Falls/Pinnacle in *Hammann I*, alleging statutory violations, breach of contracts and warranties, tortious interference, and impairment of profit-producing activities. In January 2007, the district court granted summary judgment to Falls/Pinnacle. Hammann appealed, this court affirmed, and the supreme court denied Hammann's petition for review. *Hammann v. Falls/Pinnacle, LLC*, No. A07-515, 2008 WL 933446 (Minn. App. Apr. 8, 2008), *review denied* (Minn. June 18, 2008). In October 2008, Hammann moved to vacate the district court's summary judgment in *Hammann I* pursuant to Minn. R. Civ. P. 60.02, and the district court denied the motion. He appealed

that decision, which appeal is also before this court. *See Hammann v. Falls/Pinnacle, LLC*, No. A09-576 (Minn. App. Jan. 19, 2010).

B. Hammann II

In September 2007, while the appeal in *Hammann I* was pending, Hammann brought a second lawsuit, *Hammann II*, against Falls/Pinnacle. In mid-November 2007, the district court dismissed his complaint for lack of proper service.

C. Hammann III[1]

Meanwhile, in late October 2007, Hammann obtained proper service of the previously dismissed complaint, later amended, commencing *Hammann III*, in which he again sued Falls/Pinnacle in connection with the same real-estate transactions at issue in *Hammann I*. In May 2008, the district court granted summary judgment to Falls/Pinnacle, ruling that, based on *Hammann I*, the claims were barred by res judicata. Hammann appealed, but this court dismissed his appeal as untimely.

D. Hammann IV

Also in October 2007, Hammann brought this—his fourth—lawsuit once more arising from the same real estate transactions. In his second amended complaint for this action, he named as defendants not only Falls/Pinnacle, but also Kamper Realty; respondent Donald Deyo, who purchased a unit from Falls/Pinnacle after Hammann canceled the purchase agreement Deyo had with Hammann to purchase the same unit from Hammann; and respondent Burnet Realty, Deyo's broker for the purchase. Based

[1] The lawsuit that we designate as *Hammann III* was designated as *Hammann II* by the district court.

on a motion by Deyo, the district court ruled that Hammann is a frivolous litigant under Minn. R. Gen. Pract. 9.06 and declined to require security or impose preconditions at that time but reserved the right to do so later.

All of the respondents moved for summary judgment, and Hammann moved for summary judgment and for leave to amend his complaint to add a claim for punitive damages. The district court granted respondents' motions for summary judgment, denied Hammann's motion for summary judgment, denied Hammann's motion to amend his complaint, and ordered Hammann to comply with rule 9 preconditions before making any more claims, motions, or requests. This appeal followed.[2]

D E C I S I O N

I.

In *Hammann IV*, the district court granted summary judgment in favor of Falls/Pinnacle and its broker, Kamper Realty, ruling that res judicata barred Hammann's claims against them. When reviewing an appeal from summary judgment, we determine whether there are any genuine issues of material fact and whether the district court erred in applying the relevant law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). "Application of res judicata to preclude a claim is a question of law that we review de novo." *Hauschildt v. Beckingham*, 686 N.W.2d 829, 840 (Minn. 2004).

[2] Respondent Deyo argues that this court should strike the portions of Hammann's statement of the facts in which he failed to cite to the record, as required under Minn. R. Civ. App. P. 128.03. Although Hammann has failed to comply with this rule in large part, we decline to strike his statement of facts because his failure does not significantly affect our review as most of the relevant documents are found in the parties' appendices.

"Res judicata is a finality doctrine that mandates that there be an end to litigation." *Id.* Under this doctrine, "[a] judgment on the merits constitutes an absolute bar to a second suit for the same cause of action, and is conclusive between parties and privies, not only as to every other matter which was actually litigated, but also as to every matter which might have been litigated therein." *Dorso Trailer Sales, Inc. v. Am. Body & Trailer, Inc.*, 482 N.W.2d 771, 774 (Minn. 1992) (quotation omitted). Res judicata is an absolute bar to a subsequent claim when "(1) the earlier claim involved the same set of factual circumstances; (2) the earlier 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." *Hauschildt*, 686 N.W.2d at 840. If the doctrine of res judicata applies, the decision whether to actually apply it rests within the discretion of the district court. *Erickson v. Comm'r of Human Servs.*, 494 N.W.2d 58, 61 (Minn. App. 1992).

The first factor is whether the claims arise from the same set of factual circumstances. *Hauschildt*, 686 N.W.2d at 840. The district court ruled that "Hammann's lawsuits and arbitration matters involve the same residential units, negotiations, documents, communications, sales transactions, causes of action, and damages. All of the cases and arbitration matters involve the same set of factual circumstances." Based on our review of the record, we agree that the first factor is met.

We next consider whether the earlier claims involved the same parties or privies. *Id.* Hammann does not dispute that Falls/Pinnacle was involved as a party in both the earlier claims and the present lawsuit. But he challenges the determination that Kamper

Realty was in privity with Falls/Pinnacle. The district court ruled that because Kamper Realty acted as Falls/Pinnacle's broker in the sale transactions at issues, its issues are so connected with *Hammann I* and *Hammann III* that the previous judgments should determine Kamper Realty's interests as well. *See Balasuriya v. Bemel*, 617 N.W.2d 596, 600 (Minn. App. 2000) (holding that privity existed as to one whose interests were aligned with the named party and who generally controlled the litigation), *review denied* (Minn. Nov. 21, 2000). The district court noted that Kamper Realty would have had no reasons to take the actions challenged by Hammann had it not been acting as Falls/Pinnacle's broker.

"There is no prevailing definition of privity which can be automatically applied," and a court "must carefully examine the circumstance of each case." *Margo-Kraft Distribs., Inc. v. Minneapolis Gas Co.*, 294 Minn. 274, 278, 200 N.W.2d 45, 47 (1972).

> In the context of res judicata, privies are nonparties who are so connected with the litigation that the judgment should determine their interests as well as those of the actual parties. Privies include nonparties who control an action and those whose interests are represented by a party to the action.

Balasuriya, 617 N.W.2d at 600 (quotation and citations omitted). They also can include relationships in which one is vicariously liable for the conduct of another. Restatement (Second) of Judgments, § 51 (1982); *see, e.g., State v. Lemmer*, 736 N.W.2d 650, 659, 661-62 (Minn. 2007) (in analysis of collateral estoppel issue, citing sections Restatement (Second) of Judgments (1982) for guidance).

Hammann distinguishes *Balasuriya* on the facts and argues that privity does not apply because Kamper Realty did not control Falls/Pinnacle or have any interest that

required representation in *Hammann I*. We disagree. Falls/Pinnacle, as principal, had an agency relationship with Kamper Realty, its broker, and could have been vicariously liable for any wrongful acts allegedly committed by Kamper Realty. *See Semrad v. Edina Realty, Inc.*, 493 N.W.2d 528, 535 (Minn. 1992) ("Generally speaking, a principal is liable for the act of an agent committed in the course and within the scope of the agency and not for a purpose personal to the agent."). Falls/Pinnacle represented Kamper Realty's interests in challenging the claims asserted by Hammann in the earlier actions and their interests were aligned. We agree with the district court that Kamper Realty was in privity with Falls/Pinnacle.

The last two factors required for the application of res judicata are that the earlier judgment must be final and that the estopped party must have had a full and fair opportunity to litigate the claims. *Hauschildt*, 686 N.W.2d at 840. As the district court ruled, the summary judgments in *Hammann I* and *III* were final judgments on the record and Hammann had a full and fair opportunity to litigate his claims.

A May 22, 2006 arbitration decision by the Minnesota Association of Realtors (MAR) ruled that no contractual relationship to pay commissions existed between Hammann and Kamper Realty and that consequently the matter was not subject to mandatory arbitration. Hammann challenges the district court's decision that this arbitration decision was a ruling on the merits. Citing a March 13, 2006 letter from MAR for the proposition that its determination of whether to grant his arbitration request would not represent a decision on the merits, he argues that, had he known it was on the merits, he would have appealed it. But Hammann misconstrues both the district court's ruling

and the March 13 letter. The district court stated: "The decision of MAR was a ruling on the merits that no contractual relationship to pay commissions existed between Hammann and Kamper [Realty]." The March 13 letter states that the issue of arbitrability will be heard and decided first by a hearing panel; if the panel concludes that the issue raised is arbitrable, a new hearing date will be scheduled before a new hearing panel to hear the merits of the action; if the hearing panel concludes that it is not arbitrable, it may overturn the decision of the grievance committee and the hearing would be concluded. Thus, the district court's ruling speaks to the merits of the decision that the matter was not arbitrable because no contractual relationship to pay commissions existed between Hammann and Kamper Realty, a decision which Hammann did not appeal and which is subject to res judicata. The provision in the March 13 letter, on which appellant relies, speaks to the merits of the arbitrable matter that MAR did not reach. Hammann's interpretation of the letter is erroneous, and the district court's decision that the May 22 ruling was on the merits is correct as a matter of law.

Hammann also asserts that res judicata should not apply because Kamper Realty and Falls/Pinnacle were joint tortfeasors, citing *Hentschel v. Smith*, 278 Minn. 86, 95, 153 N.W.2d 199, 206 (1967), and other cases to support this proposition. *Hentschel* indicates that status as a joint tortfeasor in itself is insufficient to confer privity. *Id.* But joint-tortfeasor status is not the basis for the privity determination here. Nor do the other cases cited support Hammann's argument.

Hammann then contends that there was a jury question as to whether Falls/Pinnacle waived its res judicata claim because in *Hammann I*, in response to

Hammann's motion to amend his complaint, Falls/Pinnacle's counsel stated: "If Mr. Hammann wants to bring another action on collateral issues, that's fine." Waiver is defined as "a voluntary relinquishment of a known right." *Engstrom v. Farmers & Bankers Life Ins. Co.*, 230 Minn. 308, 311, 41 N.W.2d 422, 424 (1950). We agree with the district court's conclusion that counsel's comment at the summary judgment hearing in *Hammann I* did not indicate Falls/Pinnacle would forego any res judicata defense it might have in subsequent proceedings.

Even if all of the necessary factors are shown, as here, the decision whether res judicata should be applied is within the discretion of the district court. *Dixon v. Depositors Ins. Co.*, 619 N.W.2d 752, 756 (Minn. App. 2000). We will not reverse that decision unless the district court abused its discretion. *Id.* (holding that district court did not abuse its discretion in applying res judicata when three different courts heard the case and appellant had his day in court and ample opportunity for appeal).

The district court ruled that, "[g]iven Hammann's history of litigious behavior and his failure to accept the finality of court decisions, it is absolutely imperative and just to apply res judicata in this case." To support his argument that the district court abused its discretion, Hammann cites his purported proposed statement of the proceedings, which is contained in an addendum to his brief. But that document cannot provide support for his argument because this court previously struck the document because the district court did not approve it. Therefore, the document is not part of the record on appeal, and Hammann was not authorized to submit it under the rules. Hammann also cites alleged errors in *Hammann I* that he raised in his motion to vacate that judgment under Minn. R.

Civ. P. 60.02(d). The district court denied his motion, and his appeal of the district court decision has been affirmed in a separate opinion by this court. *See Hammann v. Falls/Pinnacle, LLC*, No. A09-576 (Minn. App. Jan. 19, 2010). Accordingly, Hammann has not demonstrated that the district court abused its discretion by granting summary judgment based on res judicata.

Finally, we observe that Hammann raised several statutory claims against Kamper Realty in the instant lawsuit. Although the district court ruled that those claims were barred by res judicata, it also addressed the merits. We decline to further review the merits based on the determination that res judicata applies to those claims.

II.

We next review Hammann's challenge to the district court's grant of summary judgment on Hammann's claim that Deyo breached the purchase agreement with Hammann.

Hammann had signed a purchase agreement to buy unit 2301 from Falls/Pinnacle with the closing date ultimately scheduled for November 15, 2005. Hammann and Deyo then signed a purchase agreement under which Deyo would buy unit 2301 from Hammann for $455,000, with the closing date on or before November 1, 2005. Hammann planned to schedule both closings on the same day, but the title company would not permit this, and Falls/Pinnacle would not allow him to use another closing company. This required Hammann to seek alternative financing to fund his purchase of the unit, including suggesting to Deyo that they jointly purchase the unit. Deyo declined, advising that he had already obtained financing.

On November 1, 2005, Falls/Pinnacle served Hammann with a notice of cancellation for its purchase agreement with Hammann for the unit, giving Hammann 15 days to close the purchase, and the next day they entered into a written cancellation agreement. Hammann also had been discussing cancelling his purchase agreement with Deyo, and, through e-mail correspondence on November 2, Deyo accepted Hammann's offer to cancel the deal. The next day, Deyo, with Burnet Realty as his broker, signed a purchase agreement to purchase the unit from Falls/Pinnacle for $450,000 and subsequently closed on the sale.

Hammann then sued Deyo for breaching the purchase agreement under which Deyo agreed to purchase the unit from Hammann. The district court granted summary judgment in favor of Deyo on several grounds, first ruling that Hammann failed to demonstrate that Hammann suffered damages from the alleged breach.

To prevail on a breach-of-contract claim, the plaintiff must prove damages. *Christians v. Grant Thornton, LLP*, 733 N.W.2d 803, 808 (Minn. App. 2007), *review denied* (Minn. Sept. 18, 2007). The measure of damages for breach of contract to purchase real estate is the difference between what the defendant agreed to pay for the property and the actual market value when the breach occurred plus such expenses as the plaintiff reasonably incurred in attempting to mitigate the damages, minus the amount already received as a down payment. *Frank v. Jansen*, 303 Minn. 86, 96, 226 N.W.2d 739, 746 (1975). "[W]hen the market value equals or exceeds the contract price in the agreement that has been breached, the vendor of real estate is deemed to have suffered no

loss and is not entitled to a recovery from the purchaser." 77 Am. Jur. 2d *Vendor & Purchaser* § 481 (2006).

Under Deyo's purchase agreement with Hammann, Deyo was to pay $455,000 for the unit. The district court ruled that Hammann failed to show damages, citing Hammann's own statement on November 1, 2005, that the fair-market value of the unit was $489,500, more than $34,500 above his sales price to Deyo.

Hammann challenges this ruling, and he cites an attachment to his June 9, 2008 affidavit filed with the district court before the summary-judgment motions hearings containing the Hennepin County property-tax records showing sales prices of other units sold by Falls/Pinnacle in the same apartment building. He contends that the district court should have considered them as relevant to the market value. But merely citing the average sales price of seven units (including Deyo's) without any evidence establishing that those units were comparable in terms of size, number of rooms and bathrooms, improvements, and other amenities does not create a genuine issue of material fact on the issue of damages.

Moreover, Hammann cannot rely on a self-serving affidavit to support his untimely challenge to his own valuation of unit 2301. *See Hoover v. Norwest Private Mortgage Banking*, 632 N.W.2d 534, 541 n.4 (Minn. 2001) (stating that contradictory, self-serving affidavit submitted after deposition may not be used to create genuine issue of material fact unless used to explain confusion or mistake). In addition, in the *Hammann I* complaint, he asserted that unit 2301 was worth at least $479,500. *See Kessel v. Kessel*, 370 N.W.2d 889, 894-95 (Minn. App. 1985) (noting that reliability and

materiality of a party's admissions are not affected by fact they originated in separate proceedings). In light of this fundamental failure to show damages, we need not address the district court's other reasons for granting summary judgment in favor of Deyo on Hammann's breach-of-contract claim.

Hammann also argues that the district court erred in granting summary judgment on the district court's own motion on the breach-of-contract claim. "Unless an objecting party can show prejudice from lack of notice or other procedural irregularities, or was not afforded a meaningful opportunity to oppose summary judgment, the court's judicious exercise of its inherent power to grant summary judgment in appropriate cases should not be disturbed." *Fed. Land Bank of St. Paul v. Obermoller*, 429 N.W.2d 251, 255 (Minn. App. 1988), *review denied* (Minn. Oct. 26, 1988). Hammann has not shown prejudice.

III.

We next consider Hammann's challenge to the district court's grant of summary judgment on Hammann's various tortious-interference claims. Hammann sued all respondents for tortious interference with contract, prospective economic relations, and business expectancy regarding Hammann's purchase agreement with Falls/Pinnacle to purchase unit 2301. He sued Burnet Realty and Kamper Realty on the same claims as to Deyo's purchase agreement with him.

The district court granted summary judgment to Kamper Realty and Falls/Pinnacle on the tortious-interference claims based on res judicata. We need not address these claims further because, as discussed in section I, we have affirmed the district court's res judicata decisions.

The district court granted summary judgment on the remaining claims on the merits. Of these remaining claims, Hammann challenges summary judgment as to the merits of the tortious interference with prospective economic relations or business expectancy claims (but not as to the tortious interference with contract claim) against Deyo and Burnet Realty as to Hammann's purchase agreement with Falls/Pinnacle, and against Burnet Realty as to Deyo's purchase agreement with Hammann.

We first observe that Minnesota recognizes only two tortious-interference claims: "1) tortious interference with an existing contract; or 2) tortious interference with a prospective business relation or, as it is sometimes referred to, a prospective economic advantage." *Hern v. Bankers Life Cas. Co.*, 133 F. Supp. 2d 1130, 1137 (D. Minn. 2001). This court has declined to decide whether a claim for tortious interference with business expectancy is a valid tort claim. *Harbor Broad., Inc. v. Boundary Waters Broadcasters, Inc.*, 636 N.W.2d 560, 569 n.4 (Minn. App. 2001). Likewise, we decline to address this claim in the present case. Hammann's challenge on appeal is limited to the summary judgment on the tortious-interference-with-prospective-economic-relations claims. But his arguments are based on his tortious-interference-with-contract claim. Consequently, he cannot prevail on the claim he raises on appeal.

IV.

Next, Hammann challenges the district court ruling that he is a frivolous litigant and its imposition of preconditions before he can file any new claims. Minn. R. Gen. Pract. 9. A "frivolous litigant" is defined as one "who, after a claim has been finally determined against the person, repeatedly relitigates or attempts to relitigate either"

finally-determined matters or one who maintains claims not well-grounded in law. Minn. R. Gen. Pract. 9.06(b)(1), (3). The rule authorizes the district court to impose preconditions on a frivolous litigant's service or filing of new claims, motions, or requests. Minn. R. Gen. Pract. 9.01(b). A litigant is entitled to notice and a hearing before such an order may be entered. Minn. R. Gen. Pract. 9.01. We review a determination that a party is a frivolous litigant under an abuse-of-discretion standard. *Szarzynski v. Szarzynski*, 732 N.W.2d 285, 290, 295 (Minn. App. 2007).

Hammann first argues that he is not a frivolous litigant. In reaching its determination that Hammann is a frivolous litigant, the district court cited the fact that, since 2000, Hammann has filed at least ten lawsuits in Hennepin County District Court, seven of which were dismissed. Hammann also filed at least one action in federal court. The district court also cited Hammann's improper litigation against his former employer, in which he filed three actions, with a total of seven appeals filed with the court of appeals. Our review establishes that the district court's decision was not an abuse of discretion.

Hammann next argues that the district court failed to follow the procedural guidelines in rule 9. Rule 9.01 requires a district court to first hold a hearing separate from other motions or requests. Hammann argues that the district court failed to hold this hearing before imposing sanctions. There is no basis for this claim because, after Deyo's rule 9 motion, the district court held a separate hearing on January 14, 2008.

Finally, Hammann argues that his actions did not merit granting rule 9 relief. He asserts that merely because he has not yet prevailed does not demonstrate that he is a frivolous litigant, and he contends that his claims are valid and brought in good faith.

Although the district court ruled that Hammann was a frivolous litigant, it declined to impose sanctions before deciding the merits of the present lawsuit. After deciding the case on the merits, however, the district court found that

> Hammann's claims were made in bad faith because it was the third case instituted by Hammann regarding the same facts and he continued with his case after the other two matters were dismissed. The other parties have been forced to defend multiple claims in multiple actions. Hammann has consumed a disproportionate amount of the court's time by filing three voluminous cases. Monetary sanctions in *Hammann I* did not deter him in continuing in the other cases. Hammann's motion to vacate the district court order in *Hammann I* along with his arguments in this matter that the other courts have erred demonstrates his failure to respect the finality of court orders. In order to protect the rights of the parties and the courts, it is appropriate and imperative to require that any new claims, motions, or requests by Hammann must be signed by an attorney authorized to practice law in Minnesota.

Out careful review of the record establishes that the district court's decision is legally sound.

V.

Finally, Hammann argues that the district court erred by failing to grant his motion to amend the complaint to add a claim for punitive damages.

A claim for punitive damages may be allowed only "upon clear and convincing evidence that the acts of the defendant showed deliberate disregard for the rights or safety of others." Minn. Stat. § 549.20, subd. 1(a) (2008). The district court's decision to deny

such a motion will not be reversed absent an abuse of discretion. *LeDoux v. Nw. Pub., Inc.*, 521 N.W.2d 59, 69 (Minn. App. 1994), *review denied* (Minn. Nov. 16, 1994).

The district court ruled that none of the respondents "acted wrongfully or with deliberate disregard for Hammann's rights" and that "Hammann has no viable claims against any of" them. On appeal, Hammann merely argues that he made the required prima facie case and provided caselaw to demonstrate that the type of claims he raised usually result in an award of punitive damages by the jury. Without more, this argument does not demonstrate that the district court abused its discretion.

In light of our determination that the district court applied the proper legal standards to fairly and correctly address the issues that Hammann raises here, we affirm.

Affirmed.