STATE OF MINNESOTA
IN COURT OF APPEALS
A09-491

George Bougalis,
Respondent,

vs.

Nickolas Bougalis,
Appellant.

Filed February 9, 2010
Affirmed
Toussaint, Chief Judge

St. Louis County District Court
File No. 69HI-CV-08-416

Adam J. Licari, John M. Colosimo, Mitchell J. Brunfelt, Colosimo, Patchin, Kearney & Brunfelt, Ltd., Virginia, Minnesota (for respondent)

James F. Clark, Hibbing, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Toussaint, Chief Judge; and Crippen, Judge.*

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

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

TOUSSAINT, Chief Judge

Appellant Nikolas Bougalis challenges the summary judgment granted to his father, respondent George Bougalis, arguing that the district court erred by granting summary judgment to respondent and denying it to appellant and by demonstrating bias in favor of respondent. Because we conclude that summary judgment was proper and appellant's claim of bias is without merit, we affirm.

FACTS

Respondent formed Bougalis Real Estate LLC in 1997 and contributed improved real estate valued at approximately $350,000 to the LLC. He also assigned a 12% interest in the LLC to each of his four children, including appellant. According to respondent, the "assignments to each of the children were made by [respondent] without discussing or making any agreements regarding the assignments with his children." From 1997 to 2004, appellant was sent K-1 distribution forms indicating passive-taxable distributions from the LLC. Appellant paid the taxes but never received the distributions.

In 2004, appellant sued the LLC and respondent, claiming that he was entitled to the distribution money that he paid taxes on but never received. In the alternative, appellant requested to be paid the amount of his membership share in the LLC and to have his membership dissolved. The 2004 action went to a court trial, and the district court issued findings of fact, conclusions of law, and order for judgment in favor of respondent. The district court stated in its findings of fact:

> 3. There are no written documents detailing the precise nature and extent of the interest [respondent] transferred to his four children; there is no agreement apparent between the parties as to any conditions of payments or distributions relative to the creation of [appellant's] 12% interest or that of his siblings.
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> 4. It is apparent from the evidence that [respondent] intended to maintain control of the limited liability company by retention of a 52% ownership interest, and therewith the power to unilaterally determine, to the extent allowed by law, over the years what the exact legal nature of the children's interests in the L.L.C. would be.
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> 5. It is implicit in the facts and circumstances as shown by the evidence that the transfer of each child's 12% interest in the L.L.C. was actually to a certain degree in consideration of a retention of earnings distributions until a certain level of recoupment of the investment basis of [respondent] had been realized.

The district court concluded that the distributions paid to respondent were less than his total initial contribution and therefore dismissed appellant's claim with prejudice.

In 2008, respondent brought a declaratory judgment action seeking to "rescind or revoke the 12% interest in the L.L.C. transferred to [appellant]" on the grounds that respondent "never intended this transfer to be absolute or without condition" and that the relationship between appellant and respondent had changed. At the time of the 2008 action, appellant had not yet received any distributions from the LLC. Appellant answered respondent's complaint, arguing that there were no conditions on the alleged gift and that his interest in the LLC could only be terminated pursuant to the procedure in Minn. Stat. § 322B.306 (2006). Appellant then moved to dismiss respondent's claim.

At the hearing, the district court characterized the proceedings as "mutual cross motions for summary judgment." Appellant did not object to this characterization. The district court granted summary judgment to respondent, finding that the "present record

makes it clear beyond any genuine issue of material fact that [respondent] never transferred any incidents of ownership of the 12% interest in Bougalis Real Estate LLC to [appellant]; there was no delivery of documents evidencing a gift; there was no transfer to [appellant] of any right to exercise dominion or control over the 12% interest." In granting respondent a declaratory judgment allowing revocation of the 12% interest, the district court stated that the judgment was without prejudice on the issue of appellant's entitlement to reimbursement for income taxes paid on the passive income distributions.

D E C I S I O N

I.

Appellant claims the district court erred in granting summary judgment in favor of respondent. Summary judgment is appropriate "when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993) (citing Minn. R. Civ. P. 56.03). On appeal from summary judgment, we review de novo errors of law and the existence of fact issues that should have precluded summary judgment. *STAR Ctrs., Inc. v. Faegre & Benson, LLP*, 644 N.W.2d 72, 76 (Minn. 2002). "We view the evidence in the light most favorable to the party against whom summary judgment was granted." *Id.* at 76-77.

The dispositive question is whether appellant received an irrevocable gift of a 12% interest in the LLC. A valid inter vivos gift requires (1) delivery, (2) intention to make a gift on the part of the donor, and (3) absolute disposition by the donor of the thing that he

intends to give to another. *Oehler v. Falstrom*, 273 Minn. 453, 453, 142 N.W.2d 581, 583 (1966); *see also Olsen v. Olsen*, 562 N.W.2d 797, 800 (Minn. 1997). The district court concluded that there was "no genuine issue of material [fact] as to the lack of elements of intent and deliver[y] essential to establish a legally complete gift." In regard to delivery, the district court found that there was no material dispute of fact regarding delivery and that respondent "never transferred any incidents of ownership of the 12% interest in [the LLC] to [appellant] . . . there was no transfer to [appellant] of any right to exercise dominion or control over the 12% interest."

Appellant argues that there remained a genuine issue of material fact regarding intent and delivery. In support of his argument, appellant points to his payment of taxes on the passive income from the LLC and to the letter submitted by respondent's accountant, which states that, though there was no documentation of the LLC formation, the LLC commenced operation "with the following ownership percentages . . . Nick Bougalis 12%." But mere payment of income taxes does not evidence an ownership interest because tax law "does not necessarily follow the technicalities of state gift laws." *Smith v. State*, 389 N.W.2d 543, 546 (Minn. App. 1986). Moreover, a name on an account does not support an inference that respondent intended to make the requisite "present gift beyond recall," *Stribling v. Fredericks, Clark & Co., Inc.*, 300 Minn. 525, 526, 219 N.W.2d 93, 95 (1974).

To demonstrate that there was a present gift beyond recall, there must be evidence that the donor intended an unconditional surrender of future control over the property. *Id.*, 219 N.W.2d at 95. The district court's 2006 finding stated that respondent

maintained "the power to unilaterally determine, to the extent allowed by law, over the years what the exact legal nature of the children's interests in the L.L.C. would be." Appellant presented nothing to the district court to create a fact dispute regarding his control over the interest in the LLC. The undisputed evidence before the district court in 2008, consistent with the 2006 order, indicated that control over appellant's interest in the LLC was at all times with respondent.

At best appellant had an inchoate 12% interest in the LLC. Had respondent relinquished control of the 12% LLC interest or had the condition of recoupment of investment occurred, the inchoate interest would have become absolute. But, despite respondent's statement that he intended to transfer a 12% interest in the LLC to appellant, respondent never relinquished control over the 12% interest, and therefore the legal prerequisites for a valid inter vivos gift have not been met. The district court did not err by concluding that the undisputed evidence entitled respondent to summary judgment on the grounds that appellant was not transferred any incidents of ownership and that the interest was therefore revocable.

Appellant argues further that the district court erred in granting summary judgment in favor of respondent when only appellant moved for summary judgment. A district court may grant summary judgment "sua sponte without notice to either party where there remains no genuine issue of material fact, one of the parties deserves judgment as a matter of law, and the absence of a formal motion creates no prejudice to the party against whom summary judgment is entered." *Modern Heating & Air Conditioning, Inc. v. Loop Belden Porter*, 493 N.W.2d 296, 299 (Minn. App. 1992)

(emphasis omitted). Appellant was on notice that the district court considered the issue before it to be one of cross-motions for summary judgment, did not object to the characterization of the procedural posture, and has alleged no prejudice from the district court's treatment of the proceedings as one of cross-motions for summary judgment. We conclude that the district court did not err in granting summary judgment in favor of respondent.

II.

Appellant argues that he was entitled to summary judgment based on the application of the doctrines of res judicata and collateral estoppel. Fundamental to both res judicata and collateral estoppel "is that a 'right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies . . . ." *Hauschildt v. Beckingham*, 686 N.W.2d 829, 837 (Minn. 2004) (quoting *Kaiser v. N. States Power Co.*, 353 N.W.2d 899, 902 (Minn. 1984)). Res judicata and collateral estoppel are related doctrines, but res judicata is the "broader of the two and applies more generally to a set of circumstances giving rise to entire claims or lawsuits." *Hauschildt*, 686 N.W.2d at 837 (citing Bryan A. Garner, *A Dictionary of Modern Legal Usage* 169 (2d ed.1995)). "Res judicata applies as 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; (4) the estopped party had a full and fair opportunity to litigate the matter." *Hauschildt*, 686 N.W.2d at 840. "[T]he focus of res judicata is whether the second claim arises out of the same set of

factual circumstances." *Id*. (quotation omitted). "[C]laims cannot be considered the same cause of action if the right to assert the second claim did not arise at the same time as the right to assert the first claim." *Id.* at 841 (quotation omitted).

The 2006 litigation concerned the LLC's distribution scheme and whether appellant was entitled to a present distribution from the LLC. The district court was not asked to determine whether appellant received a legally complete gift. Although the district court noted in 2006 that appellant had been "transferred" an interest in the LLC and that respondent had "the power to unilaterally determine, to the extent allowed by law, over the years what the exact legal nature of the children's interest in the LLC would be," the only issue before the district court was the distribution scheme. Because (1) the precise nature of appellant's interest was not the issue before the court, (2) respondent had not attempted to revoke the interest at the time of the 2006 action, and (3) neither party had a full and fair opportunity to litigate the matter, respondent's 2008 action was not barred by the doctrines of res judicata or collateral estoppel.[1]

III.

Appellant asserts that the district court erred in not dismissing respondent's complaint as a previously unpleaded compulsory counterclaim in the 2006 action. "A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction that is the

[1] Appellant also argues that respondent's claims are barred by the statutes of limitation and lack of a justiciable controversy. These arguments are without merit. Respondent's claim to rescind the 12% inchoate interest was brought before all of the elements of a gift had been met and respondent requested specific relief.

subject matter of the opposing party's claim . . . ." Minn. R. Civ. P. 13.01. The pleading of such a counterclaim is compulsory. *G.A.W., III v. D.M.W.*, 596 N.W.2d 284, 288 (Minn. App. 1999), *review denied* (Minn. Sept. 28, 1999). But a counterclaim is compulsory only when it is ripe, i.e., when "a cause of action exists for which a lawsuit may properly be commenced and pursued." *Leiendecker v. Asian Women United of Minn.*, 731 N.W.2d 836, 841 (Minn. App. 2007), *review denied* (Minn. Aug. 7, 2007).

Respondent's 2008 complaint sought the right to revoke appellant's interest in the LLC, and the district court in declaratory judgment granted respondent's revocation of the interest. At the time of the 2006 action, the circumstances that would cause respondent to revoke the inchoate interest that had been transferred to appellant had not occurred. Because these circumstances underlying the need for the declaratory judgment had not yet occurred, the claim was not a compulsory counterclaim in the 2006 action.

IV.

Appellant asserts that the district court erred by denying appellant a jury trial. Because the court appropriately granted summary judgment, appellant was not entitled to a jury trial. *State ex rel. Pillsbury v. Honeywell, Inc.*, 291 Minn. 322, 333, 191 N.W.2d 406, 413 (1971) ("No constitutional or statutory right to a jury trial exists where there is no issue of fact.").

V.

Appellant asserts that the district court judge demonstrated bias against appellant. Whether a judge has violated the Code of Judicial Conduct is a question of law, which this court reviews de novo. *State v. Dorsey*, 701 N.W.2d 238, 246 (Minn. 2005).

Generally, it "is presumed that judges will set aside collateral knowledge and approach cases with a neutral and objective disposition." *Id.* at 248-49 (quotation omitted). In order to defeat the presumption that a judge can set aside collateral knowledge and act as a neutral, appellant would have to "adduce evidence of favoritism or antagonism." *State v. Burrell*, 743 N.W.2d 596, 603 (Minn. 2008).

According to appellant, the district court expressed bias against appellant when it said: "I am not sure how [appellant] is going to look to the court if the case goes to trial. Frankly . . . he didn't look good enough last time around to win." The district court's comment on its face does not indicate bias, and appellant has advanced no argument to explain how this comment would defeat the presumption that the district court will act as a neutral.

VI.

Finally, respondent argues that appellant's brief should be stricken because it does not conform to Minn. R. App. P. 132.01 providing that all briefs must be in 13-point font. Failure to comply with the rules regarding brief format "can diminish a brief's persuasiveness, lead to non-consideration of an issue, or dismissal of an appeal." *Cole v. Star Tribune*, 581 N.W.2d 364, 371 -372 (Minn. App. 1998) (citations omitted). Although appellant's brief appears to contain a 12-point font, respondent has not advanced any argument as to why sanctions would be appropriate, and we decline to strike appellant's brief based on this error. *See Semrad v. Edina Realty, Inc.*, 470 N.W.2d 135, 147-48 (Minn. App. 1991) (declining to impose sanctions against parties who submitted brief with length in excess of applicable page limit), *rev'd in part on other*

grounds, 493 N.W.2d 528 (Minn. 1992).

Affirmed.