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1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 **PATRICK D. TAYS,**

3 Plaintiff-Appellant,

4 v.

NO. 35,843

5 **S. CRAIG TAYS and MELVIN E. TAYS,**

6 Defendants-Appellees,

7 **APPEAL FROM THE DISTRICT COURT OF OTERO COUNTY**

8 **Angie K. Schneider, District Judge**

9 Patrick D. Tays

10 Ruidoso, NM

11 Pro Se Appellant

12 John R. Hakanson

13 Alamogordo, NM

14 for Appellees

15 **MEMORANDUM OPINION**

16 **ZAMORA, Judge.**

17 {1} Patrick D. Tays (“Plaintiff”) appeals from the district court’s order granting
18 Defendant Craig Tays’ (“Defendant”) motion to settle the trust, in accordance with a
19 settlement agreement entered into by the parties in a different matter, and awarding

1 attorney and accountant fees to be paid from the trust property that is the subject of
2 this litigation. We previously issued a notice of proposed summary disposition in
3 which we proposed to affirm. Plaintiff has filed a memorandum in opposition thereto.
4 After due consideration, we remain unpersuaded.

5 {2} In his memorandum in opposition, Plaintiff reiterates his position that he was
6 denied due process and proper notice in connection with the subject of the April 6,
7 2015 hearing, namely, Defendant’s motion to settle the trust in accordance with the
8 settlement agreement. [MIO 1-5] Plaintiff asserts that he “notified the court below that
9 he was ‘surprised’ and had not received fair notice of the April 2015 hearing[,]” and
10 we acknowledged as much in our calendar notice. [MIO 5; CN 2] Plaintiff does not
11 challenge our observation that he did not claim to be unprepared to address the motion
12 and did not ask the district court for additional time to allow him to prepare a
13 response. [MIO 5] *See State v. Barazza*, 1990-NMCA-026, ¶ 13, 110 N.M. 45, 791
14 P.2d 799 (“Failure to request a continuance undermines [a] defendant’s claim of unfair
15 surprise.”). Likewise, Plaintiff does not challenge our assumption that he received,
16 in advance, a copy of Defendant’s motion and the simultaneously filed request for a
17 hearing asking that the motion be heard during the previously scheduled April 6, 2015
18 hearing. [CN 3] As such, we hold that Plaintiff received reasonable notice that
19 Defendant’s motion could be addressed during the April 6, 2015 hearing, as well as

1 a fair opportunity to be heard. *See Rutherford v. City of Albuquerque*, 1992-NMSC-
2 027, ¶ 7, 113 N.M. 573, 829 P.2d 652 (“The essence of procedural due process is that
3 the parties be given notice and an opportunity for a hearing.”); *Sandoval v. Baker*
4 *Hughes Oilfield Operations, Inc.*, 2009-NMCA-095, ¶ 65, 146 N.M. 853, 215 P.3d
5 791 (stating that if the record is doubtful or deficient, we will indulge every
6 presumption in support of the district court’s judgment).

7 {3} With regard to Plaintiff’s second challenge on appeal—that the district court
8 erred in dismissing this case based on a settlement agreement reached in a prior matter
9 and without ordering an accounting of the trust property at issue—Plaintiff argues in
10 the memorandum in opposition that he “did not agree to [the settlement agreement]
11 and never signed it.” [MIO 5] We construe Plaintiff’s position as a challenge to the
12 district court’s decision not to allow Plaintiff to relitigate the existence of the
13 settlement agreement and its terms. [RP 256-57] *See Hyden v. Law Firm of*
14 *McCormick, Forbes, Caraway & Tabor*, 1993-NMCA-008, ¶ 15, 115 N.M. 159, 848
15 P.2d 1086 (“[C]ollateral estoppel . . . may be applied to preclude a plaintiff from
16 relitigating an issue the plaintiff has previously litigated and lost, regardless of
17 whether the defendant was privy to the prior suit.” (citation omitted)). Our review of
18 the record proper reveals that Defendant presented evidence that (1) in 2005, Plaintiff
19 and Defendant were parties to a different litigation; (2) during mediation in that

1 matter, a settlement agreement was reached providing for the division of the trust
2 property that is the subject of the present litigation; (3) Plaintiff subsequently refused
3 to sign the agreement; (4) the district court in the prior matter held an evidentiary
4 hearing during which the mediator and Plaintiff testified; and (5) on February 19,
5 2007, the latter court entered an order holding that, with certain modifications, the
6 unsigned settlement agreement presented by Defendant accurately reflected the
7 agreement of the parties (“2007 Order”). [RP 199-211, 244-45] Plaintiff’s only
8 challenge below to the 2007 Order was that it was entered in a different matter. [RP
9 256] Therefore, we hold that the district court did not err in applying the doctrine of
10 collateral estoppel to this issue. *Hyden*, 1993-NMCA-008, ¶ 14 (stating that
11 application of defensive collateral estoppel requires a showing that (1) the causes of
12 action in the two suits are different; (2) the ultimate issue was actually litigated; (3)
13 the ultimate issue was necessarily determined; and (4) the party to be bound by
14 collateral estoppel had full and fair opportunity to litigate the issue in the prior suit).

15 {4} In the memorandum in opposition, Plaintiff adds a citation to the Mediation
16 Procedures Act (the Act), NMSA 1978, §§ 44-7B-1 to -6 (2007), which states that
17 “[i]f the mediation parties reach a settlement agreement evidenced by a record signed
18 by the mediation parties, the agreement is enforceable in the same manner as any other
19 written contract.” Section 44-7B-6(A). The Act became effective on July 1, 2007, or

1 almost five months after the 2007 Order was entered, and Plaintiff makes no argument
2 that the Act should apply retroactively. [MIO 5-8] *See Warner v. Calvert*, 2011-
3 NMCA-028, ¶ 1, 150 N.M. 333, 258 P.3d 1125 (“[T]he Mediation Procedures Act .
4 . . . became effective on July 1, 2007.”). As such, we hold that the Act had no effect
5 on the 2007 Order.

6 {5} With regard to Plaintiff’s third challenge on appeal—that the district court
7 violated Rule 1-054.1 NMRA in relation to the order filed on September 1, 2015—the
8 memorandum in opposition asserts that the fact that the district court issued a written
9 order is inconsistent with our conclusion that the district court ruled orally on the
10 matter during the April 6, 2015 hearing. [MIO 1, 9] We remain unpersuaded. Our
11 review of the record on appeal reveals that the district court reached a decision on all
12 issues before it at the conclusion of the hearing and merely asked the parties to prepare
13 an order memorializing its rulings. [RP 256, 360, 330-31] As such, we hold that Rule
14 1-054.1 was not violated.

15 {6} As to Plaintiff’s fourth argument on appeal—that the district court erred in
16 accepting verbatim an order drafted by Defendant—Plaintiff merely reiterates his
17 previous position that the district court thereby abdicated its responsibility to make
18 findings of fact and conclusions of law. [MIO 10-11] We remain unpersuaded. As
19 stated in our calendar notice, our review of the record proper reveals that the language

1 of the order accurately reflects the district court’s oral rulings from the bench. [RP
2 256-57, 270] As such, we hold that the district court did not abdicate its responsibility
3 to make findings of fact and conclusions of law in adopting Defendant’s draft order.
4 {7} To Plaintiff’s fifth challenge on appeal—that the district court clerk improperly
5 failed to file several petitions—the memorandum in opposition adds that Plaintiff was
6 denied due process of law because these petitions were never ruled on. [MIO 12] Our
7 review of the record on appeal reveals that on April 6, 2015, the district court disposed
8 of all issues pending at that time, and that on August 17, 2015 and May 9, 2016, the
9 district court denied all pleadings that had been filed by Plaintiff subsequently to the
10 April 6, 2015 hearing. [RP 311, 319-20, 329-32, 331-32, 360-61] Given that
11 Plaintiff’s sole additional argument is that his petitions were not ruled upon, we
12 affirm.

13 {8} As to Plaintiff’s final contention on appeal—that the district court erred in
14 awarding attorney and accountant fees—the memorandum in opposition states that
15 “they were not authorized” and that the trustees “mismanaged the trust by not paying
16 them.” [MIO 12] Our review of the record on appeal reveals that the latter argument
17 was not raised below. As such, we decline to address it. *See Wolfley v. Real Estate*
18 *Comm’n*, 1983-NMSC-064, ¶ 5, 100 N.M. 187, 668 P.2d 303 (“It is well established
19 in this state that theories, defenses, or other objections will not be considered when

1 raised for the first time on appeal.”). As to Plaintiff’s remaining contention, we reject
2 it for the reasons stated in our calendar notice.

3 {9} For the foregoing reasons, as well as those expressed in our calendar notice, we
4 affirm the district court’s judgment below and the award of attorney and accountant
5 fees.

6 {10} **IT IS SO ORDERED.**

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8

M. MONICA ZAMORA, Judge

9 **WE CONCUR:**

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MICHAEL E. VIGIL, Judge

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STEPHEN G. FRENCH, Judge