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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0909**

Bert Lawrence Pexsa, et al.,
Appellants,

vs.

Disabled American Veterans of Minnesota Foundation,
Respondent.

**Filed December 18, 2017
Reversed and remanded
Johnson, Judge**

Douglas County District Court
File No. 21-CV-16-1753

Stephen J. Knudsen, Alexandria, Minnesota (for appellants)

Robert B. Hartley, Jr., Columbia Heights, Minnesota (for respondent)

Considered and decided by Larkin, Presiding Judge; Johnson, Judge; and Stauber,
Judge.*

UNPUBLISHED OPINION

JOHNSON, Judge

Bert Lawrence Pexsa and Kathryn M. Pexsa purchased a 166-acre family farm from
Bert's parents by a contract for deed. Bert's father's half-interest in the farm passed to a

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

non-profit organization, the Disabled American Veterans of Minnesota Foundation (DAVMN), after he died. Less than a year after receiving Bert's father's half-interest in the farm, DAVMN sought to cancel the contract for deed on the ground that Bert and Kathryn were in default. Bert and Kathryn commenced this civil action to enjoin DAVMN from canceling the contract for deed. The district court dismissed Bert and Kathryn's action on the ground that it is barred by the doctrine of *res judicata* because Bert and Kathryn previously raised an issue concerning the contract for deed in the probate action for Bert's father's estate. We conclude that the district court erred by dismissing Bert and Kathryn's action on the basis of *res judicata* and also erred by vacating a temporary restraining order (TRO) that temporarily prevented DAVMN from canceling the contract for deed. Therefore, we reverse and remand.

FACTS

This appeal concerns 166 acres of farmland in Douglas County, which have been farmed by Bert and his father and their ancestors for more than a century. In May 1985, Bert and his wife, Kathryn, purchased the property from Bert's parents, Darrel Pexsa and Marlys Pexsa, pursuant to a contract for deed. The purchase price was \$50,000. The contract required Bert and Kathryn to begin making annual payments of \$1,500 plus 8% interest on May 25, 1990, and to continue making such annual payments for 33 years, until 2023.

In February 1990, the Douglas County District Court dissolved Darrel and Marlys's marriage. The district court awarded an undivided one-half interest in the farm to each of them. Thereafter Bert and Kathryn made two annual payments of principal and interest on

the contract for deed—one-half of the amount to Darrel and one-half of the amount to Marlys.

Darrel died in May 2013. His will devised his one-half interest in the farm to DAVMN and devised the remainder of his estate to a daughter. A probate action was filed in the Otter Tail County District Court. In May 2015, after the personal representative of the estate sought approval of the final accounting, Bert and Kathryn objected. They alleged, among other things, that Bert had made an unscheduled payment to Darrel in 1988 in the amount of \$1,427. Bert and Kathryn argued that, in light of the unscheduled payment (which, they asserted, reduced the principal amount due on the contract before scheduled payments began and, thus, reduced the amount of interest that accrued each year thereafter), they had fully paid off the contract for deed and were entitled to a conveyance of the deed and a refund from the estate. The probate court found that Bert had made a payment to Darrel in 1988 but that Bert had not proved that he made the payment on the contract for deed. Thus, the probate court denied the objection. The probate court's order concluded, "No refund is due to Objector out of the Estate, and it is appropriate for the Estate to pass any interest in the contract-for-deed on to Beneficiary," *i.e.*, to DAVMN. The probate court approved the personal representative's final accounting in January 2016.

Approximately eight months later, on August 2, 2016, DAVMN served Bert and Kathryn with a notice of cancellation of the contract for deed. The notice of cancellation states that Bert and Kathryn were in default in the amount of \$22,298.35 due to their failure to make payments on the contract for deed in 1997, 1999, 2014, 2015, and 2016. The

notice of cancellation advised Bert and Kathryn of their statutory right to redeem within 90 days. *See* Minn. Stat. § 559.21, subds. 1d, 3 (2016).

On October 28, 2016, Bert and Kathryn commenced this action. In their complaint, they alleged that DAVMN committed a breach of contract by commencing cancellation proceedings on the contract for deed when they were not in default. In filing their action, they invoked a statute that authorizes a district court to “enjoin[] further proceedings to effectuate the termination of the contract [for deed], including recording of the notice of termination with proof of service, recording of an affidavit showing noncompliance with the terms of the notice, taking any action to recover possession of the real estate, or otherwise interfering with the purchaser’s lawful use of the real estate.” *See* Minn. Stat. § 559.211, subd. 1 (2016) (first sentence). The statute specifically permits a contract-for-deed vendee to “plead affirmatively any matter that would constitute a defense to an action to terminate the contract.” *Id.* (second sentence); *see also American Family Mut. Ins. Co. v. Staeheli*, 520 N.W.2d 422, 424 (Minn. App. 1994). Bert and Kathryn alleged in their complaint that they had paid off the contract for deed in full for multiple reasons, including the alleged fact that Bert had made unscheduled payments on the contract for deed to both Darrel and Marlys in 1988.

On October 30, 2016, one day before the end of the statutory redemption period, Bert and Kathryn moved for an *ex parte* TRO to temporarily prevent DAVMN from proceeding with the cancellation of the contract for deed. *See* Minn. Stat. § 559.211, subd. 1 (first sentence); Minn. R. Civ. P. 65.01. On October 31, 2016, the district court granted the TRO and ordered DAVMN to suspend cancellation proceedings.

On November 8, 2016, DAVMN moved to dismiss Bert and Kathryn's complaint. DAVMN argued that Bert and Kathryn's breach-of-contract claim is barred by the doctrine of *res judicata* based on Bert and Kathryn's prior attempt in the probate court to obtain a refund from Darrel's estate on the ground that they had overpaid on the contract for deed. On December 5, 2016, the district court granted DAVMN's motion to dismiss, reasoning that Bert and Kathryn's breach-of-contract claim is barred by the *res judicata* doctrine.

On December 14, 2016, Bert and Kathryn tendered a check in the amount of \$22,605.35 to DAVMN. The amount of the check equals the total of the alleged default, plus \$250.00 for DAVMN's attorney fees and \$57.00 for the costs of serving the notice of cancellation. At oral argument in this court, DAVMN's attorney conceded that the amount of the check is sufficient to cure the default that existed at that time.

Meanwhile, on December 12, 2016, DAVMN moved to vacate the TRO that was issued on October 31, 2016. *See* Minn. R. Civ. P. 60.02. DAVMN argued that the TRO was wrongfully procured on the ground that Bert and Kathryn's attorney had misled the district court by not disclosing the prior probate proceedings. On February 16, 2017, Bert and Kathryn moved to vacate the district court's December 5, 2016 order granting DAVMN's motion to dismiss. The district court issued two orders on February 28, 2017. In the first order, the district court granted DAVMN's motion to vacate the TRO. In the second order, the district court denied Bert and Kathryn's motion to vacate the December 5, 2016 order. Bert and Kathryn appeal.

DECISION

Bert and Kathryn argue that the district court erred by dismissing their complaint based on the *res judicata* doctrine and by vacating the TRO.

I. *Res Judicata*

Bert and Kathryn first argue that the district court erred by dismissing their complaint based on the *res judicata* doctrine. The supreme court most recently described the doctrine as follows:

Alternately called “claim preclusion” or “merger and bar,” *res judicata* is a finality doctrine that applies “when a subsequent action or suit is predicated on the same cause of action,” or claim, that has been previously determined by a judgment. *Hauser v. Mealey*, 263 N.W.2d 803, 806 (Minn. 1978). A subsequent claim is precluded when “a prior claim involved the same cause of action, there was a judgment on the merits, and the claim involved the same parties or their privies.” *Nelson v. Am. Family Ins. Grp.*, 651 N.W.2d 499, 511 (Minn. 2002). A cause of action or claim is “a group of operative facts giving rise to one or more bases for suing.” *Hauschildt [v. Beckingham]*, 686 N.W.2d [829,] 840 [(Minn. 2004)] (quoting *Martin ex rel. Hoff v. City of Rochester*, 642 N.W.2d 1, 9 (Minn. 2002)). Claims are not 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.” *Care Inst., Inc. [v. County of Ramsey]*, 612 N.W.2d [443,] 447 [Minn. 2000)]. The common test for determining whether an action is precluded is to determine “whether the same evidence will sustain both actions.” *McMenomy v. Ryden*, 276 Minn. 55, 58, 148 N.W.2d 804, 807 (1967). Additionally, “the party against whom *res judicata* is applied must have had a full and fair opportunity to litigate the matter in the prior proceeding.” *Nelson*, 651 N.W.2d at 511. *Res judicata* is not applied rigidly but is a “flexible doctrine” in which “the focus is on whether its application would work an injustice on the party against whom estoppel is urged.” *Johnson v. Consol. Freightways, Inc.*, 420 N.W.2d 608, 613-14 (Minn. 1988).

Mach v. Wells Concrete Prod. Co., 866 N.W.2d 921, 925-26 (Minn. 2015). The supreme court also has described the doctrine as having four requirements:

(1) litigation on a prior claim involved the same cause of action, (2) there was a judgment on the merits, (3) the claim involved the same parties or their privies, and (4) the party against whom *res judicata* is applied has had a full and fair opportunity to litigate the matter in the prior proceeding.

Schober v. Commissioner of Revenue, 853 N.W.2d 102, 111 (Minn. 2013). We apply a *de novo* standard of review to a district court's application of the *res judicata* doctrine. *Id.*

In this case, the district court reasoned that DAVMN satisfied all four requirements of the *res judicata* doctrine. On appeal, Bert and Kathryn contend that the district court erred with respect to the first requirement and the fourth requirement.

A. First Requirement: Same Cause of Action

Bert and Kathryn contend that their breach-of-contract claim in this case and their objection to the final accounting in the probate case are not the same cause of action. They emphasize that the conduct by DAVMN that is the factual basis of their breach-of-contract claim did not occur until after the probate case was concluded in January 2016. Bert and Kathryn's breach-of-contract claim is based on DAVMN's service of a notice of mediation in March 2016 and its service of a notice of cancellation of the contract for deed in August 2016.

The *res judicata* doctrine does not apply "if the right to assert the second claim did not arise at the same time as the right to assert the first claim." *Care Inst., Inc.*, 612 N.W.2d at 447. The supreme court's caselaw illustrates that the first requirement of *res judicata* is not satisfied if one claim arises and is asserted before another claim arises. *See, e.g., Mach*,

866 N.W.2d at 923-24, 926 (holding that claim for reimbursement of medical expenses incurred in 2010 was not same cause of action as claim for reimbursement of medical expenses incurred in 2012); *Hauschildt*, 686 N.W.2d at 834-35, 841 (holding that tort claims based on events occurring in 1992 were not same cause of action as tort claims based on events occurring in 1999).

DAVMN contends that to determine “whether a former judgment bars subsequent action,” this court will evaluate “whether the same evidence will sustain both actions.” See *e.g.*, *Schober*, 853 N.W.2d at 111. DAVMN asserts that Bert and Kathryn likely would introduce the same evidence that they introduced in the probate case. The caselaw on which DAVMN relies may be helpful in comparing two claims that arose at the same time. But if a second claim arises after a first claim has arisen and has been asserted, there is no need to compare the evidence relevant to each claim because a court may determine that the two claims are not the same cause of action based solely on the timing of events. See *Mach*, 866 N.W.2d at 926; *Hauschildt*, 686 N.W.2d at 841; *Care Inst.*, 612 N.W.2d at 447.

In any event, a comparison of the evidence introduced in the probate case and the relevant evidence in this action reveals that the two claims are different in scope. In the probate court, Bert and Kathryn’s objection was based primarily on the factual allegation that Bert had made an unscheduled payment to Darrel in 1988. The probate court made findings solely on that issue. In this action, Bert and Kathryn repeat their allegation that Bert made an unscheduled payment to Darrel in 1988, but they also make several additional allegations, including the following: Bert made an unscheduled payment to Marlys in 1988; Bert and Kathryn did not fail to make payments in 1997 and 1999; any dispute concerning

the 1997 and 1999 payments is untimely due to the statute of limitations; payments for 2014 and 2015 are not owed because Darrel's estate has been closed; and DAVMN committed a breach of contract by serving the mediation notice and the notice of cancellation in 2016. To prove their claims in this action, Bert and Kathryn inevitably would introduce more evidence than they introduced in the probate court, including evidence concerning events that occurred after the conclusion of the probate case.

Thus, Bert and Kathryn's breach-of-contract claim in this action is not the same cause of action as the objection they asserted in the probate case. Accordingly, DAVMN cannot satisfy the first requirement of the *res judicata* doctrine.

B. Fourth Requirement: Full and Fair Opportunity to Litigate

Bert and Kathryn also contend that they did not have a full and fair opportunity in the probate court to fully litigate the issues that also may be relevant to their breach-of-contract claim.

Whether a party had a full and fair opportunity to litigate a prior claim depends on "whether there were significant procedural limitations in the prior proceeding, whether the party had the incentive to litigate fully the issue, or whether effective litigation was limited by the nature or relationship of the parties." *State v. Joseph*, 636 N.W.2d 322, 328 (Minn. 2001) (internal quotation omitted). Each of these concerns is implicated here. In the probate court, Bert and Kathryn sought reimbursement from the estate in the amount of \$2,300. There was no apparent threat at that time that Bert and Kathryn might lose their interest in the property that they had acquired by the contract for deed. In contrast, in this action, Bert and Kathryn seek to prevent DAVMN from divesting them of half of their

interest in the 166-acre property, for which they have paid a total of approximately \$100,000 (half of which was paid to Darrel and half of which was paid to Marlys). Bert and Kathryn estimate that the farmland now is worth between \$5,000 and \$10,000 per acre, which implies that the entire property now may be valued at between \$830,000 and \$1,660,000. “A statutory cancellation of a contract for deed results in the vendee’s forfeiture of all payments made and restoration of full legal and equitable title in the property to the vendor.” *In re Butler*, 552 N.W.2d 226, 230 (Minn. 1996). The difference between the amount at stake in the probate case and the amount at stake in this action is substantial.

The relatively small amount at stake in the probate case naturally influenced the course of those proceedings. Bert and Kathryn did not seek to introduce any oral testimony but, rather, relied solely on their documentary evidence. In its order overruling Bert and Kathryn’s objection, the probate court limited its findings of fact to the question whether Bert had made the unscheduled payment to Darrel in 1988. The probate court did not make any findings as to whether Bert and Kathryn had made all scheduled payments on the contract for deed, which would be necessary for a thorough resolution of the current action. Furthermore, the nature of the probate proceedings did not allow for the application of statutory provisions that protect property rights that may be disadvantaged by a cancellation of a contract for deed. *See* Minn. Stat. §§ 559.209, .21, .211 (2016).

Thus, Bert and Kathryn did not have a full and fair opportunity in the probate case to litigate their allegation that they have fully satisfied their payment obligations on the contract for deed. Accordingly, DAVMN cannot satisfy the fourth requirement of the *res*

judicata doctrine. Because DAVMN cannot satisfy two of the four requirements of the *res judicata* doctrine, the district court erred by granting DAVMN's motion to dismiss Bert and Kathryn's action.

II. Vacatur of TRO

Bert and Kathryn also argue that the district court erred by vacating the TRO that temporarily prevented DAVMN from canceling the contract for deed. The TRO was authorized by a statute that provides, in part, as follows:

[1] In an action arising under or in relation to a contract for the conveyance of real estate or any interest therein, the district court . . . has the authority at any time prior to the effective date of termination of the contract and subject to the requirements of rule 65 of the Rules of Civil Procedure for the District Courts to enter an order temporarily restraining or enjoining further proceedings to effectuate the termination of the contract, including recording of the notice of termination with proof of service, recording of an affidavit showing noncompliance with the terms of the notice, taking any action to recover possession of the real estate, or otherwise interfering with the purchaser's lawful use of the real estate. [2] In the action, the purchaser may plead affirmatively any matter that would constitute a defense to an action to terminate the contract. [3] Upon a motion for a temporary restraining order the court has the discretion, notwithstanding any rule of court to the contrary, to grant the order without requiring the giving of any security or undertaking, and in exercising that discretion, the court shall consider, as one factor, the moving party's ability to afford monetary security.

Minn. Stat. § 559.211, subd. 1 (alterations added).

The district court vacated the TRO after DAVMN requested that the district court do so in February 2017. The district court analyzed DAVMN's motion to vacate the TRO by applying rule 60.02 of the rules of civil procedure, which provides:

On motion and upon such terms as are just, the court may relieve a party or the party's legal representatives from a final judgment . . . , order, or proceeding and may order a new trial or grant such other relief as may be just for the following reasons:

(a) Mistake, inadvertence, surprise, or excusable neglect;

(b) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial pursuant to Rule 59.03;

(c) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(d) The judgment is void;

(e) The judgment has been satisfied, released, or discharged or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(f) Any other reason justifying relief from the operation of the judgment.

Minn. R. Civ. P. 60.02. The district court relied on paragraph (c) and paragraph (e) of rule 60.02. The district court's ruling was based in part on its finding that Bert and Kathryn's attorney "failed to inform the Court that [their] claims had been fully adjudicated by the Otter Tail County Probate Court and that a December 21, 2015 Order in [that case] concluded there was no evidence of [their] prepayment on the contract for deed." The district court also found that Bert and Kathryn's attorney "failed to disclose material adverse facts to the Court."

The district court did not cite any legal authority for its determination that Bert and Kathryn's attorney did not comply with a duty of disclosure. DAVMN argued to the district court that Bert and Kathryn's attorney violated a rule of professional conduct that provides, "In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse." Minn. R. Prof. Conduct 3.3(d). Rule 3.3(d) imposes a greater duty than the duty that applies when all opposing parties are given notice of a proceeding. See Minn. R. Prof. Conduct 3.3(a); Minn. R. Prof. Conduct 3.3 cmt. 14. DAVMN argued further to the district court that an attorney's violation of the duty imposed by rule 3.3(d) justifies relief under rule 60.02. See *Dorso Trailer Sales, Inc. v. American Body & Trailer, Inc.*, 464 N.W.2d 551, 559 (Minn. App. 1990), *aff'd in part & rev'd in part on other grounds*, 482 N.W.2d 771 (Minn. 1992).

Whether Bert and Kathryn's attorney failed to "inform the [district court] of all material facts known to the lawyer" that would have enabled the district court "to make an informed decision" on the TRO motion was unclear when the motion was filed given the uncertainties of the pending issues. See Minn. R. Prof. Conduct 3.3(d). Bert and Kathryn's attorney arguably could have expected that the probate proceedings would be referenced in this action. But the probate proceedings would become relevant in this action only if, at a minimum, DAVMN elected to plead the affirmative defense of *res judicata*. See Minn. R. Civ. P. 8.03. At the time of Bert and Kathryn's motion for a TRO, DAVMN had not yet served its answer. But the probate proceedings also would become relevant in this action only if DAVMN had a meritorious *res judicata* defense. We have concluded above

that DAVMN cannot satisfy two of the requirements of the *res judicata* doctrine. *See supra* part I. In light of that conclusion, Bert and Kathryn's attorney did not fail to disclose material facts to the district court because the probate proceedings are not material. Accordingly, to the extent that the district court's vacatur of the TRO is based on paragraph (c) of rule 60.02 and Bert and Kathryn's attorney's non-disclosure of the probate court proceedings, the district court's ruling is erroneous. And to the extent that the district court's vacatur of the TRO is based on paragraph (e) of rule 60.02 and the dismissal of Bert and Kathryn's action, the district court's ruling is erroneous for the same underlying reason. Thus, the district court erred by granting DAVMN's motion to vacate the TRO that temporarily prevents DAVMN from canceling the contract for deed.

Therefore, we reverse the district court's dismissal of Bert and Kathryn's complaint and the district court's vacatur of the TRO, and we remand the case to the district court for further proceedings.

Reversed and remanded.