STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1731

Nonprime, LLC, et al.,
Appellants,

vs.

Walser Automotive Group, LLC, et al.,
Respondents.

Filed June 15, 2010
Affirmed
Schellhas, Judge

Hennepin County District Court
File No. 27-CV-08-24006

Richard E. Bosse, Law Offices of Richard E. Bosse Chartered, Henning, Minnesota (for appellants)

Michael H. Streater, Daniel M. Moak, Briggs & Morgan P.A., Minneapolis, Minnesota (for respondents)

Considered and decided by Schellhas, Presiding Judge; Lansing, Judge; and Harten, Judge.*

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* 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

SCHELLHAS, Judge

Appellants challenge the district court's grant of summary judgment to respondents and its dismissal of their complaint. Because appellants' claims are barred by res judicata, we affirm.

FACTS

Christopher Keppel and Michael Miller acquired the intellectual-property rights to software from its developers on August 16, 2001. According to Keppel, the software's purpose was to combine several resources to provide financing and good quality late model vehicles to people with credit challenges by taking credit information from potential customers and connecting those customers with car dealerships. Also on August 16, 2001, Keppel and Miller granted a one-year license to use the software to CreditLink Technologies Inc., a company they jointly and exclusively owned. Under its license agreement with Keppel and Miller, CreditLink's license was "non-exclusive, non-transferable, [and] revocable." The license permitted CreditLink to use the software "on a temporary basis from time to time for [CreditLink's] business purposes," and provided that CreditLink was not permitted to "otherwise sell, transfer, license, use, install, or copy the [software] without the prior permission" of Keppel and Miller.

Despite the one-year duration of CreditLink's license from Keppel and Miller, CreditLink entered into 36-month "Software Subscription Agreements" with respondent Walser Automotive Group and other entities in the Walser family of businesses (Walser licensees). Each agreement permitted the licensee "to install the Software on only one computer system," granted the licensee "only a limited nonexclusive license," and provided that CreditLink "is and remains the owner of all titles, rights, and interests in the Software." Each agreement also stated that CreditLink had the right to terminate the agreement and the licensee's right to use the software "upon any material breach" by the licensee. In the event of a termination of the agreement, the licensee was obligated to return or destroy all copies of the software.

The Walser licensees also entered into "DealerDirect Reciprocal Agreements" with CreditLink. Each agreement provided for the implementation of the CreditLink program and software, the assistance of CreditLink personnel to the licensee's special-financing department, and the payment to CreditLink by the licensee for sales leads and actual sales generated by CreditLink's advertising and the licensee's software use.

Although the software was generally accessible to the Walser licensees on the Internet, on November 1, 2001, CreditLink and Walser Automotive Group entered into a "Software Escrow Agreement," which required that a local copy of the software be placed in escrow for release to Walser Automotive Group for its continued use in the event CreditLink ceased its business operations. The Software Escrow Agreement also provided that ownership of the software remained with CreditLink, that Walser Automotive Group's use of the escrowed software would be subject to the above-described agreements, and that Walser Automotive Group could not resell or otherwise distribute the software to any other parties.

In May 2002, the Walser licensees breached their agreements with CreditLink, entitling CreditLink to terminate the contracts and collect damages. *See CreditLink*

Techs., Inc. v. Walser Auto. Group, No. A08-606, 2009 WL 1311615, at *1–2 (Minn. App. May 12, 2009), *review denied* (Minn. July 22, 2009). After the breach, Keppel and Miller shut down CreditLink and, in August 2002, entered into an agreement acknowledging that they were "equal owners in common of all right, title and interest in and to" the software, and that "each ha[d] the right to use, modify, and/or enhance the [software] and market, license, and or transfer [their] respective interest[s] in the [software] without informing or receiving approval from the other." The agreement further provided that "[n]either party shall have any right or interest in any income, royalty, profit or other benefit related to or associated with the other's modification, enhancement, marketing, licensing, transfer or other use of the [software]."

Disposition of Miller's Interest

In or about September 2002, Walser Automotive Group hired some former employees of CreditLink, including Miller, who brought his copy of the software with him. Miller worked for Walser Automotive Group for six to nine months, during which time the software was enhanced and modified with his knowledge and consent. Miller testified that the modified version of the software "was developed with the intention that we were going to create a partnership" and sell the software to other dealerships. Miller acknowledged that there was no written agreement setting out these terms or plans and that the plan was never accomplished.

Appellants cite to the deposition testimony of several witnesses to support their claim that the Walser licensees modified and turned the CreditLink software into "Walser Link" software. According to Keith Lucas, an employee of Walser Automotive Group and former employee of CreditLink, by the time Walser Automotive Group terminated Miller, Walser Automotive Group was using the software simply to obtain potential customers' credit reports and was not making use of the software's other functionality. Lucas testified that, after Miller's employment was terminated, Lucas wrote new software to allow Walser Automotive Group to obtain credit reports. Lucas further testified that he wrote the new software without using Miller's copy of the CreditLink software and later destroyed Miller's software.

Meanwhile, in December 2002, Miller entered into an agreement with Vector 3 Technologies LLC and its CEO William Martens to form a new company, appellant Credit Tech Systems LLC (CTS). Miller owned a 25% interest in CTS, and Vector 3 owned the remaining 75%. Under the agreement, Miller assigned "all of his rights, titles and interests in and to [the software] to [CTS]."

In March 2004, Miller executed an agreement conveying his 25% interest in CTS to Vector 3. In the agreement, Miller also conveyed to Vector 3 "any and all ownership or rights" to the software even though he had already transferred his interest in the software to CTS in December 2002. Before he signed the agreement with Vector 3, Miller wrote by hand at the bottom of the agreement: "PS. Miller is involved in a law suit with the Walser Automotive Group, Walser misrepresented themselves and took ownership of the software before this agreement was signed. Miller/Keppel and [CreditLink] are suing Walser for damages regarding the software and promises made by Walser." Miller testified that this note would have been present at the time Martens signed the agreement on behalf of Vector 3.

Disposition of Keppel's Interest

In August 2002, Keppel assigned his interest in the software to appellant Nonprime LLC "for its use and license to its direct customers." Nonprime was formed in August 2002, after Keppel assigned his interest. In exchange for his interest in the software, Keppel received a 33% interest in Nonprime, a 25% voting interest, and a position as co-president. Keppel testified that he has "always been on the board of directors and been a co-president of [Nonprime] from its organization."

Between July and September 2002, Keppel had "continuing discussions" with Walser Automotive Group in which he "mostly . . . offered to provide the software on [Nonprime's] server so that they could continue to use it." Keppel also testified that Walser Automotive Group was "nonresponsive" to his offers. Keppel explained, "[It] didn't give me a positive or negative response. [It] heard me out. You know, like [it] knew that I had big concerns about the obligations of [CreditLink]. [It] knew that I wanted to do something to recapture some of these lost revenues as a result of the contract." During this time, Keppel suspected that Miller was planning to work for Walser Automotive Group but was not specifically aware that Miller had done so. Not until a year or two later did Keppel confirm that Miller had been employed by Walser Automotive Group and had brought Walser Automotive Group a copy of the software.

The Prior Case of CreditLink Technologies Inc. v. Walser Automotive Group

Claims Asserted

On April 18, 2005, CreditLink, Miller, and Keppel sued Walser Automotive Group, a variety of other Walser entities, and Paul Walser, David Walser, Andrew Walser and Jack Walser (the defendants). The plaintiffs alleged that:

● "on or about November 1, 2001, the Defendants and [CreditLink] entered into a contract for product and services," but that "on or about April 1, 2002, the Defendants informed [CreditLink] that they would be breaching the contract and ceased making payments on May 1, 2002";

● following the breach, Walser Automotive Group hired Miller and other CreditLink employees to "form a new corporation to market and service the products developed by [CreditLink]," but that on or about March 1, 2003, Walser Automotive Group informed Miller that Paul Walser and it were not going to follow through with the plan;

● Walser Automotive Group terminated Miller on September 1, 2003, after he refused to relinquish his rights to the software;

● despite the breach, nonpayment, and termination of Miller, Walser Automotive Group continued using the software with no legal authority;

● the defendants were liable to the plaintiffs on the basis of breach of contract, promissory estoppel, "detrimental reliance," fraud and misrepresentation, defamation, unjust enrichment, unlawful discharge, tortious interference, unfair trade practices, conversion, and quasi-contract.

Claims Dismissed

In January 2007, the district court granted the defendants partial summary judgment and dismissed:

● all claims against David Walser because the parties agreed no such person existed;

● all claims against Jack Walser because the plaintiffs had presented no evidence that he was individually involved with the issues in the case;

● all of Keppel's and Miller's individual claims that were derivative of CreditLink's claims;

● Miller's unlawful discharge claim because he failed to plead specific facts to support the claim;

● the promissory estoppel claim because the plaintiffs had presented no evidence of a promise that would support such a claim by CreditLink;

● the "detrimental reliance" claim as duplicative of the promissory estoppel claim;

● the quasi-contract claim as duplicative of the unjust-enrichment claim;[1]

● the fraud and misrepresentation claims because the plaintiffs did not establish essential elements of the claims;

● the defamation claim because the plaintiffs provided no evidence of any defamatory statements and on statute-of-limitations grounds;

● the tortious interference claim for failure to state the essential elements of the claim;

● the unfair trade practices claim because the plaintiffs provided no evidence of a trade secret;

● the conversion claim because the plaintiffs did not demonstrate a genuine issue of material fact as to the ownership and use of the software.

Claim Tried before a Jury

In July 2007, CreditLink proceeded to trial on its breach-of-contract claim, and the jury found in favor of CreditLink and awarded it $400,000 in damages. The defendants appealed from certain post-trial orders, and this court affirmed. *CreditLink Techs.*, 2009 WL 1311615. The plaintiffs did not appeal.

[1] The district court also later dismissed the unjust-enrichment claim.

The Present Case

In September 2008, appellants sued respondents, alleging that:

● appellants obtained their interests in the software from Keppel and Miller;

● CreditLink "entered into a contract to provide access to the software and service" to the Walser licensees, which included a license for access to the software;

● the Walser licensees breached their agreements, which CreditLink then terminated;

● the jury in the first lawsuit found that the Walser licensees breached their agreements and awarded CreditLink $400,000 in damages;

● the Walser licensees did not return the software at the time of breach or termination;

● after CreditLink went out of business, the Walser licensees hired former CreditLink employees to run and modify the software, which they distributed to be used by all other respondents, rebranded as "Walser Link";

● respondents were liable to appellants for unjust enrichment, trespass, conversion, and trade-secret misappropriation.

In July 2009, the district court granted summary judgment to respondents on the basis that appellants were collaterally estopped from asserting their claims against respondents because: the "central issue" in this case was the same as one of the issues in the first case; there was a final judgment on the merits in the first case; appellants were in privity with Keppel and Miller; and Keppel and Miller had a full and fair opportunity to litigate their claims in the first case. The district court also noted that CTS's tort claims were barred because the claims were not "independent of the parties' contracts."

This appeal follows.

D E C I S I O N

Appellants challenge the district court's grant of summary judgment to respondents on their claims of unjust enrichment, trespass, and conversion. Appellants do not challenge the district court's dismissal of their trade-secret misappropriation claim. We affirm the district court's dismissal of appellants' claims, but we do so on the basis of res judicata rather than collateral estoppel. *See Schweich v. Ziegler, Inc.*, 463 N.W.2d 722, 728 (Minn. 1990) (stating that appellate court will not reverse district court's decision where the result was correct, though based on incorrect reasons).

"Res judicata is a finality doctrine that mandates that there be an end to litigation." *Hauschildt v. Beckingham*, 686 N.W.2d 829, 840 (Minn. 2004). The doctrine applies to bar a subsequent claim where: "(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." *Id.* "Under res judicata, a party is required to assert all alternative theories of recovery in the initial action." *Id.* (quotation omitted). "Res judicata not only applies to all claims actually litigated, but to all claims that could have been litigated in the earlier action." *Id.* "Once there is an adjudication of a dispute between parties, res judicata prevents either party from relitigating claims arising from the original circumstances, even under new legal theories." *Id.* at 837.

The claims in this case, like several of the claims in the first case, arise out of Walser's use of the software following the breakdown of its license agreement with CreditLink. The record contains Lucas's undisputed statement in his affidavit that the

CreditLink software has not been used for any purpose since he destroyed it in the fall of 2004, after Walser terminated Miller, and the record contains no evidence of additional or continuing use of the software by Walser subsequent to the 2005 lawsuit. We conclude that the claims in this case arise out of the same set of facts and circumstances as the claims in the first case. And there was a final judgment on the merits of those claims in the first case. Therefore, appellants' claims in this case are barred if appellants were in privity with the plaintiffs in the first case, and the plaintiffs had a full and fair opportunity to litigate the claims in the first case.

"Privity requires a person so identified in interest with another that he represents the same legal right." *Beutz v. A.O. Smith Harvestore Prods., Inc.*, 431 N.W.2d 528, 533 (Minn. 1988). Privity "expresses the idea that certain non-parties may be so connected with the litigation that the judgment should also determine their interests." *Brunsoman v. Seltz*, 414 N.W.2d 547, 550 (Minn. App. 1987) (citing *Margo-Kraft Distribs., Inc. v. Minneapolis Gas Co.*, 294 Minn. 274, 278, 200 N.W.2d 45, 47 (1972)), *review denied* (Minn. Jan. 15, 1988). Privies include, but are not limited to: those who control an action although not parties to it; those whose interests are represented by a party to the action; and successors in interest to those who have derivative claims. *Margo-Kraft*, 294 Minn. at 278, 200 N.W.2d at 47–48. "A privy to a party may be identified by the privy's controlling participation and active self-interest in the original litigation." *Miller v. Nw. Nat'l Ins. Co.*, 354 N.W.2d 58, 62 (Minn. App. 1984) (citing *Margo-Kraft*, 294 Minn. 274, 200 N.W.2d 45). "A privy is so identified with the party in interest as to be affected with the party by the litigation." *Id.* (citing *Hentschel v. Smith*, 278 Minn. 86, 95, 153

N.W.2d 199, 206 (1967)). But "[t]here is no prevailing definition of privity which can be automatically applied," so the court "must carefully examine the circumstances of each case." *Margo-Kraft*, 294 Minn. at 278, 200 N.W.2d at 47.

Taken as a whole, the circumstances of this case reveal that appellants were in privity with the plaintiffs in the first case.

The circumstances support a conclusion that Miller was in privity with CTS when he sued Walser Automotive Group and the other defendants in the first case, even though he was not an owner or officer of CTS at the time. After transferring all of his interest in the software to CTS in December 2002, Miller sold his 25% interest in CTS to Vector 3 in March 2004. When he sold his interest in CTS, along with his interest in the software, to Vector 3, Miller told Martens and Vector 3 that CreditLink, Keppel and he were suing the Walser entities over the use and ownership of the software. All parties to the March 2004 agreement were aware that Miller had transferred his interest in the software to CTS in December 2002. Yet Miller, along with Keppel and CreditLink, represented to the district court in their complaint in the first case that they did own the software at that time. Since Miller had no ownership interest in the software, CTS, or Vector 3 at that time, his prosecution of his software-related claims in the first action could only have been on behalf of the actual owners, CTS, Martens, and Vector 3. Although informed by Miller of the prosecution of the software claims, neither CTS, Martens, nor Vector 3 intervened in the first case to protect its interest in the software. *See* Minn. R. Civ. P. 24.01 (providing that anyone claiming an interest in the property that is the subject of the suit has the right to intervene); *Kisch v. Skow*, 305 Minn. 328, 334–35, 233 N.W.2d 732, 736 (1975) (holding that an owner of a car who had an opportunity to, and declined to, intervene in an action against the driver would not be heard to object later to the proceedings in that action); *Bifulk v. Evans*, 353 N.W.2d 258, 261 (Minn. App. 1984) (noting "that the professional association could have intervened" in the first lawsuit). CTS, Martens, and Vector 3 effectively acquiesced to Miller's representation of their interests in the software in the first case.

Keppel's ownership, voting interest, and leadership positions with Nonprime reflect his control over Nonprime and support a conclusion that Keppel was in privity with Nonprime when the first case was litigated. "The judgment in an action by or against the holder of ownership in the corporation is conclusive upon the corporation except when relitigation of the issue is justified in order to protect the interest of another owner or a creditor of the corporation." Restatement (Second) of Judgments § 59(3)(b) (1982); *see also Bifulk*, 353 N.W.2d at 261–62 (holding sole shareholder and professional association in privity). A comment to the restatement explains:

> When the corporation is closely held . . . , interests of the corporation's management and stockholders and the corporation itself generally fully coincide. By definition, the stockholders are few in number and either themselves constitute the management or have direct personal control over it. . . . For the purpose of affording opportunity for a day in court on issues contested in litigation, . . . there is no good reason why a closely held corporation and its owners should be ordinarily regarded as legally distinct. On the contrary, it may be presumed that their interests coincide and that one opportunity to litigate issues that concern them in common should sufficiently protect both.

Restatement (Second) of Judgments § 59 cmt. e.

Here, in addition to owning 33% of Nonprime, Keppel has been a director and co-president of Nonprime since its inception. Keppel, a plaintiff in the first case, asserted in the complaint that he, along with Miller and CreditLink, had an ownership interest in the software, that the Walser entities "wrongly exerted dominion and control" over the software "inconsistent with the ownership rights" of Keppel, Miller, and CreditLink, and that this was "a continuing violation." Yet Keppel knew that by the time the first case was commenced, he had no personal ownership rights in the software because he had assigned those rights to Nonprime in August 2002. Keppel was effectively prosecuting his claims in the first case in Nonprime's name, with Nonprime's knowledge. *See Travelers Indem. Co. v. Bloomington Steel & Supply Co.*, 718 N.W.2d 888, 895–96 (Minn. 2006) (stating that "a corporation is charged with constructive knowledge . . . of all material facts of which its officer or agent . . . acquires knowledge while acting in the course of employment within the scope of his or her authority" (alteration in original) (quotation omitted)). Appellants have advanced no evidence suggesting that relitigation of the claims in this case is justified to protect another of Nonprime's owners or creditors. We therefore conclude that privity exists between Keppel and Nonprime.

And we cannot ignore the fact that appellants' counsel in the present case represented Keppel and CreditLink in the first case. No party in the present case has complained about appellants' counsel's representation, and we do not assume that counsel has a conflict of interest or that his representation violates Minn. R. Prof. Conduct 1.9(a). But we do view counsel's representation as an additional circumstance that supports our conclusion that Keppel was in privity with appellants when he prosecuted his claims in the first case. We observe that in the first case, counsel for Keppel and CreditLink submitted a memorandum of law to the district court in which he acknowledged that the ownership of the software after August 2002 was a potential roadblock to his clients' recovery and represented to the court that CreditLink could obtain title to the software after that date, "if needed." Contrary to appellants' representations to the district court and this court, that appellants were not in privity with the plaintiffs in the first case, counsel's representation in the first case suggested strongly that privity existed. Without the ability to control appellants, who owned the software when the first case was prosecuted, it is difficult to comprehend how Keppel's counsel could have represented to the district court that ownership of the software would be obtained, "if needed."

We conclude that appellants were in privity with the plaintiffs in the first case, appellants were aware that the plaintiffs in the first case were litigating appellants' rights in the software, and appellants could have intervened in the first case if they believed their rights were not being adequately represented. Appellants therefore had a full and fair opportunity to litigate in the first case. *See Crossman v. Lockwood*, 713 N.W.2d 58, 62 (Minn. App. 2006) (stating that "the rationale behind the requirement of privity is closely associated with" a party's full and fair opportunity to be heard, "effectively merging consideration of the two" factors (quotation omitted)). Appellants' claims in this case are barred by res judicata, and the district court did not err when it granted summary judgment to respondents and dismissed appellants' claims.

Affirmed.