COURT OF APPEALS
DECISION
DATED AND FILED

February 22, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1803 **Cir. Ct. No. 2014CV2088**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

RICHARD E. OLSON AND WEBCOM SOLUTIONS INC.,

PLAINTIFFS-APPELLANTS,

V.

ALEKSANDAR IVANOVIC, CHRISTOPHER LESAR, MILAN RAJKOVIC, WEBCOM, INC. AND CALLIDUS SOFTWARE, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment and an order of the circuit court for Waukesha County: JAMES R. KIEFFER, Judge. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

¶1 HAGEDORN, J. Richard Olson is the sole owner of Webcom Solutions, Inc. (WSI). WSI contracted with respondents Webcom, Inc. and Callidus Software, Inc. to sell software, and as part of that agreement, the parties

agreed to submit any disputes "arising out of or relating to" the agreement to arbitration. Following disputes, arbitration proceedings were in fact commenced and concluded with an award. Subsequently, however, Olson filed suit in the circuit court on behalf of himself personally and his company raising various tort claims he believes are not subject to arbitration. Critically, Olson did not properly serve the respondents. The respondents answered with a motion to dismiss on substantive grounds, rather than asserting improper service. Olson responded with a motion for default judgment, maintaining service was proper and that the motion to dismiss was filed after the statutory time to answer. The circuit court denied the motion for default judgment and granted the respondents' motion to dismiss under the doctrine of claim preclusion.

¶2 Olson and WSI appeal on two grounds. They argue the court should have granted default judgment and that claim preclusion does not apply because the complaint alleges claims different from those brought in arbitration, Olson and WSI are not in privity, and the complaint alleges claims that are not arbitrable. We hold that (1) the circuit court permissibly and properly denied the motion for default judgment because Olson and WSI never proved service on the respondents; and (2) Olson's and WSI's claims are precluded because they share a common nucleus of operative fact with those brought in arbitration, Olson and WSI are in privity, and the claims brought in the complaint were, or could have been, arbitrated because they arose out of and related to the agreement. Accordingly, we affirm the circuit court's order dismissing Olson's and WSI's lawsuit, and the judgment for costs and attorneys' fees.

BACKGROUND

¶3 In 1999, Richard Olson was introduced to respondent Aleksandar Ivanovic by Ivanovic's wife, who happened to be Olson's attorney. Ivanovic and Olson agreed to establish a business arrangement: Ivanovic formed Webcom, and Olson formed WSI to sell Webcom's software. Olson is the founder and sole owner of WSI. In November 2001, Webcom and WSI entered into an initial "Consulting and Reseller Agreement." In November 2006, Olson and Ivanovic—as agents for their respective companies—renegotiated their agreement and signed a new "Reseller & Project Assignment Agreement" (RPA).

¶4 Sections 2.2 and 2.4 of the RPA forbade Webcom from directly selling the software to "customers" and "prospective customers" of WSI, and also forbade Webcom from directly billing such customers. The agreement explained that "all clients or customers of [WSI] or prospective clients and customers … are the sole and exclusive domain of" WSI. Section 8 of the RPA also provided that Webcom would pay "a 2% fee" on sales made through Salesforce.com—a website that sold Webcom's software—or pass those sales leads on to WSI. Upon termination of the agreement, section 16.3 required Webcom, at Webcom's discretion, to either (1) purchase WSI's client base, or (2) pay WSI a percentage of certain revenue streams for a period of four years after termination. Section 17.9 additionally required that "any dispute arising out of or relating to this Agreement" must be submitted to binding arbitration.

¶5 In February 2010, Webcom gave notice of its intent to terminate the RPA in ninety days. During this time, Callidus bought Webcom. Rather than purchasing WSI's client base under section 16.3, Callidus elected to pay WSI the revenue specified in that section. WSI disputed the percentages, the amounts due,

and demanded a full accounting of the revenues to which it claimed entitlement. WSI filed a statement of claim (SOC) to arbitrate these disputes. The SOC described WSI as the claimant, and it named Webcom and Callidus as the respondents. The SOC alleged six claims for relief: breach of contract, bad faith, conversion, intentional interference with contract, promissory estoppel, and accounting.

¶6 The substance of these claims were numerous alleged breaches of the RPA by Webcom and Callidus, as well as torts stemming from the same conduct. The SOC alleged that Webcom and Callidus had directly sold Webcom's software, provided pricing and estimates, and directly billed customers of WSI all in violation of the RPA. It also alleged that Webcom and Callidus failed to forward revenue and new opportunities generated by Salesforce.com as the RPA required. While engaged in these breaches, the SOC averred that Webcom and Callidus slandered Olson's good name and business reputation to WSI's clients. The SOC also claimed that Webcom and Callidus breached the contractual duty of good faith by failing to disclose the negotiations resulting in Webcom's purchase by Callidus. The SOC further attacked the signing of the RPA itself, claiming that Webcom threatened to withhold sales leads and business opportunities from WSI in order to force WSI to renegotiate the original agreement, and that Olson and WSI signed the RPA based on false representations by Ivanovic.

¶7 Despite Olson not being a named party in the arbitration, the SOC alleged the respondents' conduct injured Olson personally. As already noted, the SOC alleged Webcom and Callidus slandered Olson. It also alleged that respondents attempted "to force … Mr. Olson to waive valuable contractual rights," failed "to disclose to … Mr. Olson the negotiations leading to the acquisition of Webcom by Callidus," caused "pecuniary damage to … Mr. Olson,"

and made promises to "induce Mr. Olson" to renegotiate the original agreement.[1] The record is devoid of any objection by any party to Olson's claims being included in the arbitration proceedings.

¶8 As relief, the SOC requested the arbitrator award actual damages for the breaches of contract and tortious conduct, order the respondents to pay WSI the revenue it was entitled to under section 16.3 of the RPA, and award the costs of arbitration. Finally, the SOC requested accounting of any revenue from customers of WSI and any revenue from customers generated through Salesforce.com.

¶9 The claims were arbitrated and the arbitrator rendered a decision granting some of WSI's claims and denying others.[2] This appeared to end the matter, but on October 10, 2014, Olson and WSI filed this civil complaint naming Webcom and Callidus as defendants. The complaint additionally named agents of Webcom and Callidus as defendants: Ivanovic, Christopher Lesar, and Milan Rajkovic. None of the defendants were personally served. Rather, Olson and WSI claimed to perfect service through certified mail by "depositing a copy of the … complaint in the United States Mail … to [each defendant's] last known address[]."

¶10 The complaint asserted eight separate claims: defamation, intentional infliction of emotional distress, fraud, wrongful conversion, unfair

[1] The SOC additionally requested the arbitrator award "Claimants their costs" including attorney's fees. The reference to claimants, plural, suggests Olson was seeking to recover costs he incurred personally as a result of the arbitration.

[2] The decision clarified, "This award is in full settlement of all claims and counterclaims submitted to this Arbitration. All claims not expressly granted herein are hereby, denied."

business practices, soliciting attorney-client privileged information, conspiracy, and withholding assets/payments with intent to harm. Almost as if anticipating a challenge, the complaint prefaced its claims by stating: "Plaintiff[s] [are] suing defendants for damages not related to the breach of contract." However, the allegations were unmistakably similar to the claims brought at arbitration, as will be seen in more detail below.

¶11 On December 8, 2014, more than forty-five days after Olson mailed the complaints, Webcom and the other defendants jointly filed a motion to dismiss—though they did not contest service or personal jurisdiction. The motion asserted the suit should be dismissed on the grounds of claim preclusion, failure to state a claim, and the statute of limitations. Olson and WSI opposed the motion and moved for default judgment contending the motion to dismiss was not timely filed. The circuit court denied the motion for default judgment because the defendants were never properly served. The court then granted the defendants' motion to dismiss on the basis of claim preclusion.[3] It explained:

> [L]ooking at this pragmatically and looking at the same common set of material facts, the common nucleus of operative facts … this is simply another way of approaching this ongoing business dispute between all of these parties that has already been properly addressed … or which could have been properly addressed in the arbitration matter itself.

¶12 Olson and WSI filed a motion to reconsider solely on the issue of the default judgment. The court denied this motion on the grounds that the "[f]ailure to properly serve the defendants means that the applicable statutory response

[3] Citing WIS. STAT. §§ 814.03 and 814.04 (2013-14), the court also awarded the defendants their costs and attorneys' fees. All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

deadlines never actually began to run, thus, it was impossible … to be in default." The court also clarified that the claims were dismissed with prejudice. Olson and WSI then filed another motion to reconsider accompanied by a twenty-five page brief accusing the circuit court of, among other things, failing "to make reasonable efforts to understand and comprehend" the law, choosing to ignore the law, failing to "understand the facts," and committing errors of "profound magnitude." The court also denied this second motion and warned Olson and WSI that any further motions to reconsider would be denied and the court would award the respondents their costs. Olson and WSI appeal.

DISCUSSION

¶13 Olson[4] contends that the circuit court erred both by denying the motion for default judgment and granting the respondents' motion to dismiss. Webcom and the other respondents disagree and further argue that both of Olson's arguments are frivolous and request that we grant them their costs and attorneys' fees for this appeal.[5] *See* WIS. STAT. RULE 809.25(3). We conclude that the circuit court properly denied Olson's motion for default judgment and correctly ruled that Olson's suit was barred by claim preclusion. Although Olson's arguments are not persuasive, we are not convinced that they are so lacking in merit as to be legally frivolous. We therefore deny the respondents' request for costs and fees.

[4] For brevity, we will generally refer to the appellants collectively as "Olson."

[5] The respondents claim that this appeal was brought "solely for purposes of … maliciously injuring" the respondents under WIS. STAT. § 809.25(3). As support, they point to communications by the appellants' counsel proclaiming that the appellants had "nothing to lose" by continuing to litigate these claims.

A. Default Judgment

¶14 Olson believes the circuit court should have granted his motion for default judgment because, he argues, he properly served the respondents, and alternatively, the respondents waived the issue by failing to contest service. Olson is wrong on each point.

1. Olson and WSI Did Not Properly Serve the Respondents

¶15 Ordinarily, the proper method to serve natural persons is to "personally serv[e] the summons upon the defendant either within or without this state." WIS. STAT. § 801.11(1)(a). Similarly, a domestic or foreign corporation may be served by "personally serving … an officer, director or managing agent … either within or without this state." Sec. 801.11(5)(a). In such cases, the summons may properly be left at the office of an officer, director or managing agent "with the person who is apparently in charge of the office." ***Id.*** A plaintiff may not serve an individual or corporate defendant by other statutorily prescribed methods unless "with reasonable diligence the defendant cannot be served" personally. Sec. 801.11(1)(b)-(c), (5)(b).[6]

¶16 Rather than personally serve the respondents as required by statute, Olson elected to use certified mail. He insists that certified mail was proper as to Callidus under WIS. STAT. § 180.1510 because he could not with "reasonable diligence" serve Callidus personally. According to Olson, personal service on a

[6] WISCONSIN STAT. § 801.11 also provides that a plaintiff may serve a corporation or individual by "serving the summons in a manner specified by any other statute … or upon an agent authorized by appointment or by law to accept service of the summons for the defendant." Sec. 801.11(1)(d), (5)(c).

registered agent located outside of Wisconsin is unreasonable. He does not argue, and therefore concedes, that service as to the other respondents was improper.[7]

¶17 As to Callidus, Olson relies on WIS. STAT. § 180.1510(4)(a); it provides that a "foreign corporation may be served by registered or certified mail." But this exception to the requirement of personal service applies only "if the foreign corporation has no registered agent or its registered agent cannot with reasonable diligence be served." Sec. 180.1510(2). Olson agrees that Callidus has a registered agent. Thus, the issue is whether Olson could not "with reasonable diligence" serve Callidus' registered agent under WIS. STAT. § 801.11. And to this, he offers no defense. Olson's conclusory suggestion that he was not required to personally serve Callidus' agent simply because the agent was located in California is meritless. Section 801.11(5) requires personal service and applies to corporations "either within or without this state." In short, Olson did not comply with the statutory service requirements and makes no credible argument that he did.

2. Olson and WSI Were Not Entitled to Default Judgment

¶18 Despite the defects in service, Olson nevertheless maintains that he need not prove valid service in this case. Rather, he points to the respondents' failure to object to service of process. This concession, he stresses, represents the

[7] Olson fails to contest even once the propriety of service to the defendants other than Callidus in his brief-in-chief. He does, however, claim in his reply brief (in a single sentence) that he "properly served" Webcom as well, but the argument is void of development. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals need not address undeveloped arguments); *see also* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments deemed conceded). In any event, he does not identify any statutory or common-law rule permitting service by registered mail on the defendants other than Callidus.

respondents' waiver of the issue and establishes proper service entitling him to a default judgment. We disagree. Olson's failure to properly serve the respondents precludes him from obtaining a default judgment.

¶19 The circuit court may grant a default judgment "if no issue of law or fact has been joined" and the time to do so has expired. WIS. STAT. § 806.02. A circuit court's decision to grant or deny default judgment is a discretionary decision, which means we will affirm it if it was based on a reasoned application of the appropriate law to the facts of record. ***Binsfeld v. Conrad***, 2004 WI App 77, ¶20, 272 Wis. 2d 341, 679 N.W.2d 851. The circuit court's decision to deny default judgment was not only an acceptable discretionary decision, it was clearly correct as a matter of law.

¶20 First and most fundamental, Webcom and the other respondents were never actually in default. The forty-five-day time limit the parties agree is applicable here does not begin to run until "after the service of the complaint upon the defendant." WIS. STAT. § 802.06(1). Because the respondents were never served, the time limit never ran and their motion to dismiss was not late.

¶21 Second, to obtain a default judgment, WIS. STAT. § 806.02 required Olson to file proof of legally valid service with the court. Sec. 806.02(3) ("If a defendant fails to appear in an action within the time fixed in [WIS. STAT. §] 801.09 the court shall, before entering a judgment against such defendant, require proof of service of the summons."); *see also* ***Honeycrest Farms, Inc. v. A.O. Smith Corp.***, 169 Wis. 2d 596, 601, 486 N.W.2d 539 (Ct. App. 1992). We see no merit to Olson's contention that the requirement of proof of service before default judgment may be granted need not be proof of actual, legally valid service. This construction would render the statute a paper tiger and

no real requirement at all. We believe the plain language of the statute requires proof of statutorily satisfactory service. Olson offered no such proof, and therefore he does not meet the statutory prerequisite for default judgment.

¶22 Finally, Olson confuses default judgments with affirmative defenses. He is correct that a defendant waives lack of personal jurisdiction and defective service as affirmative defenses by failing to raise them in the answer or a motion to dismiss as the respondents concededly did here. *See* ***Studelska v. Avercamp***, 178 Wis. 2d 457, 462, 504 N.W.2d 125 (Ct. App. 1993). But waiver by the respondents does not metamorphosize into the proof of legally valid service necessary for Olson to obtain default judgment.

B. Claim Preclusion

¶23 Obtaining a judgment would be meaningless if the losing party could simply turn around and relitigate the same claims addressed in that judgment. Thus, the doctrine of claim preclusion holds that "a final judgment is conclusive in all subsequent actions between the same parties [or their privies] as to all matters which were litigated or which might have been litigated in the former proceedings." ***Menard, Inc. v. Liteway Lighting Prods.***, 2005 WI 98, ¶26, 282 Wis. 2d 582, 698 N.W.2d 738 (citations omitted). Subject to exceptions not applicable here,[8] "a valid and final award by arbitration has the same effects under

[8] The RESTATEMENT (SECOND) OF JUDGMENTS § 84 outlines the following exceptions for arbitration awards:

> (2) An award by arbitration with respect to a claim does not preclude relitigation of the same or a related claim based on the same transaction if a scheme of remedies permits assertion of the second claim notwithstanding the award regarding the first claim.

(continued)

the rules of [claim preclusion] as a judgment of a court." RESTATEMENT (SECOND) OF JUDGMENTS § 84(1) (AM. LAW INST. 1982); *see also* ***Manu-Tronics, Inc. v. Effective Mgmt. Sys., Inc.***, 163 Wis. 2d 304, 314, 471 N.W.2d 263 (Ct. App. 1991) (explaining that claim preclusion applies to arbitration awards and is essential for arbitration to be useful).

¶24 Claim preclusion requires the following three elements be satisfied: (1) there must be "an identity between the parties or their privies in the prior and present suits"; (2) there must be an identity of causes of action—that is, the prior and present actions must involve the same claims; and (3) the prior action must have resulted in a final judgment on the merits. ***Menard***, 282 Wis. 2d at 26 (citation omitted). If these requirements are met, then the claims are barred. ***Id.*** Whether claim preclusion applies is a question of law we review de novo. ***Id.***

> (3) A determination of an issue in arbitration does not preclude relitigation of that issue if:
>
> > (a) According preclusive effect to determination of the issue would be incompatible with a legal policy or contractual provision that the tribunal in which the issue subsequently arises be free to make an independent determination of the issue in question, or with a purpose of the arbitration agreement that the arbitration be specially expeditious; or
> >
> > (b) The procedure leading to the award lacked the elements of adjudicatory procedure ….
>
> (4) If the terms of an agreement to arbitrate limit the binding effect of the award in another adjudication or arbitration proceeding, the extent to which the award has conclusive effect is determined in accordance with that limitation.

Id.

¶25 Olson disputes elements one and two.[9] He does not contest privity between the individual respondents and with Callidus and Webcom, both of whom were parties in the arbitration. He does, however, insist that he is not in privity with WSI and therefore his claims are not, as a matter of law, precluded by the arbitration award. He further contends that the claims brought in the complaint are different from those brought in arbitration. We disagree; the circuit court properly applied claim preclusion to bar Olson's suit.

1. Olson is in Privity with WSI

¶26 The identity-of-parties requirement is met "'where the two actions involve a closely-held corporation in one case … and its principal shareholder in the other' … and the principal shareholder actively participated in the first case." ***Manu-Tronics, Inc.***, 163 Wis. 2d at 315 (citation omitted); *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 59(3)(a) (AM. LAW INST. 1982) ("The judgment in an action by … the corporation is conclusive upon the holder of its ownership if he actively participated in the action … unless his interests … are so different that he should have opportunity to relitigate the issue.").

¶27 Despite his protestations otherwise, Olson's relationship with WSI is a textbook example of privity. Because he is the sole owner of WSI, all substantive litigation decisions had to be made by him. Nothing in the record indicates that Olson's interests were in any way distinct from WSI's—certainly not to the degree that "he should have [the] opportunity to relitigate the issue." *See* RESTATEMENT (SECOND) OF JUDGMENTS § 59(3)(a) (AM. LAW INST. 1982).

[9] Olson does not dispute that the arbitration award is a final judgment on the merits that disposed of all claims brought in the SOC.

Furthermore, in the arbitration SOC, he elected to bring claims of injury against himself personally even though he was not a named party. We cannot imagine participation more active than this, nor does Olson offer any reason why his interests are so distinct that relitigation is appropriate. His insistence that ordinary privity rules do not apply because he did not sign the arbitration agreement is incorrect; these rules apply equally to arbitration awards. *See* ***Manu-Tronics***, 163 Wis. 2d at 314.

¶28 Nor are we persuaded by his argument that there can be no privity because he could not bring his personal claims in arbitration. The fact remains that he did voluntarily bring personal claims in the SOC. He cannot challenge the arbitrator's authority to determine his personal claims after voluntarily submitting them to arbitration. *See* ***AGCO Corp. v. Anglin***, 216 F.3d 589, 593 (7th Cir. 2000) ("If a party willingly and without reservation allows an issue to be submitted to arbitration, he cannot await the outcome and then later argue that the arbitrator lacked authority to decide the matter."); *see also* ***Pilgrim Inv. Corp. v. Reed***, 156 Wis. 2d 677, 685-86, 457 N.W.2d 544 (Ct. App. 1990) (holding that a party's voluntary participation in arbitration proceedings estops that party from asserting that no agreement to arbitrate exists); ***Environmental Barrier Co. v. Slurry Sys., Inc.***, 540 F.3d 598, 606 (7th Cir. 2008) ("[K]eeping the arbitrability card close to the chest would allow a party … to take a wait-and-see approach: if it had liked [the arbitrator's] decision, it would have remained silent, but since it did not, it is now complaining about arbitrability."). If Olson thought personal claims were not arbitrable, then he should not have brought them in arbitration. Olson and WSI are in privity.

2. *The SOC and Complaint Share an Identity of Claims*

¶29 To determine whether the prior and subsequent actions involve the same claims, our courts have adopted the transactional approach from the RESTATEMENT (SECOND) OF JUDGMENTS (AM. LAW INST. 1982). ***Menard***, 282 Wis. 2d 582, ¶30. Under this standard, "all claims arising out of one transaction or factual situation are treated as being part of a single cause of action and they are required to be litigated together." ***Id.*** (citation omitted). What constitutes a transaction is a "pragmatic standard to be applied with attention to the facts of the cases" and "connotes a natural grouping or common nucleus of operative facts." RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. b. (AM. LAW INST. 1982). The RESTATEMENT (SECOND) OF JUDGMENTS recognizes that "[h]aving been defeated on the merits in one action, a plaintiff sometimes attempts another action seeking the same or approximately the same relief but adducing a different substantive law premise or ground." RESTATEMENT (SECOND) OF JUDGMENTS § 25 cmt. d. (AM. LAW INST. 1982). Thus, we disregard the legal labels attached to the claims and look to whether the underlying acts are the same. RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. c. (AM. LAW INST. 1982).[10]

¶30 We conclude that an identity of claims exists between the arbitration proceedings and this civil complaint. Despite the altered legal labels, the

[10] The RESTATEMENT (SECOND) OF JUDGMENTS § 24 elaborates further:

> In the more complicated case where one act causes a number of harms to, or invades a number of different interests of the same person, there is still but one transaction; a judgment based on the act usually prevents the person from maintaining another action for any of the harms not sued for in the first action.

RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. c. (AM. LAW INST. 1982).

complaint alleges the same basic injuries as the SOC: the respondents wrongfully interfered with WSI's customers as prohibited by the RPA, slandered Olson's and WSI's good name to customers, and generally failed to uphold the terms of the RPA—all injuries alleged in the arbitration proceeding. Olson's specific causes of action each derive from the same common nucleus of operative facts.

¶31 The defamation claim alleged that prior to terminating the RPA, the respondents "conducted a 'smear' campaign against WSI and Olson by making defamatory statements to customers." This claim not only directly derives from the business relationship established by the RPA, it is substantively identical to the slander allegation in the SOC.

¶32 The intentional-infliction-of-emotional-distress claim averred that the respondents caused Olson emotional distress by failing to pay WSI as required by the RPA and "fail[ing] to recognize the terms of the [RPA] in order to cause mental anguish." This is a continuation of Olson's general complaints—embodied in his breach of contract and bad faith claims brought in the SOC, as well as his general assertion of pecuniary damage against him personally—about the respondents' failure to abide by the terms of the RPA by denying him accounting information and failing to pay him under the contract.

¶33 The fraud claim was based on the respondents' failure to disclose the negotiations between Webcom and Callidus and failure to pay the plaintiffs "the revenue streams under the agreement"—obviously resting on the same breakdown in the business relationship and agreement.

¶34 The wrongful conversion claim was based on the respondents directly selling software to WSI's customers and failing to pay WSI as required by the RPA, a claim resting entirely on the provisions of the RPA.

¶35 Olson's and WSI's unfair-business-practices claim simply re-alleged the respondents' failure to apprise Olson and WSI of Callidus' plan to purchase Webcom. This same issue was raised in the arbitration SOC but was characterized as a breach of the contractual duty of good faith.[11]

¶36 The solicitation of attorney-client privileged information claim alleged that Ivanovic, through his wife, "obtained privileged attorney-client information" about Olson to use in "the process of selling Webcom to Callidus." This derives from the same set of issues and complaints regarding the sale of Webcom to Callidus that were raised in arbitration. Adding a new factual wrinkle to the same bad faith claim brought in the SOC does not create a new claim. Olson's briefs also make no effort to defend or describe how this claim is distinct.

¶37 The conspiracy claim alleged the same basic conduct as all the other claims, but additionally accused the respondents of conspiring to injure Olson and WSI, and renewed Olson's and WSI's request for accounting, claiming that the respondents "have engaged in a conspiracy to deny plaintiffs access to financial information to which plaintiffs are entitled." This again arises from the same basic set of facts: the business relationship and duties established and governed by the RPA.

¶38 Olson and WSI also claimed that the respondents withheld WSI's assets with intent to harm by denying or delaying the payments due to WSI under

[11] The unfair-business-practices claim also alleges "withholding payments to which plaintiff was entitled," but does not explain which payments were withheld or why Olson was entitled to them.

the arbitration award. Olson does not appear to mount any defense to how this is not governed by the arbitration award.[12]

¶39 In short, Olson fails to muster any meaningful response to the obvious parallel between the SOC and the complaint. Conclusory assertions that the complaint contains new and different claims are not enough. Our own review reflects that there is an identity of the causes of action because these claims share a common nucleus of operative facts with the claims raised in arbitration.

¶40 Olson raises one final objection: that the arbitration clause, and hence the award itself, covers only breach of contract claims, not torts. Thus, he reasons, even if the SOC precludes him from bringing the same breach of contract claims, it cannot preclude him from bringing tort claims. This argument is belied by the fact he already brought tort claims in arbitration,[13] but it is also wrong on its own merits. The arbitration clause applies to "any dispute arising out of or relating to this Agreement." "Arising out of" is broad language that "reaches all disputes having their origin or genesis in the contract, whether or not they implicate interpretation or performance of the contract per se." ***Sweet Dreams Unlimited, Inc. v. Dial-A-Mattress Int'l, Ltd.***, 1 F.3d 639, 642 (7th Cir. 1993). As thoroughly discussed above, all of the claims in the complaint originate from the

[12] Olson does offer a conclusory argument that the current claims involve conduct postdating the arbitration award and therefore cannot be precluded. But merely alleging conduct occurring after the award does not prevent the application of claim preclusion. Olson does not, as he must, explain how that conduct forms the basis for claims independent of those brought in arbitration. We will not consider such an undeveloped argument. *See* ***Pettit***, 171 Wis. 2d at 646. The burden is on Olson to properly develop his arguments; we cannot step into the role of advocate on his behalf. *See* ***id.*** at 647.

[13] Olson even admitted to the circuit court that that the SOC alleged various torts and described the strategy as "ill conceived."

respondents' performance under the RPA. Olson's only response is his assertion that tort claims are not arbitrable under the RPA. But we do not read the provision this narrowly. Nothing in the provision's language precludes arbitrating torts "arising out of or relating to" the RPA. A party may not avoid the application of an arbitration clause or the effect of an award by restructuring his or her claim as a tort rather than breach of contract. *See* ***Kroll v. Doctor's Assocs., Inc.***, 3 F.3d 1167, 1170 (7th Cir. 1993) (concluding that "a plaintiff may not avoid an otherwise valid arbitration provision 'merely by casting its complaint in tort'" (citation omitted)).

¶41 Because this suit involves an identity of parties and causes of action, and the prior arbitration proceeding resulted in a final judgment on the merits, claim preclusion applies.

CONCLUSION

¶42 We agree with the circuit court that default judgment was inappropriate because the respondents were never in default. We also agree that Olson's suit is barred by claim preclusion. Although the legal labels have changed, the underlying injuries remain the same. Olson may not evade an otherwise valid arbitration award by tinkering with the parties and legal labels. He and his company had an opportunity to bring their claims and did so in the previous arbitration proceeding. The law does not allow him to continue filing lawsuits until he obtains the result he desires.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.