COURT OF APPEALS
DECISION
DATED AND FILED

June 11, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2669 **Cir. Ct. No. 01CV1738**

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

NATIONSCREDIT FINANCIAL SERVICES CORPORATION, D/B/A EQUICREDIT,

PLAINTIFF,

V.

FRANCISCO GUERRIDO,

DEFENDANT-THIRD-PARTY PLAINTIFF-APPELLANT,

V.

WENDY C. HUGGINS,

THIRD-PARTY DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Francisco Guerrido appeals from the trial court's order dismissing his third-party complaint against Wendy C. Huggins in a foreclosure action filed by Nationscredit Financial Services against Guerrido. Guerrido contends that the trial court erred in concluding that his third-party complaint was barred by the doctrine of claim preclusion.[1] We disagree and affirm the trial court's dismissal of the third-party complaint.

I. BACKGROUND.

¶2 Huggins acted as the broker on a mortgage that Guerrido executed on January 14, 2000, in the amount of $42,883.43. On November 2, 2000, Guerrido filed a small claims lawsuit against Huggins alleging: "Abuse of trust. Ms. Huggins never talked or even explained [ ] this loan. When I use[d] to ask her for expl[a]nations, all she use[d] to tell me was don't worry everything [is] o.k."

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[1] The final order dismissing the third-party complaint against Huggins states that "[a] motion to dismiss the action upon claim preclusion (f/k/a res judicata) grounds was brought by … Huggins." Additionally, in their briefs to this court, the parties' arguments are formed around the doctrine of res judicata, which is now referred to as claim preclusion. *See* ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 550, 525 N.W.2d 723 (1995) ("The term claim preclusion replaces res judicata; the term issue preclusion replaces collateral estoppel.").

However, in his argument, Guerrido continually confuses the terminology. For example, in his brief to this court, he incorrectly states, "Res judicata is now referred to as *issue preclusion*." The trial court was apparently also infected by this confusion – in its oral decision dismissing the third-party complaint, the trial court mistakenly stated, "[T]here is the old principle of res judicata, now looked at as issue preclusion under the new terminology…." Further, while concluding that Guerrido's claim was barred based on the doctrine of res judicata (claim preclusion), the trial court relied on the case of ***May v. Tri-County Trails Comm'n***, 220 Wis. 2d 729, 583 N.W.2d 878 (Ct. App. 1998), which deals exclusively with the concept of issue preclusion.

Despite this confusion, the parties have properly framed their arguments to this court in terms of claim preclusion. Accordingly, we deal exclusively with the issue of claim preclusion, formerly known as res judicata. *See* ***State v. Holt***, 128 Wis. 2d 110, 124-25, 382 N.W.2d 679 (Ct. App. 1985) (stating that an appellate court may affirm a trial court's correct ruling, irrespective of the trial court's rationale, on a theory or reasoning not relied upon by the trial court).

After a contested hearing, the small claims action was dismissed on March 16, 2001.

¶3 On February 27, 2001, Nationscredit filed a foreclosure action against Guerrido. On May 16, 2001, Guerrido filed an answer as well as a third-party complaint against Huggins. The third-party complaint alleges, in relevant part:

> Huggins took many thousands of dollars for her own personal use calling it fees…. Huggins processed the loan in a way that [Guerrido] owes the sum of $42,000.00 when he only received the sum of $15,000.00. That all the while [ ] Huggins was claiming to represent [Guerrido], she was in fact representing [Nationscredit] and herself in order to line her pockets with large sums of money….

On July 9, 2001, Huggins filed a motion to dismiss based on claim preclusion grounds. The trial court held a hearing and dismissed the third-party complaint on August 13, 2001.

II. ANALYSIS.

¶4 In his brief, Guerrido refers to "res judicata." However, res judicata is now known as "claim preclusion." *See* ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 550, 525 N.W.2d 723 (1995) (stating that the term "claim preclusion" replaces "res judicata"). "[C]laim preclusion is designed to draw a line between the meritorious claim on the one hand and the vexatious, repetitious and needless claim on the other hand." ***Id.*** (citation omitted). Whether claim preclusion applies to an undisputed set of facts is a question of law which this court reviews *de novo*, without deference to the trial court. *See* ***Lindas v. Cady***, 183 Wis. 2d 547, 552, 515 N.W.2d 458 (1994).

¶5 Under the doctrine of claim preclusion, "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." ***Northern States***, 189 Wis. 2d at 550 (citations omitted). In order for the earlier proceedings to act as a claim-preclusive bar in a subsequent action, the following three factors must be present: (1) identity between the parties or their privies in the prior and present suits; (2) prior litigation resulted in a final judgment on the merits by a court with jurisdiction; and (3) identity of the causes of action in the two suits. ***Sopha v. Owens-Corning Fiberglas Corp.***, 230 Wis. 2d 212, 233-34, 601 N.W.2d 627 (1999). Guerrido does not challenge the first two elements.[2] Thus, we must only decide whether there is an "identity of the causes of action in the two suits." *See* ***id.***

¶6 Wisconsin has adopted a transactional approach to determine whether there is an identity of causes of action:

> The present trend is to see [a] claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights. The transaction is the basis of the litigative unit or entity which may not be split.

[2] In his main brief, after outlining all three relevant claim-preclusive factors, Guerrido only addresses the element concerning the identity of the causes of action. In his response brief, however, Guerrido chooses to also argue that there is no identity of parties or final judgment. We will not address these two additional allegations because they were not raised in his main brief. *See* ***Swartwout v. Bilsie***, 100 Wis. 2d 342, 346 n.2, 302 N.W.2d 508 (1981) (stating that if an appellant fails to discuss an alleged error in the main brief, appellant may not do so in the reply brief).

DePratt v. West Bend Mut. Ins. Co., 113 Wis. 2d 306, 311, 334 N.W.2d 883 (1983) (footnote and citations omitted).

¶7 Whether factual situations constitute a "transaction" is to be determined pragmatically, giving weight to the following considerations: time, space, origin, motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage. *See* ***Northern States***, 189 Wis. 2d at 554. Thus, if both suits arise from the same transaction, incident or factual situation, claim preclusion may bar the second suit. *See* ***id.***

¶8 Here, we conclude that Guerrido's third-party claim arose out of the same transaction as his small claims suit, in that both claims arose out of the negotiation and execution of Guerrido's mortgage. Guerrido's attempt to distinguish the two causes falls flat. He lists a number of factors that he claims destroys the identity of the causes of action, including: (1) the small claims action failed to include certain damages that he learned about subsequent to filing the small claims action; (2) he is "an elderly Hispanic man with a limited capacity for understanding and speaking English," who did not understand the full extent of the transaction that resulted in both suits; and (3) he could not recover the damages from Huggins that he deemed appropriate because the first action was brought in small claims court. Despite the fact that more evidence may have come to light subsequent to the filing and dismissal of his small claims action regarding the nature of the transaction and the extent of damages, the fact remains that the conduct giving rise to both suits occurred at the same time and involved the same acts. Therefore, while Guerrido raises a number of facts that he may have overlooked in filing his small claims action, those facts could have been raised and litigated in the former proceeding. Thus, the third-party claim against Huggins is

barred by the doctrine of claim preclusion, because the facts giving rise to both claims arose out of the same transaction.

¶9 Based upon the foregoing, the trial court is affirmed.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.