COURT OF APPEALS DECISION DATED AND FILED

November 12, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 02-0701

Cir. Ct. No. 01 CV 4099

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

NICK RADMER AND LYNN RADMER,

PLAINTIFFS-APPELLANTS,

V.

CARL KRUEGER CONSTRUCTION, INC.,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: DOMINIC S. AMATO, Judge. *Affirmed*.

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

¶1 PER CURIAM. Nick and Lynn Radmer appeal from the circuit court order for summary judgment dismissing their claim against Carl Krueger Construction, Inc. Based on the doctrine of claim preclusion, the court concluded that the Radmers were barred from bringing a claim against Krueger for the negligent installation of a hydronic heating system because the claim arose from a

construction dispute that had been successfully arbitrated. The Radmers argue that "claim preclusion does not apply if [they], exercising reasonable diligence, could not have discovered the [heating] claim at the time they filed their arbitration application" and that "there was a factual issue as to whether [they] exercised reasonable diligence in discovering the cause of the [heating] problem." We affirm.

I. BACKGROUND

¶2 In 1993, the Radmers hired Krueger to build an addition onto their house. In 1998, despite the problems that they said had to do with the 1993 addition, they again hired Krueger—to add another room to their house and to install a hydronic heating system. Krueger completed the project in October or November 1998. Soon thereafter, the Radmers discovered that the heating system was not functioning properly and they notified Krueger. Krueger attempted to remedy the problem by installing additional insulation under the floorboards; this, however, did not solve the problem.

¶3 In October 2000, prior to commencing the underlying action, the Radmers filed a complaint against Krueger with the National Association of the Remodeling Industry (NARI) and requested binding arbitration to resolve their disputes regarding both the 1993 and 1998 work. They alleged that they experienced "interior water damage to [their] home due to [the] poor quality of [the] roofing and siding work," but they did not mention their problems with the hydronic heating system. Final arbitration was concluded in 2001 and NARI's ethics committee upheld the arbitration decision after further review. Under the arbitration order, Krueger paid the Radmers $3,000 to "rectify the water leakage problem."

¶4 In April 2001, the Radmers had their hydronic heating system evaluated by Energy Expediters, a heating contractor, and were advised that the heating system had been improperly installed. Then, in May 2001, the Radmers filed the underlying action alleging that Krueger was negligent when installing the hydronic heating system in their home during the 1998 construction.

¶5 Krueger moved to dismiss[1] and the circuit court granted summary judgment, concluding that claim preclusion barred the Radmers' action.[2]

II. DISCUSSION

¶6 A motion for summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2). Our review of the circuit court's grant of summary judgment based on claim preclusion is *de novo*. *See* ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 551, 525 N.W.2d 723 (1995). The following factors must be present for claim preclusion to bar an action before the court: "(1) an identity between the

[1] Krueger referred to its motion as a motion to dismiss. Because the motion relied upon a supporting affidavit, and not solely on the pleadings, the motion actually was for summary judgment. *See* WIS. STAT. § 802.06(3) (1999-2000). The parties agree that, on appeal, the motion should be considered a motion for summary judgment. All references to the Wisconsin Statutes are to the 1999-2000 version.

[2] The circuit court's written order provides that "Radmers' claims are dismissed as a matter of law based on the doctrine of issue preclusion." The parties agree, however, that the circuit court erroneously used the term, "issue preclusion," and that the issue in this case involves the applicability of the doctrine of claim preclusion.

parties or their privies in the prior and present suits; (2) an identity between the causes of action in the two suits; and (3) a final judgment on the merits in a court of competent jurisdiction." ***Northern States Power Co.***, 189 Wis. 2d at 551.

¶7 The first factor is whether an "identity between the parties or their privies in the prior and present suits" exists. ***Id.*** In the NARI arbitration, the Radmers were the complainants and Krueger was the respondent. In the underlying action, again, the Radmers were the plaintiffs and Krueger was the respondent. Thus, the parties have indeed been the same in the prior and present suits.

¶8 The second factor is whether "an identity between the causes of action in the two suits" exists, ***id.***, and, as the Radmers contend, whether a genuine issue of material fact remains. In determining whether two suits involve the same claims or causes of action, we apply a "transactional approach"; i.e., "'if both suits arise from the same transaction, incident or factual situation, [claim preclusion] generally will bar the second suit.'" ***Id.*** at 554 (quoting ***Pliska v. City of Stevens Point, Wis.***, 823 F.2d 1168, 1172 (7th Cir. 1987)).

¶9 The Radmers argue, however, that claim preclusion does not bar their action because, although both causes of action arise from the same transaction—the 1998 construction—they did not know about the problems with the hydronic heating system until after the arbitration proceedings occurred. They argue that the trier of fact should have determined whether the problems with the hydronic heating system could have been discovered with due diligence. They are incorrect.

¶10 The undisputed summary judgment submissions establish, as Krueger maintains, that "the Radmers knew of the problem with their heating system, but chose not to include it in their arbitration." Mrs. Radmer acknowledged in her deposition, "Prior to [April 2001] we were dissatisfied with the hydronic heat into the sunroom and we just were not happy with the way that it worked." She said, however, that they delayed dealing with that problem because they "were continuing to have other problems with [Krueger] … and [they] did not want to add at that time additional noise … [as they] wanted them [Krueger] to focus on the most pressing problems[.]" The undisputed summary judgment submissions also establish, as Krueger maintains, that it wasn't until "March or April of 2001, approximately five … months after the arbitration proceeding concluded and approximately two years … and two … months after they discovered that their heating system was not functioning, the Radmers decided to retain another heating contractor to review their heating system."

¶11 Clearly, therefore, the summary judgment submissions establish four critical undisputed facts: (1) the Radmers were dissatisfied with their heating system in the winter of 1998-99; (2) they believed that the heating problem was due to Krueger's work; (3) they chose to delay further investigation into the problem with their heating system; and (4) they could have exercised reasonable diligence in discovering the cause of the heating problem long before submitting to arbitration.

¶12 The third factor to consider is whether there was "a final judgment on the merits in a court of competent jurisdiction." ***Northern States Power Co.***, 189 Wis. 2d at 551. Where an arbitration award on its face makes clear that no issue was left unresolved, it is to be considered final and definite. *See* ***Manu-Tronics, Inc. v. Effective Mgmt. Sys., Inc.***, 163 Wis. 2d 304, 311, 471 N.W.2d

263 (Ct. App. 1991). Further, "essential to arbitration remaining useful is the elementary principle that the doctrines of [claim preclusion] and [issue preclusion] are applicable to arbitration awards." ***Id.***

¶13 The Radmers were awarded $3,000 as a result of the binding arbitration that they entered into with Krueger to resolve their disputes involving the 1993 and 1998 constructions. According to the NARI ethics committee, "both parties have agreed [that] the decision of the [arbitration] is final and binding." Thus, the NARI arbitration award is a final judgment on the merits that left no issue unresolved and, therefore, it bars the Radmers from bringing any further claims arising from the same transaction. Summary judgment was appropriate.

By the Court.—Order affirmed.

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