COURT OF APPEALS
DECISION
DATED AND FILED

January 12, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1594 **Cir. Ct. No. 2009SC852**

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

BROOK BROWN AND ELIZABETH BROWN,

PLAINTIFFS-RESPONDENTS,

V.

CASSIE WISTH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Ozaukee County: PAUL V. MALLOY, Judge. *Affirmed*.

¶1 REILLY, J.[1] Cassie Wisth appeals from a judgment of the circuit court awarding $2411.21 to Brook and Elizabeth Brown for breach of a lease and property damage. Wisth argues that a previous judgment against her former co-tenant barred the court from awarding a judgment against her. The issue in this appeal is whether the doctrine of claim preclusion applies. As we find that claim preclusion does not apply, we affirm the circuit court's judgment.

FACTUAL BACKGROUND

¶2 Wisth and Justin Neumeier leased a residence from the Browns in August of 2008. Ten months later, Wisth and Neumeier were evicted. Following the judgment for eviction, the Browns filed separate complaints against Neumeier and Wisth for the breach of their lease agreement and property damage. Neumeier defaulted and a judgment was entered against him on August 28, 2009, for $1953.62. Wisth defended against the claim, but the circuit court entered judgment against her for $2411.21. The circuit court entered the judgment "joint and severally with Justin Neumeier." The court also amended Neumeier's judgment to $2411.21 and made it "joint and severally with Cassie Wisth."

¶3 Wisth argued before the circuit court that the doctrine of claim preclusion prevented the damages action against her as the Browns already received a judgment against Neumeier for damages. The circuit court concluded that claim preclusion did not apply because it would be unfair to deny the Browns their day in court against Wisth.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶4 Wisth renews her claim preclusion argument before this court. Whether claim preclusion applies to an undisputed set of facts is a question of law that this court reviews de novo. ***Amber J.F. v. Richard B.***, 205 Wis. 2d 510, 515, 557 N.W.2d 84 (Ct. App. 1996).

¶5 The doctrine of claim preclusion states 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." ***Pasko v. City of Milwaukee***, 2002 WI 33, ¶14, 252 Wis. 2d 1, 643 N.W.2d 72 (citation omitted). The purpose of claim preclusion is to "draw a line between the meritorious claim on the one hand and the vexatious, repetitious and needless claim on the other hand." ***Menard, Inc. v. Liteway Lighting Prods.***, 2005 WI 98, ¶26, 282 Wis. 2d 582, 698 N.W.2d 738 (citation omitted). Additionally, claim preclusion is concerned with fairness to the victor and judicial efficiency. ***Amber J.F.***, 205 Wis. 2d at 516.

¶6 For a litigant to succeed on a claim preclusion argument, three factors must be present: "(1) an identity between the 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. v. Bugher***, 189 Wis. 2d 541, 551, 525 N.W.2d 723 (1995).

¶7 Wisth argues that because she and Neumeier both signed the lease, they are in privity such that the judgment against Neumeier precludes the Browns from suing Wisth for the same claim. "Privity exists when a person is so identified in interest with a party to former litigation that he or she represents precisely the same legal right in respect to the subject matter involved." ***Pasko***,

252 Wis. 2d 1, ¶16. For Wisth and Neumeier to be in privity, Neumeier must have represented the interests of Wisth. *See* ***id.***, ¶18.

¶8 While Wisth and Neumeier both signed the lease, they are not in privity. Neumeier defaulted in the Browns' lawsuit against him; he clearly did not represent the interests of Wisth. Furthermore, the original judgment entered against Wisth was greater than the judgment entered against Neumeier. As Wisth and Neumeier do not share an identity of interests, claim preclusion does not apply.

¶9 The Browns had the right to seek recovery for the damages they suffered. The Browns also had the right to seek recovery from Wisth individually, Neumeier individually, or to seek damages from both, so long as they only recover once for their damages. The circuit court properly entered judgment "joint and severally" against Wisth and Neumeier. The Browns may now collect their damages from Wisth or Neumeier, but not for more than their total damages of $2411.21.

CONCLUSION

¶10 The circuit court properly entered judgment "joint and severally" against Wisth and Neumeier. Considerations of judicial efficiency were not offended by the separate actions filed by the Browns. The judgment of the circuit court is affirmed.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809. 23(1)(b)4.