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DISTRICT II

May 31, 2017

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You are hereby notified that the Court has entered the following opinion and order:

2016AP2389-FT EduCap, Inc. v. Glen Mendenhall and Mary Mendenhall (L.C. #2015CV934)

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

Glen and Mary Mendenhall appeal from a money judgment granted in favor of EduCap, Inc., resulting from their guarantee of a student loan to their son, Justin Mendenhall. The Mendenhalls argue the Wisconsin judgment should be amended to reflect the lower amount imposed by a Michigan judgment against Justin. The Mendenhalls claim issue preclusion bars EduCap from seeking a different sum of money. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).[1] We summarily affirm the judgment of the circuit court.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

EduCap commenced suit in Wisconsin against the Mendenhalls as guarantors of a student loan for the benefit of Justin. After a trial to the court, the circuit court orally entered judgment in favor of EduCap in the amount of $68,418.09. While the Wisconsin case was proceeding, EduCap also brought suit for the same loan against Justin in Michigan, where the case was subject to a "Case Evaluation Process required by the court." Justin reached a settlement, and a consent judgment was entered in the amount of $48,000. The Mendenhalls brought a motion for reconsideration of the judgment against them, claiming their judgment should also be for $48,000 on grounds of issue or claim preclusion.[2] The court denied the motion and entered a written judgment against the Mendenhalls in the amount of $68,711.80.[3]

The doctrine of issue preclusion prevents the relitigation of issues that have been contested in a previous action between the same or different parties.[4] ***Michelle T. v. Crozier***, 173 Wis. 2d 681, 687, 495 N.W.2d 327 (1993). Under the doctrine of issue preclusion, a court must apply a two-step analysis. ***Estate of Rille v. Physicians Ins. Co.***, 2007 WI 36, ¶36, 300 Wis. 2d 1, 728 N.W.2d 693. First, we determine whether the material issue of fact "was actually litigated and determined in the prior proceeding by a valid judgment in a previous action and whether the determination was essential to the judgment." ***Id.***, ¶37. This is a question of law. ***Id.*** If

[2] "The term claim preclusion replaces res judicata; the term issue preclusion replaces collateral estoppel." ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 550, 525 N.W.2d 723 (1995). On appeal, the Mendenhalls appear to have abandoned any claim preclusion argument; thus, we do not address claim preclusion. ***Reiman Assocs., Inc. v. R/A Adver., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981) (issues not briefed are deemed abandoned).

[3] The difference represents the interest accrued between the October 4, 2016 oral judgment and the November 21, 2016 written judgment.

[4] Issue preclusion applies to "the same or different parties," unlike claim preclusion which requires the same parties. ***Michelle T. v. Crozier***, 173 Wis. 2d 681, 687, 495 N.W.2d 327 (1993); *see also* ***Lindas v. Cady***, 183 Wis. 2d 547, 558, 515 N.W.2d 458 (1994).

satisfied, the second question we must investigate is "whether applying issue preclusion comports with principles of fundamental fairness." ***Id.***, ¶38. Our case law sets forth five factors to aid our determination:

> (1) could the party against whom preclusion is sought, as a matter of law, have obtained review of the judgment; (2) is the question one of law that involves two distinct claims or intervening contextual shifts in the law; (3) do significant differences in the quality or extensiveness of proceedings between the two courts warrant relitigation of the issue; (4) have the burdens of persuasion shifted such that the party seeking preclusion had a lower burden of persuasion in the first trial than in the second; or (5) are matters of public policy and individual circumstances involved that would render the application of [issue preclusion] to be fundamentally unfair, including inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action?

Michelle T., 173 Wis. 2d at 689. We review the circuit court's ultimate decision on fundamental fairness for an erroneous exercise of discretion. ***Estate of Rille***, 300 Wis. 2d 1, ¶38.

As to the first issue, we note that the Kenosha County Circuit Court entered the oral judgment in favor of EduCap on October 4, 2016. *See* WIS. STAT. § 806.06(1)(d) ("A judgment is granted when given orally in open court on the record."). The parties admit, and the record reflects, that the Michigan consent judgment was entered after that date, on October 6, 2016. Based on these facts, we conclude that at the time the judgment was entered in the circuit court, the issue had not yet been "actually litigated and determined in the prior proceeding by a valid judgment." Moreover, the Mendenhalls provided no facts or law to show that the Michigan consent judgment satisfied the "actually litigated" requirement. As the Mendenhalls failed to establish the first prong of the issue preclusion analysis, we could stop here. We will, however, continue to reach the issue of fundamental fairness.

On reconsideration, the circuit court found that fundamental fairness did not weigh in favor of the Mendenhalls. The court explained that the case went to trial, was not resolved by a

default hearing or a stipulation, both parties were represented by an attorney, and a decision was reached on the merits. According to the court, it "had to make a determination under the facts as to who won this case and because of that, I think this judgment's going to stand because it's totally different than Michigan…. And that judgment was filed two days after this trial had ended."

We reiterate that we review the circuit court's decision on fundamental fairness for an erroneous exercise of discretion. ***Estate of Rille***, 300 Wis. 2d 1, ¶38. We see no error in the court's conclusion. We acknowledge that of the five factors, some weigh in favor of the Mendenhalls and some in favor of EduCap. As guarantors, however, the Mendenhalls were responsible to EduCap for the full amount of the debt, regardless of Justin's liability. The "Combined Private Education Loan Application and Promissory Note," signed by Justin and the Mendenhalls, warns that where more than one person signs the note, "any one of you may be required to pay all of the amounts owed under this Note, which may include interest charges, late fees and collection costs." The terms and conditions further provide: "My responsibility for paying this Note is unaffected by the liability of any other person to me or you for repayment of this Note…. You may release any other person liable on this Note without affecting my obligations under this Note." Where the circuit court engaged in a full and fair trial involving represented parties and reached a decision on the merits prior to a judgment being entered on the issue, we conclude that fundamental fairness does not preclude the circuit court from entering judgment in favor of EduCap in excess of the amount of the stipulated Michigan judgment.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published and may not be cited except as provided under WIS. STAT. RULE 809.23(3).

Diane M. Fremgen
Clerk of Court of Appeals