

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 24, 2001

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.

No. 01-0676

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

RICHARD GREENE,

PLAINTIFF-APPELLANT,

V.

**ALLAN S. GREENE, ALLAN S. GREENE D/B/A ALLAN S.
GREENE CONSTRUCTION AND ALLAN S. GREENE D/B/A
B/A CONSTRUCTION,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Waukesha County:
J. MAC DAVIS, Judge. *Affirmed.*

Before Nettlesheim, P.J., Brown and Anderson, JJ.

¶1 NETTESHEIM, P.J. Richard Greene appeals from a circuit court order dismissing his complaint against Allan S. Greene on grounds of claim preclusion. We affirm the circuit court's ruling on a narrower ground. We hold that the circuit court properly exercised its discretion to decline jurisdiction in this

case because Richard was concurrently seeking relief from the prior judgment of dismissal in that forum. *State ex rel. Bohren v. Circuit Court for Milwaukee County*, 192 Wis. 2d 407, 532 N.W.2d 135 (Ct. App. 1995).

PROCEDURAL HISTORY

¶2 We begin with the procedural history of the prior action.¹ Richard and Nikki-Anne Baumann-Greene commenced an action against Allan on May 18, 1999.² The complaint alleged that Allan had contracted to build a residence for the plaintiffs and that Allan had breached the contract by “failing to complete said residence in a workmanlike and substantial manner.” On July 8, 1999, Allan filed a motion to dismiss the complaint on various grounds, including a claim that the complaint stated no cause of action on behalf of Nikki-Anne. On July 29, 1999, prior to the hearing on the motion to dismiss, Richard filed an amended complaint. Judge Joseph Wimmer heard Allan’s motion to dismiss on September 20, 1999, and granted Allan’s motion to dismiss the complaint as to Nikki-Anne’s claim. The court did not rule on the balance of Allan’s motion and the minutes of this proceeding indicate that Allan would schedule a future summary judgment motion. On January 31, 2000, all matters previously assigned to Judge Wimmer were transferred to Reserve Judge John F. Foley.

¶3 On March 1, 2000, Richard submitted a proposed order for judgment seeking a default judgment because Allan had not answered the amended

¹ Some, but not all, of the relevant history of the prior action is included in the appellate record. We take judicial notice of all the proceedings in that action.

² Richard also named Allan S. Greene d/b/a Allan S. Greene Construction and Allan S. Greene d/b/a B/A Construction as defendants. We refer to all the defendants as “Allan.”

complaint.³ Two days later, Allan filed a written response objecting to Richard's request for a default judgment. In support, Allan noted that he had already filed an answer to Richard's original complaint. With this response, Allan also filed an answer, affirmative defense and counterclaim. In addition, on March 9, 2000, Allan further filed a copy of his original motion to dismiss as an additional response to Richard's amended complaint.

¶4 Judge Foley heard Allan's motion for dismissal on April 10, 2000. Allan appeared, but Richard did not. Judge Foley opened the proceedings by noting, "We've waited 15 minutes and there is no appearance for the other side." Allan then advised Judge Foley that the matter was before the court on his motion to dismiss. Judge Foley then stated, "I've gone over the motion and motion to dismiss and it appears that the motion to dismiss should be granted. Accordingly, the court will order that the proceedings be dismissed" The ensuing written order signed by Judge Foley states:

The above-captioned matter having been heard on today's date, April 10, 2000 by the Honorable John Foley, the defendants appearing by Attorney Stephen M. Needham, and no appearance being made by the plaintiffs:

IT IS HEREBY ORDERED that this matter be dismissed.

¶5 That brings us to the present action. On July 3, 2000, Richard filed the instant action. Except for the absence of Nikki-Anne as a plaintiff, the complaint was a mirror image of Richard's amended complaint in the prior action. Richard again alleged that Allan had breached the contract by failing to construct

³ At approximately the same time, for reasons not clear from the record, the trial court also placed this action on its dismissal calendar. However, the matter was removed from the dismissal calendar at Richard's request.

the residence in “a workmanlike and substantial manner.” This action was assigned to the Honorable J. Mac Davis.

¶6 On October 9, 2000, Allan filed a motion to dismiss contending that Richard’s action was barred by claim preclusion and because the complaint failed to state a claim. In addition, Richard filed a motion both in this case and in the prior case seeking to reopen the prior action. In support, he argued that the dismissal of the original action was without prejudice and that he had not received notice of the hearing on Allan’s motion to dismiss in the original action.

¶7 Judge Davis heard Allan’s motion to dismiss on November 27, 2000. Judge Davis declined to address Richard’s motion to reopen the original action because Richard was concurrently seeking the same relief in the prior action. As for Allan’s claim preclusion argument, Richard acknowledged that the instant action involved the same claim and the same parties as the earlier action. Based on that information, Judge Davis dismissed this action on claim preclusion grounds. Richard appeals.

DISCUSSION

¶8 In light of the fact that Richard was concurrently seeking to reopen the original action, he understandably does not quarrel with Judge Davis’s rejection of his motion seeking that very same relief in this action. Instead, Richard challenges Judge Davis’s ruling dismissing this case on claim preclusion grounds. Richard argues that he was free to commence this action because Judge Foley’s dismissal of his original action was without prejudice.

¶9 It is unclear whether Judge Foley’s dismissal of Richard’s action was with or without prejudice.⁴ However, we need not decide this question because the law does not tolerate two simultaneous actions between the same parties on the same action in different courts of concurrent jurisdiction. In *Bohren*, 192 Wis. 2d at 422-23, the court of appeals said:

Where two actions between the same parties, on the same subject, and to test the same rights, are brought in different courts having concurrent jurisdiction, the court which first acquires jurisdiction, its power being adequate to the administration of complete justice, retains its jurisdiction and may dispose of the whole controversy, and no court of coordinate power is at liberty to interfere with its action.... In such a circumstance, it is reversible error for the second court to also assume jurisdiction. This is a public policy rule designed to avoid conflicts and chaos in the work of independent courts and ... promote the orderly administration of laws. (Citations omitted.)

¶10 Richard’s subsequent action assigned to Judge Davis was a mirror image of the action that had already been litigated to finality before Judge Foley. In addition, Richard’s motion to reopen the matter before Judge Foley was a mirror image of a similar motion that was then pending before Judge Foley.

4 Judge Foley’s oral ruling and his written order do not state that the dismissal was without prejudice. Instead, the oral ruling and the written order are silent on this point. Ordinarily, a dismissal resulting from a motion to dismiss is without prejudice absent a finding of egregious conduct or bad faith. *Haselow v. Gauthier*, 212 Wis. 2d 580, 591, 569 N.W.2d 97 (Ct. App. 1997). This would suggest that Judge Foley’s dismissal was without prejudice.

However, it may also be that Judge Foley’s dismissal was a disciplinary dismissal pursuant to WIS. STAT. § 805.03 (1999-2000) based upon Richard’s failure to appear at the motion to dismiss. A dismissal under this statute operates as “an adjudication on the merits unless the court in its order for dismissal otherwise specifies for good cause shown recited in the order.” *Id.* This would suggest that Judge Foley’s dismissal was with prejudice. Regardless, as we have noted, we need not answer this question.

All references to the Wisconsin Statutes are to the 1999-2000 version.

Richard's simultaneous pursuit of his claim against Allan in this action clearly posed the risk of conflicting rulings from the two courts. Such tactic violated the public policy expressed in *Bohren*. Judge Davis correctly ruled that Richard's proper forum was the prior action because that court had first acquired jurisdiction over this dispute. On that basis, Judge Davis was required to dismiss this action.⁵ Judge Davis did not have to go further and invoke the law of claim preclusion.

¶11 We affirm Judge Davis's dismissal of this action on this narrower ground.

CONCLUSION

¶12 We hold that Judge Foley's dismissal of Richard's original action was authorized by WIS. STAT. § 805.03. Therefore, Judge Davis correctly ruled that Richard's proper relief was via WIS. STAT. § 806.07, not by commencing the instant action.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

⁵ Since Richard had an adequate forum in which to litigate the prior action, Judge Davis's dismissal of this action with prejudice was also proper.

