COURT OF APPEALS
DECISION
DATED AND FILED

February 8, 2012

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP3158 **Cir. Ct. No. 2007CV1028**

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

PARK BANK,

PLAINTIFF-RESPONDENT,

V.

ROGER E. WESTBURG AND SANDRA L. WESTBURG,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed*.

Before Neubauer, P.J., Reilly, J., and Neal Nettesheim, Reserve Judge.

¶1 NEUBAUER, P.J. Roger Westburg and Sandra Westburg appeal from the circuit court's grant of summary judgment in favor of Park Bank. Park Bank seeks payment on the Westburgs' personal guaranties. The Westburgs

contend that the circuit court erred in its determination that the Westburgs' various affirmative defenses and counterclaims against Park Bank were barred due to lack of standing and claim preclusion. Based on our review of the summary judgment record, we conclude that the Westburgs' challenges are without merit. We affirm the judgment.

BACKGROUND

¶2 Roger and Sandra Westburg were the sole operating officers and shareholders of Zaddo, Inc. (Zaddo) and the sole members of Zaddo Holdings, LLC (Zaddo Holdings).[1] When the Westburgs formed the Zaddo entities, Park Bank assisted in securing financing.[2] On January 28, 2005, the Westburgs signed two identical contracts, each entitled Continuing Guaranty (Unlimited), by which they personally guaranteed the loan obligations of both Zaddo and Zaddo Holdings to Park Bank. In May 2006, Park Bank and the corporations entered into a Forbearance Agreement which established additional terms and conditions on the bank's financial relationship with the corporations. This agreement confirmed that Zaddo was in default under loan agreements with Park Bank and, in exchange for Park Bank's agreement to forbear taking any further action on the default, established certain conditions for Zaddo, including profitability requirements and minimal loan payments. The Westburgs signed the agreement as guarantors.

[1] Zaddo, Inc. represented the business operations while Zaddo Holdings, LLC was formed solely to hold title to the real estate where Zaddo, Inc. would operate.

[2] The Westburgs set forth in detail the history of Park Bank's financial relationship with Zaddo and Zaddo Holdings from late 2004 to 2007. While we have reviewed the briefs and record with respect to this relationship, we limit our recitation to those facts relevant to the disposition on appeal.

¶3 The Westburgs assert that, in August 2006, Park Bank advised them that Zaddo must immediately file for WIS. STAT. ch. 128 (2009-10)[3] receivership or the bank would place a "hold" on the Westburgs' personal accounts. The Westburgs agreed to place Zaddo into receivership and the ch. 128 proceeding was filed on September 7, 2006. Zaddo's assets were subsequently liquidated, with Park Bank receiving almost all of the proceeds. Park Bank then filed a foreclosure action against Zaddo Holdings, and a default judgment was entered.

¶4 Park Bank commenced this action against the Westburgs on January 19, 2007, seeking collection on the continuing guaranties. Park Bank sought to collect $681,852.05 for amounts due from Zaddo and $698,718.17 for amounts due from Zaddo Holdings.

¶5 The Westburgs raised numerous affirmative defenses to Park Bank's claims, as well as numerous counterclaims. Among its affirmative defenses, the Westburgs asserted failure to state a claim, laches, estoppel, failure to mitigate, and failure to marshal assets and remedies. The Westburgs additionally asserted that the "'Forbearance Agreement,' upon which [Park Bank] asserts the basis for Zaddo, Inc.'s default is void and unenforceable having been obtained by duress and other unconscionable and improper conduct by [Park Bank]." The Westburgs counterclaimed against Park Bank, alleging breach of fiduciary duty, breach of good faith and fair dealing and a request for declaratory judgment and injunctive relief.

[3] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶6 The Westburgs claimed that Park Bank violated its fiduciary duty to Zaddo, Zaddo Holdings and the Westburgs by, among other things, failing to allow Zaddo sufficient time to establish itself and become profitable, refusing to authorize or honor payments to Zaddo's creditors and forcing Zaddo into an unnecessary WIS. STAT. ch. 128 receivership.

¶7 As to breach of the personal guaranties, the Westburgs alleged that Park Bank violated a duty of good faith and fair dealing by, among other things, forcing Zaddo and the Westburgs to hire a "turnaround specialist" at Zaddo's expense that did not work for the benefit of Zaddo, but rather for Park Bank; claiming default on the part of Zaddo, Zaddo Holdings and the Westburgs when no monetary default existed; establishing unrealistic profitability requirements in an effort to obtain defaults; and controlling all management of Zaddo, Zaddo Holdings and the Westburgs. The Westburgs further complained that the bank froze the Westburgs' personal accounts until they agreed to Park Bank's unreasonable demands, including the filing of the WIS. STAT. ch. 128 receivership, which culminated in the foreclosure judgment.[4] And, the Westburgs sought a declaratory judgment and injunctive relief claiming that entry into the Forbearance Agreement, which formed the basis of Zaddo's default on the underlying

[4] The Westburgs additionally claimed that (1) Park Bank breached the Intercreditor Agreement between Park Bank and the United States Small Business Administration by holding Zaddo, Zaddo Holdings and the Westburgs "in default"; (2) Park Bank was negligent in its exercise of care in relation to the Zaddo entities and the Westburgs; and (3) Park Bank violated its duty to disclose material facts relating to Zaddo. The Westburgs claim they were damaged as a result. However, the Westburgs do not develop any argument relating to these counterclaims and we do not address them further on appeal. *See* ***Truttschel v. Martin***, 208 Wis. 2d 361, 369, 560 N.W.2d 315 (Ct. App. 1997) (we are not required to consider undeveloped arguments); ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we may decline to review issues which are inadequately briefed; appellate judges cannot serve as both advocates and judges).

indebtedness and led to the filing of the ch. 128 proceeding, was "obtained by duress and under circumstances which are unconscionable."

¶8 Park Bank subsequently moved for summary judgment. At a motion hearing on March 20, 2009, the circuit court, Judge Robert Kennedy presiding, granted summary judgment to Park Bank as to all counterclaims and the Westburgs' affirmative defenses of failure to state a claim, laches, insufficiency of process and failure to marshal assets. The court noted that the corporations were not parties to the action and that the Westburgs could not bring suit on behalf of the corporations. The court determined that the Westburgs' counterclaims belonged to the corporations, not to the Westburgs as the guarantors. The court also dismissed the Westburgs' punitive damages claim as moot.[5]

¶9 With respect to the Westburgs' remaining affirmative defenses, the court ordered additional briefing as to "whether the [Westburgs] as guarantors can raise as asserted defenses, defenses of the corporations whose obligations they have guaranteed." The court reasoned that while it was clear that the Westburgs cannot bring an action on behalf of the corporation, it was unclear as to whether the Westburgs were entitled to protect themselves as guarantors of the corporate debt by raising defenses that the corporation failed to raise in the actions on the principal indebtedness.

[5] The Westburgs do not develop any argument relating to the dismissal of the affirmative defenses of failure to state a claim, laches and failure to marshal assets, nor do they challenge the dismissal of the punitive damages claim. Accordingly, we do not address these issues further on appeal.

¶10 Following additional briefing, the court held another hearing on July 9, 2009. The court determined that the doctrine of claim preclusion[6] barred the Westburgs from raising any defenses which might have been raised in the Zaddo Holdings foreclosure action. The circuit court reasoned that because the Westburgs were the guarantors of the Zaddo Holdings debt, and also the officers and directors of that same corporation, they had a commonality of interest with Zaddo Holdings such that they are and were in privity.

> Therefore, in regard to all matters that were litigated in that foreclosure suit against Zaddo Holdings, LLC, or that might have been litigated in the former proceeding by Zaddo Holdings, LLC, those judgments are final judgments conclusive in any subsequent action between the bank, which was a party to the foreclosure action, and Roger and Sandra Westburg, who were in privity to Zaddo Holdings, LLC.

The court further noted that because Park Bank had successfully forced Zaddo into a WIS. STAT. ch. 128 receivership, there was not a judgment against it. Therefore, the Westburgs were free to raise any defenses that Zaddo could have raised had it chosen to defend itself against Park Bank. The court granted Park Bank partial summary judgment on its claims against the Westburgs for the Zaddo Holding's guaranty, but denied summary judgment as to the Zaddo guaranty.[7]

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[6] While the circuit court's decision referenced both issue preclusion and claim preclusion, the parties agree that the court's decision was based on claim preclusion.

[7] The court also confirmed its earlier ruling that the injuries alleged in the Westburgs' counterclaims were derivative to those of the corporation:

> [T]he Westburgs' only damages appear to be based on a claim that the corporations were damaged and thus their value became useless or negligible, and as a result, [the Westburgs] as shareholders or stockholders lost the value of their investment.
>
> This appears to be a clear direct derivative type suit.

¶11 Due to judicial rotation, the matter was assigned to Judge John R. Race just prior to trial. In an attempt to define the issues for trial, the parties again argued as to what remained to be litigated. The circuit court permitted summary judgment briefing and subsequently granted summary judgment in favor of Park Bank on all issues. In its written decision, the circuit court agreed with Park Bank that this is essentially a contract case and that the Westburgs' affirmative defenses and counterclaims did not create a material issue of fact as to the enforceability of the guaranties. On November 18, 2010, judgment was entered against the Westburgs in the amount of $489,334.23 for the deficiencies owing Park Bank after the liquidation of Zaddo and the foreclosure of the real estate owned by Zaddo Holdings. The Westburgs appeal.

DISCUSSION

¶12 We review an order granting summary judgment de novo, applying the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). The first step in our summary judgment methodology is to determine whether the complaint states a claim, taking as true the facts as pled. ***Id.*** at 317. If the complaint states a claim, we examine the parties' submissions to determine whether there are any issues of material fact precluding summary judgment. ***Id.*** at 315. If there are no issues of material fact, we must determine whether either party is entitled to judgment as a matter of law. ***Id.***

¶13 The Westburgs raise multiple challenges to Park Bank's efforts to collect on the personal guaranties of payment for the debts of Zaddo and Zaddo

Holdings.[8] The challenges are premised on, or arise out of, Park Bank's conduct in relation to the underlying WIS. STAT. ch. 128 proceeding (Zaddo) and the foreclosure proceeding (Zaddo Holdings). As to these challenges, the issues on appeal can be narrowed to whether the circuit court properly concluded that (1) the Westburgs lack standing because their claims are derivative and (2) the Westburgs' claims are barred by claim preclusion. We conclude that it did. We likewise uphold the circuit court's determination that the Westburgs received proper service of the action.

Lack of Standing to Pursue Derivative Claims

¶14 The circuit court held, and Park Bank asserts on appeal, that the Westburgs lack standing to assert claims on behalf of the Zaddo entities. Park Bank argues that the Westburgs "are attempting to escape liability as guarantors by raising defenses and making claims involving alleged injury to one or the other Zaddo entity" but "as guarantors the Westburgs lack standing to pursue these claims or defenses." The Westburgs counter that their breach of contract counterclaim alleges direct injury and damages to the Westburgs for violation of

[8] Park Bank devotes a section of its appellate brief to the enforceability of the Continuing Guaranties. However, we do not understand the Westburgs to be challenging the enforceability of these agreements pursuant to their terms, but rather their enforceability in light of the events leading up to the current action. While the Westburgs suggest that they were not provided with notice of default by the Zaddo entities, Park Bank's response cites to language in the guaranties whereby the Westburgs expressly waived notice of default. The Westburgs do not reply to Park Bank's assertions and do not otherwise develop this argument. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

several contracts between the corporate entities and the bank.[9] We have reviewed the Westburgs' claims and conclude that they all arise out of the alleged injury to Zaddo due to the WIS. STAT. ch. 128 receivership proceedings which ultimately led to the foreclosure proceedings against Zaddo Holdings. As such, the Westburgs' claims are derivative and they lack standing to raise them in this action.

¶15 Whether a complaint states claims based on an injury primarily to the corporation or whether some are grounded primarily in an individual injury is a question of law we review de novo. ***Borne v. Gonstead Advanced Techniques, Inc.***, 2003 WI App 135, ¶10, 266 Wis. 2d 253, 667 N.W.2d 709. If the injury complained of was caused by acts against the corporation that cause harm to the corporation and was not caused by acts against the plaintiff, the claim is derivative. ***Id.***, ¶15. Derivative claims are those a corporation could bring because the corporation's assets are affected. ***Id.*** Such claims must be brought on behalf of the corporation and cannot be brought in an individual or direct action. ***Krier v. Vilione***, 2009 WI 45, ¶31, 317 Wis. 2d 288, 766 N.W.2d 517.

¶16 As explained by our supreme court in ***Rose v. Schantz***, 56 Wis. 2d 222, 229, 201 N.W.2d 593 (1972), "Rights of action accruing to a corporation belong to the corporation, and an action at law or in equity, cannot be maintained by the members as individuals." (Citation omitted.) While it is clear that "primary and direct injury to a corporation may have a subsequent impact on the

[9] While the Westburgs also assert that they executed certain agreements between the corporations and the bank on behalf of themselves, they do not develop any argument based on this allegation. We are not required to consider undeveloped arguments. *See* ***Truttschel v. Martin***, 208 Wis. 2d at 369; ***State v. Pettit***, 171 Wis. 2d at 646-47.

value of the stockholders' shares," that is not enough to create a right to bring a direct, rather than derivative, action. ***Id.*** "Where the injury to the corporation is the primary injury, and any injury to stockholders secondary, it is the derivative action alone that can be brought and maintained." ***Id.***

¶17 Here, Park Bank is seeking to collect on the Westburgs' guaranties to make payment conditioned on the corporations' failure to meet their obligations. In response, the Westburgs are defending against their obligation under the guaranties by claiming that Zaddo was not in monetary default at the time the WIS. STAT. ch. 128 petition was filed. They further contend that Park Bank breached its obligations to them by inflicting economic duress and wrongfully withholding access to their personal account, which resulted, in turn, in the corporations' entry into the Forbearance Agreement and ultimately Zaddo's filing for ch. 128 receivership proceeding. That proceeding, because of cross-collateralization, culminated in the Zaddo Holdings foreclosure.[10] As Park Bank points out, the Westburgs are raising as issues of material fact "the events leading to, surrounding and comprising the filing of the Chapter 128 receivership, and the collateral shortfall experienced by Park Bank therein." Moreover, the Westburgs fail to allege any direct injury—independent of any alleged injury to Zaddo or Zaddo Holdings.[11]

[10] The Westburgs contend that the agreements between the Zaddo entities and Park Bank did not provide for cross-collateralization. However, they do not develop this argument factually or legally, s*ee* ***Pettit***, 171 Wis. 2d at 646-47, and, as discussed herein, any such claim would be governed by our derivative claim and claim preclusion analyses.

[11] While the Westburgs may have suffered individual duress when Park Bank denied them access to their personal money market accounts, the Westburgs do not allege any resulting monetary injury because the bank did eventually return the funds.

¶18 In examining the Westburgs' amended answer, we focus on the allegations of injury and damages. The Westburgs' claims of breach of fiduciary duty, and breach of contract premised on a breach of the duty of good faith and fair dealing, arise out of Park Bank's dealings with Zaddo, Zaddo Holdings and the Westburgs as sole shareholders and members, not as personal guarantors. Park Bank allegedly set in motion a series of events leading to the liquidation of Zaddo and foreclosure of Zaddo Holdings. The allegedly wrongful conduct of Park Bank first injured the corporations and then the Westburgs. While the Westburgs may have suffered secondary injuries, claims for injury involving the liquidation and foreclosure belong to the corporations and must be brought and maintained by the corporations.

¶19 Park Bank cites to the Seventh Circuit's decision in ***Mid-State Fertilizer Co. v. Exchange National Bank***, 877 F.2d 1333 (7th Cir. 1989), in support of its contention that the Westburgs, as guarantors, have no standing to pursue derivative claims. We agree that it provides guidance. In ***Mid-State***, the bank loaned money to the corporation; however, the corporation remained liable for the full amount of any loan. ***Id.*** at 1333-34. The bank also obtained guaranties from the corporation's sole shareholders, Lasley and Maxine Kimmel. ***Id.*** at 1334. When the corporation's financial statement showed a loss of money, the bank stopped making new advances to the corporation and demanded that the corporation's clients send all payments directly to the bank. ***Id.*** The corporation was unable to secure new financing; it folded and was liquidated in bankruptcy. ***Id.*** The corporation, joined by the Kimmels, filed an action against the bank alleging breach of contract and violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1962(a) and 1964(c), and federal banking laws. ***Id.***

¶20 The Seventh Circuit held that the Kimmels were not entitled to recover under RICO and the federal banking statute because their injury was derivative.

> Lasley and Maxine Kimmel were the managers and shareholders of [the corporation]. They guaranteed its obligations to [the bank]. Their wealth obviously was tied to [the corporation's] success: to injure [the corporation] was to wound the Kimmels. Equally obviously, the Kimmels' injury was derivative. Investors gain or lose with the firm; stockholders receive what's left after the corporation pays its debts. Lenders (guarantees are a form of contingent loan) also gain or lose with the firm, although lenders have more protection than equity investors. Employees, too, invest in the firm: they invest their human capital…. In all of these roles—as equity investors, as debt investors (guarantors), and as human capital investors (managers)—the Kimmels gained and lost with [the corporation]. A blow costing [the corporation] $1 could not cost the Kimmels more than $1. An award putting the $1 back in [the corporation's] treasury would restore the Kimmels to their former position.

Id. at 1335. The Seventh Circuit noted that "shareholders, creditors, managers, lessors, suppliers, and the like cannot recover on account of injury done the corporation." ***Id.*** at 1336. The court declined to view guarantors, or contingent creditors, any differently. ***Id.*** "Guarantors must be treated as creditors. When they suffer direct injury—injury independent of the firm's fate—they may pursue their own remedies. Those whose injury is derivative [are] … dependent now as before on the success of the firm in which they invested." ***Id.*** at 1336-37. Notably, the Kimmels did not contend that the bank breached the contracts by which they guaranteed the corporation's borrowing but rather asserted that the bank violated statutory and contractual duties *owed the corporation*, which caused

them derivative injury as guarantors. ***Id.*** at 1336.[12] *See also* ***Labovitz v. Washington Times Corp.***, 172 F.3d 897, 902 (D.C. Cir. 1999) (injury arising from obligations of guarantor is derivative of alleged injury to the corporation); ***Weissman v. Weener***, 12 F.3d 84, 86-87 (7th Cir. 1993) (where third party allegedly injured corporation, forcing it into bankruptcy and triggering its guarantors' obligations on loans, the shareholder-guarantor's claims were derivative rather than direct).

¶21 Here, as did the Kimmels in ***Mid-State***, the Westburgs raise defenses and claims involving alleged harm and damage to Zaddo and/or Zaddo Holdings. Insofar as the Westburgs contend that Park Bank breached its obligations to them by wrongfully withholding access to the Westburgs' personal money index account and inflicting economic duress which resulted in Zaddo filing the WIS. STAT. ch. 128 receivership proceeding (and ultimately the foreclosure), these claims involve secondary injury to the Westburgs caused by alleged initial injury to the corporate entities. The Westburgs have failed to allege that they suffered a direct injury—injury independent of the fate of Zaddo and Zaddo Holdings. Because the claims are derivative, the Westburgs cannot raise them in the context of this action. We uphold the circuit court's dismissal of the Westburgs' claims on this ground.[13]

[12] We note that after the dismissal of the Kimmels' federal claims, the court did not have jurisdiction over the state law breach of contract claims. *See* ***Mid-State Fertilizer Co. v. Exchange Nat'l Bank***, 877 F.2d 1333, 1334 (7th Cir. 1989). While ***Mid-State*** addressed federal fraud and banking claims, the derivative-claim analysis is equally applicable in this case, as explained herein.

[13] Although the Westburgs' claim was addressed in the context of a summary judgment motion, the circuit court properly examined the claim as pled.

Claim Preclusion Also Bars the Westburgs' Affirmative Defenses and Counterclaims Because the Matters were Litigated or Could Have Been Litigated in the Underlying Zaddo Receivership Proceeding or the Zaddo Holdings Foreclosure Action.

¶22 Turning to claim preclusion, we address the Westburgs' contention that the default judgment in the separate foreclosure action against Zaddo Holdings is not an additional basis for summary judgment on the continuing guaranties. Under claim preclusion, "a final judgment is conclusive in all subsequent actions between the same parties as to all matters which were litigated or which might have been litigated in the former proceedings." ***Lindas v. Cady***, 183 Wis. 2d 547, 558, 515 N.W.2d 458 (1994) (citation omitted). In order for claim preclusion to apply, there must be an identity of parties or their privies and an identity of claims in the two cases, as well as a final judgment on the merits in a court of competent jurisdiction. ***Menard, Inc. v. Liteway Lighting Prods.***, 2005 WI 98, ¶26, 282 Wis. 2d 582, 698 N.W.2d 738. Whether claim preclusion and the common-law compulsory counterclaim rule apply to a given set of facts is a question of law that we decide de novo. ***Id.***, ¶23.

¶23 The Westburgs contend that there is neither an identity of parties nor an identity of claims in the underlying foreclosure action and the current action to collect on the continuing guaranties. The Westburgs assert that they were not personally named as necessary or interested parties in the foreclosure action against Zaddo Holdings and that they were not "in privity" with Zaddo Holdings. They further contend that there is a lack of identity between the Bank's cause of action for collection on the Westburgs' personal guaranty of payment and the foreclosure action against Zaddo Holdings. We reject the Westburgs' arguments. Rather, we agree with Park Bank that the Westburgs are barred by claim preclusion from relitigating issues which could have been raised by Zaddo

Holdings in the foreclosure action. We further agree that claim preclusion bars the Westburgs from relitigating issues which could have been raised on behalf of Zaddo in the WIS. STAT. ch. 128 receivership proceeding. Both of these proceedings, which involved the obligations of the Zaddo entities to Park Bank, were litigated to conclusion.[14]

¶24 "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 v. City of Milwaukee***, 2002 WI 33, ¶16, 252 Wis. 2d 1, 643 N.W.2d 72. Privity compares the interests of a party to a first action with a nonparty to determine whether the first action protected the interests of the nonparty. ***Id.***, ¶18. Park Bank argues, and we agree, that for purposes of this analysis "the Westburgs were Zaddo." The Westburgs were sole shareholders of Zaddo and were the only members of Zaddo Holdings. The Westburgs were actively involved in the administration of both entities. When Zaddo filed for WIS. STAT. ch. 128 receivership, Roger Westburg signed the petition. The Westburgs, as sole shareholders, raised objections in the context of the receivership proceedings and Park Bank was a creditor with the right to appeal. *See* WIS. STAT. § 128.20(2). Likewise, when Zaddo Holdings was subject to a foreclosure action initiated by Park Bank, the Westburgs, through counsel, contested those proceedings. We are satisfied that there is an identity of

[14] The foreclosure was entered upon a default judgment. *See* ***Park Bank v. Zaddo Holdings, Inc.***, Walworth county circuit court case No. 2006CV899. While Zaddo Holdings appealed the circuit court order confirming the sheriff's sale of its real estate, it did not appeal the default judgment. The receivership proceedings, commenced in September 2006, terminated in October 2007 with an approving of the final account and the discharge of the court appointed receiver. *See* ***Zaddo, Inc.***, Walworth county circuit court case No. 2006CV756.

parties/privity in the current action and the prior receivership and foreclosure proceedings.

¶25 The second requirement for claim preclusion to apply is that there be identity between the causes of action in both cases. Wisconsin applies a transactional approach to the determination of whether two suits involve the same cause of action. *See* ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 553, 525 N.W.2d 723 (1995). "[I]f both suits arise from the same transaction, incident or factual situation, [claim preclusion] generally will bar the second suit." ***Id.*** at 554 (citation omitted). Further, the number of substantive theories that may be available to the plaintiff is immaterial if they all arise from the same factual underpinnings: all are barred from future consideration unless brought in the same action. ***Id.*** at 555 (citing RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. a (1982)).

¶26 Here, Park Bank's claims arise from the same transactions and the same underlying facts of the receivership and the foreclosure. Likewise, the Westburgs' claims are based on factual issues arising out of the receivership proceeding and foreclosure. The Westburgs contend that material issues of fact exist as to whether Zaddo was in monetary default when it filed for receivership, whether Zaddo filed the WIS. STAT. ch. 128 petition under duress and whether the agreements between the Zaddo entities and Park Bank provided for cross-collateralization. Again, it is the underlying ch. 128 proceeding that led to the foreclosure action. The Westburgs provide no reason why the claims regarding

Park Bank's conduct[15] and the enforceability of the parties' various agreements leading up to the receivership and foreclosure could not have been raised in the context of those proceedings.[16]

¶27 The third requirement is that the underlying proceedings resulted in a final judgment on the merits. ***Menard, Inc.***, 282 Wis. 2d 582, ¶26. We are satisfied that there was a final judgment in the foreclosure proceeding and a final order in the receivership proceeding. While the foreclosure proceeding resulted in a default judgment against Zaddo Holdings, "a default judgment is a final judgment for purposes of claim preclusion." ***Id.***, ¶29. As for the receivership proceeding, the court's order settling the assignee's accounts is "conclusive upon all parties including the sureties of the receiver or assignee," and is subject to appeal by the receiver, assignee or any creditor.[17] WIS. STAT. § 128.20(2).

[15] While the Westburgs suggest that Zaddo Holdings did not have standing to assert that the bank exerted duress on the Westburgs personally in securing the WIS. STAT. ch. 128 filing, they fail to develop this argument.

[16] Indeed, in the receivership proceeding, the Westburgs "as creditors and the sole shareholders and officers of Zaddo, Inc.," raised objections to the discharge of the receiver and the conclusion of the receivership proceedings. In this filing, the Westburgs challenged the amount owing to Park Bank, raised Zaddo's status as a third-party beneficiary under the Intercreditor Agreement, and contended that Zaddo was not insolvent at the time of filing of the receivership petition or in the four months preceding filing. Despite the Westburgs' objections, the receiver was discharged, the final accounting approved and the receivership petition granted on October 11, 2007.

[17] WISCONSIN STAT. § 128.20(2) provides that, after providing an opportunity to hear objections or take evidence, the court shall

(continued)

¶28 Finally, we recognize that Zaddo Holdings—and the Westburgs as the sole members—were the defendants in the underlying foreclosure proceedings and did not initiate suit. However, claim preclusion may operate to preclude a party from asserting claims in a subsequent action that the party failed to assert in an action in which it was a defendant. ***A.B.C.G. Enters,. Inc. v. First Bank Se.***, ***N.A.***, 184 Wis. 2d 465, 480, 515 N.W.2d 904 (1994).

> The common-law compulsory counterclaim rule creates an exception to the permissive counterclaim statute and bars a subsequent action by a party who was a defendant in a previous suit if "a favorable judgment in the second action would nullify the judgment in the original action or impair the rights established in the initial action." The common-law compulsory counterclaim rule operates to "preserve[] the integrity and finality of judgments and the litigant's reliance on them, by precluding a collateral attack upon a judgment in a subsequent proceeding when the attack *would completely undermine the rights established in the initial judgment*."

Menard, Inc., 282 Wis. 2d 582, ¶28 (citation omitted; alterations in orginal). If successful, the Westburgs' attack on the WIS. STAT. ch. 128 proceeding and, in turn, the foreclosure proceeding, in the context of this guaranty collection action, would completely undermine or nullify the rights established in those proceedings.

> by order settle and adjust the accounts and the compensation and expenses of the receiver or assignee, regardless of whether objection is made. The order shall be conclusive upon all parties including the sureties of the receiver or the assignee. The receiver or assignee or any creditor may appeal from the order in the manner prescribed for appeals in civil actions …. The receiver or assignee shall be discharged of the trust and the bond canceled upon compliance with the final order of the court.

The public record for the receivership, Walworth county case No. 2006CV756, indicates that an order discharging the receiver was entered on October 11, 2007.

¶29 The application of the common-law compulsory counterclaim rule by the court in ***A.B.C.G.*** is instructive here. There, First Bank, as mortgagee, sued ABCG in six separate actions seeking foreclosure of ABCG's interests in various properties pursuant to certain mortgage assumption agreements. ***A.B.C.G.***, 184 Wis. 2d at 471. ABCG did not defend those actions and default judgments were entered in favor of First Bank. ***Id.*** ABCG then brought an action against First Bank alleging: (1) misrepresentation by First Bank as to the investment quality of the properties; (2) breach of contract regarding payment schedules and extension of credit for repairs to the properties; and (3) failure to properly manage the properties and to collect, apply and conserve rental payments collected from the properties. ***Id.*** at 471-72. ABCG alleged that First Bank's actions caused it to default on its mortgage agreements and lose its interests in the properties due to foreclosure. ***Id.*** at 472. ABCG sought compensatory damages and equitable relief. ***Id.***

¶30 The circuit court granted summary judgment to First Bank on the ground that ABCG's claims were barred by claim preclusion due to the prior default judgments in the foreclosure action. ***Id.*** ABCG argued that WIS. STAT. § 802.07(1) is a permissive counterclaim statute; it allows a defendant to bring a counterclaim, but does not require a defendant to do so. ***A.B.C.G.***, 184 Wis. 2d at 473. While recognizing the permissive counterclaim rule, our supreme court determined that it is not absolute and that the common-law compulsory counterclaim rule will apply when the counterclaim is such that it "would so plainly operate to undermine the initial judgment that the principle of finality requires preclusion of such an action." ***Id.*** at 476-77 (citation omitted). The court held:

> If we were to allow ABCG to recover damages from First Bank, or if we were to grant other "equitable" remedies (as ABCG requests), the judgment awarding First Bank the amounts due on the properties and additional costs would be rendered meaningless. If a court found the mortgages invalid or First Bank to have caused the default, First Bank could be essentially forced to return its previous recovery. In the interest of equity and finality, we hold that ABCG is barred from raising its present claims against First Bank.

Id. at 483. As did the court in ***A.B.C.G.***, we conclude that equity and finality bar the Westburgs' claims against Park Bank as those claims relate to, and arise out of, the prior receivership of Zaddo and the foreclosure action against Zaddo Holdings.

Service of Process

¶31 Next, we reject the Westburgs' contention that a material issue of fact exists as to their affirmative defense alleging insufficiency of the service of process. The Westburgs set forth a detailed summary of the alleged facts surrounding the service of process in this case, including doubts about Park Bank's attempt to have them served at their home and its eventual publication of the summons in the newspaper. They contend that Judge Kennedy erred in his "two sentence dismissal" of their affirmative defense challenging service of process. However, the record contains an affidavit from the process server that he unsuccessfully attempted to serve the Westburgs in Sharon, Wisconsin, on four occasions. The record also contains a certificate of publication. In response to the publication summons, the Westburgs made a demand for the complaint and timely filed their answer. Our review of the record failed to locate, and the Westburgs have not cited to, any evidence creating a material issue of fact as to service of process. While Roger Westburg averred that he and Sandra "made no attempts to evade service of process and the Bank knew where [they] lived and had the address of [their] home for service attempts," this does nothing to refute the

affidavit of the process server. We uphold the circuit court's dismissal of this defense.

Motion for Reconsideration

¶32 As a final matter, the Westburgs contend that the circuit court erred in denying their motion for reconsideration. We review a circuit court's decision on a motion for reconsideration for an erroneous exercise of discretion. ***Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.***, 2004 WI App 129, ¶6, 275 Wis. 2d 397, 685 N.W.2d 853. To prevail on a motion for reconsideration, the movant must present either newly discovered evidence or establish a manifest error of law or fact. ***Id.***, ¶44.

¶33 The Westburgs' motion for reconsideration asserted that the circuit court "committed manifest errors of law in reaching the decisions rendered in an oral ruling on July 9, 2009." In support of the motion, Roger Westburg averred that the Small Business Administration (SBA) had issued a demand for full payment from the Westburgs on an SBA guaranteed loan and that the loan referenced in the SBA letter is the same loan for which Park Bank is claiming damages. The SBA letter to the Westburgs is dated July 17, 2010. The Westburgs alleged that these newly discovered damages warranted reconsideration of the July 2009 summary judgment decision. However, the Westburgs fail to establish, factually or legally, or otherwise explain how the SBA demand letter bears on the substantive issues in the guaranty collection action which were disposed of in July 2009. We therefore reject the Westburgs' contention that the circuit court erred in denying its motion for reconsideration of the issues disposed of in the July 2009 summary judgment.

CONCLUSION

¶34 We conclude that the circuit court properly granted summary judgment in favor of Park Bank. The Westburgs lack standing to challenge Park Bank's conduct toward Zaddo and Zaddo Holdings in the underlying WIS. STAT. ch. 128 receivership proceeding and foreclosure action. Further, the Westburgs' affirmative defenses and counterclaims, rooted in the Zaddo receivership and the Zaddo Holdings foreclosure action, are barred by claim preclusion. Finally, the Westburgs failed to raise a material issue of fact as to service and failed to demonstrate that the circuit court erred in denying their motion for reconsideration. We affirm the judgment.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.