COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

Nos. 96-2152 & 96-2153

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

96-2152
DE MARINIS PIZZA PLACE, INC., DE MARINIS WEST, INC., DE MARINIS REAL ESTATE PARTNERSHIP, DE MARINIS CONSULTANTS, INC., PHILIP DE MARINIS AND DOMINIC DE MARINIS,

PLAINTIFFS-APPELLANTS,

V.

VINCENT DE MARINIS AND LUCILLE DE MARINIS,

DEFENDANTS-RESPONDENTS.

96-2153
VINCENT DE MARINIS AND LUCILLE DE MARINIS,

PLAINTIFFS-RESPONDENTS,

V.

DE MARINIS PIZZA PLACE, INC.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL J. BARRON, Judge. *Reversed and cause remanded.*

Before Fine, Schudson and Cane, JJ.

PER CURIAM. Dominic and Philip De Marinis appeal the trial court's judgment dismissing their complaint against their parents, Vincent and Lucille De Marinis. The complaint was brought in response to a conflict over the ownership of the family business. It requested a constructive trust over Vincent's shares of stock in the business and the real estate used in the operation of the business, or, in the alternative, restitution for payments allegedly made to Vincent based upon his alleged promise to leave his interest in the family business to his sons. The De Marinis sons argue that the trial court improperly dismissed their complaint based upon evidence heard in an eviction action that was eventually dismissed as premature. We agree, and therefore reverse the trial court's judgment dismissing the De Marinis sons' action, and remand for trial. Because we reverse on this issue, we do not address the De Marinis sons' other asserted issues. *See* ***Gross v. Hoffman,*** 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (if decision on one point disposes of appeal, appellate court will not decide other issues raised).

I. BACKGROUND

In 1951, Vincent and Lucille De Marinis began operating De Marinis Pizza from their home on South Wentworth Avenue in Milwaukee. De Marinis Pizza occupied the bottom portion of the building, and Vincent and Lucille lived in an apartment above the restaurant. In 1955, Vincent's brother, Albert De Marinis, became a partner in the business. The De Marinis sons worked for the family business as children, and became partners in the business as adults. The business eventually expanded, and two additional restaurants were opened on

Kinnickinnic and on 108th Street in West Allis. The De Marinis sons ran the restaurant on the South Wentworth Avenue property, under a lease from Vincent and Lucille, who owned the property.

Vincent De Marinis retired from the business in 1980, but continued to draw a salary and receive benefits from the business. The De Marinis sons allege that Vincent received those payments because he promised that he would leave them his interest in the family business upon his death; the sons further allege that this promise included the understanding that Vincent would also leave his sons the real estate used in the operation of the business. The business was incorporated in 1984. In 1994, Vincent allegedly informed his sons that he wanted to redistribute the stock of the business to give equal interests in the business to his two daughters.

The sons did not surrender their stock for redistribution. Thereafter, on March 30, 1995, Vincent and Lucille served De Marinis Pizza a twenty-eight-day notice to terminate their tenancy of the property on South Wentworth on or before April 30, 1995. On April 18, 1995, the sons filed their complaint requesting a constructive trust over Vincent's shares of stock and over the South Wentworth and 108th Street real estate that was used in the operation of the business, or, in the alternative, restitution. On April 19, 1995, Vincent and Lucille commenced an eviction action against De Marinis Pizza, a business then owned by Vincent and his two sons, to remove it from the South Wentworth property.[1]

[1] The summons is file stamped with an April 25, 1995 date; however, the summons and complaint were served on April 20, 1995. April 19, 1995, is the date on which the documents appear to have been prepared, and that is the date that the De Marinis sons cite in their brief as the date that the eviction action was commenced. The trial court's order dismissing the eviction action as premature has not been appealed. Accordingly, we do not decide the effect, if any, of these circumstances.

In their answer to the eviction complaint, the De Marinis sons asserted as a defense that they had an ownership interest in the South Wentworth property, and as a counterclaim, they incorporated by reference the claims presented in their action for a constructive trust/restitution. The De Marinis sons also challenged the court's competency to proceed with the eviction action, contending that the action had been brought prematurely. The eviction action was upgraded from small claims court to a large claim pursuant to an order dated May 9, 1995. The De Marinis sons moved for consolidation of the eviction action with the constructive trust/restitution action, but that motion was not granted. Rather, the chief judge assigned both actions to one judge and ordered that they not be consolidated, but tried on an individual basis.

On March 22, 1996, Vincent and Lucille filed a motion to be heard on March 25, 1996 in the eviction action. Before any evidence was offered, the De Marinis sons requested that the action be dismissed as premature because it had been commenced at a time when De Marinis Pizza was still entitled to possession of the property. The trial court initially denied the motion, and evidence in that action was taken on March 25, March 26, and March 28, 1996. At the conclusion of the evidence, the trial court dismissed the eviction action, without prejudice, because it had been brought prematurely. As noted, no one has appealed from that order. The trial court also dismissed the De Marinis sons' separate constructive trust/restitution action on its merits.

II. DISCUSSION

The De Marinis sons argue that the trial court improperly dismissed their constructive trust/restitution action based upon the evidence it heard in the eviction action. We agree. The constructive trust/restitution action was not tried. Rather, the trial court tried the eviction action only, before concluding that it had been commenced prematurely. In applying to the constructive trust/restitution action the evidence that it heard in the eviction action, the trial court applied principles of "issue preclusion and claim preclusion." Neither claim preclusion nor issue preclusion is applicable under the present facts, however, and the trial court therefore had no legal basis to dismiss the constructive trust/restitution action based upon the proceedings in the eviction action.

Whether claim preclusion applies to a particular set of facts is an issue of law that we review *de novo*. ***Northern States Power Co. v. Bugher,*** 189 Wis.2d 541, 551, 525 N.W.2d 723, 728 (1995). Under the doctrine of claim preclusion, 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. ***Id.,*** 189 Wis.2d at 550, 525 N.W.2d at 727. In order for earlier proceedings to act as a bar to a later suit, the following factors must be present: (1) an identity between the parties or their privies in the prior and later suit; (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. ***Id.,*** 189 Wis.2d at 551, 525 N.W.2d at 728. In determining whether there is an identity of causes of action in two suits, Wisconsin uses the transactional approach; if both suits arise from the same transaction, incident or factual situation, claim preclusion will generally bar the second suit. ***Id.,*** 189 Wis.2d at 553–554, 525 N.W.2d at 728–729.

Under the related doctrine of issue preclusion, the general rule is that "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." ***Hlavinka v. Blunt, Ellis & Loewi, Inc.,*** 174 Wis.2d 381, 396, 497 N.W.2d 756, 762 (Ct. App. 1993). Thus, three elements must be satisfied in order for issue preclusion to bar relitigation of an issue of law or fact: (1) the issue of fact or law must have been actually litigated and determined by a valid and final judgment in the prior action; (2) the determination of the issue of fact or law in the prior action must have been essential to the judgment in the prior action; and (3) the parties in the prior or subsequent action must be the same. ***Id.***

With respect to claim preclusion, the eviction action was dismissed because it had been filed prematurely, and thus no judgment on the merits was ever rendered with respect to the constructive trust/restitution claims that were asserted as a defense and counterclaim in that action. Similarly, with respect to issue preclusion, the constructive trust/restitution issues were not determined by the final judgment in the eviction action. Neither claim preclusion nor issue preclusion bars litigation of those issues. The trial court therefore erred in dismissing the constructive trust/eviction action based upon the evidence presented in the eviction action. Accordingly, we reverse the trial court's judgment of dismissal and remand the constructive trust/restitution action for trial.

By the Court.—Judgment reversed and cause remanded.

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