COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-1119

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

NATIONAL OPERATING, L.P.,

PLAINTIFF-APPELLANT,

V.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, AND BRIDGEVIEW PLAZA PARTNERSHIP,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for La Crosse County: RAMONA A. GONZALEZ, Judge. *Affirmed.*

Before Eich, Vergeront and Roggensack, JJ.

¶1 EICH, J. National Operating, L.P., appeals from a judgment dismissing its complaint against Mutual Life Insurance Company of New York and Bridgeview Plaza Partnership. The circuit court concluded that the action was barred by the doctrine of claim preclusion. We affirm.

¶2 In 1978, National borrowed money from Mutual to purchase the Bridgeview Plaza shopping center in La Crosse.[1] National gave Mutual a note (the "underlying note") for the full amount of the purchase price, approximately $3.5 million, which was secured by a mortgage on the shopping center. In 1990, National sold the center to Bridgeview, receiving in return a $5.5 million note (the "wrap note") and a mortgage on the property. The wrap note entitled National to monthly interest payments and a balloon payment of $5.5 million on February 29, 2000.

¶3 After National defaulted on the underlying note in 1993, National and Mutual entered into a two-year "Loan Modification and Extension Agreement." As additional security for the extension, National assigned Mutual all of its "right[s], title and interest" in the wrap note and the Bridgeview mortgage. The assignment contained the following language:

> NOW, THEREFORE, Assignor [National] does hereby assign to Assignee [Mutual] all of its right, title and interest in those certain rights and remedies granted in the Wrap Note and Mortgage by Bridgeview, to Assignor.
>
> At any time after default, under the Wrap Note and Mortgage, Assignee may exercise said rights and remedies at such time and instance Assignor would be able to exercise those rights and remedies, upon notice to and without recourse from Assignor.
>
> Upon payment of the Note and any amounts due under the Mortgage, Assignee shall convey the Wrap Note and Mortgage to Assignor.

¶4 In December 1995, National again defaulted on the underlying note. Mutual gave notice that it intended to exercise its right under the assignment and

[1] National and Mutual are actually successors to the original parties to the shopping mall purchase.

step into National's shoes as payee and mortgagee under the wrap note and mortgage. A few months later, in early 1996, Mutual brought a declaratory judgment action against National and Bridgeview seeking to confirm its [Mutual's] assumption of the wrap note and mortgage under the assignment and to extinguish all of National's rights in those instruments. Specifically, Mutual's complaint requested entry of a declaratory judgment

> … confirming its assumption of the Notes between … National Operating, L.P., and … Bridgeview Plaza Partnership; extinguishing the rights of … National Operating, L.P., as a mortgagee under said Mortgage; extinguishing the rights of … National Operating, L.P., as payee under the [Wrap] Note; and confirming [Mutual's] interest as primary mortgagee and holder of the [Wrap] Note and Mortgage declared herein.

National did not file a responsive pleading and default judgment was entered according to the demands of Mutual's complaint.

¶5 A year or so later, National, apparently believing that it still possessed rights under the assignment which it was about to lose in the wake of a deal between Mutual and Bridgeview, notified Mutual that it was now prepared to tender full payment of its debt to Mutual and to exercise its right under the assignment to reconveyance of the wrap note and mortgage.[2] Mutual refused the tender and National sued, alleging its attempted repayment and seeking to redeem its equity in the note and mortgage.

[2] Specifically, National learned that Mutual and Bridgeview were contemplating a transaction whereby Mutual would allow Bridgeview to satisfy its entire obligation under the Wrap Note for a total of $4 million—rather than the $5.5 million that Bridgeview actually owed on the Wrap Note. Bridgeview's payment would satisfy the amount due Mutual on the Underlying Note—and give Mutual a windfall of at least $1 million—while at the same time, bestow a $1.5 million windfall on Bridgeview because it would be released from its $5.5 million obligation under the Wrap Note for only $4 million. All of this would, of course, deprive National of its claimed right to the surplus equity in the Wrap Note.

¶6 Defending the action, Mutual contended that all of National's rights under the assignment, wrap note and mortgage had been foreclosed in the declaratory judgment action. The circuit court agreed. It concluded that because National's claim could have been litigated in the prior action, it was now barred by the doctrine of claim preclusion. Mutual's motion to dismiss was granted and National appeals.

¶7 Whether claim preclusion applies in a given case is a question of law which we decide de novo. ***DePratt v. West Bend Mut'l Ins. Co.***, 113 Wis.2d 306, 310, 334 N.W.2d 883, 885 (1983). Under the rule, "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, 463 (1994) (quoted source omitted). The rule is "designed to draw a line between the meritorious claim on the one hand and the vexatious, repetitious and needless claim on the other hand." ***Northern States Power Co. v. Bugher***, 189 Wis.2d 541, 550, 525 N.W.2d 723, 727 (1995) (quoted source omitted).

¶8 In order for the earlier proceedings to bar a subsequent action, the following factors must be present: (1) an identity of parties (or privies) in the two actions; (2) a valid and final judgment on the merits in the prior action; and (3) an identity of claims or causes of action in the two suits. ***Northern States Power***, 189 Wis.2d at 551, 525 N.W.2d at 728 (citation omitted). When those factors coalesce, the prior judgment is conclusive as to all matters which were either litigated, or might have been litigated, in the earlier action. ***Great Lakes Trucking Co. v. Black***, 165 Wis.2d 162, 168, 477 N.W.2d 65, 67 (Ct. App. 1991). There is no question that the first two factors have been met. The parties are identical in both cases, and Mutual's earlier action resulted in a final judgment declaring the

rights of the parties. The fact that the judgment was entered by default is irrelevant, for a default judgment has been held to constitute a "valid and final judgment" within the meaning of the claim preclusion rule. *See* ***A.B.C.G. Enters., Inc. v. First Bank Southeast***, 184 Wis.2d 465, 481, 515 N.W.2d 904, 910 (1994). In such a case, the conclusiveness of the judgment is "limited to the material issues of facts which are well pleaded in the … complaint," and the prior judgment "does not extend to issues which were not raised in the pleadings" in the first action. ***Id.***[3]

¶9 National maintains that claim preclusion is not available in declaratory judgment actions—that a declaratory judgment can never have preclusive effect. It bases the argument on a comment in RESTATEMENT (SECOND) OF JUDGMENTS § 33 cmt. C, which states:

> [A] declaratory judgment action determines only what it actually decides and does not have claim preclusive effect on other contentions that might have been advanced….

We think the argument is misplaced. All the Restatement says is that a declaratory judgment will not be given claim preclusive effect on contentions "that might have

[3] In cases where the question is whether the issues could have been litigated in the prior action, we employ a "transactional analysis" to determine whether there is an identity of claims. ***Juneau Square Corp. v. First Wis. Nat'l Bank***, 122 Wis.2d 673, 682, 364 N.W.2d 164, 169 (Ct. App. 1985). It is a fact-centered analysis under which all claims arising out of one "transaction," or factual situation, are treated as being part of a single cause of action and are required to be litigated together. ***Parks v. City of Madison***, 171 Wis.2d 730, 735, 492 N.W.2d 365, 368 (Ct. App. 1992). Thus, if the present claim arose out of the same "transaction" as that involved in the former action—if the issue now raised could have been raised in that action—it is barred even though the plaintiff may be prepared (a) to present evidence, grounds or theories of the case not presented in the first action, or (b) to seek remedies or forms of relief not demanded earlier. Because, as we discuss below, we treat the well-pleaded issues in the earlier action as having actually been litigated, we need not engage in a could-have-been-litigated analysis in this case.

been advanced," in the former case, but will only preclude relitigation of matters actually tried and declared in the action.

¶10 As we have said, the prior declaratory judgment action ended in a default judgment declaring the parties' rights in the documents at issue, and it is well settled that: (1) a default judgment may form the basis for claim preclusion in a subsequent action; and (2) the judgment has preclusive effect "as to all issues aptly pleaded in the complaint, and [the] defendant is estopped to deny in a future action any allegation contained in the former complaint." ***A.B.C.G. Enters., Inc.***, 184 Wis.2d at 481, 515 N.W.2d at 910 (citing ***Mitchell v. Jones***, 342 P.2d 503, 506-07 (Cal. 1959). *See also* ***Barbian v. Lindner Bros. Trucking Co., Inc.***, 106 Wis.2d 291, 297, 316 N.W.2d 371, 375 (1982), where the supreme court stated: "The effect of a declaratory judgment is … to make *res judicata* the matters declared by the judgment, thus precluding the parties to the litigation." In other words, where the judgment claimed to have preclusive effect is a declaratory judgment, it precludes only such claims as were actually litigated and adjudged—and where that declaratory judgment was procured by default, all well-pled allegations in the complaint, and all terms of the judgment entered thereon, are considered as having been litigated for purposes of the claim preclusion rule.

¶11 Mutual's 1996 complaint for declaratory judgment set forth the identical set of facts, involving the same parties, as are involved in the instant case. Mutual detailed the chronology of events and the facts underlying the various notes and mortgages, and it alleged that National's rights under the wrap note and mortgage had been extinguished as a result of its default on the underlying note. Mutual was asserting its rights under the wrap note and mortgage *in full*, claiming, in effect, that National had no remaining rights in or under either document. And the judgment expressly declared the parties' rights in all those

respects.[4] The circuit court properly ruled that National was barred from relitigating them here.[5]

¶12 We conclude that National's claims are precluded by the judgment entered against it in the prior action—a judgment extinguishing National's rights in the wrap note and mortgage, and confirming Mutual as the primary payee and mortgagee under those instruments.

By the Court.—Judgment affirmed.

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[4] It is true that Mutual's complaint for declaratory judgment did not specifically refer to the "repayment" or "reconveyance" provisions of the assignment; but the entire document was incorporated by reference and, as a result, those provisions must be considered to have been pleaded. As the circuit court stated, "if [National] felt it had an interest in the property after default, it should have appeared at the previous lawsuit and disputed [Mutual]'s claims." And while National is correct in stating that it had not made the repayment at that time, it could have made a tender at that time or, failing that, sought a declaration that it retained the right to do so, and seek reconveyance, at some future time.

[5] National also maintains that claim preclusion is inapplicable because the earlier action concerned a "transaction" entirely separate from the one giving rise to its present claim of a right to reconveyance of the wrap note and mortgage. According to National, the assignment was comprised of two distinct parts: (1) National's assignment of ownership of the wrap note and mortgage to Mutual "on the condition that [Mutual] could not exercise its rights as payee and mortgagee unless National … defaulted on its [u]nderlying [n]ote to [Mutual]"; and (2) Mutual's agreement to reassign the wrap note and mortgage back to National upon National's repayment of the underlying loan. National contends that only the first of the two covenants was at issue in the earlier action because the second—the right to reconveyance—had not yet vested. It says this right could not even arise until the underlying debt to Mutual was paid in full, and because it had not yet fulfilled that obligation at the time of the declaratory judgment, there was no legal basis for it to seek reconveyance at that point. Stated another way, National's position is that this issue *could not have been* litigated in the earlier action and, as a result, the second action is not barred.

Again, we disagree. As we have discussed at some length above, Mutual sought and obtained a judgment in the prior action declaring that, under all applicable documents, National's rights and interests as a mortgagee under the wrap mortgage, and as payee under the wrap note, were extinguished, and that Mutual had become the primary mortgagee and payee. These were the matters declared (and deemed litigated) in the earlier action. We need not indulge in a transactional analysis to see whether these matters might have been litigated in the prior action. They were alleged in the complaint and declared in the judgment—and are deemed to have been litigated in that action.