COURT OF APPEALS
DECISION
DATED AND FILED

November 1, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2591 **Cir. Ct. No. 2010CV144**

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

FORD MOTOR COMPANY, LLC,

PLAINTIFF-RESPONDENT,

V.

PAUL A. HEINRICH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Vilas County: NEAL A. NIELSEN, III, Judge. *Affirmed*.

Before Hoover, P.J., Peterson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Paul Heinrich, pro se, appeals a judgment that awarded damages to Ford Motor Credit Company, LLC, after Heinrich defaulted on an installment sale contract. Heinrich contends that, because Ford had already obtained a judgment of replevin stemming from the default, the doctrine of claim

preclusion barred Ford from seeking a money judgment in a subsequent lawsuit. We disagree and affirm.

BACKGROUND

¶2 On March 28, 2008, Heinrich entered into a contract to purchase a 2008 Ford F-250 truck from Dave Marston Motors, Inc. The dealership assigned its interest in the contract to Ford. The contract required Heinrich to make sixty monthly payments of $774.59. The contract also gave Ford a security interest in the truck.

¶3 On July 17, 2009, Ford filed a replevin action against Heinrich, claiming that he had failed to make the required payments under the contract. Ford alleged it was "entitled to possession of the [truck], to sell the same and apply [the] proceeds of such sale to the balance due." Ford requested "a judgment for recovery of possession of the [truck]," along with costs and attorney fees. Heinrich failed to answer Ford's complaint, and the court entered a default judgment against him. The judgment stated that Ford was "entitled to possession of" the truck. Several days later, the court issued a writ of replevin. Vilas County case No. 2009-CV-214.

¶4 The Vilas County sheriff was apparently unable to execute the writ of replevin, and Ford did not recover the truck. Consequently, on May 3, 2010, Ford filed another lawsuit against Heinrich. Ford again alleged that Heinrich had failed to make the installment payments required by the contract. Specifically, Ford claimed Heinrich owed $38,123.20. Ford sought a money judgment in that amount, plus interest, costs, and attorney fees.

¶5 Heinrich moved to dismiss Ford's complaint. He argued Ford's claim involved the same parties and arose out of the same transaction as Ford's 2009 replevin lawsuit, which had resulted in a final judgment. He therefore contended Ford's 2010 lawsuit was barred by the doctrine of claim preclusion. The circuit court denied Heinrich's motion to dismiss. Thereafter, Heinrich failed to answer Ford's complaint, and the court entered a default judgment against him.

DISCUSSION

¶6 Heinrich contends the circuit court should have granted his motion to dismiss because claim preclusion bars Ford's 2010 lawsuit.[1] Whether claim preclusion applies to a given set of facts is a question of law, which we review independently. ***National Operating, L.P. v. Mutual Life Ins. Co. of N.Y.***, 2001 WI 87, ¶28, 244 Wis. 2d 839, 630 N.W.2d 116.

¶7 The doctrine of claim preclusion, previously called res judicata, "provides that a final judgment on the merits in one action bars parties from relitigating any claim that arises out of the same relevant facts, transactions, or occurrences." ***Kruckenberg v. Harvey***, 2005 WI 43, ¶19, 279 Wis. 2d 520, 694 N.W.2d 879. Claim preclusion has three elements: "(1) identity between the parties or their privies in the prior and present suits; (2) prior litigation [that] resulted in a final judgment on the merits by a court with jurisdiction; and (3) identity of the causes of action in the two suits." ***Sopha v. Owens-Corning***

[1] In his appellate brief, Heinrich also argues that issue preclusion is "at issue in this case." However, aside from a single sentence stating that issue preclusion "limits re-litigation of issues that have actually been litigated in former proceedings," Heinrich does not discuss issue preclusion or explain why it should bar Ford's 2010 lawsuit. Heinrich's argument with respect to issue preclusion is undeveloped, and we decline to address it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

Fiberglas Corp., 230 Wis. 2d 212, 233-34, 601 N.W.2d 627 (1999) (footnotes omitted).

¶8 Heinrich contends claim preclusion applies because Ford obtained a final judgment against him in 2009 stemming from his failure to make the required payments under the installment sale contract. He argues the 2009 and 2010 lawsuits involve the same parties and the same causes of action, so the 2009 final judgment should be given preclusive effect. We disagree. We conclude that, under Wisconsin's Uniform Commercial Code (UCC), WIS. STAT. chs. 401-11,[2] Ford had the option to bring two separate lawsuits—one to enforce its security interest in the truck, and another to reduce its claim against Heinrich to a monetary judgment. Consequently, claim preclusion does not bar Ford's 2010 lawsuit.

¶9 Statutory interpretation presents a question of law, which we review independently. ***Richards v. Badger Mut. Ins. Co.***, 2008 WI 52, ¶14, 309 Wis. 2d 541, 749 N.W.2d 581. "[S]tatutory interpretation 'begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.'" ***State ex rel. Kalal v. Circuit Court for Dane Cnty.***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 (citations omitted).

¶10 WISCONSIN STAT. § 409.601(1)(a) provides that, in the event of a default, a secured creditor "[m]ay reduce a claim to judgment, foreclose, or otherwise enforce the claim, security interest, or agricultural lien by any available judicial procedure." The creditor's remedies are "cumulative and may be exercised simultaneously." WIS. STAT. § 409.601(3). According to BLACK'S LAW

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

DICTIONARY 1320 (8th ed. 2004), a cumulative remedy is "a remedy available to a party in addition to another remedy that still remains in force." In other words, § 409.601(3) gives a secured creditor a choice of remedies, and pursuing only one remedy does not prevent the creditor from later pursuing other remedies, which still remain in force. While the statute states that the creditor "may" exercise its rights simultaneously, the word may in a statute is generally construed as permissive, not mandatory. *See* ***City of Wauwatosa v. Milwaukee Cnty.***, 22 Wis. 2d 184, 191, 125 N.W.2d 386 (1963). Thus, while § 409.601(3) permits a creditor to seek all available remedies in a single lawsuit, it does not require the creditor to do so. Under the statute, Ford was therefore able to bring a separate lawsuit seeking a money judgment after the sheriff failed to execute Ford's writ of replevin.[3]

¶11 Heinrich argues that, regardless of any statutory provisions, claim preclusion still applies. However, WIS. STAT. § 401.103(2) specifically states that common law principles of law and equity "supplement" the UCC "[u]nless displaced by the particular provisions of [WIS. STAT.] chs. 401 to 411." Here, WIS. STAT. §§ 409.601(1)(a) and 409.601(3) provide that, after default, a secured creditor may pursue its cumulative remedies in multiple lawsuits. These provisions displace the common law doctrine of claim preclusion.

¶12 Admittedly, there are no reported Wisconsin cases discussing the application of claim preclusion to lawsuits by secured creditors. However, in

[3] On appeal, Ford argues that WIS. STAT. §§ 409.601(1)(a) and 409.601(3) permit a secured creditor to file multiple lawsuits to satisfy a debt. Heinrich failed to file a reply brief, and therefore failed to respond to Ford's argument. Arguments not refuted are deemed conceded. ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

Dorman v. Morris, 185 Wis. 2d 845, 846-47, 519 N.W.2d 685 (Ct. App. 1994), we considered whether a secured creditor may retain a debtor's collateral while maintaining an independent action for a money judgment. We concluded that "a creditor in possession of a debtor's collateral may employ a number of different remedial steps until the debt is satisfied and the creditor is made whole[,]" including seeking a money judgment. ***Id.*** at 851. We quoted a Georgia court for the proposition that the "intent of [the UCC] was to broaden the options open to a creditor after default rather than to limit them under the old theory of election of remedies." ***Id.*** (quoting ***McCullough v. Mobiland, Inc.***, 228 S.E.2d 146, 149 (Ga. Ct. App. 1976)). Our reasoning in ***Dorman*** is consistent with our conclusion in this case that claim preclusion does not prevent a secured creditor from exercising its cumulative remedies in multiple lawsuits.

¶13 Furthermore, based on similar statutory language, other jurisdictions have held that claim preclusion does not bar a secured creditor from bringing multiple lawsuits seeking different remedies after default. For instance, in ***State Bank of Piper City v. A-Way, Inc.***, 504 N.E.2d 737, 738 (Ill. 1987), a secured creditor instituted two lawsuits against a debtor. In the first lawsuit, the creditor obtained a money judgment on a note, but, due to a mistake, the judgment was not sufficient to satisfy the debtor's obligation. ***Id.*** Consequently, the creditor brought a second lawsuit, in which it attempted to enforce its security interest in the collateral. ***Id.*** The circuit court granted the debtor's motion to dismiss the second lawsuit, based on the doctrine of claim preclusion. ***Id.*** However, the Illinois Supreme Court held that claim preclusion did not apply, stating, "Because of the provision under article 9 of the UCC for multiple and cumulative remedies upon the debtor's default, [claim preclusion] will not bar a secured creditor from exhausting his remedies under the UCC." ***Id.*** at 740. The court explained that the

creditor's previous money judgment against the debtor "[did] not bar the [creditor] from proceeding here." ***Id.*** at 741.

¶14 The Tenth Circuit reached a similar conclusion in ***Hill v. Bank of Colorado***, 648 F.2d 1282 (10th Cir. 1981). There, a bankruptcy trustee sought to apply claim preclusion to prevent a secured creditor from enforcing its security interest. ***Id.*** at 1283. The trustee argued that, because the creditor had already obtained a money judgment against the bankrupt party prior to bankruptcy, the creditor could no longer enforce the security interest. ***Id.*** The Tenth Circuit disagreed, concluding that, under Colorado's UCC, the creditor's remedies were cumulative and the creditor was entitled "to pursue the cause until he achieves satisfaction" of the debt. ***Id.*** at 1286. The court noted, "To interpret the doctrine of [claim preclusion] the way [the trustee] seek[s] to do so would be to nullify the word 'cumulative' in the statute." ***Id.***

¶15 Like the creditors in ***State Bank of Piper City*** and ***Hill***, Ford is entitled to exhaust its cumulative remedies under the UCC. That is precisely what Ford attempted to do in this case. When Heinrich defaulted on the installment sale contract, Ford had several available remedies under WIS. STAT. § 409.601(1)(a), including: (1) reducing its claim to a money judgment; and (2) enforcing its security interest. Ford first elected to enforce its security interest through the 2009 replevin action. Ford obtained a writ of replevin in that case, but the writ could not be satisfied, and Ford was therefore unable to recover its collateral. Ford then instituted the current lawsuit, seeking a money judgment for the installment contract's outstanding balance. Because Ford's remedies under § 409.601(1)(a) are cumulative and need not be exercised simultaneously, *see* WIS. STAT. § 409.601(3), claim preclusion does not bar Ford's second lawsuit. Until

Heinrich's debt is satisfied, Ford is entitled to exercise all available remedies under § 409.601(1)(a), even by bringing multiple lawsuits.

¶16 As a final point, Heinrich implies that Ford actually sought a money judgment in the 2009 lawsuit, but the circuit court declined to award monetary damages. He states that Ford "did not appeal the trial court's decision to limit [Ford's] remedy to a judgment of replevin" in the 2009 case. However, Heinrich is mistaken. Ford never requested a money judgment in the 2009 case. The circuit court did not decline to award monetary damages. Instead, it entered a judgment of replevin—the very relief Ford had requested. Ford therefore had no reason to appeal the 2009 judgment, and its failure to do so did not prevent it from seeking a money judgment against Heinrich in 2010.

By the Court.—Judgment affirmed.

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