COURT OF APPEALS
DECISION
DATED AND FILED

February 7, 2012

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP2187 **Cir. Ct. No. 2010SC38657**

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

JOHN C. WEICHMAN, JR.,

PLAINTIFF-APPELLANT,

V.

WALFRID A. FRIEDMAN, NANCY FRIEDMAN AND FRIEDMAN FAMILY TRUST,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Milwaukee County: PAUL R. VAN GRUNSVEN, Judge. *Judgment reversed and cause remanded.*

¶1 FINE, J. John C. Weichman appeals the circuit court's dismissal of his small-claims action against Walfrid A. Friedman, Nancy Friedman, and the Friedman Family Trust. The circuit court held that Weichman's action was barred by claim-preclusion. Nothing in the Record that the parties have caused to be sent

to us, however, shows that the circuit court's claim-preclusion ruling is either correct or incorrect. Further, we have no way of assessing whether any of Weichman's claims were not sufficiently supported by the evidence, as the circuit court opined as to one of them an alternate reason to dismiss. Accordingly, we must reverse and remand for further proceedings.

I.

¶2 Weichman rented an apartment from the Friedmans. He brought this small-claims action against them alleging in narrative form various wrongs in connection with his tenancy and its termination. The Friedmans counterclaimed for rent Weichman allegedly owed as well as for damages the Friedmans claim Weichman caused. As recited in the Friedmans' counterclaim, they had sought to evict Weichman in an earlier case, Milwaukee County 10-SC-022584, and that eviction action was dismissed by the circuit court on the parties' stipulation. The Friedmans' counterclaim alleged that Weichman "breached the terms of the Stipulation" because he did not vacate the apartment when he was supposed to under the stipulation. The circuit court here dismissed this case, ruling: "All of these claims, all of the claims, every single thing that I have heard, were claims that accrued and were claims that could and should have been presented as part of the earlier case, 10-SC-022584."

¶3 Weichman is *pro se*. The Friedmans are represented by a lawyer.

II.

¶4 The main question here is whether claim-preclusion can prevent a subsequent action asserting claims that perhaps could have been raised in a counterclaim to an earlier eviction action.

> Although the general formulation of the doctrine of claim preclusion states that the final judgment is conclusive between the same parties or their privies on "all matters which ... might have been litigated," it is settled law that we employ a different analysis when the matter that might have been litigated is a counterclaim.

Wisconsin Public Service Corp. v. Arby Constr., Inc., 2011 WI App 65, ¶17, 333 Wis. 2d 184, 194, 798 N.W.2d 715, 720 (quoted source omitted). This is because "counterclaims are generally permissive in Wisconsin and if we were to apply claim preclusion whenever a defendant in a prior action chose not to counterclaim, we would be improperly creating a compulsory counterclaim rule." ***Ibid.*** Wisconsin recognizes, however, "a narrow exception called the common law compulsory counterclaim rule." ***Id.***, 2011 WI App 65, ¶17 n.5, 333 Wis. 2d at 194 n.5, 798 N.W.2d at 720 n.5. The circuit court's conclusion that Weichman should have asserted his claims in the Friedmans' eviction action against him raises issues addressed by ***Arby Construction***.[1] Further, the supreme court has granted review of ***Arby Construction***, *see* 2011 WI 100, 337 Wis. 2d 48, 806 N.W.2d 637, and the supreme court heard oral argument on January 12, 2012, so the future of the rule that we reference from the court of appeals's decision may be affected. Equally

[1] The Friedmans tell us in their brief that after the circuit court in the eviction action (10-SC-022584) dismissed it on the parties' stipulation, Weichman sought leave to assert counterclaims in that by-then-dismissed matter. None of the documents supporting the Friedmans' representation in that regard are in the Record here, and, as noted in the main part of this opinion, we are bound by the Record.

important, however, we do not have in the Record the prior eviction action, so we have no way of knowing, on our *de novo* review, whether the circuit court correctly applied the claim-preclusion doctrine, even apart from the compulsory-counterclaim problem. *See* ***id.***, 2011 WI App 65, ¶13, 333 Wis. 2d at 192, 798 N.W.2d at 719 (Our review of the circuit court's application of the claim-preclusion doctrine is *de novo*.).

¶5 The parties to an appeal are responsible for designating the Record for the clerk of circuit court. WIS. STAT. RULE 809.15(2) & (3). Although the appellant has the initial burden of ensuring that the clerk transmit a proper Record, any other party to the appeal may seek to have the circuit court "supplement or correct the record." RULE 809.15(3). The Friedmans want us to uphold the circuit court's conclusion that claim-preclusion barred Weichman's small-claims action. It was thus their burden to ensure that the Record included support for that contention, namely, the prior eviction action (10-SC-022584) on which the circuit court here based its claim-preclusion ruling. The same thing is true with the circuit court's alternative ruling on one of Weichman's claims, a moving expense for $930. The circuit court opined that if it reached the merits, it would not "find that the plaintiff has met his burden of proof[.]" Although it is true, as we have noted, that the appellant has the initial responsibility to ensure that the Record suffices for appellate review, any other party "who believes that the record, including the transcript of the reporter's notes, is defective … may move the court in which the record is located to supplement … the record." RULE 809.15(3). Here, the transcript does not include the evidence presented by the parties. Further, the circuit court did not explain in that part of its oral ruling why Weichman's proffer of a receipt for the $930 was not sufficient proof of his

payment even without the "invoice to accompany" it that the circuit court ruled was a necessary part of Weichman's proof.

¶6 Appellate courts are limited to the Record brought to them. ***Herro, McAndrews & Porter, S. C. v. Gerhardt***, 62 Wis. 2d 179, 180, 214 N.W.2d 401, 402 (1974), *overruled on other grounds by*, ***Standard Theatres, Inc. v. Department of Transportation***, 118 Wis. 2d 730, 746–747, 349 N.W.2d 661, 670 (1984). On this Record, we cannot assess the circuit court's use of claim preclusion to dismiss Weichman's small-claims action, and we have no way of knowing whether the evidence presented to the circuit court supports the circuit court's alternate reason for dismissing one of Weichman's claims (the other claims were swept into the circuit court's claim-preclusion rationale). Accordingly, we reverse and remand for further proceedings.

By the Court.—Judgment reversed and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.