COURT OF APPEALS
DECISION
DATED AND FILED

October 15, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP804-FT **Cir. Ct. No. 2012CV297**

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

RTS ROOFING, INC.,

PLAINTIFF-RESPONDENT,

V.

GOLDRIDGE GROUP, LLP,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Eau Claire County: PAUL J. LENZ, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM.[1] Goldridge Group, LLP (Group) appeals a money judgment in favor of RTS Roofing, Inc., arguing the circuit court erroneously

[1] This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2011-12 version.

determined RTS's claims were not barred by issue preclusion, claim preclusion, or the election of remedies doctrine. We reject Group's arguments, and affirm.

BACKGROUND

¶2 RTS performed work for which it was partially unpaid on a project referred to as the "Waterford Project," which was constructed by Goldridge Construction, Inc. (GCI). Marshall & Ilsley Bank, N.A., initiated a foreclosure lawsuit naming Group, RTS, GCI, and others as defendants. RTS filed a cross-claim against GCI, GCI officers Gerard Koehn and Steven Stamm, and others (but not Group) for amounts due for work it performed, and also alleged theft by contractor. The theft claim ultimately failed, but the parties to the cross-claim stipulated to judgment against GCI for $115,449 for the services RTS provided.[2]

¶3 In the present case, RTS sued Group to recover on a $67,500 promissory note, which secured payment for a portion of RTS's work on the Waterford Project. Group moved to dismiss, arguing the claim was barred by issue preclusion, claim preclusion, and the election of remedies doctrine. The circuit court denied Group's motion and entered judgment on the note. Group now appeals.

DISCUSSION

¶4 Group renews its arguments in favor of dismissal. Because the circuit court considered matters outside the pleadings, we review the matter under the summary judgment procedure. *See* ***Wisconsin Pub. Serv. Corp. v. Arby***

[2] The court determined the theft by contractor claim failed because GCI had paid out more to its subcontractors than had been disbursed to it in loan funds by the bank.

Const., Inc., 2011 WI App 65, ¶13, 333 Wis. 2d 184, 798 N.W.2d 715. Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to summary judgment as a matter of law. ***Id.*** (citing WIS. STAT. § 802.08(2)). In reviewing a summary judgment determination, we apply the same methodology as the circuit court, and our review is de novo. ***Id.*** Here, neither party suggests there are factual disputes. Thus, only questions of law remain. *See* ***id.***

Claim preclusion

¶5 Group first argues RTS's claim was barred by claim preclusion. Generally, 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.***, ¶14 (citing ***Wickenhauser v. Lehtinen***, 2007 WI 82, ¶22, 302 Wis. 2d 41, 734 N.W.2d 855). "The elements of claim preclusion are: (1) an identity between the parties or their privies in the prior and present suits; (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.***, ¶15 (citation omitted).

¶6 However, there is essentially a fourth element with respect to cross-claims because the common-law compulsory cross-claim rule must also apply. Because cross-claims are merely permissive, claim preclusion will not apply to a cross-claim that was not actually litigated unless "a favorable judgment in the subsequent action would 'nullify the first judgment or impair rights established in the first action.'" ***Id.***, ¶¶17-19 n.5 (quoting ***Wickenhauser***, 302 Wis. 2d 41, ¶¶25-26). This common-law compulsory cross-claim rule is a narrow exception to the

general rule of permissive cross-claims. *See* ***Wickenhauser***, 302 Wis. 2d 41, ¶26.[3] The rule serves to protect the integrity of judgments from collateral attack. ***Id.***

¶7 To determine whether the common-law compulsory cross-claim rule applies, we first analyze whether the three general elements of claim preclusion are satisfied. *See* ***id.***, ¶27 (citing ***Menard, Inc. v. Liteway Lighting Prods.***, 2005 WI 98, ¶28, 282 Wis. 2d 582, 698 N.W.2d 738). In this case, there is no dispute that the first action resulted in a final judgment on the merits in a court of competent jurisdiction. However, neither of the remaining elements is satisfied.

¶8 There is no identity between the parties or their privies in the prior and present suits. In the prior suit, RTS cross-claimed against GCI and its officers, Koehn and Stamm, whereas here RTS's claim is against only Group.[4] Yet, the parties need not be identical under this element; they need be only "for the most part, identical." ***Id.***, ¶28.[5] Thus, there is identity of parties when two actions involve a closely-held corporation in one case and its officers or shareholders in the other. ***Id.***, ¶¶28-29 n.12. Here, it appears Koehn and Stamm are also members of Group. Nonetheless, we agree with the circuit court that there is no identity of parties because in the prior case Koehn and Stamm were named only in their

[3] ***Wickenhauser v. Lehtinen***, 2007 WI 82, ¶26, 302 Wis. 2d 41, 734 N.W.2d 855, discussed the common-law compulsory *counterclaim* rule. However, ***Wisconsin Public Service Corp. v. Arby Construction, Inc.***, 2011 WI App 65, ¶¶16-19, 333 Wis. 2d 184, 798 N.W.2d 715, held that counterclaims and cross-claims are treated equally for claim preclusion purposes because both are permissive claims.

[4] While Group was a party to the prior case, it was not party to RTS's cross-claim.

[5] RTS incorrectly asserts ***Wickenhauser***, 302 Wis. 2d 41, ¶¶28-29, held the parties there were in privity because they were nearly identical. ***Wickenhauser***'s analysis did not mention privity. Moreover, in a footnote, the court stated, "No argument was presented to us contending that the relationship between the [parties] rises to the level of privities, and therefore, we do not address this issue." ***Id.***, ¶29 n.13.

capacity as officers of GCI. There is no assertion that GCI and Group are identical, or nearly so.

¶9 There is also no identity between the causes of action in the two suits. Under this element, "all claims arising out of one transaction or factual situation are treated as being part of a single cause of action." ***Id.***, ¶30 (quoted source omitted). "[I]t is irrelevant that the legal theories, remedies sought, and evidence used may be different between the first and second actions." ***Id.*** (quoted source omitted). Group argues this element is met because all of the claims in the two cases arise out of RTS's work on the Waterford Project. We disagree. The prior case concerned disputes arising from the construction contract, whereas the present case deals solely with enforcement of a promissory note—a separate contract. Group's liability under the promissory note is independent of any party's liability for work RTS performed.

¶10 Not only does claim preclusion fail to apply in the first instance, but the common-law compulsory cross-claim exception is also inapplicable. A judgment favorable to RTS in this action, i.e., enforcing the note, would not nullify the first judgment or impair rights established in the first action. In the prior action, RTS obtained a judgment against GCI for work performed on the construction project, and the court dismissed RTS's theft by contractor claims. Enforcing the note, which constitutes partial payment for the work RTS performed, is in no way inconsistent with the prior judgment.[6] Rather, because

[6] The only right that is conceivably impaired by the present judgment is RTS's right to collect the full judgment amount in the prior case, because GCI is entitled to an offset for the amount of the promissory note if enforced and collected. However, RTS suffers no harm from this result, and even if it did, Group would have no basis to assert claim preclusion based on harm to RTS.

both judgments recognize RTS is entitled to payment for the work it performed, the judgments are complementary.

Issue preclusion

¶11 Group next argues issue preclusion bars RTS's claim. For issue preclusion to apply, inter alia, the "issue of fact or law must have been 'actually litigated and determined by a valid and final judgment' in the prior action." ***Hlavinka v. Blunt, Ellis & Loewi, Inc.***, 174 Wis. 2d 381, 396, 497 N.W.2d 756 (Ct. App. 1993) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1980)).

¶12 Group contends the "actually litigated" requirement is satisfied because the issue in both cases was "who owed RTS for payment of services rendered on the Waterford Project." We disagree. The present case involves no question of *who* is liable to RTS. Nor did the prior case involve any issue concerning enforcement of the promissory note. As RTS stresses, no party so much as mentioned the promissory note in the prior action. Accordingly, it cannot be said—by any stretch of the imagination—that the issue of Group's liability for the promissory note was actually litigated in the prior action. We therefore reject Group's issue preclusion argument.

Election of remedies

¶13 Finally, Group argues the election of remedies doctrine bars RTS's claim on the promissory note. The doctrine, which is equitable in nature, "is defined as 'the act of choosing between two or more different and coexisting modes of procedure and relief allowed by law on the same state of facts.'" ***Bank of Commerce v. Paine, Webber, Jackson & Curtis***, 39 Wis. 2d 30, 36, 158 N.W.2d 350 (1968) (quoted source omitted). The doctrine's general purpose is to

prevent double recovery for a single wrong. ***Id.*** "'Its rationale is that courts will not permit suitors solemnly to affirm that a given state of facts exists from which they are entitled to a particular relief and afterward affirm or assume that a contrary state of facts exists, from which they are entitled to inconsistent relief.'" ***Id.*** (quoted source omitted). The doctrine has been further explained as follows:

> Where more than one remedy to deal with a single subject of action exists and they are inconsistent with each other, after the choice of one the others to all intents and purposes no longer exist. Where more than one remedy exists to deal with a single subject of action, but they are not inconsistent, nothing short of full satisfaction of the plaintiff's claim waives any of such remedies. All may be pursued concurrently, even to judgment, but satisfaction in one reaching the whole claim is a satisfaction in all.

Id. at 37 (quoting ***Rowell v. Smith***, 123 Wis. 510, 522, 102 N.W. 1 (1905)).

¶14 "Absent a true inconsistency, the doctrine is completely inapplicable." ***Id.*** at 39.

> "If the remedies are recognized as consistent, and there is no conflict of legal position as between them, there is no necessity for an election between them and there is no election by following one course of action as against another, even though but one satisfaction can be had for the various judgments obtained."

Id. (quoting 1 WISCONSIN PLEADING AND PRACTICE, ELECTION OF REMEDIES, 291, 292, § 7.05). The classic example of inconsistent remedies where the doctrine applies is a cause of action attempting both to rescind a contract and to enforce its terms. *See* ***id.*** at 37-38. "It is equally clear, however, that this rule does not apply where there are distinct and independent contracts." ***Id.*** at 38.

¶15 Wisconsin courts do not favor the election of remedies doctrine. ***Id.*** at 40, 42; ***Artisan & Truckers Cas. Co. v. Thorson***, 2012 WI App 17, ¶20, 339

Wis. 2d 346, 810 N.W.2d 825. "'It results in substantial injustice, is harsh, and largely obsolete.'" ***Appleton Chinese Food Serv., Inc. v. Murken Ins., Inc.***, 185 Wis. 2d 791, 807, 519 N.W.2d 674 (Ct. App. 1994) (quoted source omitted). The doctrine should be confined to cases where the plaintiff may be unjustly enriched, the defendant has been misled by the plaintiff's conduct, or the result is otherwise inequitable or res judicata applies. ***Bank of Commerce***, 39 Wis. 2d at 40-41.

¶16 The election of remedies doctrine is inapplicable here. First and foremost, the claims do not arise from the same subject of action. The prior claim centered on a construction contract, while the present claim centers on a promissory note. The doctrine cannot apply "where there are distinct and independent contracts." ***Id.*** at 38. Additionally, the doctrine does not apply merely because RTS pursued alternative modes of recovery for the same loss. *See* ***id.*** at 37. Rather, RTS is limited to a single, full recovery. *See* ***id.*** Group does not dispute that GCI is insolvent or that RTS has not actually recovered any amount of its judgment against GCI. Because RTS openly concedes its recovery in this case must be offset against its judgment against GCI, there is no threat of double recovery. Under such circumstances, the election of remedies doctrine does not apply. *See* ***id.*** at 40; ***Artisan & Truckers***, 339 Wis. 2d 346, ¶¶20, 26; ***Appleton Chinese Food***, 185 Wis. 2d at 807.

By the Court.—Judgment affirmed.

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