COURT OF APPEALS
DECISION
DATED AND FILED

March 18, 2015

Diane M. Fremgen
Clerk of Court of Appeals

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* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP2806 **Cir. Ct. No. 2013CV126**

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

RONALD WEIS AND JO WEIS,
PLAINTIFFS-APPELLANTS,

V.

RICHARD KAPINOS,
DEFENDANT-RESPONDENT-CROSS-APPELLANT,

COMMERCE STATE BANK AND DAVE BORCHARDT,
DEFENDANTS-RESPONDENTS,

WEST BEND MUTUAL INSURANCE COMPANY,
DEFENDANT-RESPONDENT-CROSS-RESPONDENT,

FRANKLIN LORD AND FRANKLIN LORD D/B/A FRANKLIN LORD, CPA,
DEFENDANTS.

APPEAL and CROSS-APPEAL from judgments of the circuit court for Ozaukee County: SANDY A. WILLIAMS, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. This case arises from a failed business venture involving Ronald Weis and Richard Kapinos. Weis and his wife Jo appeal from a judgment dismissing their claims against Kapinos, Kapinos' banker Dave Borchardt, and Borchardt's employer Commerce State Bank. Kapinos cross-appeals from a summary judgment in favor of his insurer West Bend Mutual Insurance Company on a duty to defend claim.

¶2 We conclude that the circuit court properly dismissed the claims against Kapinos, Borchardt, and Commerce. However, we also conclude that West Bend breached its duty to defend Kapinos. Accordingly, we affirm in part, reverse in part, and remand the matter to the circuit court.

BACKGROUND

¶3 In early 2006, Weis and Kapinos became members of LPJ of Wisconsin, LLC. Together, they sought to purchase a commercial building outside of West Bend. The building was owned by another company that Weis had an ownership interest in named Professional Ventures, LLC.

¶4 Weis and Kapinos subsequently met with Borchardt at Commerce to apply for a loan. They hoped to obtain a loan guaranteed by the U.S. Small Business Administration (SBA). Kapinos said that he was going to work with his accountant to advance the loan application relating to the SBA loan guarantee.

¶5 Kapinos and Weis wanted to move quickly with the purchase of the building. Commerce was willing to offer a loan, but only if it received more collateral. According to Weis, Borchardt indicated that he and Commerce were familiar with SBA loan procedures and that Commerce was "confident" that all paperwork was done for this loan and the projections were in order. Meanwhile,

Kapinos allegedly told Weis, "the projections and other documents look good" and "that the SBA approval was forthcoming." Based on such representations, Weis decided to mortgage his lake house in order to secure the Commerce loan for LPJ. The Commerce loan closed in February 2006.

¶6 After securing the Commerce loan, Kapinos continued to work to pursue the SBA guarantee. However, he learned from the local SBA office that no guarantee was possible because SBA loans cannot be used to affect a partial change of business ownership. As noted, Weis was a member of both the buyer (LPJ) and seller (Professional Ventures) in the transaction of the building. Kapinos informed Weis in April 2006 that no SBA loan was possible. The two attempted to find alternative financing and also to negotiate a sale of the property; however, their efforts were unsuccessful.

¶7 At the time that LPJ's note with Commerce was due for renewal in July 2008, Weis needed to sell the lake house to pay a judgment against him in an unrelated matter. Weis offered to grant Commerce, in exchange for releasing the lake house mortgage, a personal guaranty. He also offered to secure that guaranty with a mortgage on his homestead property in Ozaukee County. Commerce accepted the substitute collateral. Weis signed his guaranty knowing that Kapinos was unwilling to be a co-guarantor.

¶8 By the summer of 2009, Weis was the managing member of LPJ and in control of all operations, finances, and properties. Ultimately, LPJ defaulted on its note to Commerce, and several lawsuits followed.

Commerce State Bank v. LPJ of Wisconsin LLC et al
Washington County Case No. 2009CV1312

¶9 In September 2009, Commerce initiated an action against LPJ for foreclosure of the LPJ property and collection of amounts due under the LPJ note. LPJ was actively involved in the foreclosure. After LPJ filed its answer, judgment was entered against it for foreclosure and for a deficiency judgment. The LPJ property was then sold at a sheriff's sale to Commerce, the sheriff's sale was confirmed, and notice of the deficiency judgment was entered.

Commerce State Bank v. Ronald A Weis et al
Ozaukee County Case No. 2009CV1002

¶10 In December 2009, Commerce initiated an action against Weis and his wife for foreclosure of the homestead property in Ozaukee County and collection under the personal guaranty for the deficiency that was remaining in the Washington County foreclosure. Weis and his wife were actively involved in the foreclosure. They filed an answer, pled affirmative defenses including the unenforceability and inequity of the personal guaranty.[1] Ultimately, the circuit court rejected the defenses on summary judgment and entered a judgment for foreclosure. The Weis's property was sold at sheriff's sale to Commerce, the sheriff's sale was confirmed, and notice of judgment was entered.

Weis v. Kapinos, Washington County Case No. 2011CV766

¶11 In June 2011, Weis filed a complaint against Kapinos alleging a derivative claim relating to the projections of LPJ and the capitalization of LPJ. The claim revolved around the time period of early 2006. Kapinos defended the case and eventually obtained an order dismissing the action with prejudice.

[1] Weis and his wife accused Commerce of giving preferential treatment to Kapinos by not requiring him to make a personal guaranty.

Current Action

¶12 In March 2013, Weis and his wife commenced the current action against Kapinos, Borchardt, and Commerce. Their complaint alleged a number of claims including negligence, misrepresentation, breach of contract, unjust enrichment, and breach of fiduciary duty.

¶13 Although West Bend had sold a Commercial General Liability (CGL) policy to Kapinos, it refused to defend him when he tendered a defense. Accordingly, Kapinos retained private counsel at his own expense to respond to the complaint.

¶14 Kapinos, Borchardt, and Commerce filed motions to dismiss. West Bend then filed an answer on its own behalf along with a motion to stay and bifurcate so that the issue of coverage could be tried separately. It also joined the motions to dismiss.

¶15 Following a hearing on the matter, the circuit court granted the motions to dismiss. The court concluded, in part, that the claims of Weis and his wife were barred by the doctrine of claim preclusion.[2] The court also resolved the coverage dispute on summary judgment in favor of West Bend, concluding that it had no duty to defend Kapinos. This appeal and cross-appeal follow.

[2] The circuit court also concluded that Weis and his wife had failed to state proper claims and that their claims were barred by issue preclusion and the applicable statutes of limitations. Because we view the doctrine of claim preclusion as dispositive, we do not address these alternative grounds.

DISCUSSION

¶16 In this case, we are asked to review two judgments: a judgment granting motions to dismiss and a judgment granting summary judgment. We review a circuit court's decision on a motion to dismiss de novo. *See* ***Northbrook Wisconsin, LLC v. City of Niagara***, 2014 WI App 22, ¶28, 352 Wis. 2d 657, 843 N.W.2d 851. Likewise, we review a grant of summary judgment de novo, using the same methodology as the circuit court. ***Cole v. Hubanks***, 2004 WI 74, ¶5, 272 Wis. 2d 539, 681 N.W.2d 147. Summary judgment is proper when there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2013-14).[3]

¶17 On appeal, Weis and his wife contend that the circuit court erred in granting the motions to dismiss. We disagree.

¶18 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." ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 550, 525 N.W.2d 723 (1995) (quoted source and internal quotation marks omitted). There are three elements required to establish claim preclusion: "(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.*** at 551.

[3] All references to the Wisconsin Statutes are to the 2013-14 version.

¶19 Here, the facts meet these three elements. First, an identity between the parties exists in the prior and present suits. The parties in the Washington County foreclosure included Commerce (which employed Borchardt) and LPJ (which was co-owned by Weis and Kapinos). The parties in the Ozaukee County foreclosure included Weis, his wife, and Commerce. Finally, the parties in Weis's 2011 suit were Weis and Kapinos. Although not exactly the same, the parties in the present suit are, for the most part, identical to the ones in the prior suits. That is all that is required for the first element to be met. *See* ***Wickenhauser v. Lehtinen***, 2007 WI 82, ¶28, 302 Wis. 2d 41, 734 N.W.2d 855 (recognizing that an identity of parties exists when the parties are, "for the most part, identical") (quoted source and internal quotation marks omitted).

¶20 Second, an identity between the causes of action exists in the prior and present suits. The Washington County foreclosure dealt with the LPJ note and LPJ mortgage. The Ozaukee County foreclosure dealt with the LPJ note, Weis's personal guaranty, and the mortgage of his homestead property. Finally, Weis's 2011 suit dealt with the inception of LPJ and its eventual failure. The allegations in the present suit arise out of same common nucleus of operative facts relating to LPJ and its loan with Commerce. *See* ***Kruckenberg v. Harvey***, 2005 WI 43, ¶¶25-26, 279 Wis. 2d 520, 694 N.W.2d 879 (whether there is an identity in the causes of action is determined using the transactional approach, asking whether there is a common nucleus of operative facts).

¶21 Third, a final judgment was entered on the merits in a court of competent jurisdiction. Both the Washington and Ozaukee foreclosure actions resulted in final judgments of foreclosure based on the merits. Likewise, the order dismissing Weis's 2011 lawsuit with prejudice was final and based on the merits.

¶22 We recognize that neither Weis nor his wife initiated the prior foreclosure actions. However, claim preclusion may operate to preclude a party from asserting claims in a subsequent action that the party failed to assert in an earlier action. On this point, the case of ***A.B.C.G. Enterprises, Inc. v. First Bank Southeast, N.A.***, 184 Wis. 2d 465, 480, 515 N.W.2d 904 (1994) is instructive.

¶23 In ***A.B.C.G.***, the Wisconsin Supreme Court addressed whether A.B.C.G. Enterprises was precluded from suing First Bank for breach of contract, among other claims, relating back to the mortgage underlying a prior foreclosure action. ***Id.*** at 471-72. The court determined that, by attacking First Bank's actions regarding the mortgage underlying the foreclosure action, A.B.C.G. Enterprises was, essentially, "alleg[ing] that the original foreclosure was improper." ***Id.*** at 482. The court noted that, if it "were to allow ABCG to recover [money] damages from First Bank, … [the bank] could be essentially forced to return its previous recovery." ***Id.*** at 483. "A judgment in favor of ABCG would thus directly undermine the original default judgment in which the court held that under the circumstances, foreclosure was proper." ***Id.*** Accordingly, in the interest of equity and finality, the court held that A.B.C.G. was barred from bringing its suit. ***Id.***

¶24 The same is true here. The claims made by Weis and his wife are essentially defenses and counterclaims that could have been raised in the foreclosure actions because they specifically relate to the validity of the

Commerce loan and Weis's personal guaranty.[4] Furthermore, a judgment in their favor would undermine the prior foreclosure judgments.[5] Accordingly, we agree with the circuit court that dismissal of the claims was proper.

¶25 Having resolved the matter on appeal, we turn next to the cross-appeal. In his cross-appeal, Kapinos contends that the circuit court erred in granting summary judgment in favor of his insurer West Bend on a duty to defend claim. We agree.

¶26 "An insurer's duty to defend its insured is determined by comparing the allegations of the complaint to the terms of the insurance policy." ***Estate of Sustache v. American Fam. Mut. Ins. Co.***, 2008 WI 87, ¶20, 311 Wis. 2d 548, 751 N.W.2d 845. "The duty to defend is necessarily broader than the duty to indemnify because the duty to defend is triggered by arguable, as opposed to actual, coverage." ***Fireman's Fund Ins. Co. of Wis. v. Bradley Corp.***, 2003 WI 33, ¶20, 261 Wis. 2d 4, 660 N.W.2d 666.

¶27 The duty to defend is triggered if the allegations, if proved, "give rise to the possibility of recovery" under the policy. ***Id.***, ¶19. The existence of coverage under the facts in the complaint need only be "fairly debatable." *See*

[4] Weis and his wife assert that they could not have raised such defenses and counterclaims because they did not learn until December 2011 that the representations made by Kapinos and Borchardt regarding the application and status of the SBA loan were false and that the application had never been filed. The problem with this argument is twofold. First, the complaint does not allege that Kapinos or Borchardt ever advised Weis that they actually filed the application for a SBA loan. Second, Weis knew from Kapinos as early as April 2006 that a SBA loan was not possible.

[5] While Weis and his wife do not directly seek the return of the foreclosed properties, their complaint alleges as damages "severe financial damages," that they were "forced to file for bankruptcy, to their detriment," and that they were caused to lose "at a minimum, their homestead property in Ozaukee County."

Baumann v. Elliott, 2005 WI App 186, ¶10, 286 Wis. 2d 667, 704 N.W.2d 361. If even one theory in a complaint "appears to fall within the policy's coverage, the insurer is obligated to defend the entire action." ***State Farm Fire & Cas. Co. v. Acuity***, 2005 WI App 77, ¶8, 280 Wis. 2d 624, 695 N.W.2d 883.

¶28 Here, the complaint's first cause of action accused Kapinos of negligence. It alleged that Kapinos was "negligent in [his] investigation, diligence, application, procurement, and representation of Weis and LPJ to procure a SBA guaranteed loan." It also alleged that Kapinos was "otherwise negligent" and that his conduct "caused [Weis and his wife] to lose, at a minimum, their homestead property in Ozaukee County."

¶29 West Bend's CGL policy to Kapinos provided coverage for "property damage" caused by an "occurrence." The policy defined "occurrence" to mean "an accident." Meanwhile, it defined "property damage" to include "loss of use of tangible property."

¶30 We have little trouble concluding that a reasonable insured would expect the policy provision defining "occurrence" to include negligent acts. *See* ***Doyle v. Engelke***, 219 Wis. 2d 277, 289-90, 580 N.W.2d 245 (1998) (noting that the definitions of "accident" and "negligence" both center on an unintentional occurrence leading to undesirable results). Moreover, such negligence allegedly caused the loss of use of the Ozaukee County homestead property, which arguably qualifies as "property damage." Coverage for the first cause of action was therefore "fairly debatable."

¶31 What West Bend argues here is that the negligence claim made by Weis and his wife is really a baseless misrepresentation claim in disguise and that there is no precedent for finding property damage under such circumstances. The

problem with this argument is twofold. First, insurance companies cannot relabel causes of action in a complaint to conform to something more to their liking. Second, the fact that a claim may be novel does not mean that coverage cannot exist under the plain language of a policy.

¶32 Essentially what West Bend has done in this case is to weigh the merits of the complaint, literally on its own terms, find that it is weak, and refuse to defend against it. But that is not the law. The duty to defend focuses on the nature of the claims in a complaint and has nothing to do with their merits. ***J.G. v. Wangard***, 2008 WI 99, ¶22, 313 Wis. 2d 329, 753 N.W.2d 475 (citation omitted). The question is whether allegations in a complaint, on their face, trigger a duty to defend. Here, we are satisfied that they do.

¶33 While it was appropriate for West Bend to seek a bifurcated trial on the issue of coverage, it should not have refused to provide a defense to Kapinos prior to the coverage determination. *See* ***Bauman***, 286 Wis. 2d 667, ¶9 ("The insurer breaches its duty to defend if it refuses to provide a defense before the court decides the issue of coverage"). Because West Bend refused to provide a defense when coverage was "fairly debatable," we conclude that it breached its duty to defend. We therefore reverse the judgment in favor of West Bend and remand for further proceedings.

By the Court.—Judgments affirmed in part; reversed in part and cause remanded.

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