COURT OF APPEALS
DECISION
DATED AND FILED

October 27, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP77 **Cir. Ct. No. 2014CV174**

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

ADAM THOMPSON D/B/A THOMPSON INVESTMENTS AND A & M PLUMBING, INC.,

PLAINTIFF-APPELLANT,

V.

MUELLER TAX AND ACCOUNTING, INC.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Juneau County: JOHN P. ROEMER, JR., Judge. *Affirmed*.

Before Kloppenburg, P.J, Sherman, and Blanchard, JJ.

¶1 PER CURIAM. Adam Thompson, doing business as Thompson Investments, and A & M Plumbing, Inc. (collectively, "Thompson") appeals a judgment dismissing Thompson's accounting negligence action, filed in Juneau

County, against Mueller Tax and Accounting Inc. ("Mueller"). This Juneau County action ("the instant action") was preceded by a related, previously resolved action between the same parties in Waushara County ("the first action"). The circuit court dismissed the instant action, based on the nature of the first action, both under the doctrine of claim preclusion and because the instant action is a compulsory counterclaim arising out of the same transaction as the first action. On appeal, Thompson challenges only the determination regarding claim preclusion and not any separate aspect of the compulsory counterclaim determination. For the following reasons we affirm.

BACKGROUND

The First Action (Waushara County)

¶2 In October 2013, Mueller filed the first action in Waushara County as a small claims action.[1] Mueller sought payment for accounting services that Mueller alleged it had provided to Thompson. Thompson timely answered by way of a letter, which stated in its entirety:

> I, Adam Thompson[,] owner of A & M Plumbing and Pump Service LLC, am requesting that the case be dismissed due to the fact that the plaintiff solicited business with me in Juneau County via a business acquaintance reference, I did not go to them. I also dispute the charges[.] [F]or plaintiffs['] reference, a countersuit will follow regardless of the location of the lawsuit.

[1] The record in this appeal does not appear to contain a copy of the complaint in the first action. However, the circuit court in the instant action made a factual finding describing the nature of Mueller's claim in the first action, which Thompson does not dispute in this appeal.

¶3 In November 2013, on the "return date" for the defendant in the small claims proceeding, *see* WIS. STAT. §§ 799.05(1), 799.20(1), (4),[2] Thompson told the clerk that he planned to raise a venue challenge. Three days later, the Waushara clerk of court sent the parties notice of a telephone status conference to be held on December 4, 2013 at 10:15 a.m. Thompson's notice was inadvertently sent to an incorrect address. However, the wrongly addressed notice was returned to the clerk's office and the clerk resent it to Thompson at his correct address in advance of the hearing date.

¶4 Thompson failed to appear by telephone or in person at the December 4 hearing. Consequently, the court entered a default money judgment against Thompson, in favor of Mueller, in the amount of $7,254.74, including costs.

¶5 In a letter sent to the court a few days after the hearing, Thompson requested an order vacating the default judgment. In that letter, Thompson acknowledged that he had received the notice three days before the December 4 hearing, but represented that he had not opened the notice until December 4, and implied that this occurred too late for him to call in for the hearing. The court denied Thompson's request to vacate on the ground that there was "no basis for providing such relief." Thompson subsequently filed a formal motion to vacate the default judgment, which the court denied as "disingenuous," and undermined by a "lack of candor."

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶6 Thompson did not appeal the judgment in the first action.

The Instant Action (Juneau County)

¶7 In July 2014, Thompson filed the instant action in Juneau County, alleging accounting negligence. Thompson alleged that he employed Mueller from 2008 through 2012 to perform accounting services, including filing state and federal tax returns. In doing so, Thompson alleged, Mueller negligently committed errors in preparing tax returns, resulting in excess taxes paid, and requiring Thompson to hire a different accounting firm to prepare amended returns for tax years 2011 and 2012. Thompson sought relief that included $20,904 in payments that Thompson made to Mueller and $1,025 for expenses in refiling returns.

¶8 Mueller filed an answer to the complaint and a motion to dismiss on the grounds that "[t]he doctrine of claim preclusion and the common-law compulsory counterclaim rule both dictate that the plaintiffs should not get a second chance to litigate [in the instant action] that which was or could have been already litigated" in the first action. Thompson opposed this motion on various grounds.

¶9 In an oral decision, the circuit court concluded that Mueller proved that the elements of claim preclusion were met and that Thompson's negligence claim was a common-law compulsory counterclaim, with the result that Thompson was obligated to have brought the claim, if ever, in the first action. Accordingly, the court issued a judgment dismissing the instant action. Thompson now appeals.

DISCUSSION

¶10 We begin by noting a set of arguments that Thompson has abandoned on appeal. Thompson argues that not all elements of claim preclusion are met, and we address this argument below. However, he fails to argue that his claim in the second action was a permissive counterclaim, and not a common-law compulsory counterclaim. An action is to be barred in this context only if both of the following are true: (1) all the elements of claim preclusion are met; and (2) the claim was a common-law compulsory counterclaim, "because in Wisconsin, with this one narrow exception, counterclaims are permissive." *See* ***Wickenhauser v. Lehtinen***, 2007 WI 82, ¶32, 302 Wis. 2d 41, 734 N.W.2d 855. Thus, as an original matter, Thompson presumably could have presented us with an argument, going beyond his arguments challenging the claim preclusion elements, addressing those aspects of the common-law compulsory counterclaim rule that he has not already addressed as claim preclusion elements. In the circuit court, Thompson made somewhat oblique reference to the common-law compulsory counterclaim exception to the general rule allowing permissive counterclaims, but in his principal brief on appeal he addresses only the elements of claim preclusion. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998) ("in order for a party to have an issue considered by this court, it must be raised and argued within its brief"). Moreover, Thompson concedes the issue. After Mueller presents a developed argument in its responsive brief that any judgment in the instant action would nullify the judgment in the first action or impair rights established in the first action, Thompson fails to counter this argument in his reply brief. *See* ***United Coop. v. Frontier FS Coop.***, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (appellant's failure to respond in

reply brief to argument made in response brief may be taken as concession). This leaves only the issue of whether the elements of claim preclusion are met.

¶11 Claim preclusion operates as follows:

> """[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."""" Claim preclusion has three elements: "(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." Claim preclusion "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.'"

Menard, Inc. v. Liteway Lighting Products, 2005 WI 98, ¶26, 282 Wis. 2d 582, 698 N.W.2d 738 (emphasis in original, citations omitted). We now apply the three criteria to the first action and the instant action.

Identity Between Parties

¶12 Regarding the first criterion—that there is "an identity between the parties or their privies in the prior and present suits"—Thompson acknowledges that the parties are the same in the two actions.

Identity Between Causes of Action

¶13 Thompson contends that the second criterion—that there is "an identity between the causes of action in the two suits"—is not met. We now describe the legal standard and then explain why we conclude that this criterion is met and why we reject Thompson's argument on this issue.

¶14 Wisconsin "has adopted the 'transactional approach' from the Restatement (Second) of Judgments § 24 (1982)." ***Menard***, 282 Wis. 2d 582, ¶30. Under this approach, "all claims arising out of one transaction or factual situation are treated as being part of a single cause of action and they are required to be litigated together." ***Id.*** (quoted sources omitted). A transaction is considered to be "a natural grouping or common nucleus of operative facts." ***Id.*** (quoted source omitted). Under this approach, "it is irrelevant that 'the legal theories, remedies sought, and evidence used may be different between the first and second actions.'" ***Id.***, ¶32 (quoted source omitted). Claims are considered "in factual terms," and we are to generally disregard "the claimant's substantive theories or forms of relief," "the primary rights invaded," and "the evidence needed to support the theories or rights." ***Id.*** (quoted source omitted).

¶15 Applying this fact-based standard, we conclude that the first action and the instant action involve a "natural grouping" of one set of operative facts, namely, the accounting services and tax preparation that Mueller provided to Thompson under their agreement. Readily at issue in both actions were the obligations of the parties to fulfill their obligations under their agreement: for Mueller to provide particular services at some level of quality or care, and for Thompson to pay for those services. The two actions involve the same conduct by the same parties. Thompson does not suggest that much of the same evidence would not have been used by the parties in both actions, if each case had been fully litigated. Thompson fails to develop an argument that there was a difference in the time periods at issue in the two actions that could matter to the analysis.

¶16 A significant feature of the legal standard quoted above is that it does not matter that the first action sought a money judgment for accounting services and the instant action sought a money judgment for accounting

negligence, because the specific "legal theories, remedies sought, and evidence used may be different between the first and second actions," without regard to "substantive theories or forms of relief," "the primary rights invaded," and "the evidence needed to support the theories or rights." *See* ***id.*** (quoted source omitted).

¶17 Thompson's argument to the contrary is not well developed. He quotes a statement by our supreme court quoting the following Restatement comment: "The transactional approach to claim preclusion reflects 'the expectation that parties who are given the capacity to present their "entire controversies" shall in fact do so.'" *See* ***Kruckenberg v. Harvey***, 2005 WI 43, ¶¶27, 279 Wis. 2d 520, 694 N.W.2d 879 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 242(2), cmt. a. (1982)). Based on this comment, Thompson first asserts that he was "never given the capacity to present 'the entire controversy.'" However, this is not accurate. It is undisputed that Thompson had a full opportunity to address the entire controversy in the first action. He acknowledges that "the Waushara [Circuit] Court was within [its] statutory authority to enter a Default Judgment." The expectation expressed in ***Kruckenberg*** that parties will typically pursue all claims available to them in an action does not suggest that a default judgment cannot provide the basis for claim preclusion.

¶18 Thompson next flatly asserts that the two actions present "two distinct issues": the first action "strictly" involved "fees for services which were rendered," while the instant action "relates to Mueller's failure to file proper tax returns over a period of years which resulted in an overpayment of income taxes by Thompson for which he seeks recovery from Mueller." This assertion does not even begin to explain why we should not conclude that, under the "'pragmatic' view of what constitutes a transaction," discussed in ***Menard***, the circumstances

here are analogous to those in ***Menard***. ***Menard***, 282 Wis. 2d 582, ¶41. Without going into the details of that case, it is sufficient to note that the court there concluded, "In the end, both suits raise the single issue of how much money [the second suit plaintiff] owed [the second suit defendant] for the goods that [the second suit defendant] sold to [the second suit plaintiff] on credit." *See* ***id.***, ¶39.

¶19 For these reasons, we conclude that there is an identity between the causes of action in the first action and the instant action.

Final Judgment

¶20 Thompson argues that the third criterion—that there was "a final judgment" in the first action "on the merits in a court of competent jurisdiction"—was not met here. This argument has no merit.

¶21 Our supreme court has categorically held that "a default judgment is a final judgment for purposes of claim preclusion." ***Id.***, ¶29 (citation omitted). Thompson argues that ***Menard*** is distinguishable because the default at issue in ***Menard*** resulted from a party's failure to file an answer, and here the default in the first action was a sanction for failure to appear at a status conference. However, Thompson fails to provide a rationale, based on any statement in ***Menard*** or any other authority, that could justify limiting the categorical rule of ***Menard*** based on this factual difference.

¶22 Although not well developed as an argument, Thompson suggests that, because the circuit court did not explicitly state in its order dismissing the first action that it was an adjudication on the merits, it was not a final judgment for purposes of claim preclusion analysis. However, he provides no authority for this

argument, including any basis for us to conclude that the categorical statement in ***Menard*** is not controlling here.

¶23 Thompson suggests that entering a default judgment in the first action was not "just." This apparent challenge to the first action is undeveloped and appears to have multiple defects. It is sufficient for our purposes to observe that Thompson fails to explain why a challenge to the default judgment in the first action, which he did not appeal, should be deemed timely when argued in this appeal.

By the Court.—Judgment affirmed.

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