COURT OF APPEALS
DECISION
DATED AND FILED

September 17, 2014

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 Nos. 2012AP2676
2013AP1489

Cir. Ct. Nos. 2008CV556
2012CV663

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

WOODFORD STATE BANK,

PLAINTIFF-RESPONDENT,

V.

ROBIN ZAHRAN AND KAREN A. ZAHRAN,

DEFENDANTS-APPELLANTS,

PRUDENTIAL INSURANCE COMPANY OF AMERICA, MANITOWOC COUNTY CLERK OF CIRCUIT COURT AND MARJAN KMIEC, D/B/A KMIEC LAW OFFICE,

DEFENDANTS.

ROBIN ZAHRAN AND KAREN ZAHRAN,

PLAINTIFFS-APPELLANTS,

V.

THOMAS ROWE, SCOTT DENURE, CHARLES R. WELLINGTON, ANN USTAD SMITH AND DANIEL W. STOLPER,

DEFENDANTS-RESPONDENTS.

APPEALS from orders of the circuit court for Manitowoc County: JEROME L. FOX and ANGELA W. SUTKIEWICZ, Judges. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. These consolidated cases arise out of a foreclosure action commenced against Robin and Karen Zahran. The Zahrans appeal pro se from an order denying their motions for reconsideration of the foreclosure judgment entered against them. They also appeal from an order dismissing their subsequent complaint against various parties allegedly involved in obtaining the foreclosure judgment. For the reasons that follow, we affirm.

¶2 In March 2006, Woodford State Bank made a loan to the Zahrans that was secured by a mortgage on real estate in Manitowoc County. Woodford's mortgage was junior to the first mortgage of Prudential Insurance Company of America.

¶3 In 2007, the Zahrans defaulted on the loan to Woodford, and Woodford filed a foreclosure action. The circuit court entered a foreclosure judgment against the Zahrans on January 27, 2009.

¶4 The Zahrans and Woodford subsequently entered into a forbearance agreement regarding the foreclosure judgment. The agreement required, among other things, that the Zahrans stay current on their loan with Prudential. It also included the following language waiving potential claims against Woodford:

> Zahran waives any deficiencies by Woodford (which Woodford disputes) regarding the application of Regulation Z to Zahran's indebtedness to Woodford or any other claim by Zahran to the effect that the initial loan, or any renewal thereof, came under the purview of Regulation Z or that Woodford, by commission or omission, failed to meet any

> requirements under Federal or State law relating to the implementation, processing or administration of said loan.

Finally, the agreement allowed Woodford to file an affidavit of nonperformance with the circuit court to reinstate the foreclosure judgment upon default. Based on the foregoing, the circuit court vacated the foreclosure judgment.

¶5 Following a default by the Zahrans on their loan with Prudential, Woodford moved to reinstate the foreclosure judgment. The circuit court granted the motion and reinstated the judgment on April 1, 2010.

¶6 In an effort to give the Zahrans another opportunity to repay their loan, Woodford entered into a second forbearance agreement with them. Again, the agreement allowed Woodford to file an affidavit of nonperformance with the circuit court to reinstate the foreclosure judgment upon default. Furthermore, the Zahrans agreed "not to make any objection or challenge to the reinstatement of said judgment should they default on any of their obligations set forth above." Based on the foregoing, the circuit court again vacated the foreclosure judgment.

¶7 Several months later, the Zahrans entered into a similar agreement with Prudential to modify the terms of their mortgage. That agreement included the following language releasing any and all claims against Prudential and its attorneys:

> 14. **Release**. Effective upon the execution of this Agreement, the Borrower hereby releases, acquits and forever discharges Lender and Prudential, their subsidiaries, affiliates, officers, directors, agents, employees, servants, attorneys and representatives, as well as the respective heirs, personal representatives, successors and assigns of any and all of them hereinafter (collectively, the "Released Party"), from any and all claims, demands, debts, actions, causes of action, suits, contracts, agreements, obligations, accounts, defenses, offsets against the amounts owed and liabilities of any kind or nature

> whatsoever, known or unknown, suspected or unsuspected, in contract or in tort, at law or in equity including without implied limitation, such claims and defenses as fraud, mistake, duress, lender liability and usury which the Borrower ever had, now has or might hereafter have against the Released Party for or by reason of any matter, cause or thing whatsoever occurring before today's date which relates in whole or in part directly or indirectly:
>
> a. to the Loan from Prudential or Lender to Borrower;
>
> b. to the lending relationship between Prudential or Lender and the Borrower; and
>
> c. to any promise or alleged promise made by the Released Party to the Borrower.
>
> In addition, the Borrower will not commence, join in, prosecute or participate in any suit or other proceedings in a position that is adverse to the Released Party, arising directly or indirectly from any of the foregoing matters.

¶8 Following yet another default by the Zahrans, Woodford moved for reinstatement of the foreclosure judgment. The circuit court granted the motion and reinstated the judgment on September 13, 2012.

¶9 The Zahrans did not timely appeal from the reinstatement of the foreclosure judgment[1] but rather filed motions for reconsideration. The circuit court denied the motions in an order entered November 21, 2012. The Zahrans appealed that order.

¶10 The Zahrans also filed a separate complaint attacking the foreclosure judgment and various parties allegedly involved in obtaining it, including

[1] Contrary to the Zahrans' assertion, the September 13, 2012 reinstatement of the foreclosure judgment was a final, appealable order. Because they did not timely appeal from it, we do not consider arguments relating to it now.

Woodford, its officers and attorneys, and the attorneys for Prudential.[2] The defendants filed motions to dismiss the complaint. The circuit court granted the motions in an order entered July 26, 2013. The Zahrans appealed that order as well.

¶11 This court subsequently consolidated the Zahrans' appeals for purposes of briefing and disposition.

¶12 In this case, we are asked to review two circuit court orders: an order denying motions for reconsideration[3] and an order granting motions to dismiss. We review a circuit court's decision on a motion for reconsideration for an erroneous exercise of discretion. ***Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.***, 2004 WI App 129, ¶6, 275 Wis. 2d 397, 685 N.W.2d 853. Meanwhile, we review a circuit court's decision on a motion to dismiss de novo. *See* ***Northbrook Wis., LLC v. City of Niagara***, 2014 WI App 22, ¶28, 352 Wis. 2d 657, 843 N.W.2d 851.

¶13 On appeal, the Zahrans first contend that the circuit court erred in denying their motions for reconsideration. We disagree.

¶14 To prevail on a motion for reconsideration, a "movant must present either newly discovered evidence or establish a manifest error of law or fact."

[2] The Zahrans' complaint alleged seventeen counts against nine defendants. The causes of action included fraud, conspiracy, abuse of process, breach of contract, defamation, rescission, slander of title, interference in contract, violations of various consumer protection laws, violations of various government regulations, and racketeering.

[3] We conclude that the order denying the motions for reconsideration is appealable because the motions presented new issues not addressed in the foreclosure judgment. *See* ***Silverton Enter., Inc. v. General Cas. Co. of Wis.***, 143 Wis. 2d 661, 665, 422 N.W.2d 154 (Ct. App. 1988).

Koepsell's, 275 Wis. 2d 397, ¶44. The circuit court correctly cited this legal standard in its decision. It then explained why the Zahrans' motions fell short of this standard, describing them as a "hodge-podge of complaints consisting of little more than conclusory accusations unsupported by any legally significant facts and without any basis in law." The record supports the court's description of the motions. Accordingly, we conclude that the court properly exercised its discretion in denying them.

¶15 The Zahrans next contend that the circuit court erred in granting the defendants' motions to dismiss their complaint. Again, we disagree.

¶16 There are at least two reasons why dismissal was appropriate. First, the Zahrans were barred from bringing their complaint by the terms of their contractual agreements with Woodford and Prudential cited above. Second, they were barred from bringing their complaint by the doctrine of claim preclusion.

¶17 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) (citation 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.

¶18 Here, the facts meet these three elements. First, an identity between the parties exists in the prior and subsequent suits. The Zahrans, Woodford, and Prudential were parties in the prior foreclosure action. Although the officers and

attorneys of Woodford and Prudential were not named in that suit, they were in privity for claim preclusion purposes. *See, e.g.*, ***Henry v. Farmer City State Bank***, 808 F.2d 1228, 1235 n.6 (7th Cir. 1986).

¶19 Second, an identity between the causes of action exists in the prior foreclosure action and subsequent suit. Both cases arise out of the 2006 loan made to the Zahrans by Woodford and Woodford's attempts to originate, renew, and collect on the loan and to foreclose on the property securing it. In other words, the factual allegations in both actions are all part of a common nucleus of operative facts surrounding the debt owed and prior foreclosure action. *See* ***Kruckenberg v. Harvey***, 2005 WI 43, ¶¶25-26, 279 Wis. 2d 520, 694 N.W.2d 879 (whether there is an "identity between the causes of action" is determined using the transactional approach, asking whether there is a common nucleus of operative facts).

¶20 Third, a final judgment was entered against the Zahrans on the merits in the prior foreclosure action. The fact that the Zahrans did not timely appeal from that judgment is immaterial for claim preclusion purposes. There is no requirement that the appeals process be exhausted before a judgment becomes final and has preclusive effect.

¶21 We recognize that the Zahrans were defendants in the prior foreclosure action and did not initiate that suit. However, claim preclusion may operate to preclude a party from asserting claims in a subsequent action that the party failed to assert in an action in which it was a defendant. 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.

¶22 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 in which it was a defendant. ***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 [A.B.C.G. Enterprises] 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 [A.B.C.G. Enterprises] 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. Enterprises was barred from bringing its suit. ***Id.***

¶23 The same is true here. A judgment in favor of the Zahrans in their subsequent action would directly undermine the prior foreclosure judgment. Accordingly, we conclude that the Zahrans were barred from bringing their complaint.

¶24 For the reasons stated, we affirm the orders of the circuit court.[4]

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

[4] To the extent we have not addressed an argument raised by the Zahrans on appeal, the argument is deemed rejected. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").