COURT OF APPEALS
DECISION
DATED AND FILED

March 17, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1624

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

MICHAEL G. PLOURDE AND
JANET L. PLOURDE,

PLAINTIFFS-APPELLANTS,

V.

JEFFREY W. GUETTINGER, DENNIS M.
SULLIVAN AND NORWEST BANK
WISCONSIN EAU CLAIRE, N.A.,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Eau Claire County: BENJAMIN D. PROCTOR, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

PER CURIAM. Michael and Janet Plourde appeal a summary judgment that dismissed their lawsuit claiming fraud against Norwest Bank Wisconsin Eau Claire, N.A., and its lawyers. The trial court dismissed the lawsuit,

ruling that the Plourdes were precluded from raising this claim by their failure to do so earlier when Norwest moved for summary judgment based on the Plourdes' default on this and other bank loans in a mortgage foreclosure case. On appeal, the Plourdes argue that the trial court misconstrued the mortgage foreclosure case as having litigated their fraud claim on Norwest's $27,000 collection effort. For various reasons, including what they perceive as our recognition in the mortgage foreclosure appeal[1] of this claim's viability, *see* ***Norwest Bank v. Plourde***, 185 Wis.2d 377, 518 N.W.2d 265 (Ct. App. 1994), they believe that this claim survived the summary judgment in the mortgage foreclosure case and forms the basis for a subsequent lawsuit claiming fraud. We conclude that the doctrine of claim preclusion bars the Plourdes' fraud lawsuit. We therefore affirm the trial court's summary judgment.

The Plourdes entered into several loan agreements with Norwest. One of these was in the amount of $27,000, which the Plourdes and Norwest had designated for a building permit from the City of Hudson for a twenty-four-unit apartment complex. The bank paid this sum to an escrow agent, who deposited the check into his own account at his savings bank. The agent then drew but left in his files a new check on that account payable to the City of Hudson. Meanwhile, the drawee bank failed and came under the control of the Resolution Trust Corporation; neither the Plourdes nor the city ever received the $27,000. The Plourdes' fraud lawsuit claimed that this nonreceipt, of which Norwest knew, relieved them of liability for the $27,000. In their view, Norwest perpetrated a

[1] The issue of claim preclusion was not raised in the first appeal. This court did not endorse the merits or viability of the Plourdes' fraud claim, but merely observed that their allegations constituted a claim upon which relief could be granted.

fraud on them and the mortgage foreclosure court when it dishonestly sought to collect the $27,000 sum in the foreclosure case.

The mortgage foreclosure case concerned other Plourde properties and loans in addition to the Hudson twenty-four-unit apartment project. Norwest's summary judgment affidavit in the foreclosure case claimed that the Plourdes defaulted on several loans, including the Hudson loan; the Plourdes never filed a counteraffidavit denying Norwest's assertion that they were obligated on this loan and that it was past due. They never asserted in summary judgment proofs that they did not receive the $27,000. Rather, they cited other issues involving what amounted to Norwest's alleged misconduct and bad faith in the loans' administration, including its failure to advance the Plourdes loan moneys other than the $27,000. On that record, the mortgage foreclosure court expressly disposed of all issues regarding the loans' default, except for a few of Plourdes' defenses[2] that the court characterized as tort and contract duties.

The doctrine of claim preclusion bars litigation of all claims that were or could have been asserted in previous litigation. ***Lindas v. Cady***, 183 Wis.2d 547, 558-59, 515 N.W.2d 458, 463 (1994). The Plourdes do not suggest that they could not have interjected their fraud claim in response to the summary judgment motion in the foreclosure action, and we independently see no reason why they could not deny that they were obligated for the $27,000 on the basis of nonreceipt of the money or its benefit. Instead, they pursued other tacks. Thus, when Norwest moved for summary judgment of foreclosure, filed an affidavit

[2] Read in context, the defenses the court was referring to were those concerning whether the bank had contributed to the default by administering the various loans in a tortious, bad faith way, including its failure to advance loan moneys other than the $27,000. They did not include the claim at issue here.

averring that the $27,000 was due and owing and the Plourdes did not contest this averment with their own affidavit, they became foreclosed by claim preclusion from now denying the loan *was* due and owing. This final adjudication precludes the Plourdes from claiming that the bank had perpetrated a fraud on them and the court in trying to dishonestly collect a debt for an undelivered sum. If the Plourdes wanted to claim they never received the $27,000, they needed to expressly raise that claim in response to the bank's summary judgment motion in the mortgage foreclosure case.

By the Court.—Judgment affirmed.

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