COURT OF APPEALS
DECISION
DATED AND FILED

DECEMBER 10, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2200-FT

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

PEKAY SPECIALTY CONTRACTING, INC.,

PLAINTIFF-APPELLANT,

V.

MADSON TILING & EXCAVATING, INC.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Calumet County: DONALD A. POPPY, Judge. *Affirmed.*

ANDERSON, J. Pekay Specialty Contracting, Inc. appeals from a judgment dismissing its small claims complaint against Madson Tiling & Excavating, Inc. Pekay appeals the trial court's finding that Madson's answer was timely filed and that the court's previous order for default judgment was in error. Pekay further questions the trial court's grant of summary judgment

in favor of Madson based on claim preclusion. Because we agree with the trial court's conclusions, we affirm.

In April 1994, Pekay agreed to remove silage from, and then dismantle, several Harvestor silos located at Clover Mist Farms. Pekay hired Madson for the silage removal. Madson did remove the silage; however, Pekay alleges that the operator caused damage to the silos. Madson billed Pekay for thirty-five hours of work; the bill went unpaid.

After correspondence between the parties,[1] Madson filed a small claims action in Manitowoc county seeking payment for services rendered, plus interest, in the amount of $2891. Pekay failed to appear and default judgment was entered in the amount of $3002. Pekay satisfied the judgment.

Subsequently, on June 21, 1996, Pekay filed a small claims action against Madson seeking $5000 in money damages. Pekay alleged that:

> We contracted Madson Tiling to remove feed from Harvestore silos with a high hoe excavator which Madson Tiling did, however in doing so they greatly damaged the silo structures through reckless use of their equipment around our customer's silos. They dented & damaged a total of 38 sheets, they were told several times about the care that needed to be taken so as not to damage the sheets. Their bill was $2600. I reported the damage to them and made an appointment to see them regarding our bill and the damage, but they canceled. Eventually they got an attorney … who sued us for a total of $3002 and guaranteed us that

[1] In a letter dated February 16, 1995, Madson demanded payment for the silage removal. Joel Portmann, president of Pekay, responded that "[Madson] damaged the [Harvestore silos] in excess of the $2,639.35 which they billed us. Clover Mist Farms is holding us responsible for this damage and we intend to hold Madson responsible." In a letter dated March 13, 1995, Madson questioned its liability for damages to the silos. The letter indicated, "You can feel free to make your claim against his insurance company … Rural Insurance. In any event, kindly send a check to me in the amount of $2,639.35. What you do with the insurance company is your business."

> if we paid it Madson Insurance Company would pay for the damage. We paid the total bill and after much time & effort we got in touch with their claims adjuster who stated they had no insurance for this type of damage.
>
> Our customer has held us responsible for the damages costing us in excess of $5000 demanding that all sheets with damage from the excavator be replaced.

On the return date, Madson did not appear in court. The court initially ordered default judgment to Pekay; however, "when the Clerk's office notified [the court] that a faxed answer had been received … the Court simply ordered that the matter be set for further proceedings … with notices to be mailed to all parties." This was explained to both parties at the October 8, 1996 pretrial conference.

Madson then moved for dismissal of Pekay's claims on the grounds of claim preclusion. The December hearing was postponed to allow Pekay's newly-retained counsel to respond to the motion. Pekay then filed a motion for written judgment and Madson filed a motion to reopen default judgment and/or to vacate technical default. At the hearing, the circuit court found that Madson filed a timely answer to Pekay's complaint and withdrew the default judgment entered on July 16, 1996. As a result, the court denied Pekay's motion for default judgment in writing. The court also concluded that Pekay's complaint was barred by the doctrine of claim preclusion and consequently granted Madson's motion to dismiss. Pekay appeals.

Motion to Reopen

Pekay first questions the trial court reopening the action after its order for default judgment. Pekay maintains that it did not have notice of the motion to reopen and that the court's reasons do not constitute sufficient cause to reopen the default judgment. We disagree.

Section 799.29(1), STATS., controls motions to reopen default judgments. The statute provides: "There shall be no appeal from default judgments, but the trial court, may, by order, reopen default judgments upon notice and motion or petition duly made and good cause shown." Section 799.29(1)(a).

Contrary to Pekay's contention, notice was provided. After Pekay was granted an initial default judgment, a faxed answer by Madson was received by the circuit court (an answer via mail was also received). The court ordered that the matter be set for further proceedings, specifically, a pretrial conference with notices mailed to all parties. At the March 18, 1997 hearing, the circuit court found that Madson had timely filed an answer to Pekay's small claims complaint via mail.[2] The court concluded that "service was made when mailed … and that default judgment should not have been entered …." A circuit court's findings shall not be set aside unless clearly erroneous. *See* § 805.17(2), STATS. The court's finding is supported by the record, and therefore, we affirm the court's denial of Pekay's motion for written default judgment.

Claim Preclusion

Pekay also seeks review of the circuit court's grant of summary judgment dismissing its complaint based on claim preclusion. We review summary judgment de novo, applying the same standards as the trial court. *See* ***Voss v. City of Middleton***, 162 Wis.2d 737, 748, 470 N.W.2d 625, 629 (1991).

[2] Chapter 799, STATS., does not specifically address an answer served by mail. Accordingly, all provisions of chs. 801 to 847, STATS., apply. *See* § 799.12(1), STATS. Section 801.14(2), STATS., provides that "[s]ervice by mail is complete upon mailing ... [and] [s]ervice by facsimile is complete upon transmission." Section 799.12(2) and (3) allows for service of the summons by mail except in eviction actions.

Summary judgment is proper when the pleadings, answers, admissions and affidavits show no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See* ***id.***

Before claim preclusion can be applied here, it is necessary to determine whether Pekay was required to have brought its cause of action as a counterclaim in the initial contract action in Manitowoc. We conclude that the exception to the permissive nature of counterclaims does not apply.

In ***A.B.C.G. Enterprises, Inc. v. First Bank Southeast, N.A.***, 184 Wis.2d 465, 474, 515 N.W.2d 904, 907 (1994), our supreme court acknowledged a common law compulsory counterclaim rule founded upon principles of claim preclusion as an exception to the general permissive counterclaim statute. The court declared:

> [I]n limited circumstances, failure to raise such counterclaims in a prior action bars related claims from being raised in a subsequent action. The application of this common law rule is narrow: the rule applies only if a favorable judgment in the second action would nullify the judgment in the original action or impair rights established in the initial action.

Id. at 476-77, 515 N.W.2d at 908.

Here, there is no nullification or impairment of rights. Pekay's claim for reimbursement from the alleged tortfeasor, Madson, if successful, would do nothing to nullify or impair the rights of Madson to the $3000 award for services rendered. Thus, the explicit limitation of the ***A.B.C.G.*** rule is not met.

Nevertheless, Pekay's complaint may still be barred under the doctrine of claim preclusion. Under 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." ***DePratt v. West Bend Mut. Ins. Co.,*** 113 Wis.2d 306, 310, 334 N.W.2d 883, 885 (1983); *see also* ***Northern States Power Co. v. Bugher***, 189 Wis.2d 541, 550, 525 N.W.2d 723, 727 (1995). In order for an earlier proceeding to bar subsequent claims under claim preclusion, the following factors must be present: "(1) an identity between the parties or their privies in the prior and present suit; (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." ***Northern,*** 189 Wis.2d at 551, 525 N.W.2d at 728. Whether claim preclusion applies to a case is a question of law that we review de novo. *See* ***Lindas v. Cady***, 183 Wis.2d 547, 552, 515 N.W.2d 458, 460 (1994).

In this case, the parties are the same as in the Manitowoc action. We conclude that there is an identity of parties.

In addition, the Manitowoc action was disposed of by entry of default judgment in favor of Madson. The conclusiveness of a default judgment "'is limited to the material issuable facts which are well pleaded in the declaration or complaint. The judgment does not extend to issues which were not raised in the pleadings.'" ***A.B.C.G.***, 184 Wis.2d at 481, 515 N.W.2d at 910 (quoted source omitted); *see also* ***Mitchell v. Jones***, 342 P.2d 503, 506-07 (Cal. Dist. Ct. App. 1959) (default judgment is res judicata as to all issues aptly pleaded in the complaint, and defendant is estopped to deny in a future action any allegation contained in the former complaint).

Our analysis focuses on whether there is an identity between the causes of action asserted in the two suits. Wisconsin uses a transactional approach to determine whether two suits involve the same action. *See* ***Northern***, 189

Wis.2d at 553, 525 N.W.2d at 728. "'Under this analysis, 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.'" ***A.B.C.G.***, 184 Wis.2d at 481, 515 N.W.2d at 910. "In determining if the claims of an action arise from a single transaction, we may consider whether the facts are related in time, space, origin, or motivation." ***Id.***

Keeping within the transactional analysis framework and the restrictions upon default judgments, we conclude that there is an identity of causes of action between Pekay's claims and the prior contract action. Both actions arise from Pekay's agreement with Clover Mist Farms to remove the silage from, and then dismantle, the silos. Madson originally brought a small claims action against Pekay seeking payment for removal of silage in the amount of $3002. Default judgment was entered against Pekay. After Pekay paid off the judgment, it sought money damages from Madson for damage Madson allegedly caused to the silos during its removal of the silage. The circumstances of Madson's excavation of the silage, as well as Madson's alleged damage to the silos, and Pekay's disassembling of the silos are inextricably intertwined as part of one transaction.

Pekay maintains that this action is one of tort and Madson's was based in contract. However, "the transactional view of claim preclusion requires 'the presentation in the action of all material relevant to the transaction without artificial confinement to any substantive theory or kind of relief ….'" ***Northern***, 189 N.W.2d at 555, 525 N.W.2d at 729 (quoted source omitted). If there are a number of theories or approaches which may support a party's claim to relief arising from the same factual underpinnings, they must be brought in the same action or be barred from future consideration. *See* ***id.*** Because the basis for Pekay's claim for contribution from Madson for damage to the silos was known at

the time of the Manitowoc action and could have been the subject of further investigation, the issue could have been fully litigated in that case. We conclude that claim preclusion is satisfied here, and that the trial court did not err in granting Madson summary judgment.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.