COURT OF APPEALS
DECISION
DATED AND FILED

November 3, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1443-FT

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

UNI-GENERAL CORPORATION, A WISCONSIN CORPORATION,

PLAINTIFF-APPELLANT,

V.

CENTURY 21 GREAT AMERICAN HOMES, INC. AND GREAT AMERICAN HOMES, A MAURER-CHRISTENSEN CORPORATION,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Outagamie County: JOSEPH M. TROY, Judge. *Reversed and cause remanded.*

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

PER CURIAM. Uni-General Corporation appeals a summary judgment dismissing its claim against Century 21 Great American Homes, Inc.,

and Great American Homes, a Maurer-Christensen Corporation.[1] Uni-General argues that the trial court erroneously applied the doctrines of issue preclusion and laches to bar its action on its promissory note. Because the two corporations were not parties to the contract giving rise to the previous arbitration proceedings, we agree. Therefore, we reverse the summary judgment and remand for further proceedings.

On January 18, 1991, Kim Maurer and Dawn Christensen entered into a stock purchase agreement to buy Century 21 Great American Homes, Inc., stock from Helen Cassiani. The stock purchase agreement contained the following arbitration clause:

> 9.11 Arbitration. Any and all disputes arising between the parties related to this Agreement or any document or instrument executed pursuant to this Agreement shall be submitted by the parties to and be decided by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association in effect at the time of the dispute unless the parties mutually agree otherwise. Demand for arbitration shall be filed in writing with the other party and with the American Arbitration Association. Demand for arbitration shall be made within a reasonable time after the claim, dispute or other matter in question has arisen. In no event shall the demand for arbitration be made after the date when institution of legal or equitable proceedings based on such claim, dispute or other matter in question would be barred by the applicable statutes of limitations.

The agreement further provided that the purchase price be paid with a promissory note from Maurer and Christensen to Cassiani. On July 25, 1991, the parties amended their agreement to provide that Century 21 Great American Homes, Inc., execute a promissory note to pay Uni-General, a company Cassiani

[1] This is an expedited appeal under RULE 809.17, STATS.

owned, the sum of $244,855. Maurer and Christensen executed a personal guaranty providing that they would personally guarantee payment of Century 21's obligations under the promissory note. The amendment also required Maurer and Christensen to execute a promissory note to Cassiani in the sum of $12,645.

Century 21 defaulted on its promissory note. Uni-General and Cassiani filed a demand for arbitration pursuant to the stock purchase agreement. On February 11, 1994, on the basis of the personal guaranties, the arbitrator entered an award against Maurer and Christensen and in favor of Uni-General for the sum due and owing on the note. Cassiani was awarded the sum due on the note from Maurer and Christensen.

On February 24, Uni-General and Cassiani sued Maurer and Christensen to confirm the award pursuant to § 788.09, STATS. The court entered a judgment of confirmation. Shortly thereafter, Maurer and Christensen filed personal bankruptcies.

On December 30, 1996, Uni-General filed this action against Century 21 Great American Homes, Inc., alleging that it had defaulted on its promissory note. The complaint also named as a defendant Great American Homes, a Maurer-Christensen Corporation, and alleged that it was a successor corporation of Century 21 Great American Homes, Inc., thereby becoming liable on the note.

The trial court granted the corporations' motion for summary judgment. It ruled that Uni-General's claims "could obviously have been litigated in the underlying arbitration and subsequent circuit court case to enforce the arbitration." As a result, "on a theory of issue preclusion and laches" the trial court granted summary judgment of dismissal.

When reviewing a summary judgment, this court applies the same standards set forth in § 802.08, STATS., as the trial court. ***Griebler v. Doughboy Recreational Inc.,*** 160 Wis.2d 547, 559, 466 N.W.2d 897, 902 (1991). Our review is de novo. *See* ***id***. at 555, 466 N.W.2d at 900. Summary judgment is granted when there is no dispute of material fact and the moving party is entitled to judgment as a matter of law. ***Id***. at 559, 466 N.W.2d at 902. Whether the claim is barred on grounds of claim or issue preclusion presents a question of law that we review without deference to trial court. ***Mayonia M.M. v. Keith N.***, 202 Wis.2d 460, 464, 551 N.W.2d 31, 33 (Ct. App. 1996).[2]

Arbitration "is an informal process where the parties have bargained to have a decision maker who is not restricted by the formalistic rules that govern courtroom proceedings." ***Dane Co. v. Dane Co. Union Local 65***, 210 Wis.2d 267, 278, 565 N.W.2d 540, 545 (Ct. App. 1997). "Arbitration is also designed to bring an end to controversy." ***Id***. at 279, 565 N.W.2d at 545. "Essential to arbitration remaining useful is the elementary principle that the doctrines of res judicata and collateral estoppel are applicable to arbitration awards." ***Manu-Tronics, Inc. v. Effective Managements Systems***, 163 Wis.2d 304, 311, 471 N.W.2d 263, 266 (1991). Recently, the supreme court has clarified the doctrine of res judicata, which it renamed "claim preclusion," and the doctrine of collateral estoppel, which it renamed "issue preclusion." ***NSP v. Bugher***, 189 Wis.2d 541, 549, 525 N.W.2d 723, 727 (1995).

[2] We acknowledge authority that holds that in certain circumstances the application of the doctrine of issue preclusion is discretionary. ***Ambrose v. Continental Ins.,*** 208 Wis.2d 346, 349-50, 560 N.W.2d 309, 311 (Ct. App. 1997). Here, however, both parties agree that the issue is one of law.

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." ***Id***. at 550, 525 N.W.2d at 727 (citations omitted). In order for the earlier proceedings to act as a claim-preclusive bar in relation to the present suit, the following factors must be present: (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 550-51, 525 N.W.2d 727.

"Issue preclusion refers to the effect of a judgment in foreclosing relitigation in a subsequent action of an issue of law or fact that has been actually litigated and decided in a prior action." ***Id***. at 550, 525 N.W.2d at 727. Unlike claim preclusion, identity of parties is not required in issue preclusion. ***Id***. at 550-51, 525 N.W.2d at 727. "Issue preclusion is a narrower doctrine than claim preclusion and requires courts to conduct a 'fundamental fairness' analysis before applying the doctrine." ***Id***. at 551, 525 N.W.2d at 727. Under this fundamental fairness analysis, "courts consider an array of factors in deciding whether issue preclusion is equitable in a particular case." ***Id***. Offensive issue preclusion occurs when the plaintiff seeks to foreclose a defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party. Defensive use occurs when a defendant seeks to prevent a plaintiff from asserting a claim that the plaintiff has previously litigated and lost against another defendant. ***Mayonia M.M.***, 202 Wis.2d at 468-69, 551 N.W.2d at 34-35.

We conclude that neither claim nor issue preclusion applies.[3] There is nothing in the arbitration clause to indicate that the corporations were made parties. Because neither Century 21 Great American Homes, Inc., nor Great American Homes, a Maurer-Christensen Corporation were parties to the stock purchase agreement, they were was not subject to the arbitration process. *See* ***Scholl v. Lundberg***, 178 Wis.2d 259, 264, 504 N.W.2d 115, 117 (Ct. App. 1993) ("It is axiomatic that the disputing parties must be bound by a contract to arbitrate before an arbitrator has any authority to act."). The promissory note Century 21 Great American Homes, Inc., signed also is silent with respect to any obligation on the part of the corporation to arbitrate. The corporations offer no authority for their proposition that the arbitration clause in a contract binds them as nonparties to the contract. Because the contract that defined the parties' obligations to one another did not include the corporations in the arbitration process, they were not required to and did not participate.

As a result, the arbitration award was binding only against Maurer and Christensen. Consequently, when confirmation of the award was sought pursuant to § 788.09, STATS., the proper party defendants were Maurer and Christensen. *See* ***id***. Accordingly, Century 21 Great American Homes, Inc.'s, liability on the note was not a matter that might have been subject to the former arbitration process or the ensuing litigation to confirm the award. Therefore, the judgment confirming the award is not conclusive between Uni-General and Century 21 Great American Homes, Inc., and Great American Homes.

[3] Although the trial court did not address the issue of claim preclusion, Century 21 Great American Homes, Inc., raised the issue at the trial level and argues it on appeal. Because our review is de novo, we address the issue.

Century 21 and Great American Homes argue that Uni-General chose not to assert any claims against them for merely strategic reasons. It claims that Uni-General "admitted" in its affidavit that "it could have brought claims" against the two corporations but "consciously chose not to." (Emphasis in original.) This argument mischaracterizes the affidavit. The referenced affidavit states that Uni-General decided not pursue claims against Century 21 Great American-Homes, Inc., because Maurer stated the company had no value, and they decided not to pursue claims against Great American Homes because it was not a party to any of the agreements requiring arbitration. The affidavit nowhere admits that Uni-General could have brought the corporations into the arbitration process. Although Uni-General could have brought a lawsuit against the two corporations, it would have had to initiate it as a separate action.

The two corporations also argue that the present claims against them should have been brought in the first action "since the issue in the first action was whether any third parties were liable for the debt of Great American; whether such third parties are guarantors or successor corporations." We are unpersuaded. No citation to the record accompanies this argument. Our review of the record indicates that the earlier proceedings were strictly limited to arbitration of the guarantors' liability. This argument ignores the fact that the two corporations were not parties to the stock purchase agreement and therefore were not subject to the arbitration process. As a result, this argument must fail.[4]

[4] The corporations also argue that Uni-General's claim is improperly brought because the dispute is subject to the arbitration agreement. This argument is apparently brought for the first time on appeal. In any event, it fails to address the issue that neither corporation was a party to the stock purchase agreement. It is also unaccompanied by any legal authority for the proposition that the arbitration clause binds nonparties. Therefore, this argument is rejected.

Finally, we conclude that the doctrine of laches does not apply. The two corporations rely on ***Schneider Fuel & Supply Co. v. West Allis State Bank***, 70 Wis.2d 1041, 1053, 236 N.W.2d 266, 272 (1975), that states:

> To successfully assert the defense of laches it must be established that there exists: (1) unreasonable delay, (2) lack of knowledge on the part of the party asserting the defense that the other party would assert the right on which he bases his suit, and (3) prejudice to the party asserting the defense in the event the action is maintained.

Here, the arbitration award was confirmed in 1994, and not long thereafter, Maurer and Christensen filed personal bankruptcies. In 1996, Uni-General filed the instant action. Laches was developed in equity to prevent the assertion of stale claims. *See* ***Andersen v. Kojo***, 110 Wis.2d 22, 26-27, 327 N.W.2d 195, 197 (Ct. App. 1982). We conclude that this interval does not constitute an unreasonable delay that would justify the application of laches to bar the claim.

Because the doctrines of laches, claim and issue preclusion do not apply, we reverse the summary judgment of dismissal. We decline Uni-General's invitation to enter a partial summary judgment in its favor and remand for further proceedings.

By the Court.—Judgment reversed and cause remanded.

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