COURT OF APPEALS
DECISION
DATED AND FILED

October 3, 2017

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 No. 2016AP1448 **Cir. Ct. No. 2012CV755**

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

HELMER E. HANSON LIVING TRUST (RANDI L. OSBERG, TRUSTEE),

PLAINTIFF-RESPONDENT,

V.

STEVEN D. HANSON,

DEFENDANT-THIRD-PARTY
PLAINTIFF-APPELLANT,

HANSON MANAGEMENT, HANSON MANAGEMENT, A CORPORATION, HANSON MANAGEMENT, INC., BANK OF CLEAR LAKE N/K/A CITIZENS REPUBLIC BANCORP INC., LAWRENCE L. HAUBRICH, JUDITH A. HAUBRICH, MARGARET M. WILSON, JUDITH B. MULLIN, CAROL BAHNEMANN, DARRYLL DODSON, KELLY S. KUHL AND KIM D. KUHL,

DEFENDANTS,

HANSON MANAGEMENT, A NEVADA CORPORATION,

DEFENDANT-THIRD-PARTY PLAINTIFF,

V.

RANDI L. OSBERG,

THIRD-PARTY DEFENDANT-RESPONDENT,

KATHRYN DESFORGE D/B/A EVERGREEN SOILS AND MARK KRAUSE,

INTERVENORS.

APPEAL from a judgment of the circuit court for Polk County: JAMES C. BABLER, Judge. *Affirmed in part; reversed in part and cause remanded for further proceedings*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Steven Hanson, pro se, appeals from a judgment foreclosing a mortgage on property owned by Hanson Management, Inc. On appeal, Hanson raises a number of arguments directed at challenging the validity of the underlying mortgage. We conclude these arguments constitute an improper attempt to collaterally attack the mortgage, and we therefore decline to consider them. We reject on the merits Hanson's argument that he is entitled to a homestead exemption with respect to approximately twenty acres of the mortgaged property. We therefore affirm in part.

¶2 Hanson also argues on appeal that the circuit court erred by concluding his counterclaims against the mortgagee, the Helmer E. Hanson Living Trust ("the Trust"), and his third-party claims against the trustee, individually, were barred by the doctrines of claim preclusion, issue preclusion, and laches. We

agree with Hanson that the circuit court erred by concluding claim preclusion and issue preclusion barred his counterclaims and third-party claims regarding the Trust's rejection of certain offers to purchase a portion of the mortgaged property. We further conclude the record is insufficient for us to determine, as a matter of law, whether the doctrine of laches bars those claims. We therefore reverse the circuit court's dismissal of Hanson's counterclaims and third-party claims regarding the Trust's rejection of the offers to purchase. We remand for the circuit court to determine if the doctrine of laches bars those claims, and, if not, for further proceedings on those claims.

BACKGROUND

¶3 On October 3, 2008, six of the eight sibling beneficiaries of the Trust sued the two other beneficiaries, Hanson and Stanley Hanson,[1] in Barron County case No. 2008-CV-507. The lawsuit alleged that Stanley Hanson had breached his fiduciary duties as trustee of the Trust.

¶4 On November 30, 2009, the Honorable Timothy M. Doyle entered written findings of fact and conclusions of law in Barron County case No. 2008-CV-507. As relevant to this appeal, Judge Doyle concluded Stanley Hanson breached his fiduciary duties as trustee in various ways, including by "systematically drain[ing] almost all cash assets from the trust, almost exclusively for the benefit of himself and his twin brother, [Hanson]." Judge Doyle ordered Stanley Hanson immediately removed as trustee and further found that Hanson

[1] We refer to Steven Hanson, the appellant in this case, as "Hanson." We refer to Hanson's brother, Stanley Hanson, by his full name. We refer to the other six beneficiaries of the Trust as "the sibling beneficiaries."

was unfit to replace his brother as successor trustee. Judge Doyle therefore appointed attorney Randi Osberg as successor trustee. Judge Doyle also found that the Trust was entitled to repayment from Hanson and Stanley Hanson, jointly and severally, in the amount of $272,216.16. A written judgment against Hanson and Stanley Hanson was entered on December 9, 2009. Judge Doyle subsequently entered an order granting the Trust's motion to intervene and declaring the Trust "the owner of the Judgment."

¶5 On January 11, 2010, Hanson and Stanley Hanson filed a notice of appeal from the judgment in Barron County case No. 2008-CV-507. While their appeal was pending, Hanson was ordered to appear at a supplemental examination. The Trust also filed a motion to appoint a post-judgment receiver for Hanson Management, Inc., a corporation wholly owned by Hanson. In a brief in opposition to that motion, Hanson asserted Hanson Management owned real estate in Polk and Barron Counties worth $750,000. In lieu of a receivership, Hanson offered to grant the Trust "a first position security interest in Lot 4 CSM# 5674, Parcel ID. 008-287," and a "second position security interest in Lot 3 CSM# 5674, Parcel ID. 008-286," both located in Polk County. At a subsequent hearing on the Trust's motion, the Trust indicated that, instead of a receivership, it would accept "a security interest in a recordable form on all real estate owned by Hanson Management."

¶6 On November 16, 2010, Judge Doyle entered an "Order Regarding Real Property Owned by Hanson Management, Inc." Judge Doyle found that: (1) Hanson owned one-hundred percent of the outstanding stock of Hanson Management; and (2) Hanson Management owned one parcel of real estate in Barron County and five parcels of real estate in Polk County. Judge Doyle granted the Trust "a recordable security interest in all of the above described real

estate … to secure the full amount of the Judgment, plus interest to date of payment." Judge Doyle also stayed enforcement of the December 2009 judgment pending the outcome of Hanson's appeal. Judge Doyle's November 16, 2010 order was recorded at the Barron County Register of Deeds office on December 9, 2010. Neither Hanson nor Hanson Management took any action to appeal or seek relief from the November 16, 2010 order.

¶7 On May 17, 2011, this court issued an opinion reducing the amount of the Barron County judgment to $229,412.66, but affirming the judgment in all other respects. *See* ***Haugen v. Hanson***, No. 2010AP115, unpublished slip op. ¶1 (WI App May 17, 2011). The Wisconsin Supreme Court later denied review of our decision. On August 17, 2012, Judge Doyle entered an order lifting the stay of enforcement of the judgment. Judge Doyle's November 16, 2010 order granting the Trust a security interest in Hanson Management's real estate was recorded at the Polk County Register of Deeds office on December 8, 2012.

¶8 Nine days later, the Trust filed the instant lawsuit in Polk County Circuit Court, seeking a judgment of foreclosure and sale with respect to Hanson Management's Polk and Barron County real estate. Hanson and Hanson Management each answered the Trust's complaint; asserted counterclaims against the Trust; and asserted third-party claims against attorney Osberg, individually, and against the sibling beneficiaries. The circuit court, the Honorable James C. Babler presiding, granted the Trust a judgment of foreclosure on June 16, 2016. The court also dismissed Hanson's and Hanson Management's counterclaims and third-party claims. Hanson now appeals.

DISCUSSION

I. Collateral attack

¶9 On appeal, Hanson raises a number of arguments challenging the validity of the Trust's security interest. Specifically, he contends: (1) Judge Doyle's November 16, 2010 "mortgage order" is void due to a lack of personal jurisdiction over Hanson Management; (2) the mortgage order is void for lack of consideration; (3) a separate action from the original Barron County case was required in order to obtain a lien against Hanson Management's property; (4) the creation and foreclosure of the Trust's mortgage violated WIS. STAT. § 180.0640(3) (2015-16),[2] which pertains to shareholder distributions; and (5) the mortgage order improperly "reverse-pierc[ed]" the corporate veil.

¶10 The Trust argues that, regardless of their merits, Hanson's arguments regarding the validity of the mortgage order fail because they constitute an improper attempt to collaterally attack that order. We agree. A collateral attack is "an attempt to avoid, evade, or deny the force and effect of a judgment in an indirect manner and not in a direct proceeding prescribed by law and instituted for the purpose of vacating, reviewing, or annulling it." ***Zrimsek v. American Auto. Ins. Co.***, 8 Wis. 2d 1, 3, 98 N.W.2d 383 (1959). Collateral attacks are generally disfavored because they "disrupt the finality of prior judgments and thereby tend to undermine confidence in the integrity of our procedures and inevitably delay and impair the orderly administration of justice." ***Oneida Cty. DSS v. Nicole W.***, 2007 WI 30, ¶28, 299 Wis. 2d 637, 728 N.W.2d 652 (quoting ***State v. Gudgeon***,

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

2006 WI App 143, ¶6, 295 Wis. 2d 189, 720 N.W.2d 114). Accordingly, collateral attacks on prior judicial orders or judgments are generally prohibited. ***State v. Hershberger***, 2014 WI App 86, ¶13, 356 Wis. 2d 220, 853 N.W.2d 586. Whether a collateral attack is permissible in a given situation is a question of law that we review independently. *See* ***State v. Campbell***, 2006 WI 99, ¶27, 294 Wis. 2d 100, 718 N.W.2d 649.

¶11 Our prior decision in ***Mercado v. GE Money Bank***, 2009 WI App 73, 318 Wis. 2d 216, 768 N.W.2d 53, is instructive. There, default judgments were granted in small claims court against two individuals. ***Id.***, ¶¶3-4. Neither individual sought relief from those judgments in small claims court. ***Id.***, ¶5. They instead filed a separate lawsuit against the judgment holder, alleging violations of the Wisconsin Consumer Act. ***Id.***, ¶6. On appeal, we affirmed the circuit court's decision to dismiss that lawsuit, concluding the plaintiffs could not collaterally attack the default judgments that were entered against them in the prior action. ***Id.***, ¶16. We explained:

> If [the plaintiffs] wanted to challenge the validity of the default judgments entered against them, they were obligated to do so, within the time frame set forth in WIS. STAT. § 799.29, by filing motions to reopen in the actions that resulted in the default judgments, as opposed to commencing a separate lawsuit as they did here. … Their failure to follow the statutory procedure set forth in § 799.29 precludes them from indirectly attacking the judgments now.

Id., ¶14.

¶12 Like the plaintiffs in ***Mercado***, Hanson failed to follow the requisite procedures to obtain relief from the mortgage order entered in Barron County case

No. 2008-CV-507, nor did he appeal from that order.[3] Instead, Hanson attempted to invalidate the mortgage order in a separate, subsequent action filed by the Trust. We agree with the Trust that, by doing so, Hanson has effectively asked both the Polk County Circuit Court and this court to "second guess Judge Doyle's 2010 decision and Order to allow the trust to take a recordable security interest in property owned by Hanson Management." We reject Hanson's attempt to collaterally attack the mortgage order in this way.

¶13 The general rule prohibiting collateral attacks on prior judicial orders or judgments does not apply where the order or judgment is void. *See* ***Hershberger***, 356 Wis. 2d 220, ¶13. An order or judgment is void when the court entering it lacked personal or subject matter jurisdiction. ***Id.***, ¶10. Hanson argues the mortgage order in Barron County case No. 2008-CV-507 is void because the court in that case lacked personal jurisdiction over Hanson Management. However, Hanson's argument in this regard is wholly undeveloped. Hanson does not explain why he believes the Barron County Circuit Court lacked personal jurisdiction over Hanson Management, nor does he provide any legal authority in support of that assertion. We need not address arguments that are undeveloped or unsupported by citation to legal authority. ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

[3] For the first time in his reply brief, Hanson raises an underdeveloped argument that the mortgage order in Barron County case No. 2008-CV-507 was not a final order for purposes of appeal. We need not address arguments that are insufficiently developed, *see* ***Barakat v. DHSS***, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995), or that were raised for the first time in a reply brief, *see* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998).

¶14 Hanson also argues the mortgage order is void because it lacked consideration. However, this argument goes to whether the mortgage order is erroneous. It has no bearing on whether the Barron County Circuit Court had the personal and subject matter jurisdiction necessary to enter the mortgage order. An order or judgment, "however erroneous … is not subject to collateral attack merely because it is erroneous, nor is it void for that reason." ***Hershberger***, 356 Wis. 2d 220, ¶10 (quoting ***Stimson v. Munsen***, 251 Wis. 41, 44, 27 N.W.2d 896 (1947)). Hanson's argument regarding the alleged lack of consideration for the mortgage provides no basis for us to conclude the mortgage order is void, and therefore subject to collateral attack.

¶15 Because Hanson's arguments challenging the validity of the mortgage order constitute an improper attempt to collaterally attack that order, we decline to address them. For the same reason, we conclude the circuit court properly dismissed Hanson's first counterclaim against the Trust, which he denominated "Claim 1." That counterclaim merely sought relief on the basis that the underlying mortgage order was invalid, and we have already determined Hanson cannot collaterally attack the mortgage order in the instant lawsuit.

II. Homestead exemption

¶16 It is undisputed that Hanson Management owns the mortgaged properties, rather than Hanson individually. However, the record shows that, on June 3, 1990, Hanson Management leased approximately twenty acres of its Barron County property to Hanson for a term of one-hundred years. Hanson argues his long-term lease of those twenty acres triggers operation of the homestead exemption in WIS. STAT. § 815.20(1), which provides:

> An exempt homestead as defined in s. 990.01(14) selected by a resident owner and occupied by him or her shall be exempt from execution, from the lien of every judgment, and from liability for the debts of the owner to the amount of $75,000, except mortgages, laborers', mechanics', and purchase money liens and taxes and except as otherwise provided. …. The exemption extends to the interest therein of tenants in common, having a homestead thereon with the consent of the cotenants, and to any estate less than a fee.

¶17 Assuming without deciding that a long-term lease is sufficient to trigger operation of the homestead exemption, we nevertheless conclude Hanson is not entitled to the exemption under the circumstances of this case. WISCONSIN STAT. § 815.20(1) expressly excepts "mortgages" from operation of the homestead exemption.[4] Accordingly, Hanson cannot use the homestead exemption to avoid foreclosure of the Trust's mortgage on the twenty-acre parcel he leases from Hanson Management.

¶18 Hanson argues the homestead exemption applies in this case because the Trust's security interest is not a valid "mortgage" under WIS. STAT. § 815.20(1), in that it does not satisfy the requirements of WIS. STAT. § 706.02(1), the statute of frauds. Specifically, Hanson asserts the security interest in this case is deficient because it is not evidenced by a written conveyance signed by Hanson. *See* § 706.02(1)(d). However, as the Trust observes, § 706.02(1) does not apply to transactions in which an interest in land is affected "[b]y act or operation of law." *See* WIS. STAT. § 706.001(2). Here, the mortgage on Hanson Management's property was created by a court order. Entry of that order constituted a judicial act. *See Act*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "judicial act"

[4] Statutory interpretation presents a question of law that we review independently. *See* ***McNeil v. Hansen***, 2007 WI 56, ¶7, 300 Wis. 2d 358, 731 N.W.2d 273.

as "[a]n act involving the exercise of judicial power"). On these facts, we agree with the Trust that the mortgage arose "[b]y act … of law." *See* § 706.001(2). The mortgage is therefore exempt from the requirements set forth in the statute of frauds.[5]

¶19 Finally, to the extent Hanson argues his long-term lease of the twenty-acre Barron County property takes precedence over the Trust's mortgage, he is mistaken. Under Wisconsin's race-notice statute, "every conveyance that is not recorded as provided by law shall be void as against any subsequent purchaser, in good faith and for a valuable consideration, of the same real estate or any portion of the same real estate whose conveyance is recorded first." WIS. STAT. § 706.08(1)(a). Thus, a subsequent mortgage may take priority over a prior, unrecorded lease, "but only if the mortgagee is in good faith, *i.e.*, had no knowledge of the prior lease." ***Grosskopf Oil, Inc. v. Winter***, 156 Wis. 2d 575, 584, 457 N.W.2d 514 (Ct. App. 1990).

¶20 It is undisputed that Hanson's lease of the twenty-acre Barron County property was never recorded. The issue therefore becomes whether the Trust had knowledge of the lease at the time the mortgage was created, which is a question of fact. *See* ***id.*** at 585. The circuit court found that attorney Osberg, who was appointed successor trustee on November 30, 2009, did not find out about Hanson's lease until after January 18, 2013—over two years after the mortgage was created. The court further found that attorney Osberg "made sufficient and

[5] We also observe that Hanson does not respond to the Trust's argument that the statute of frauds does not apply to the Trust's security interest because that interest arose "[b]y act … of law." *See* WIS. STAT. § 706.001(2). Unrefuted arguments are deemed conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

diligent efforts to determine the ownership of the property by getting a title search," and that Hanson should have, but failed to, reveal the existence of the lease at his supplemental examination on September 15, 2010. Hanson does not argue any of these factual findings are clearly erroneous. *See* WIS. STAT. § 805.17(2). Based on the circuit court's factual findings, the Trust qualifies as a mortgagee in good faith. *See* ***Grosskopf Oil***, 156 Wis. 2d at 584. The Trust's mortgage therefore takes priority over Hanson's prior, unrecorded lease, pursuant to WIS. STAT. § 706.08(1)(a).

¶21 For all the foregoing reasons, we conclude the circuit court properly rejected Hanson's arguments regarding the homestead exemption. We further conclude the court properly dismissed Hanson's final two counterclaims against the Trust, denominated "Claim XI" and "Claim XII," because those claims relied on the (incorrect) proposition that the homestead exemption applies to the twenty-acre Barron County parcel.

III. Hanson's counterclaims and third-party claims

¶22 Hanson also argues on appeal that the circuit court erred by dismissing his counterclaims against the Trust and his third-party claims against attorney Osberg. We have already concluded the circuit court properly dismissed three of Hanson's counterclaims against the Trust—Claims 1, XI, and XII. *See supra*, ¶¶15, 21. We therefore consider in this section whether the court properly

dismissed Hanson's remaining counterclaims against the Trust and his third-party claims against attorney Osberg.[6]

¶23 Hanson's remaining counterclaims and third-party claims were based on Hanson's contention that, after the mortgage order was entered, the Trust improperly rejected several offers to purchase a portion of the mortgaged property. Hanson alleged that, at the time the judgment was entered against him in Barron County case No. 2008-CV-507—i.e., December 9, 2009—Hanson Management "had a purchaser" for its Polk County real estate. Hanson alleged the prospective purchaser, Todd Teich, had offered to pay $600,000 for that property, but the Trust rejected his offer.

¶24 Hanson further alleged that, in 2011, the Trust "rejected a subsequent purchase offer by the same purchaser for $500,000." Hanson alleged the net amount of the judgment against Hanson was $175,000 at that time, and attorney Osberg "subsequently admitted that the purchase would have paid the judgment in full prior to July, 2012 if the purchaser made the payments." Hanson also alleged that, in 2013, the Trust rejected a third offer from Teich to purchase the Polk County real estate for $450,000.

[6] Hanson also asserted third-party claims against the sibling beneficiaries. However, he does not argue on appeal that the circuit court improperly dismissed those third-party claims. He argues only that the court erred by dismissing his claims against the Trust and attorney Osberg. We therefore limit our analysis to Hanson's counterclaims against the Trust and his third-party claims against attorney Osberg. *See* ***A.O. Smith Corp.***, 222 Wis. 2d at 491 (holding that an issue raised in the circuit court but not raised on appeal is deemed abandoned).

We also decline to address Hanson's "Claim III." Although that claim is included among Hanson's counterclaims against the Trust, it actually alleges that the sibling beneficiaries violated the implied duty of good faith and fair dealing and the implied duty of reasonable care. Again, Hanson does not argue on appeal that the circuit court erred by dismissing any of his claims against the sibling beneficiaries.

¶25 Based on this alleged conduct, Hanson asserted counterclaims against the Trust for: breach of the implied duty of good faith and fair dealing and the implied duty of reasonable care (Claim II); negligence (Claim IV); gross negligence (Claim V); violation of a special duty of care (Claim VI); breach of fiduciary duty (Claims VII and VIII); intentional interference with a business relationship (Claim IX); and intentional interference with prospective economic advantage (Claim X). Hanson also asserted the following third-party claims against attorney Osberg based on the Trust's rejection of the Teich offers: violations of WIS. STAT. § 134.01 (Claims XIIa[7] and XIII); breach of fiduciary duty (Claim XIV); negligence (Claim XV); gross negligence (Claim XVI); tortious interference with a business relationship (Claim XVII); tortious interference with prospective economic advantage (Claim XVIII); and punitive damages (Claim XXII).[8]

¶26 The Trust contends the circuit court properly dismissed these counterclaims and third-party claims under the doctrines of claim preclusion, issue preclusion, and laches. For the reasons explained below, we conclude as a matter of law that neither claim preclusion nor issue preclusion bars the claims listed above in ¶25. We further conclude the present record is insufficient for us to determine whether the elements of laches are satisfied as to these claims.

[7] Hanson denominated both his final counterclaim against the Trust and his first third-party claim as "Claim XII." For clarity, we refer to the final counterclaim against the Trust as "Claim XII" and the first third-party claim as "Claim XIIa."

[8] Hanson's Claims XIX, XX, and XXI were based on conduct by the sibling beneficiaries. We therefore decline to address those claims. *See supra* n.6.

A. Claim preclusion

¶27 The application of claim preclusion to a set of facts presents a question of law that we review independently. ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 551, 525 N.W.2d 723 (1995). 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*." ***Id.*** at 550 (quoting ***Lindas v. Cady***, 183 Wis. 2d 547, 558, 515 N.W.2d 458 (1994); emphasis added; brackets in ***Northern States Power***). Three factors must be present in order for claim preclusion to apply: (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.

¶28 The circuit court concluded claim preclusion barred Hanson's claims against the Trust and attorney Osberg because "you may not relitigate the issue of the lien here in Polk County." The court stated there was an "identity of causes of action in the two suits" because "[t]he issue really is about that lien." The Trust similarly argues on appeal that Hanson "cannot choose to challenge the 2010 recordable security interest in the 2012 foreclosure action simply because he failed to attempt to reopen or overturn that decision in the Barron County case."

¶29 This reasoning is flawed, in that it assumes all of Hanson's counterclaims and third-party claims were based on Hanson's contention that the mortgage order in Barron County case No. 2008-CV-507 was invalid. However, as set forth above, the majority of Hanson's counterclaims and third-party claims were actually based on his contention that the Trust acted improperly by rejecting Teich's offers to purchase Hanson Management's Polk County real estate. Those

rejections did not occur until *after* the mortgage order was entered in the Barron County lawsuit. Consequently, whether the Trust acted improperly in rejecting the Teich offers is not a matter that either was or could have been litigated in the prior proceedings. *See* ***id.*** at 550. Stated differently, there is no identity between Hanson's claims in the instant case and the causes of action in the previous lawsuit because Hanson's claims here arose out of events that occurred after that lawsuit ended. *See* ***id.*** at 551. We therefore conclude, as a matter of law, that claim preclusion does not bar Hanson's counterclaims and third-party claims regarding the Trust's rejection of the Teich offers.

B. Issue preclusion

¶30 The Trust argues in the alternative that Hanson's counterclaims and third-party claims are barred by the doctrine of issue preclusion. "The rule of issue preclusion bars relitigation of issues of law or fact that have been litigated in a previous action." ***Reuter v. Murphy***, 2000 WI App 276, ¶7, 240 Wis. 2d 110, 622 N.W.2d 464. In deciding whether to apply issue preclusion in a given case, a court must first determine whether the operative issue of law or fact "was actually litigated and determined in the prior proceeding by a valid judgment in a previous action and whether the determination was essential to the judgment." ***Estate of Rille v. Physicians Ins. Co.***, 2007 WI 36, ¶37, 300 Wis. 2d 1, 728 N.W.2d 693. This is a question of law that we review independently. ***Id.***

¶31 The Trust argues issue preclusion applies in the instant case because "[o]ne of the issues before the Barron County Circuit Court is identical to that before this Court—whether the Trust can collect its judgment from the assets of Hanson Management." The Trust therefore asserts that "the issue Hanson

Management and [Hanson] seek to litigate in this case has been fully litigated before the Barron County Circuit Court."

¶32 The Trust's issue preclusion argument fails, as a matter of law, for the same reason its claim preclusion argument failed. Namely, the Trust fails to account for the fact that the majority of Hanson's counterclaims against the Trust and third-party claims against attorney Osberg were based on the Trust's rejection of the Teich offers, which did not occur until *after* the mortgage order was entered in the prior Barron County proceedings. As a result, the legal and factual issues underlying these counterclaims and third-party claims could not possibly have been litigated in the Barron County lawsuit. Issue preclusion therefore does not bar Hanson's counterclaims and third-party claims regarding the Trust's rejection of the Teich offers.

C. Laches

¶33 Finally, the Trust asserts Hanson's counterclaims and third-party claims were properly dismissed pursuant to the equitable doctrine of laches. The elements of laches are: (1) unreasonable delay by the party seeking relief; (2) lack of knowledge or acquiescence by the party asserting laches that a claim for relief was forthcoming; and (3) prejudice to the party asserting laches caused by the delay. ***Dickau v. Dickau***, 2012 WI App 111, ¶9, 344 Wis. 2d 308, 824 N.W.2d 142. "The reasonableness of the delay, and whether prejudice resulted from the delay, are questions of law based upon factual findings." ***Id.*** (citing ***State ex rel. Coleman v. McCaughtry***, 2006 WI 49, ¶17, 290 Wis. 2d 352, 714 N.W.2d 900); *see also* ***Sawyer v. Midelfort***, 227 Wis. 2d 124, 159, 595 N.W.2d 423 (1999) (stating that, where the facts are undisputed and only one reasonable inference can be drawn from them, a court may conclude as a matter of law that the elements of

laches are met). Once the elements of laches have been established, a court has discretion to decide whether to apply the doctrine. ***Dickau***, 344 Wis. 2d 308, ¶9.

¶34 The Trust's argument regarding laches is as follows:

> [O]n November 16, 2010, [Judge Doyle] entered an Order Regarding Real Property Owned by Hanson Management, Inc., through which he found and ordered, among other things, that the Trust was granted a recordable security interest in all real estate owned by Hanson Management to secure the full amount of the Judgment. Over two years then passed before [Hanson] brought the counterclaims and third party claim collaterally challenging that Order in the Polk County matter. Consequently, the Trial Court was correct to have dismissed the counterclaims and third party claims and to go ahead and grant judgment of foreclosure on the recordable security interest.

As with its arguments regarding claim and issue preclusion, the Trust's argument regarding laches focuses on Hanson's claims challenging the validity of the mortgage order. The Trust does not separately address whether laches bars Hanson's claims regarding the Trust's rejection of the Teich offers.

¶35 The circuit court similarly failed to address whether laches bars Hanson's claims regarding the Trust's rejection of the Teich offers. The court concluded the first element of laches—unreasonable delay—was satisfied because twenty-five months elapsed between the time the mortgage order was entered and the time Hanson filed his counterclaims and third-party claims. The court concluded the second element—lack of knowledge or acquiescence by the party asserting laches that a claim for relief was forthcoming—was satisfied because Hanson never moved for reconsideration of the mortgage order or attempted to appeal it. As for the third element—prejudice to the party asserting laches caused by the delay—the court concluded the Trust was prejudiced by Hanson's delay in challenging the validity of the mortgage order because the Trust initially sought a

receivership over Hanson Management, and it only accepted a security interest in Hanson Management's real estate in lieu of a receivership after Hanson suggested that alternative.

¶36 As the foregoing summary shows, the circuit court's analysis of each of the elements of laches focused on whether those elements were met with respect to Hanson's claims regarding the validity of the mortgage order. The court did not address whether the elements of laches were satisfied with respect to Hanson's claims regarding the Trust's rejection of the Teich offers. When the facts are undisputed, or when the circuit court has made findings regarding the underlying factual issues, we may determine as a matter of law whether the facts satisfy the elements of laches. *See* ***Sawyer***, 227 Wis. 2d at 159; ***Dickau***, 344 Wis. 2d 308, ¶9. In the instant case, however, the record is insufficient for us to make this determination.

¶37 We cannot, for instance, determine as a matter of law based on the record before us whether Hanson unreasonably delayed in bringing his counterclaims and third-party claims regarding the Trust's rejection of the Teich offers. Hanson's pleadings do not allege, with specificity, when those offers were made or when the Trust rejected them. Moreover, the record does not indicate when Hanson became aware of Teich's offers or the Trust's subsequent decisions to reject them. The circuit court did not make any findings with respect to these issues.

¶38 The record is also devoid of evidence as to whether the Trust had prior knowledge that Hanson planned to assert claims for relief based on the Trust's rejection of the Teich offers. Again, the circuit court did not make any findings regarding that issue. The court also failed to make any findings that

would allow us to determine whether the Trust was prejudiced by Hanson's delay in asserting his claims regarding the Teich offers. The court did not determine, for instance, whether Hanson's delay in asserting those claims hindered the respective defendants' ability to defend against them, and the record contains no evidence indicating whether that was the case.

¶39 We therefore reverse the circuit court's dismissal of Hanson's counterclaims against the Trust and his third-party claims against attorney Osberg pertaining to the Trust's rejection of the Teich offers.[9] We remand for further proceedings on those claims, consistent with this opinion.

¶40 No WIS. STAT. RULE 809.25(1) costs are awarded to any party.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded for further proceedings.

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

[9] In other words, we reverse the circuit court's dismissal of the claims listed above in ¶25.