COURT OF APPEALS
DECISION
DATED AND FILED

December 6, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP487 **Cir. Ct. No. 2011CV7**

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

JAMES E. MOLITOR AND BEVERLY B. MOLITOR,

PLAINTIFFS-APPELLANTS,

V.

ADVANTAGE COMMUNITY BANK,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Clark County: TODD P. WOLF, Judge. *Affirmed*.

Before Higginbotham, Blanchard and Kloppenburg, JJ.

¶1 KLOPPENBURG, J. This case concerns the effects of a chapter 7 bankruptcy and the doctrine of accord and satisfaction in the context of one residential mortgage securing two different loans. James and Beverly Molitor appeal a circuit court order denying their claims seeking a declaration that the

mortgage lien on the residential property was satisfied upon their having tendered to Advantage Community Bank (the Bank) a check for the outstanding balance on one of the loans. They contend that their reaffirmation of that first loan in bankruptcy eliminated the debt under the second loan so that no mortgage lien remained upon payment in full of the debt under the first loan. In addition, they argue that they satisfied the entire debt secured by the mortgage when the Bank accepted and cashed their check, under the doctrine of accord and satisfaction. We disagree and affirm the circuit court's denial of their claims.

BACKGROUND

¶2 James and Beverly Molitor owned and operated a restaurant, the Old Saloon, until it burned down in 2004. They opened a second restaurant, which we will refer to as the New Saloon, in 2001. Beverly and two Molitor children, Troy and Eve, created TEB, Inc., to be the owner and operator of the New Saloon. James owned the real estate where the New Saloon was located. The New Saloon ultimately closed. Various loans were taken out to finance the New Saloon, before James and Beverly declared bankruptcy in 2009. The following are documents related to these loans:

1. 2001 Personal Guaranty: In October 2001, James, Beverly and their children Troy and Eve each signed a continuing guaranty for all credit "past, present and future" to induce the predecessor to the Bank to extend credit to TEB, Inc.

2. 2001/2002 TEB Business Loan: In 2001/2002, the Bank loaned TEB, Inc. $508,614.12.

3. 2002 Real Estate Mortgage: In June 2002, James and Beverly executed a mortgage on the New Saloon property, which secured the 2001/2002 TEB Business Loan.

4. 2007 Personal Loan: In February 2007, the Bank loaned James and Beverly $15,000, identified as Loan No. 71533.

5. 2007 Real Estate Security Agreement (2007 RESA): In February 2007, James and Beverly executed a Real Estate Security Agreement, pursuant to which James and Beverly executed a mortgage and granted a lien on their residential property to secure the 2007 Personal Loan, and "to secure all debts, obligations and liabilities arising out of all credit previously granted, all credit contemporaneously granted and all credit granted in the future …."

6. 2008 TEB Business Loan: In May 2008, Advantage Community Bank renegotiated the 2001/2002 TEB Business loan for $405,357.45, identified as Loan No. 68390. The note for this loan was signed by Beverly, Troy, and Eve, as TEB, Inc. officers.

7. 2008 Personal Loan: In October 2008, James and Beverly renegotiated the 2007 Personal Loan for $14,311.02, which was secured by James and Beverly's residential property under the 2007 RESA.

8. 2008 Business Work-Out Agreement: In October 2008, James and Beverly signed a work-out agreement for the 2008 TEB Business Loan. This agreement noted that the 2008 TEB Business Loan was secured by the 2007 RESA (document number 5 above) on James and Beverly's residential property. Under this 2008 agreement, TEB, Inc. surrendered the New Saloon restaurant, restaurant property, and restaurant equipment to the Bank for $250,000, leaving

approximately $150,000 due on the 2008 TEB Business Loan No. 68390; and James and Beverly were given three years to sell their residential property, with proceeds going first to pay off the note to a different bank holding the first mortgage on the property, second to pay off the 2008 Personal Loan, third to pay closing costs, and fourth to pay forty percent of any remaining proceeds to the Bank and sixty percent to James and Beverly.

9. 2009 Reaffirmation Agreement: In 2009, James and Beverly filed for chapter 7 bankruptcy. After filing, they executed a Reaffirmation Agreement, reaffirming the "home equity loan," namely the 2007 Personal Loan renewed by the 2008 Personal Loan, for $14,280.15.[1] Paragraph 1.d. of the Reaffirmation Agreement provided that the "Real Estate Mortgage on 202 Poplar St." remains "subject to such security interest or lien in connection with the debt or debts being reaffirmed" – the $14,280.15 debt.

¶3 In late 2008, the Bank sued Molitor children Troy and Eve seeking repayment of the balance due on the 2008 TEB Business Loan. The parties stipulated to a third-party appraisal of the restaurant and restaurant property, and to the children's payment to the Bank of the difference, if any, between the appraisal and the amount due on the 2008 TEB Business Loan if the appraisal came in below that loan amount. The appraisal came in above the loan amount, and the parties stipulated to dismissal of the suit. In November 2009, the court ordered the case dismissed based on the stipulation.

[1] As discussed more fully below, a reaffirmation agreement is "[a]n agreement between the debtor and a creditor by which the debtor promises to repay a prepetition debt that would otherwise be discharged at the conclusion of the bankruptcy." Black's Law Dictionary 1378 (9th ed. 2004); *see also* ***In re Schott***, 282 B.R. 1, 6 (10th Cir. 2002).

¶4 James and Beverly received their discharge in bankruptcy in August 2009.

¶5 In October 2009, James and Beverly's attorney wrote the Bank, asking for the Bank's position on the effect of the bankruptcy discharge. The letter stated that the work-out agreement that surrendered the restaurant created an unsecured obligation to pay forty percent of the sale of the home proceeds, which did not appear to have been reaffirmed in the bankruptcy. The letter concluded, "so it would appear that that obligation was discharged in the bankruptcy."

¶6 In November 2009, the Bank responded by letter stating that the 2007 RESA (the document identified as number 5 in our summary above) securing the debt owed on the 2008 TEB Business Loan "passed intact through the bankruptcy," and that the bankruptcy discharge did not impair the Bank's "perfected security interest in the Molitor home…. Additionally, the Bank retains its right to foreclose on its security interest, if necessary."

¶7 In October 2010, James and Beverly received from the Bank a loan payoff calculation for Personal Loan No. 71533 in the amount of $13,544.50. On October 14, 2010, James and Beverly's attorney sent the Bank a letter entitled "Payoff of Mortgage and Recordable Satisfaction of Mortgage," with a reference line of "Loan Account: 71533." The letter enclosed a check for $13,544.50 on which was written "Mortgage Paid in Full." The letter also stated that the Bank must "'execute and record a proper and full satisfaction of mortgage'" within thirty days. Also enclosed was a check for $30 for the mortgage recording fee.

¶8 The Bank cashed the $13,544.50 check on October 15, 2010, and on October 18, 2010, returned the $30 check with a letter stating that the Bank had

applied the $13,544.50 to the home equity loan and would not release the mortgage because it continued to secure the 2008 Business Work-Out Agreement.

¶9 James and Beverly commenced this action seeking to quiet title and a declaration that the mortgage lien on their residential property was satisfied upon their having tendered the check for the outstanding balance on the 2008 Personal Loan, No. 71533. They based their complaint on their claim that the 2008 TEB Business Loan, No. 68390, no longer existed after they had reaffirmed their debt with the Bank for $14,280.15 during the course of their bankruptcy.

¶10 The circuit court denied the Bank's motion to dismiss. In response to the Bank's subsequent summary judgment motion, the court ruled that James and Beverly's personal liability on the 2008 TEB Business Loan had been discharged in bankruptcy, but the Bank's security interest in the mortgage securing that loan survived the bankruptcy. The court also ruled that material issues of fact remained regarding whether payment of the check satisfied only the 2008 Personal Loan or the 2008 TEB Business Loan as well.

¶11 After a bench trial, the circuit court denied the claims, finding that: (1) the 2009 Reaffirmation Agreement did not address the debt created by the 2008 TEB Business Loan or rewrite the 2008 Business Work-Out Agreement, so that the payment by James and Beverly satisfied only the debt on the 2008 Personal Loan and not the debt on the 2008 TEB Business Loan, leaving the mortgage in place; (2) the payment by James and Beverly did not constitute an accord and satisfaction because there was no reasonable notice on the check that it was intended to satisfy the debt secured under the 2008 TEB Business Loan as well as the debt created under the 2008 Personal Loan; (3) claim preclusion and issue preclusion arising from the stipulation to settle the Bank's suit against the

adult children did not apply because there was no final judgment on the merits and the issue was not actually litigated; and (4) there was no slander of title, judicial estoppel did not exist, and the joint debtor law did not apply. James and Beverly appealed the circuit court's first three findings. We affirm those findings for the reasons we explain below.

DISCUSSION

¶12 We first interpret the plain language of the 2009 Reaffirmation Agreement in light of the general rule that debts are discharged in bankruptcy but security interests typically survive discharge. Applying this rule to the plain language of the agreement, we conclude that only the 2008 Personal Loan secured by the residential mortgage was reaffirmed and the debt on the 2008 TEB Business Loan remained outstanding. Next, we determine that, in paying off the undisputed amount of that loan, James and Beverly could not avail themselves of accord and satisfaction relating to the 2008 TEB Business Loan secured by the residential mortgage. Finally, we conclude that neither claim preclusion nor issue preclusion relieves James and Beverly from the obligation of paying the amount of the 2008 TEB Business Loan secured by the residential mortgage.

A. The Reach of the 2009 Reaffirmation Agreement

¶13 James and Beverly argue that, through the 2009 Reaffirmation Agreement, the parties agreed to reduce the amount of James and Beverly's total debt by the amount of the 2008 TEB Business Loan, leaving only the amount of the 2008 Personal Loan outstanding. For the following reasons, we disagree.

¶14 A note represents a debt, and a mortgage secures the debt. ***Mitchell Bank v. Schanke***, 2004 WI 13, ¶41, 268 Wis. 2d 571, 676 N.W.2d 849. The

following two actions are distinct: (1) a cause of action on a note evidencing indebtedness, and (2) a cause of action to foreclose a mortgage on real estate that secures the indebtedness. ***Bank of Sun Prairie v. Marshall Dev. Co.***, 2001 WI App 64, ¶¶20-21, 242 Wis. 2d 355, 626 N.W.2d 319. This distinction carries over into the bankruptcy context. "It is now well settled that a chapter 7 [bankruptcy] discharge eliminates the debtors' *in personam* liability on a secured debt while the *in rem* liability of the property held as security is unaffected and may be enforced by the mortgagee postdischarge." ***Matter of Hagberg***, 92 B.R. 809, 811 (W.D. Wis. 1988); ***Johnson v. Home State Bank***, 501 U.S. 78, 83 (1991).

¶15 However, while the two types of liabilities are generally treated differently, a debtor in bankruptcy can avert foreclosure by reaffirmation of the mortgage debt. This preserves the debtor's personal liability as other debts are discharged. ***Hagberg***, 92 B.R. at 811.

¶16 As we have referenced above, a reaffirmation agreement such as the one entered into in this case, "is a contract between a debtor and a creditor that permits a debtor who cannot pay a debt immediately to keep the property [that secured the debt] while making periodic payments on that property." ***In re Schott***, 282 B.R. 1, 6 (10th Cir. 2002). A reaffirmation agreement is a new contract on a previous debt, and is construed according to conventional state contract law principles. ***Id.*** at 7-8; ***In re Eiler***, 390 B.R. 920, 924 (E.D. Wis. 2008). Whether contract language is plain is a question of law subject to de novo review. ***Lynch v. Crossroads Counseling Ctr., Inc.***, 2004 WI App 114, ¶19, 275 Wis. 2d 171, 684 N.W.2d 141.

¶17 The essence of James and Beverly's argument here is not that the terms of the 2009 Reaffirmation Agreement are not plain, but that the document

does not reflect the true intent of the parties. However, under Wisconsin contract law, when the terms are unambiguous, our search for the parties' intent is confined to the language in the agreement. *See* ***Management Computer Serv. v. Hawkins, Ash, Baptie & Co.***, 206 Wis. 2d 158, 178-79, 557 N.W.2d 67 (1996) (noting that regardless whether the parties subjectively agreed to the same interpretation at the time of contracting, the key to interpretation is not what the parties intended to agree to but what they did agree to, as evidenced by the language that they saw fit to use).

¶18 "When we interpret contracts, we do so to determine and give effect to the intentions of the parties. We presume their intentions are expressed in the language of the contract." ***Estate of Kriefall v. Sizzler USA Franchise, Inc.***, 2012 WI 70, ¶21, 342 Wis. 2d 29, 816 N.W.2d 853 (citation omitted). Where the language is unambiguous, we presume the parties' intent is evidenced by the words they chose and we apply that plain language as the expression of the parties' intent. *See* ***Kernz v. J.L. French Corp.***, 2003 WI App 140, ¶9, 266 Wis. 2d 124, 667 N.W.2d 751. We derive the parties' intent from the unambiguous contract language, not from how one party may interpret it. ***Campion v. Montgomery Elevator Co.***, 172 Wis. 2d 405, 416, 493 N.W.2d 244 (Ct. App. 1992).

¶19 Here, prior to the bankruptcy, James and Beverly and the Bank unambiguously indicated, in the 2007 RESA, their intent to secure all prior and future debt with a mortgage or lien on the residential property ("lien … to secure all debts, obligations and liabilities arising out of all credit previously granted, all credit contemporaneously granted and all credit granted in the future …."). By that language, James and Beverly gave the Bank a mortgage on their home to secure all loans that the Bank made to them, namely the 2008 Personal Loan and

the 2008 TEB Business Loan. *See* ***In re Becker***, 415 B.R. 360, 366 (E.D. Wis. 2009) (concluding "that the mortgage and notes should be enforced according to their clear and unambiguous terms," by which "[t]he debtors gave [the bank] a mortgage on their home to secure not only the original loan, but all future loans").

¶20 Once in bankruptcy, James and Beverly reaffirmed only one of the loans secured by the mortgage on their home. In the 2009 Reaffirmation Agreement where they identified the debts covered by the Agreement, they wrote in "Home Equity Loan," in the amount of $14,280.15. This language is plain and unambiguous. It reaffirmed only the debt on the 2008 Personal Loan and made no mention of the 2008 TEB Business Loan.

¶21 It is true that the 2009 Reaffirmation Agreement identified the residential real estate mortgage as the property that remained subject to the security interest or lien securing the reaffirmed debt. It is also true that the same mortgage also secured the 2008 TEB Business Loan. However, nothing in the 2009 Reaffirmation Agreement referred to *debts* other than the 2008 Personal Loan.

¶22 James and Beverly argue that, through the 2009 Reaffirmation Agreement, they reduced the total amount they owed to the Bank from approximately $165,000 to $14,280.15. This occurred, they contend, because the Reaffirmation Agreement renegotiated both loans secured by the residential mortgage. The case that they rely on, ***Eiler***, 390 B.R. 920, does not support their argument. That case merely confirms the settled law that parties may renegotiate the original debt through a reaffirmation agreement. ***Id.*** at 924. In ***Eiler***, there was one mortgage securing one loan, and the reaffirmation agreement changed the terms of the portion of the loan related to the calculation and collectability of past-

due arrearages, so that the new debt did not include the arrearages. ***Id.*** The court rejected the bank's attempts to collect the arrearage amounts, related to the single loan, which were "clearly not due under the reaffirmation agreement." ***Id.*** at 926.

¶23 Here, James and Beverly seek to wipe out a debt that was clearly not covered under the plain terms of the 2009 Reaffirmation Agreement. Unlike in ***Eiler***, one mortgage secured two separate loans, and the Reaffirmation Agreement related, by its express terms, to only one of those loans. Certainly, the parties could have renegotiated both the 2008 Personal Loan and the 2008 TEB Business Loan. However, the Reaffirmation Agreement contained no language even suggesting that they did so. James and Beverly fail to show any ambiguity in the Reaffirmation Agreement's terms that would support the interpretation they advance. *See* ***Schott***, 282 B.R. at 8.

¶24 In sum, we conclude that the 2009 Reaffirmation Agreement reaffirmed only the 2008 Personal Loan, not the debt on the 2008 TEB Business Loan, and that the Bank's security interest in the 2008 TEB Business Loan (the residential mortgage) survived the bankruptcy.

B. Accord and Satisfaction

¶25 James and Beverly ask us to find that the Bank's cashing of their October 2010 check constituted accord and satisfaction as to all of their outstanding debt to the Bank, namely both the 2008 Personal Loan and the 2008 TEB Business Loan. We conclude that the Bank's cashing of the October 2010 check did not constitute accord and satisfaction, because there was no disputed claim and the proffered payment was directed at only one of two outstanding debts.

¶26 Because this matter was tried to the circuit court, we review the court's findings of fact regarding the absence of a contract of accord and satisfaction under the clearly erroneous standard. WIS. STAT. § 805.17(2) (2009-2010).[2] We review de novo the circuit court's legal conclusion that the facts are not sufficient to establish the existence of an accord and satisfaction of a disputed debt. *See* ***Bantz v. Montgomery Estates, Inc.***, 163 Wis. 2d 973, 978, 473 N.W.2d 506 (Ct. App. 1991) (whether facts satisfy a particular legal standard presents a question of law which we decide de novo).

¶27 "An 'accord and satisfaction' is an agreement to discharge an existing *disputed* claim …." ***Hoffman v. Ralston Purina Co.***, 86 Wis. 2d 445, 453, 273 N.W.2d 214 (1979) (emphasis added). "[T]here must be a good faith dispute about the debt," for there to be an accord and satisfaction. ***Flambeau Products Corp. v. Honeywell Information Systems, Inc.***, 116 Wis. 2d 95, 111, 341 N.W.2d 655 (1984); *see* ***Butler v. Kocisko***, 166 Wis. 2d 212, 215, 479 N.W.2d 208 (Ct. App. 1991) ("An accord and satisfaction requires a bona fide dispute as to the total amount owing"). Acceptance in full of payment on one claim does not operate as an accord and satisfaction for other separate, distinct claims. ***Flambeau Products Corp.***, 116 Wis. 2d at 117 (citing ***Weidner v. Standard Life & Accident Ins. Co.***, 130 Wis. 10, 15, 110 N.W. 246 (1906)).

¶28 An accord and satisfaction constitutes an affirmative defense, ***Hoffman***, 86 Wis. 2d at 453, and so James and Beverly bore the burden of proving each of its elements. The Molitors point to no evidence establishing that the

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

parties disputed the amount owing on the 2008 Personal Loan or the amount owing on the 2008 TEB Business Loan. They argue instead that the amount owed was disputed because the parties differed as to whether the debt on the 2008 TEB Business Loan remained outstanding after the 2009 Reaffirmation Agreement and bankruptcy, resulting in a dispute as to the amount of debt that remained secured by the residential mortgage. However, as explained above, we have concluded that the 2009 Reaffirmation Agreement unambiguously concerned the 2008 Personal Loan only and did not alter the Bank's security interest in the 2008 TEB Business Loan. Consequently, to the extent a dispute existed, the dispute did not center on the amount of the loan that remained due, but rather on whether payment tendered by James and Beverly satisfied two separate loans. This does not fit the criteria under which an accord and satisfaction would arise. *See* ***Butler***, 166 Wis. 2d at 215 ("An accord and satisfaction requires a bona fide dispute as to the total amount owing").

¶29 James and Beverly argue that, even if the 2009 Reaffirmation Agreement left both the 2008 Personal Loan and 2008 TEB Business Loan debts outstanding, the October and November 2009 letters between them and the Bank confirmed that the parties disputed the amount of money owed to satisfy the mortgage that secured those debts. The letters do not support their argument. Rather, the letters only confirmed that the unsecured obligation to pay forty percent of the proceeds from the sale of the home, created by the 2008 Business Work-Out Agreement, had been discharged in bankruptcy, but that the Bank's security interest and ability to foreclose on the mortgage survived the bankruptcy. The letters did not establish any dispute as to the amount of the debt owing or secured by the mortgage under either the 2008 Personal Loan or the 2008 TEB Business Loan.

¶30 In sum, there were two debts outstanding secured by one residential mortgage, James and Beverly failed to point to evidence of a dispute as to the amount of each debt secured by that mortgage, and therefore there was no accord and satisfaction when the Bank cashed the October 2010 check tendered by James and Beverly.

C. Claim and Issue Preclusion

¶31 We turn to the assertion by James and Beverly that the Stipulation and Order of Dismissal entered in the action between the Molitor children and the Bank precluded the Bank from asserting its interest in the mortgage securing the balance due on the 2008 TEB Business Loan under the 2008 Business Work-Out Agreement. In support of this argument, the Molitors rely on the doctrines of claim and issue preclusion. The circuit court concluded that neither doctrine applies in this case. The application of preclusion doctrines to a given set of facts is a question of law which this court reviews without deference to lower courts. ***Lindas v. Cady***, 183 Wis. 2d 547, 552, 515 N.W.2d 458 (1994). We address each doctrine in turn, concluding that claim preclusion does not apply because the parties were not identical nor in privity and because the stipulation at issue was not a final judgment, and that issue preclusion does not apply because the stipulation was not the subject of actual litigation.

1. Claim Preclusion

¶32 Under claim preclusion, "a final judgment is conclusive in all subsequent actions between the same parties as to all matters which were litigated or which might have been litigated in the former proceedings." ***Lindas***, 183 Wis. 2d at 558 (quoting ***DePratt v. West Bend Mut. Ins. Co.***, 113 Wis. 2d 306, 310, 334 N.W.2d 883 (1983)). The elements of claim preclusion are: "(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." ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 551, 525 N.W.2d 723 (1995). The party asserting claim preclusion has the burden of proving its applicability. ***Pasko v. City of Milwaukee,*** 2002 WI 33, ¶16, 252 Wis. 2d 1, 643 N.W.2d 72.

¶33 With regard to the identity-of-the-parties element, it is undisputed that James and Beverly were not parties to the Stipulation and Order of Dismissal. In seeking to establish this element, the Molitors assert that privity exists between their interests and their children's interests in the former action. This argument fails under the applicable test.

¶34 The Wisconsin Supreme Court has explained that "[p]rivity exists when a person is so identified in interest with a party to former litigation that he or she represents precisely the same legal right in respect to the subject matter involved." ***Id.*** In other words, "privity compares the interests of a party to a first action with a nonparty to determine whether the interests of the nonparty were represented in the first action." ***Id.***, ¶18.

¶35 Here, the Molitor children and James and Beverly do not share identical legal interests. At the time of the Bank's action against them, the Molitor children were personal guarantors on the 2008 TEB Business Loan. Troy and Eve each signed his and her own Continuing Guaranty on October 31, 2001, guaranteeing the past, present and future obligations of the debtor on the 2008 TEB Business Loan. Accordingly, during the previous action, the Molitor children were defending their personal liability interest as personal guarantors.

¶36 In contrast, in the present action, James and Beverly seek to preclude the Bank's claim that they are liable as mortgagors for the remaining balance owed on the 2008 TEB Business Loan. We have already concluded that this mortgage passed through bankruptcy and remains unsatisfied. The Molitors' home provides security for payment of the 2008 TEB Business Loan under the 2008 Business Work-Out Agreement. Thus, the interests of James and Beverly are those of mortgagors.

¶37 These interests – personal guarantor versus mortgagor – are distinct in that Troy and Eve were personally liable for borrowed amounts, while the liability of James and Beverly is that of a secured interest in their real estate. The Wisconsin Supreme Court has recognized a distinction between these two interests in the context of shortened redemption periods when a mortgagee waives a deficiency judgment. *See* ***Bank Mut. v. S.J. Boyer Const., Inc.***, 2010 WI 74, ¶3, 326 Wis. 2d 521, 785 N.W.2d 462 (distinguishing "the liability of a borrower on a debt, which is a personal obligation, from the liability of a mortgagor, which is an obligation limited to the property the mortgagor has put up as security for the debt"). We find this distinction applicable here.

¶38 Moreover, it is apparent from the record that the Molitor children did not represent the interest of their parents in the previous action. In October 2008, James and Beverly had already negotiated with the Bank and entered into the 2008 Business Work-Out Agreement with respect to the real estate mortgage securing the 2008 TEB Business Loan. The Bank negotiated with James and Beverly a $250,000 credit for the value of the property. In the Bank's action against them, the Molitor children refused to allow the $250,000 value to set the amount owed remaining on the note. Rather, they conducted their own negotiations with the

Bank and pursued an independent appraisal. Thus, the Molitor children's interest did not represent the interest of their parents in the prior action.

¶39 Moreover, even if privity existed between the respective interests of the parents and their children, claim preclusion would not apply because, as the circuit court concluded, the Stipulation and Order of Dismissal did not constitute a final judgment on the merits under the applicable test.

¶40 A final judgment on the merits need not be the result of a full litigation of the claims in order for claim preclusion to apply. ***Tomsen v. Secura Ins.***, 2003 WI App 187, ¶9, 266 Wis. 2d 491, 668 N.W.2d 794. A default judgment or a stipulation may meet the requirement of a "final judgment on the merits," if it ends the litigation on the merits of the claim or claims. ***State v. Miller***, 2004 WI App 117, ¶28, 274 Wis. 2d 471, 683 N.W.2d 485.

¶41 The Stipulation and Order of Dismissal dated November 2, 2009, stated: "Upon the above and foregoing Stipulation, it is hereby ordered that the above entitled action shall be and hereby is dismissed without costs, disbursements or other expenses or fees awarded to either party." (Uppercase type removed.) This language does not support a conclusion that the document is a final judgment on the merits. The Stipulation and Order of Dismissal did not determine the rights or explain the relief of the parties. Rather, it merely dismissed the action, notably without instruction as to whether the dismissal was with or without prejudice. Under the words of the order, it appears that either party remained free to restart the litigation. Therefore, we conclude that the Stipulation and Order of Dismissal did not constitute a judgment on the merits.

¶42 The Molitors rely on a recent case in which the Wisconsin Supreme Court determined that the dismissal of a federal-court action following settlement

had claim-preclusive effect on a subsequent action. *See* ***Wisconsin Pub. Serv. Corp. v. Arby Const., Inc.***, 2012 WI 87, 342 Wis. 2d 544, 818 N.W.2d 863. In ***Wisconsin Public Service Corp.***, the petitioner insurance company had raised, as a defendant, a cross-claim against a co-defendant construction company in a prior federal case that was ultimately resolved by the parties' stipulation and an order of dismissal. ***Id.***, ¶¶18-19. The order of dismissal in the prior federal case stated:

> [A]ll issues in this case are resolved and all claims are settled with the exception of certain contribution and indemnification claims which will be addressed outside the confines of this lawsuit; …. This lawsuit, together with any and all claims set forth in the pleadings … is dismissed on the merits, with prejudice, but without costs.

Id., ¶20. One year later, the insurance company filed an indemnification action against the construction company. ***Id.***, ¶21. The circuit court granted the construction company's motion to dismiss based on claim preclusion. ***Id.***, ¶25. The Wisconsin Supreme Court affirmed, concluding that the federal court's order of dismissal was a final judgment on the merits. ***Id.***, ¶65. The Court explained: "While the phrase 'on the merits' is not enough for a judgment to be on the merits for purposes of claim preclusion, the judgment in this case explicitly referred to the representations of counsel that *all* claims (except specific contribution and indemnification claims) were to be dismissed with prejudice." ***Id.*** (citation omitted; emphasis in original). Therefore, the Court held that the "judgment disposed of the action on the merits and [had] claim-preclusive effect." ***Id.***

¶43 We find the ***Wisconsin Public Service*** case distinguishable from the present matter, because the language in that case differs significantly from the language in the Bank-Molitor Order of Dismissal. First, the Order of Dismissal did not state that all claims between the parties are resolved and settled. Second,

unlike in ***Wisconsin Public Service***, the Order of Dismissal did not dismiss the matter with prejudice, which reflected its lack of finality.

¶44 In sum, claim preclusion does not apply, because the parties were not identical and are not in privity, and the Stipulation and Order of Dismissal was not a final judgment on the merits. Because these two elements fail, we do not reach the remaining identity-of-claims element. We turn now to the argument concerning issue preclusion.

2. Issue Preclusion

¶45 The doctrine of issue preclusion bars the relitigation in a subsequent action of an *issue* of law or fact that was actually litigated and decided in a prior action between the same or different parties. ***Mrozek v. Intra Fin. Corp.***, 2005 WI 73, ¶17, 281 Wis. 2d 448, 699 N.W.2d 54; *see also* ***Northern States Power Co.***, 189 Wis. 2d at 550. An issue is "actually litigated" when it is "properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined." ***City of Sheboygan v. Nytsch***, 2006 WI App 191, ¶12, 296 Wis. 2d 73, 722 N.W.2d 626 (quoting ***Randall v. Felt***, 2002 WI App 157, ¶9, 256 Wis. 2d 563, 647 N.W.2d 373). The requirement that the issue be "actually litigated" is a threshold prerequisite for application of the doctrine. ***City of Sheboygan***, 296 Wis. 2d 73, ¶11. If the issue was actually litigated, then the court must "determine whether it is fundamentally fair to employ issue preclusion given the circumstances of the particular case at hand," ***Mrozek***, 281 Wis. 2d 448, ¶17, under a multi-factor test, the details of which are irrelevant to our resolution of this issue.

¶46 James and Beverly argue that the Stipulation and Order of Dismissal in the children's case conclusively established the issue that no amount remains

owing by the Molitors on the 2008 TEB Business Loan. However, the law does not support the contention that issue preclusion applies. Specifically, the Stipulation and Order of Dismissal does not meet the "actually litigated" requirement of issue preclusion. Under Wisconsin law, "[a]n issue is not actually litigated … if it is the subject of a stipulation between the parties." ***City of Sheboygan***, 296 Wis. 2d 73, ¶12 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 27, cmt. e (1982)). The Molitors have not met the threshold prerequisite that an issue be actually litigated, and so we need not apply the multi-factor fairness analysis. The doctrine of issue preclusion is inapplicable.

CONCLUSION

¶47 For the reasons stated above, we conclude that the mortgage on the residential property of James and Beverly, which secured the 2008 TEB Business Loan, survived the bankruptcy, that the 2009 Reaffirmation Agreement did not renegotiate the 2008 TEB Business Loan or the lien securing the loan, that the Molitors did not establish accord and satisfaction of the 2008 TEB Business Loan when they submitted a check in satisfaction of the mortgage on the 2008 Personal Loan, and that the doctrines of claim preclusion and issue preclusion do not apply. Accordingly, we affirm.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.