

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 6, 2012

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. 2012AP934

Cir. Ct. No. 2010SC8182

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

DIANA GOODAVAGE,

PLAINTIFF-APPELLANT,

V.

**FIDUCIARY REAL ESTATE DEVELOPMENT
D/B/A VALLEY VIEW APTS.,**

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
RICHARD G. NIESS, Judge. *Affirmed.*

¶1 BLANCHARD, J.¹ This appeal by a pro se tenant presents two issues. The circuit court dismissed the tenant's small claims action against her

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

landlord, Fiduciary Real Estate Development. The issues are (1) whether tenant Diana Goodavage's breach of contract claim is precluded by a prior court decision in a related case, and (2) whether Goodavage's breach of contract claim fails on its merits, even if it is not precluded by the prior decision. This court concludes that Goodavage fails to show in this appeal that her claim is not precluded by the prior decision, *Fiduciary Real Estate Development, Inc. v. Goodavage*, No. 2010AP3056, unpublished slip op. (WI App Dec. 22, 2011). This court also concludes that, even if her claim is not precluded, it fails on its merits. The order is therefore affirmed.

BACKGROUND

¶2 Goodavage was under a twelve-month lease from noon on November 1, 2009, to noon on October 31, 2010. Fiduciary offered to renew Goodavage's lease for the following year. The renewal form offered by Fiduciary provided that the renewed lease would commence at noon on November 1, 2010, and would terminate at noon on October 31, 2011.

¶3 Fiduciary also offered Goodavage \$150 in incentives if she signed and returned the renewal by August 15, 2010. This \$150 incentives offer was on a separate document, a flyer stating, "Just return your signed 12 month renewal by **8/15/2010** and receive a **\$50 AMEX Gift Card + \$100 Rent Credit and Free Carpet Shampoo!!**"

¶4 It is undisputed that Goodavage signed and returned the renewal form before August 15, 2010, and that she made hand-written changes to the form. The changes would have extended the termination time and date to 11:49 a.m. on November 1, 2011, that is, to just under one day later than offered by Fiduciary. Fiduciary did not agree to the changes.

¶5 After this, Fiduciary indicated that it would not renew Goodavage's lease until Goodavage's apartment passed inspection by the Dane County Housing Authority, a requirement for Goodavage's participation in the authority's Section 8 rent assistance program. The property manager informed Goodavage that, when her apartment passed inspection by the authority, Fiduciary would sign the renewal and offer her the incentives. Goodavage's apartment failed to pass an authority inspection.

¶6 Following a re-inspection, Fiduciary sent Goodavage a letter stating that it would renew her lease effective November 1, 2010, on a month-to-month basis, on the condition that she had to sign and return a month-to-month renewal form by November 1, 2010. Fiduciary also informed Goodavage that she would receive the renewal incentives if she signed the month-to-month lease agreement. Goodavage did not sign the month-to-month agreement.

¶7 In August 2010, Goodavage filed the action underlying this appeal, a small claims action against Fiduciary for breach of contract, claiming that she is entitled to the incentives.² A court commissioner dismissed the case and Goodavage requested a trial de novo before the circuit court.

¶8 While Goodavage's request was pending, Fiduciary informed Goodavage that she would become a holdover tenant on November 1, 2010, if Fiduciary did not receive her signed lease renewal. Fiduciary reiterated that

² To clarify, Goodavage does not claim in this action that the alleged breach of contract by Fiduciary entitles her to a lease of any length on the unit. Instead, she claimed below, and now argues on appeal, that the alleged breach entitles her to the \$150 in incentives.

Goodavage would receive the \$150 in incentives if she signed the month-to-month lease renewal. Again, Goodavage declined to sign the month-to-month lease.

¶9 After her twelve-month lease expired on October 31, 2010, Goodavage did not vacate her apartment and attempted to pay Fiduciary rent for the month of November 2010. Fiduciary did not accept Goodavage's payment and filed a separate eviction action against her, alleging that she was a holdover tenant. The circuit court in this new eviction action found that Goodavage was a holdover tenant, concluding that Goodavage and Fiduciary never entered into a valid renewal lease agreement and granting Fiduciary a judgment of eviction.

¶10 Goodavage appealed the eviction judgment. Upon review, this court in a one-judge opinion affirmed the judgment. Among the issues decided in that appeal was whether Goodavage and Fiduciary had entered into a valid renewal lease. This court concluded that the parties had not done so because, "[n]o matter how slight Goodavage's changes were to the lease, those changes constituted a rejection of Fiduciary's offer and [created] a counteroffer, which Fiduciary had to agree to in order for there to be a valid contract." This court further concluded that, because Fiduciary did not agree to Goodavage's modifications, a contract for renewal was not formed.

¶11 Following this court's decision in the eviction action, Fiduciary sent a letter to the circuit court in this contract action asking it to dismiss the case on preclusion grounds, based on that decision. The circuit court granted the request after a hearing, concluding that this court's prior decision was dispositive. As indicated above, Goodavage appeals.

DISCUSSION

¶12 Goodavage argues that her claim for the incentives in this action is not precluded by this court’s decision in the eviction action and that Fiduciary’s failure to provide her with the incentives was a breach of contract. This court will address each of these contentions in turn.

A. *Preclusion*

¶13 There are two types of preclusion, claim preclusion and issue preclusion.

1. *Claim Preclusion*

¶14 The doctrine of claim preclusion (formerly called *res judicata*) focuses on judgments and their preclusive effect. *Sopha v. Owens-Corning Fiberglas Corp.*, 230 Wis. 2d 212, 233, 601 N.W.2d 627 (1999). The doctrine “provides that a final judgment on the merits bars parties from relitigating any claim that arises out of the same relevant facts, transactions[,] or occurrences.” *Id.* Generally, a final judgment is conclusive in all subsequent actions 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 (1983); *see also Lindas v. Cady*, 183 Wis. 2d 547, 559, 515 N.W.2d 458 (1994) (holding claim preclusion “extends to any and all claims that either were or which *could have been* asserted in the previous litigation”).

¶15 Thus, in order for claim preclusion to apply, 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.” *Northern States Power Co. v. Bugher*, 189 Wis. 2d 541, 551, 525 N.W.2d 723 (1995).

¶16 When the policies favoring preclusion of a second action are trumped by other significant policies, claim preclusion may be disregarded. *Sopha*, 230 Wis. 2d at 236. However, any exception to claim preclusion must be limited to special circumstances. *Id.*

¶17 The question of whether claim preclusion applies under a given factual scenario is a question of law that this court reviews de novo. *See DePratt*, 113 Wis. 2d at 310.

2. Issue Preclusion

¶18 The doctrine of issue preclusion (formerly called collateral estoppel) is designed to limit the relitigation of issues previously litigated in a prior proceeding involving the same parties or their privies. *Reuter v. Murphy*, 2000 WI App 276, ¶7, 240 Wis. 2d 110, 622 N.W.2d 464. Issue preclusion seeks to strike a balance between the competing goals of judicial efficiency and finality, protecting against repetitious or harassing litigation. *Michelle T. v. Crozier*, 173 Wis. 2d 681, 688, 495 N.W.2d 327 (1993). The burden of establishing issue preclusion falls on the party seeking to invoke it. *State ex rel. Flowers v. DHSS*, 81 Wis. 2d 376, 389, 260 N.W.2d 727 (1978).

¶19 The Wisconsin Supreme Court established a two-step analysis for issue preclusion in *Paige K.B. v. Steven G.B.*, 226 Wis. 2d 210, 224-25, 594 N.W.2d 370 (1999). The first step is to determine whether a litigant is in privity or has sufficient identity of interest with the party to the prior proceeding. *Id.* If the litigant is in privity or has a sufficient identity of interest with the party to the

prior proceeding, the court should turn to the second step of the analysis. *Id.* at 224-25. The second step addresses whether the application of issue preclusion comports with fundamental fairness. *Id.* at 225.

¶20 “Whether issue preclusion is a potential limit on litigation in an individual case is a question of law, on which we give no deference to the circuit court’s decision.” *Mrozek v. Intra Fin. Corp.*, 2005 WI 73, ¶15, 281 Wis. 2d 448, 699 N.W.2d 54. “However, whether the circuit court properly applied, or refused to apply, issue preclusion in an individual case is a discretionary decision.” *Id.*

3. *Failure to Develop Argument and Provide Transcript*

¶21 Goodavage argues that her claim for the incentives in this case should not be precluded, but develops what is at best a minimal argument in support. Fiduciary argues on appeal that issue preclusion applies. This court concludes that Goodavage fails to adequately develop a preclusion argument. In addition, she forfeits the issue by having failed to ensure that the record includes a copy of the relevant transcript. *See State v. Pettit*, 171 Wis. 2d 627, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals need not consider inadequately developed arguments, and review is confined to portions of record available).

¶22 According to the circuit court minutes in the record, the court held a hearing before dismissing Goodavage’s claim on preclusion grounds. However, this court finds no transcript of that hearing in the record, and it is not clear whether the circuit court applied claim preclusion, issue preclusion, or both.

¶23 It was Goodavage’s responsibility to ensure that the record reviewed by this court contains a copy of the relevant transcript. *See Fiumefreddo v. McLean*, 174 Wis. 2d 10, 26, 496 N.W.2d 226 (Ct. App. 1993); *State Bank of*

Hartland v. Arndt, 129 Wis. 2d 411, 423, 385 N.W.2d 219 (Ct. App. 1986). An appellant must provide an adequate appellate record so the reviewing court can properly review the issues raised on appeal. See *J.F. Ahern Co. v. Wisconsin State Building Comm’n*, 114 Wis. 2d 69, 85, 336 N.W.2d 679 (Ct. App. 1983).

¶24 Turning to the consequences of a failure to follow these rules, when an appellate record is incomplete in connection with an issue raised by the appellant, this court must assume that the missing material supports the circuit court’s ruling. See *Duhamé v. Duhamé*, 154 Wis. 2d 258, 269, 453 N.W.2d 149 (Ct. App. 1989). Specifically as to transcripts, when an appellant fails to include a transcript in the record, the reviewing court will assume the missing transcript supports every fact essential to sustain a circuit court’s ruling. *State Bank of Hartland*, 129 Wis. 2d at 423. Therefore, this court will assume that the transcript would support the circuit court’s conclusion that this court’s prior opinion is preclusive.

¶25 This court’s analysis could end here, given Goodavage’s failure to develop a preclusion argument and failure to ensure that the record included a copy of the relevant transcript.

B. Merits of Argument

¶26 Even if this court assumed that Goodavage’s claim for the incentives is not precluded by this court’s prior decision, the claim would fail on the merits. For the following reasons, this court concludes that Goodavage and Fiduciary never formed a contract that would require Fiduciary to pay Goodavage the incentives.

¶27 Goodavage argues that the Fiduciary flyer referenced above, which advertised the \$150 in incentives for early renewal of the lease, constituted an offer separate from the lease renewal itself. She argues that the flyer offered the incentives in return for her agreeing to an early renewal of a twelve-month lease. She contends that the offer in the flyer had only two conditions: (1) sign the early lease renewal form and (2) return the form by August 15, 2010. In essence, her argument is that, by signing the form, she accepted Fiduciary's offer of incentives, gave her early renewal as consideration, and entered into a separate contract with Fiduciary for the incentives. For the following reasons, this court is unconvinced by her argument.

¶28 As far as this court can discern from the record, the circuit court did not reach the merits of Goodavage's contract claim. In any case, however, when the facts of a given case are undisputed, "the existence and interpretation of a contract" are both questions of law that an appellate court reviews de novo. *Gustafson v. Physicians Ins. Co. of Wisconsin, Inc.*, 223 Wis. 2d 164, 172-73, 588 N.W.2d 363 (Ct. App. 1998). "A valid contract requires an offer, acceptance and consideration." *Piaskoski & Assocs. v. Ricciardi*, 2004 WI App 152, ¶7, 275 Wis. 2d 650, 686 N.W.2d 675 (quoting *Briggs v. Miller*, 176 Wis. 321, 325, 186 N.W. 163 (1922)). An offer and acceptance exist when there is mutual assent among the parties, and consideration exists if it is evident that the parties intend to be bound. *Gustafson*, 223 Wis. 2d at 173.

¶29 Here, the material facts are not disputed; the only facts material to whether there was an offer and acceptance are the flyer and signed renewal form. Thus, deciding whether those documents constituted an offer and acceptance, as Goodavage argues, is a question of law that does not depend on any underlying fact finding by the circuit court.

¶30 Goodavage’s argument lacks merit because there is no reasonable way to interpret the flyer as a stand-alone offer separate from the lease renewal offer itself. The flyer stated that Goodavage needed to “return [her] signed 12 month renewal by 8/15/2010” in order to receive the incentives. The renewal form, in turn, made clear that it was an offer to renew a twelve-month lease, not a stand-alone offer of incentives for a mere promise to renew early.

¶31 Thus, the only way Goodavage could be entitled to the incentives was if she had accepted Fiduciary’s offer to renew her twelve-month lease. As this court’s prior decision established, however, she did not. As already summarized above, the renewal form provided that Goodavage’s lease would terminate at noon on October 31, 2011. Goodavage made hand-written changes to the form providing that the termination time and date would instead be 11:49 a.m. on November 1, 2011. Those changes constituted a rejection of Fiduciary’s offer and a counter offer, which required Fiduciary’s acceptance to constitute a valid contract. Fiduciary did not agree to the counter-offer. Because Goodavage has failed to prove she signed a valid lease renewal, a valid contract did not exist.

¶32 For all of the reasons stated, this court concludes that Goodavage is not entitled to the incentives. Therefore, the circuit court’s order dismissing her claim against Fiduciary is affirmed.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

