COURT OF APPEALS
DECISION
DATED AND FILED

June 20, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2700 **Cir. Ct. No. 2012CV2567**

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

JAMES MOSER,

PLAINTIFF-APPELLANT,

V.

ANCHOR BANK FSB,

DEFENDANT-RESPONDENT,

FANNIE MAE,

DEFENDANT.

APPEAL from an order of the circuit court for Dane County: JOHN C. ALBERT, Judge. *Affirmed*.

Before Lundsten, P.J., Sherman and Blanchard, JJ.

¶1 LUNDSTEN, P.J. James Moser appeals an order of the circuit court granting Anchor Bank's motion to dismiss Moser's action under the doctrine of claim preclusion. In a prior action, following Moser's mortgage loan default, Anchor Bank, the mortgagee, obtained a judgment of foreclosure and the confirmation of a sheriff's sale. In the current action, Moser alleges that he is entitled to damages because various acts and omissions of Anchor Bank improperly denied Moser a mortgage loan modification, which would have halted the sale of his property and restored his right to retain the property. Moser argues that claim preclusion does not apply to his loan modification claims because facts necessary to these claims were not in existence when Anchor Bank filed the foreclosure action or when the judgment of foreclosure was entered. However, we agree with the circuit court that, because Moser could have brought his claims prior to the confirmation of sale, claim preclusion and the common-law compulsory counterclaim rule apply to bar his current claims. We therefore affirm the decision of the circuit court.

Background

¶2 On August 5, 2009, after having missed at least one payment on his home mortgage, Moser filed paperwork with his lender, Anchor Bank, for a loan modification pursuant to the Home Affordable Modification Program (HA Modification Program), a federal loan modification program. Although, as discussed below, the parties do not provide us with detailed information regarding the HA Modification Program, it appears that, under the program, Anchor Bank could have granted Moser a loan modification at a more favorable interest rate, which might have enabled Moser to make lower monthly payments and retain his home.

¶3 On September 4, 2009, Anchor Bank informed Moser that he was eligible for the trial period for a loan modification under the HA Modification Program, but that he would need to submit proof to Anchor Bank of sole ownership—a divorce decree and quit claim deed from his ex-spouse—before the trial period could begin.

¶4 On October 9, 2009, while the loan modification was pending, Anchor Bank filed for foreclosure on Moser's home. On November 2, 2009, Moser filed an answer to the foreclosure complaint. Anchor Bank moved for summary judgment on January 27, 2010, and Moser failed to respond. On March 4, 2010, the court entered a default judgment of foreclosure in favor of Anchor Bank and ordered that the sheriff's sale be held on October 26, 2010.

¶5 On April 26, 2010, Anchor Bank sent a letter to Moser informing him that his loan modification application was incomplete and the Bank was, therefore, treating the application as withdrawn. Anchor Bank informed Moser that he should contact Anchor Bank if he still wanted to be considered for the loan modification.

¶6 On October 25, 2010, one day prior to the scheduled sheriff's sale, Moser met with employees at Anchor Bank with the intent of giving Anchor Bank the divorce decree and quit claim deed required for the loan modification. Anchor Bank refused to accept the documents and refused to move forward on a loan modification.

¶7 On October 26, 2010, at the sheriff's sale, Anchor Bank was the only bidder. Before the sale to Anchor Bank could be confirmed, Moser filed for bankruptcy, prompting an automatic stay.

¶8 On October 14, 2011, the stay was lifted and a confirmation hearing was scheduled.

¶9 Moser filed a "Motion to Deny Confirmation and Compel Modification." The circuit court held two hearings on Moser's motion and eventually determined that Moser's motion was, in essence, a request to reopen the judgment of foreclosure. At the hearing on Moser's motion to reopen, the circuit court heard testimony from Moser and an Anchor Bank employee regarding Moser's loan modification application. At the conclusion of the hearing, the circuit court denied Moser's motion.

¶10 Instead of appealing the circuit court's denial of his motion to reopen the foreclosure judgment, Moser filed the new separate action against Anchor Bank that underlies the appeal in this case. In this new action, Moser makes several claims relating to Anchor Bank's handling of Moser's loan modification application. Moser alleges breach of good faith duty, breach of contract, violation of certain requirements of the HA Modification Program, intentional misrepresentation, and negligent hiring and supervision. Anchor Bank moved to dismiss Moser's claims on the basis of claim preclusion. The circuit court granted Anchor Bank's motion to dismiss on the grounds that claim preclusion and the common-law compulsory counterclaim rule bar Moser's suit against Anchor Bank.[1] Moser appeals.

[1] The prior foreclosure action was heard and decided by Dane County Circuit Court Judge C. William Foust. The new action that is the subject of this appeal was heard and decided by Dane County Circuit Court Judge John C. Albert.

Discussion

¶11 Moser makes three arguments in support of his contention that he is not barred by claim preclusion or by the common-law compulsory counterclaim rule from bringing this new action against Anchor Bank relating to the HA Modification Program.[2] We address and reject all three, but first provide applicable principles of law and describe our understanding of the interaction between the federal loan modification program and the foreclosure action.

¶12 The application of claim preclusion, and the related common-law compulsory counterclaim rule, to the set of facts before us is a question of law that we review de novo. *See* ***Menard, Inc. v. Liteway Lighting Prods.***, 2005 WI 98, ¶23, 282 Wis. 2d 582, 698 N.W.2d 738.

¶13 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." ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 550, 525 N.W.2d 723 (1995) (quoted source and internal quotation marks omitted). There are three elements required to establish claim preclusion: "(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.

[2] The parties also discuss issue preclusion but, because we have concluded that claim preclusion was properly applied, we need not address issue preclusion. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (court need address only dispositive issues).

¶14 In addition, when, as here, the claim at issue could have been brought as a counterclaim by a defendant in a prior action, the compulsory counterclaim rule applies:

> Claim preclusion, in addition to precluding a plaintiff in a subsequent action from asserting claims that were litigated or could have been litigated in a prior action, may operate to preclude a plaintiff from asserting claims in a subsequent action that the party failed to assert in a previous action in which it was a defendant. Although "the general rule in Wisconsin [under WIS. STAT. § (Rule) 802.07(1)] is that where a defendant may interpose a counterclaim but fails to do so, he is not precluded from maintaining a subsequent action on that claim[,]" this court has adopted the common-law compulsory counterclaim rule set forth in the Restatement (Second) of Judgments § 22(2)(b) (1982).
>
> The common-law compulsory counterclaim rule creates an exception to the permissive counterclaim statute and bars a subsequent action by a party who was a defendant in a previous suit if "a favorable judgment in the second action would nullify the judgment in the original action or impair rights established in the initial action." The common-law compulsory counterclaim rule operates to "preserve[] the integrity and finality of judgments and the litigant's reliance on them, by precluding a collateral attack upon a judgment in a subsequent proceeding when the attack *would completely undermine the rights established in the initial judgment*." Thus, for the common-law compulsory counterclaim rule to apply, a court must conclude that all the elements of claim preclusion are present and that a verdict favorable to the plaintiff in the second suit would undermine the judgment in the first suit or impair the established legal rights of the plaintiff in the initial action.

Menard, 282 Wis. 2d 582, ¶¶27-28 (citations omitted).

¶15 The particular context to which we apply the above legal principles involves a prior foreclosure action. It is important to keep in mind that foreclosure actions, unlike most other actions, often result in two separate and final appealable orders: a judgment of foreclosure and a subsequent order of confirmation of sale.

See ***Shuput v. Lauer***, 109 Wis. 2d 164, 172, 325 N.W.2d 321 (1982); *see also* ***Anchor Sav. & Loan Ass'n v. Coyle***, 148 Wis. 2d 94, 101, 435 N.W.2d 727 (1989). The judgment of foreclosure

> determines the parties' legal rights in the underlying obligation and in the mortgaged property and thus determines the default, the right of the mortgagee to realize upon the security, the time and place of sale of the security and the notice required, and the right of the mortgagee to a judgment of deficiency.

Shuput, 109 Wis. 2d at 171. The order confirming the sale "determines the interests of the parties to the sale." ***Id.*** An appeal from the judgment of foreclosure allows an appellant to challenge the underlying default, while an appeal of the confirmation of sale order enables a party to the sale to challenge defects in the sale proceedings. ***Id.*** at 171-72.

¶16 Key to understanding our analysis in this case is understanding that, despite the fact that a judgment of foreclosure and a later confirmation of sale are two separate and final appealable decisions, the circuit court retains jurisdiction over the entire foreclosure action until after the confirmation of sale is ordered. In other words, the judgment of foreclosure is not a typical final appealable order that resolves all issues in a case. Proceedings that occur after the judgment of foreclosure, but prior to the confirmation of sale, may retroactively affect the judgment of foreclosure. For example, if a defendant in a foreclosure action pays the amount owed on his mortgage, plus other statutorily specified amounts, such as "interest thereon," at any point prior to the sale of the property, the defendant can redeem the foreclosed-upon property and the judgment of foreclosure will be

discharged. WIS. STAT. § 846.13 (2011-12).[3] And, as we discuss next, the parties agree that a successful loan modification under the federal HA Modification Program affects the foreclosure action.

¶17 The parties provide few specifics, much less supporting citations, regarding the mechanics of the HA Modification Program or the interaction of the HA Modification Program and a circuit court foreclosure action.[4] Still, so far as we can tell, it is undisputed that, during the foreclosure proceedings at issue here, an HA Modification Program loan modification application did not force a stay of the foreclosure proceeding, and thus the loan modification application process and the foreclosure action could proceed side by side. There appears to be no dispute that a loan modification could, therefore, be granted even after the judgment of foreclosure was entered, thus reviving the mortgagee/mortgagor relationship between Anchor Bank and Moser. We discern no dispute that, if a loan modification were granted after the judgment of foreclosure, the sheriff's sale would not be held or confirmed, although the parties do not explain the mechanics of how this would happen. Regardless, for purposes of this appeal, it is sufficient to understand that, even when there has been a final judgment of foreclosure, a subsequent HA Modification Program loan modification can affect the judgment of foreclosure and the pending sheriff's sale.

[3] All further references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[4] For example, at one point in Moser's brief-in-chief, he alleges that Anchor Bank was "required to make him a new loan," while at the same time acknowledging that "the parties have referred to this as a 'modification.'" However, Moser provides no specific information as to why new mortgage terms would have constituted a new mortgage, as opposed to a modification of the prior mortgage, much less why this would be legally significant.

¶18 This interaction between the HA Modification Program loan modification process and the foreclosure action means that Moser passed up an opportunity to bring a timely challenge to Anchor Bank's loan modification procedure. As we explain below, if Moser was permitted to bring these challenges in the current action, a judgment in his favor in this action would impair the rights granted in the foreclosure action. This is an outcome that conflicts with the fairness and judicial economy goals that underlie the claim preclusion doctrine. *See* ***A.B.C.G. Enters., Inc. v. First Bank Southeast, N.A.***, 184 Wis. 2d 465, 473, 515 N.W.2d 904 (1994) ("[Claim preclusion] is premised upon the maxim that litigation must come to an end so as to ensure fairness to the parties and sound judicial administration.").

¶19 With this understanding of the law and facts, we turn to Moser's specific arguments.

1. Moser's Timing Arguments

¶20 What we label "timing arguments" are the parts of Moser's arguments that focus on the timing of facts necessary to support his loan modification claims. His timing arguments focus on two events: the filing of the foreclosure action and the entry of the judgment of foreclosure.

a. Facts Arising After The Filing

¶21 Moser's first argument relates to the relative timing of the events that gave rise to his claims against Anchor Bank relating to the HA Modification Program and the filing of the foreclosure action. As we understand this argument, Moser contends that, because Anchor Bank filed for foreclosure on Moser's home before, ultimately, denying him a loan modification, Moser could not have filed

his claims relating to the HA Modification Program until after the Bank filed the foreclosure action and, therefore, claim preclusion does not apply. If this is what Moser means to argue, we are not persuaded.

¶22 Moser had the option, pursuant to WIS. STAT. § 802.07(2), to litigate his claims against Anchor Bank as counterclaims in the foreclosure action even though those claims arose after the foreclosure action was filed. Section 802.07(2) provides: "A claim which either matured or was acquired by the pleader after serving the pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading." Under this statute, Moser could have moved to file a counterclaim against Anchor Bank even though facts underlying his claims arose after the foreclosure action was filed.

¶23 Moser does not argue that he, as a defendant, could not have brought counterclaims pursuant to WIS. STAT. § 802.07(2).[5] Rather, Moser argues that we should not apply claim preclusion in this situation because no published Wisconsin case involves the application of claim preclusion where some facts necessary to support a defendant's counterclaim arose subsequent to the plaintiff's filing of the action.[6] For example, Moser spends considerable time discussing the

[5] For that matter, we note that Moser does not argue that the circuit court improperly prevented him from raising the issue or filing counterclaims in the prior action. Apart from the merits of any such arguments, it would appear the time for making them has passed. As noted in the background facts, Moser did not appeal any part of the foreclosure action.

[6] Moser also points to case law outside of Wisconsin for the general proposition that claim preclusion bars a second suit only if the facts of the second suit arose prior to the filing of the first. *See, e.g.*, ***Smith v. Potter***, 513 F.3d 781, 783-84 (7th Cir. 2008) (no duty to amend a pleading rather than bring a separate suit if new facts arise after the filing of the first suit); ***Ripplin Shoals Land Co. LLC v. United States Army Corps of Eng'rs***, 440 F.3d 1038, 1042 (8th Cir. 2006) ("[R]es judicata does not apply to claims that did not exist when the first suit was filed."); ***Allied Fire Prot. v. Diede Constr., Inc.***, 25 Cal. Rptr. 3d 195, 127 Cal. App. 4th 150, 155 (Cal. Ct. App. 2005) ("Res judicata is not a bar to claims that arise after the initial complaint is filed."). Even if it is true that this is a general rule, Moser fails to explain how it would apply in a (continued)

supreme court's decision in ***Menard***, 282 Wis. 2d 582, a case in which a new claim was barred because the facts supporting that claim were in existence when the opposing party filed suit in a prior litigation. We discuss ***Menard*** in some detail because a close look at ***Menard*** reveals the fundamental flaw in Moser's reasoning.

¶24 Over the course of several years, the retailer Menard purchased products from Liteway. ***Id.***, ¶¶3, 6. After their business relationship ended, Liteway sued Menard for sums due for product Menard purchased from Liteway. ***Id.*** Menard failed to file a timely answer, and default judgment was entered in favor of Liteway. ***Id.***, ¶7. Subsequently, Menard filed suit against Liteway, alleging that Liteway had not reimbursed Menard for defective products Menard had returned. ***Id.***, ¶4. Liteway moved to dismiss the action, arguing claim preclusion. The supreme court in ***Menard*** concluded that Menard's new suit should have been dismissed because Menard should have raised its claim for reimbursement in the context of the prior lawsuit. ***Id.***, ¶¶20-21. The ***Menard*** court's primary reasoning was that "both suits raise[d] the single issue of how much money Menard owed Liteway for the goods Liteway sold to Menard," ***id.***, ¶39, and Menard could have raised its reimbursement issue in the prior suit, ***id.***, ¶42.

¶25 Moser focuses on the reason the ***Menard*** court gave for why Menard could have raised its reimbursement claim in the context of the prior suit. The

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situation where, as in Wisconsin, a defendant may bring a counterclaim after the initial pleadings have been filed. *See* WIS. STAT. § 802.07(2). As explained in the body of this opinion, Moser points us to no Wisconsin courts that have held that the common-law compulsory counterclaim rule is applicable only where the facts underlying the counterclaim arose prior to the filing of the first action.

court repeatedly pointed out that all of the facts giving rise to Menard's suit were in existence at the time Liteway *filed* the prior action. *See* ***id.***, ¶¶20, 38, 42. However, the key to understanding why the ***Menard*** court concluded that the application of claim preclusion was appropriate is the court's explanation that "Menard's [current] claims could clearly have been raised in Liteway's prior suit." ***Id.***, ¶42. This more basic proposition—that the claims could have been raised in the prior suit—was, of course, true because the necessary facts were in existence prior to the time Liteway filed its prior suit. But the ***Menard*** court's discussion makes clear that this might *also* have been true if the facts had arisen post-filing but pre-judgment in the prior suit. For example, the ***Menard*** court wrote:

> Had Menard not discovered that Liteway's goods were defective and nonconforming *until after Liteway's default judgment*, it would have a good argument that the separation in time between the facts in the two suits was sufficient to render its return of the defective goods a separate transaction.

Id. (emphasis added). Similarly, the supreme court in ***Menard*** put the proper focus on the *end* of the prior action, rather than on the filing, when the court explained that part of the claim preclusion reasoning used by the court of appeals was faulty because we did not take into account the possibility that "a buyer may not in fact discover the nonconformity, or legally be required to discover the nonconformity, until *after the seller has obtained a judgment* in a suit for the price of the goods." ***Id.***, ¶40 (emphasis added). The clear import of this observation is that the discovery of facts supporting a claim after the suit has commenced, but prior to judgment, may set the scene for litigating the claim in the context of the prior action.

¶26 Accordingly, we reject Moser's reliance on ***Menard*** and similar cases that apply claim preclusion based on the circumstance that all necessary

facts for a new claim were in existence at the time a prior related action was filed.[7] While this is one circumstance supporting the application of claim preclusion, it is not necessarily the only circumstance.

¶27 Indeed, the proposition that post-filing/pre-judgment discovery of facts may be sufficient to apply claim preclusion was highlighted when the ***Menard*** court explained why Menard's reliance on ***National Operating, L.P. v. Mutual Life Insurance Co.***, 2001 WI 87, 244 Wis. 2d 839, 630 N.W.2d 116, was misplaced.

¶28 In ***National Operating***, as relevant to this appeal, the court concluded that National Operating was not barred by claim preclusion from bringing an action regarding a violation of the Uniform Commercial Code where a prior declaratory judgment had extinguished National Operating's rights under a note and mortgage. ***Id.***, ¶¶84-87, 94. The ***Menard*** court disposed of Menard's reliance on ***National Operating*** by explaining that the new claim that was permitted to proceed in that case was based on facts that did not exist at the time

[7] In addition to ***Menard, Inc. v. Liteway Lighting Products***, 2005 WI 98, 282 Wis. 2d 582, 698 N.W.2d 738, Moser relies on ***A.B.C.G. Enterprises, Inc. v. First Bank Southeast, N.A.***, 184 Wis. 2d 465, 472, 482, 515 N.W.2d 904 (1994) (claim preclusion and the common-law compulsory counterclaim rule barred litigation of breach of contract and other claims pertaining to a mortgage where claims in the second action arose prior to the foreclosure action); ***Kowske v. Ameriquest Mortgage Co.***, 2009 WI App 45, ¶¶2-3, 22-25, 317 Wis. 2d 500, 767 N.W.2d 309 (mortgagor barred by claim preclusion and the common-law compulsory counterclaim rule from bringing claims against a mortgagee relating to issuance of the mortgage underlying the foreclosure action); and ***Post v. Schwall***, 157 Wis. 2d 652, 659-60, 460 N.W.2d 794 (Ct. App. 1990) (res judicata barred litigation of claims "existing and known" at the time the foreclosure action was commenced).

We acknowledge that Moser points to several other cases, but we choose not to address them all. As to each, we conclude that they are either inapposite or non-binding decisions from other jurisdictions that conflict with the reasoning in ***Menard***, 282 Wis. 2d 582.

of the "original suit."[8] ***Menard***, 282 Wis. 2d 582, ¶45. More specifically, the ***Menard*** court explained that the facts supporting the new suit did not arise until after the judgment was entered in the prior action. ***Id.***, ¶¶43-45. The new claim was based on the adverse party's post-judgment activity of retaining sums in addition to sums it was owed under a note. ***Id.*** Thus, the ***Menard*** court explained that the key difference was that, in ***National Operating***, facts necessary to support the claim at issue did not arise until it was too late to litigate the claim in the context of the original action. *See* ***Menard***, 282 Wis. 2d 582, ¶¶38, 43, 45.

¶29 As we have previously discussed, under WIS. STAT. § 802.07(2), Moser had the opportunity to bring his current claims as counterclaims in the prior foreclosure action after the filing of that action. Accordingly, we reject Moser's contention that claim preclusion may not be applied here because the facts supporting his claims did not arise until after the foreclosure filing.

b. Facts Arising After The Judgment Of Foreclosure

¶30 Moser may also be making an argument based on the two-judgment nature of foreclosure actions. Directing our attention to the first appealable

[8] We note that our own review of ***National Operating, L.P. v. Mutual Life Insurance Co.***, 2001 WI 87, 244 Wis. 2d 839, 630 N.W.2d 116, suggests that it was not necessary for the supreme court to distinguish that case. It does not appear to us that the result in ***National Operating*** hinged on whether, in the words of the ***Menard*** court, "National Operating's suit was based on facts that did not exist at the time of [the] original suit." ***Menard***, 282 Wis. 2d 582, ¶45. Rather, the decision in ***National Operating*** appears to have turned on whether the claims National Operating was asserting had been "aptly pleaded … and fully determined by the circuit court" in the first action, which is a claim preclusion requirement when the prior action is one for declaratory judgment. ***National Operating***, 244 Wis. 2d 839, ¶83; *see also* ***Barbian v. Lindner Bros. Trucking Co.***, 106 Wis. 2d 291, 297, 316 N.W.2d 371 (1982) ("[A] declaratory judgment is only binding as to matters which were actually decided therein and is not binding to matters which 'might have been litigated' in the proceedings."). Thus, regardless of the ***Menard*** discussion, we do not think that ***National Operating*** supports Moser here.

decision in a foreclosure action—the judgment of foreclosure—Moser appears to argue that he cannot be faulted for failing to file his loan modification claims because some of the facts underlying his claims did not arise until after the judgment of foreclosure. After this judgment was entered, according to Moser, his only recourse was to move the circuit court to reopen the judgment of foreclosure and ask for permission to amend his answer in order to assert his claims against Anchor Bank as a counterclaim. If this is what Moser means to argue, we are not persuaded.

¶31 It does not matter that some of the facts underlying Moser's claims against Anchor Bank arose after the judgment of foreclosure. As we explained above, the HA Modification Program loan modification process can proceed simultaneously with the judgment of foreclosure, and the circuit court retains jurisdiction over the foreclosure action after the judgment of foreclosure and until the sheriff's sale is confirmed. And, so far as we can tell, it is undisputed that a successful loan modification under the HA Modification Program, even after entry of a judgment of foreclosure, halts the sale of the property and restores the mortgagee/mortgagor relationship between the note holder and the borrower. Thus, whether a lender grants a loan modification or not is directly relevant to whether the foreclosure sale can proceed. Indeed, it is precisely because the foreclosure sale could not proceed if the loan modification was granted that the appropriate time for Moser to assert his loan modification claims against Anchor Bank was prior to confirmation of the foreclosure sale.

¶32 In sum, Moser's argument about the timing of facts necessary to his loan modification claims relative to entry of the judgment of foreclosure is not persuasive because, although a foreclosure judgment is final for purposes of appeal, it is not final in the same way most other judgments are final. For

purposes of the claim preclusion dispute here, the pertinent final order was the confirmation of the sale. Moser has failed to explain why he could not have brought a counterclaim challenging the denial of his HA Modification Program loan modification application after the judgment of foreclosure but prior to the confirmation of sale.

2. Moser's Different Transactions Argument

¶33 Moser's next argument is a variation of arguments we have already addressed. Here, Moser's focus is on the requirement of "identity between the causes of action in the two suits," which is determined under the "transactional approach." *See* ***Northern States Power Co.***, 189 Wis. 2d at 551, 553. Moser argues that, because the facts underlying his present claims arose after the judgment of foreclosure, those claims cannot be part of the same *transaction* as the facts underlying the foreclosure action.[9] We disagree.

¶34 When determining whether there is an identity of causes of action, courts examine the causes of action in both suits under a transactional approach. ***A.B.C.G. Enters.***, 184 Wis. 2d at 480-81. "Under this analysis, all claims arising out of one transaction or factual situation are treated as being part of a single cause of action, and they are required to be litigated together." ***Parks v. City of Madison***, 171 Wis. 2d 730, 735, 492 N.W.2d 365 (Ct. App. 1992). We may consider "whether the facts are related in time, space, origin, or motivation" to

[9] For ease of discussion, we focus on the part of Moser's "transactions" argument addressing the *judgment of foreclosure*. But our analysis similarly defeats his references in this part of his discussion to the filing of the foreclosure action.

determine whether the two causes share a "'common nucleus of operative facts.'" ***A.B.C.G Enters.***, 184 Wis. 2d at 481 (quoted source omitted).

¶35 Moser's "transactional approach" argument relies on an interpretation of ***Menard*** that we have already rejected. Moser points to the judgment of foreclosure, and argues that it is an event that renders facts arising after that judgment a different transaction as a matter of law. But we have already explained that a judgment of foreclosure, at least for purposes of the claim preclusion issue in this case, lacks sufficient finality because the case proceeds after that judgment and can be undone by a successful HA Modification Program loan modification.

¶36 Moreover, the ***Menard*** "transactional approach" discussion supports the conclusion that Moser's new claims arise from the same facts for purposes of claim preclusion. The ***Menard*** court explained:

> The reasons *why* Menard asserts it does not owe as much as Liteway originally claimed are not unpleaded issues or new transactions; they are merely defenses and/or counterclaims to Liteway's original claims based on the same set of facts as Liteway's claims. Despite the different substantive theories asserted by Menard, its position has always been that Liteway was not entitled to as much money as it claimed because Menard was entitled to an offset for defective products that were returned. In the end, both suits raise the single issue of how much money Menard owed Liteway for the goods Liteway sold to Menard on credit.

Menard, 282 Wis. 2d 582, ¶39 (citations and footnotes omitted). Similarly here, it was Moser's contention then and now that Anchor Bank was not entitled to force a sheriff's sale because Anchor Bank failed, in several respects, to comply with the HA Modification Program. To paraphrase ***Menard***, in the end, both suits raise the single issue of whether Moser's property should have been sold at the sheriff's sale.

¶37 Because Moser does not appear to contest the other elements of claim preclusion, we conclude that Moser's current action fulfills the required elements of claim preclusion.

3. Moser's Compulsory Counterclaim Rule Argument

¶38 Because the dispute here involves new claims that could have been brought as counterclaims in the prior action, the question arises whether the common-law compulsory counterclaim rule applies. We described this rule in detail earlier. Most pertinent here, the rule permits the application of claim preclusion to bar a claim if the claim could have been brought in the earlier action and if successfully bringing the claim in the present suit would "undermine the judgment in the first suit or impair the established legal rights of the plaintiff in the initial action." ***Id.***, ¶28; *see also* ***A.B.C.G. Enters.***, 184 Wis. 2d at 474.

¶39 Moser contends that, even if he won a favorable verdict against Anchor Bank in this action, his victory would not undermine the judgment in the prior action because he is seeking only money damages. According to Moser, the prior judgment is not affected because Anchor Bank would still be "free to exercise every single right it obtained in the foreclosure judgment: It could sell the property and apply the proceeds." We agree with Anchor Bank, however, that Moser's argument conflicts with ***A.B.C.G. Enterprises***.

¶40 In ***A.B.C.G. Enterprises***, the court addressed whether A.B.C.G. Enterprises was precluded from suing First Bank for breach of contract, among other claims, relating back to the mortgage underlying a prior foreclosure action. ***Id.***, 184 Wis. 2d at 471. The supreme court determined that, by attacking First Bank's actions regarding the mortgage underlying the foreclosure action, A.B.C.G. Enterprises was, essentially, "alleg[ing] that the original foreclosure was

improper." ***Id.*** at 482. The court determined that, if it "were to allow ABCG to recover [money] damages from First Bank, ... [the bank] could be essentially forced to return its previous recovery." ***Id.*** at 483. "A judgment in favor of ABCG would thus directly undermine the original default judgment in which the court held that under the circumstances, foreclosure was proper." ***Id.***

¶41 The same is true here. A money judgment against Anchor Bank would necessarily reduce whatever benefit the Bank obtained in the prior action. The circuit court aptly explained:

> In the previous action, the Court determined the amount that Plaintiff owed Defendant, and approved the sheriff's sale. The confirmation of sale gave Defendant the rights to the proceeds of the sale as compensation for Plaintiff's default on the note and mortgage. *If the Court were to award damages to Plaintiff, this would in effect reduce the amount of recovery Defendant received from the foreclosure.* Moreover, if the house was worth more than the price paid through the sheriff's sale, and if the Court were to conclude that Plaintiff only lost his house due to Defendant's breach of contract and tortious behavior, then the Court could conceivably award Defendant an amount higher than Defendant's recovery. *A judgment in Plaintiff's favor in this case would thus impair or completely eliminate Defendant's rights as established in the previous judgment.*

(Emphasis added.)

¶42 We conclude that a verdict favorable to Moser would undermine the judgment in the prior action and, therefore, Moser's present action is barred under the common-law compulsory counterclaim rule.

Conclusion

¶43 Because Moser's present action is barred by the doctrine of claim preclusion and the common-law compulsory counterclaim rule, we affirm the decision of the circuit court that dismissed Moser's present action.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.