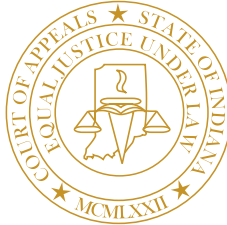


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.

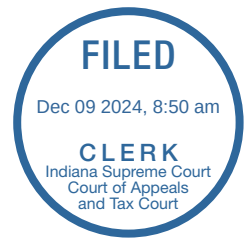


IN THE Court of Appeals of Indiana

Charles Sauter, as assignee for Midwest Telephone Co., Inc.,
Appellant-Plaintiff

v.

Telecom, LLC d/b/a Priority Communications, Robert Brack,
and Lake City Bank,
Appellees-Defendants



December 9, 2024

Court of Appeals Case No.
24A-PL-1143

Appeal from the Marion Superior Court
The Honorable John M. T. Chavis, II, Judge
Trial Court Cause No.
49D05-2310-PL-40584

Memorandum Decision by Judge Brown
Judges Mathias and Kenworthy concur.

Brown, Judge.

- [1] Charles Sauter, as Assignee for Midwest Telephone Co., Inc., appeals the trial court's order dismissing his complaint. Finding that Sauter is collaterally estopped from raising the claims in his complaint, we affirm.

Facts and Procedural History

- [2] The relevant facts as discussed in this Court's August 31, 2020 memorandum decision follow:

At the heart of this action is debt incurred by Telecom LLC ("Telecom"). The undisputed facts are that Telecom purchased assets from Midwest Telephone Co Inc ("Midwest"). As a part of that transaction, Telecom—through its managing member, [Robert] Brack—executed a promissory note (the "Note") in the amount of \$250,000 (the "Junior Debt") in May 2018. Under the Note, Telecom promised to pay Midwest quarterly installments beginning on March 31, 2019. The Note provides for an event of default "whenever any payment due . . . is not paid within fifteen (15) days following the due date of that payment," so long as Telecom receives notice and an opportunity to cure. The Note also contains an acceleration clause, specifying that Telecom would pay the balance of the Junior Debt upon an event of default.

When the Note was executed, Brack separately signed a personal guaranty (the "Guaranty"), which specifies that Brack's obligations under the Guaranty follow any assignment of the Note. In the Guaranty, Brack promises that, "[i]n the event that [Telecom] fails at any time to pay any part or all of the Note balance guaranteed when due," he will "pay the unpaid balance of the Note, in the same manner as if it constituted" his "direct and primary obligation[.]" The Guaranty also permits modifications to the terms of the Note, specifying that Midwest and Telecom may

“[c]hange the terms of . . . any debts or liabilities of [Telecom] to [Midwest]” without notice to Brack.

Prior to the Midwest-Telecom transaction, Telecom had lines of credit and a loan (the “Senior Debt”) from Lake City Bank (“Lake”). Contemporaneously with the execution of the Note and Guaranty, the interested entities—Lake, Midwest, and Telecom—entered into an agreement concerning the Junior Debt and the Senior Debt (the “Subordination Agreement”).^[1] Section 2 and Section 4 of the Subordination Agreement address Telecom’s payment obligations under the Note. Section 2 generally provides that, “[e]xcept as permitted in Section 4 below, the Junior Debt shall not be payable . . . unless and until the Senior Debt has been paid in full.” Section 4 specifies that, “[n]otwithstanding the provisions of Section 2 above, [Midwest] may receive the regularly scheduled quarterly payments of principal plus regular interest . . . **until** [Lake] provides written notice of [Telecom’s] [d]efault” as to the Senior Debt. Section 4 further provides that, “[a]fter [Lake] has sent to [Midwest] a [n]otice of [d]efault, **no payments permitted under this Section 4 may be made by [Telecom]** or received or recovered by [Midwest] or any other party . . . until (a) [Lake] has provided written notice that such payments may be made; or (b) [Telecom] has paid the Senior Debt in full.”

On May 9, 2019, Midwest assigned its rights under the Note to Sauter. A few weeks later, Lake sent Sauter a notice of default. There is no dispute that, as a result, Telecom “is prohibited from making payments to [Sauter] at this time, and has been since [Lake] issued the [n]otice of [d]efault.”

¹ Sauter signed the Subordination Agreement on behalf of Midwest as its President.

Sauter v. Brack, No. 20A-MI-751, 2020 WL 5104870, at *1-2 (Ind. Ct. App. Aug. 31, 2020) (“*Sauter I*”) (footnote and citations to record omitted).

[3] In July 2019, Sauter filed a complaint (the “2019 Complaint”) against Brack, Lake, and Telecom under cause number 49D10-1907-MI-27247 (“Cause No. 247”). *Id.* at *2. Lake and Telecom were later dismissed from the action. *Id.* at *2 n.2. Sauter alleged that Telecom defaulted on the Note by failing to make any installment payments and that Brack, as guarantor, was liable to Sauter for the balance of the Junior Debt.² *Id.* at *2. Brack and Sauter filed cross motions for summary judgment.³ *Id.* The trial court entered summary judgment in favor of Brack. *Id.* Sauter appealed. This Court held:

² The 2019 Complaint alleged two counts, with Count I requesting the appointment of a receiver to administer the activities of Telecom and Count II claiming damages against Brack based on the terms of the Note and Guaranty. Count I was later dismissed by joint stipulation.

³ In support of his summary judgment motion, Brack argued:

By executing the Subordination Agreement, Midwest specifically subordinated its right to payment on the Junior Debt, along with any other future amounts from [Telecom], to [Lake’s] right to payment on the Senior Debt. The Subordination Agreement greatly restricts the circumstances under which [Sauter] is permitted to receive payments under the Junior Debt, and ensures that [Lake] maintains its position as the primary creditor.

Statement of Facts and Brief in Support of Robert E. Brack’s Motion for Summary Judgment at 3. He argued the parties executed several agreements relating to the same transaction, the Subordination Agreement specifically referenced the Note, and “[t]he clear language of the contracts shows that [Sauter’s] right to payment was contingent on [Lake] being paid first, as the primary creditor.” *Id.* at 7.

For his part, Sauter asserted “Brack lacks standing relative to the Subordination Agreement” and argued:

[A] subordination agreement is essentially a modification of lien priorities. In this Cause however, the primary purpose and focus of said subordination agreement between [Lake] and Midwest was to grant superior lien rights to the benefit of [Lake] to the detriment of Midwest, vis-a-vi[s] [Lake’s] contractual dealings with Telecom. Therefore, the agreement between these parties to forego the right to any payment under the subordination agreement pertained only to Midwest’s right to receive payments from Telecom. Nothing is stated in said subordination agreement relative to the [Guaranty] between [Sauter] and Brack. . . . Brack’s attempt to use

Here, the Note obligates Telecom to pay quarterly installments. Critically, Section 4 of the Subordination Agreement adds a condition to that obligation—*i.e.*, when Lake has issued a notice that Telecom is in default on the Senior Debt. At that point, installments are not payable “until (a) [Lake] has provided written notice that such payments may be made; or (b) [Telecom] has paid the Senior Debt in full.” Notably, the issuance of notice **broadly suspends Telecom’s obligation to pay Sauter**—even suspending an obligation to make past-due payments: “After [Lake] has sent . . . a [n]otice of [d]efault, no payments permitted under this Section 4 may be made by [Telecom.]”

Sauter disagrees that the Subordination Agreement changed the structure of Telecom’s obligations under the Note. Sauter asserts that, under Indiana law, “a subordination agreement only arranges lien priorities between creditors of a single debtor” and “doesn’t transmute a debtor’s underlying debt obligations[.]” However, regardless of the scope of a typical subordination agreement, we must apply the specific terms contained in the instant agreement. This agreement modifies the payability of the Note, conditioning payability on whether Lake has issued a notice of default. Moreover, it is not as though—as Sauter suggests—Lake has been improperly empowered to “unilaterally chang[e] payment due dates in a promissory note that neither [Brack] nor the bank [was a party to] and that neither [Brack] nor the bank has authority to amend.” Rather, the suspension of the payment obligation arises through the plain terms of the Subordination Agreement—a trilateral bargain struck between Lake, the principal obligor, and the original payee of the Note. *Cf. State v. Int’l Bus. Machs. Corp.*, 51 N.E.3d 150, 160 (Ind. 2016) (“Indiana courts zealously defend the freedom to

said Subordination Agreement as a shield or defense against his payment obligations to [Sauter] is erroneous.

Plaintiff’s Response to Defendant’s Motion for Summary Judgment, Cross-Motion for Summary Judgment, Designation of Evidentiary Materials, Statement of Facts and Memorandum of Law in Support Thereof at 4-5.

contract.”). We therefore decline to adopt Sauter’s proffered reading of the interplay between the Subordination Agreement and the Note.

Ultimately, there is no dispute that Lake issued a notice of default. As earlier discussed, that notice suspended Telecom’s obligation to pay Sauter on the Note. Moreover, there is also no dispute that Telecom’s obligation to pay has not been revived. Thus, Telecom’s obligation to pay remains suspended.

Id. at *2-3 (citations to record and briefs omitted). With respect to Brack’s Guaranty, we held that “Brack’s obligations track Telecom’s obligations, *i.e.*, Brack is liable only if Telecom has a ripe financial obligation under the Note,” “[b]efore Lake issued the notice of default, Telecom was obligated to make regular payments on the Note,” “[h]owever, the notice suspended Telecom’s obligation to pay even past-due payments,” and “[b]ecause Telecom is not presently obligated to pay Sauter, Brack is not presently obligated to pay Sauter.” *Id.* at *3-4. We concluded the trial court did not err in entering summary judgment in Brack’s favor. *Id.* at *4.

[4] On October 16, 2023, Sauter filed a Complaint for Damages, Declaratory Relief and Demand for Jury Trial (the “2023 Complaint”) against Telecom, Lake, and Brack (collectively, “Defendants”) under cause number 49D05-2310-PL-40584 (“Cause No. 584”), the cause from which this appeal arises. Sauter alleged that, since the filing of the 2019 Complaint, Defendants have failed to make a single quarterly payment as required by the Note. He raised counts of breach of contract, promissory estoppel, and unjust enrichment against Telecom and Brack. He also requested “a declaratory judgment that the Subordination

Agreement fails for a lack of consideration, is illusory, is unconscionable, and is therefore unenforceable.” Appellant’s Appendix Volume II at 21.

[5] In November 2023, Telecom and Brack filed a motion to dismiss the 2023 Complaint pursuant to Trial Rule 12(B)(6) arguing that Sauter’s claims were barred by claim and issue preclusion, and in December 2023, Lake filed a motion to dismiss the 2023 Complaint pursuant to Rule 12(B)(6) arguing that issue preclusion applied and that both Cause No. 247 and Cause No. 584 “involved issues relating to a breach of the Note” and “both actions necessarily involve a determination of the viability and enforceability of the Subordination Agreement.” *Id.* at 74. The court held a hearing on the motions to dismiss.

[6] In April 2024, the trial court issued an order finding “[t]he Indiana Court of Appeals brought finality to the issues presented in this case” in *Sauter I* and granting Defendants’ motions to dismiss. *Id.* at 9. The court stated that Sauter was granted leave to amend his complaint within ten days and, if he did not file an amended complaint, the court would dismiss the cause with prejudice. In May 2024, the court issued an Order of Dismissal with Prejudice stating that Sauter did not file an amended complaint, that it granted Defendants’ motions to dismiss with prejudice, and it considered the matter closed.

Discussion

[7] A motion to dismiss under Ind. Trial Rule 12(B)(6) tests the legal sufficiency of the complaint. *Price v. Ind. Dep’t of Child Servs.*, 80 N.E.3d 170, 173 (Ind. 2017). We accept as true the facts alleged in the complaint. *Id.* We review a trial

court's grant or denial of a Trial Rule 12(B)(6) motion *de novo*. *Thornton v. State*, 43 N.E.3d 585, 587 (Ind. 2015).

[8] Sauter argues that he “brought new and different claims, including promissory estoppel, unjust enrichment, and a count requesting declaratory relief,” that the only issue determined in the 2019 litigation was “whether Brack, as guarantor, owed a debt under the Subordination Agreement,” and “[t]hat issue has no bearing on the claims raised” in his 2023 Complaint. Appellant’s Brief at 19. He also argues that this Court should reconsider its holding in *Sauter I*.

[9] Lake argues that Sauter is collaterally estopped from relitigating his claims and that the elements of issue preclusion were satisfied. It argues there are no new facts or evidence, the Senior Debt remains unsatisfied, and thus no payments can be made to the Junior Debt pursuant to the Subordination Agreement. Brack also argues that Sauter’s 2023 Complaint is barred by issue preclusion.

[10] The Indiana Supreme Court recently discussed Indiana’s preclusion doctrine in *Miller v. Patel*, 212 N.E.3d 639 (Ind. 2023). In *Miller*, the Court stated: “Traditionally, we have followed the common law path of classifying **res judicata** and **collateral estoppel**—also referred as **claim preclusion** and **issue preclusion**—as two types of preclusion that are not separate branches but separate trees.” 212 N.E.3d at 646 (citation and quotation marks omitted). “In practice, both trees exist to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions,

encourage reliance on adjudication.” *Id.* (citation and quotation marks omitted).

[11] With respect to claim preclusion, the Indiana Supreme Court held:

Starting with **claim preclusion**: this doctrine serves a broader role as a complete and categorical “bar to subsequent litigation on the same claim between identical parties.” *Edwards v. Edwards*, 132 N.E.3d 391, 396 (Ind. Ct. App. 2019). Underlying claim preclusion are four requirements that must be satisfied: “(1) the former judgment must have been rendered by a court of competent jurisdiction; (2) the former judgment must have been rendered on the merits; (3) the matter now in issue was, or could have been, determined in the prior action; and (4) the controversy adjudicated in the former action must have been between the parties to the present suit or their privies.” *Afolabi v. Atl. Mortg. & Inv. Corp.*, 849 N.E.2d 1170, 1173 (Ind. Ct. App. 2006). . . . Where at play, claim preclusion enacts a robust and “powerful prohibition against claim splitting” because it extinguishes not only an entire claim or set of defenses, but any other possible “claims that could have been litigated.” [*Robbins v. MED-1 Solutions, LLC*, 13 F.4th 652, 657 (7th Cir. 2021)].

Id.

[12] With respect to issue preclusion, the Indiana Supreme Court held:

Issue preclusion, in contrast, is narrower and instead executes a more targeted purpose. For example, collateral estoppel forecloses any “subsequent re-litigation of the **same fact or issue** where that fact or issue was necessarily adjudicated in a former suit and the same fact or issue is presented in the subsequent lawsuit.” *Tofany v. NBS Imaging Sys., Inc.*, 616 N.E.2d 1034, 1037 (Ind. 1993) (emphasis added). In these cases, “the first adjudication will be held conclusive even if the second is [constituted] on a different

claim.” *Tofany*, 616 N.E.2d at 1037 (citing *Sullivan v. American Cas. Co.*, 605 N.E.2d 134, 137 (Ind. 1992)). Three conditions lay the foundation for collateral estoppel: “(1) a final judgment on the merits in a court of competent jurisdiction; (2) identity of the issues; and (3) the party to be estopped was a party or the privity of a party in the prior action.” *National Wine & Spirits, Inc. v. Ernst & Young, LLP*, 976 N.E.2d 699, 704 (Ind. 2012), *cert. denied*, 569 U.S. 1018, 133 S. Ct. 2780 (2013). The second requirement will fail “if the issue is one that was **not actually litigated and determined**[.]” *Id.* (emphasis added). In deciding whether issue preclusion is appropriate, Indiana courts also examine two salient considerations—(a) “whether the party against whom the judgment is pled had a full and fair opportunity to litigate the issue,” and (b) “whether it would be otherwise unfair under the circumstances to permit the use of collateral estoppel.” *Id.* (internal citation and quotation marks omitted). These twin considerations shape whether collateral estoppel is fitting in a case.

Id. at 646-647. The Court further stated:

Today, collateral estoppel is analyzed by its **offensive** or **defensive** posture. *See Tofany*, 616 N.E.2d at 1037. In *Parklane Hosiery*, the United States Supreme Court concluded that both forms of collateral estoppel share a common core: “the party against whom estoppel is asserted has **litigated and lost** in an earlier action.” 439 U.S. at 329, 99 S. Ct. 645 (emphasis added). So, unlike claim preclusion, which only allows a defensive application in practice, issue preclusion can be used in **two ways**—defensively or offensively. *See Robbins*, 13 F.4th at 657.

Posture matters. Take offensive issue preclusion—the more discouraged form of collateral estoppel. In that setting, the later “plaintiff seeks to foreclose the defendant from litigating an issue the defendant had previously litigated unsuccessfully in an action with another party.” *Tofany*, 616 N.E.2d at 1037 (quoting *Parklane Hosiery*, 439 U.S. at 326 n.4, 99 S. Ct. 645). This form of preclusion

is disfavored for two key policy reasons: (1) judicial economy and (2) unfairness to the defendant. *Id.* at 1038 (citing *Parklane Hosiery*, 439 U.S. at 329-31, 99 S. Ct. 645).

* * * * *

In contrast, **defensive** issue preclusion is viewed with less circumspection because it “is more likely to promote judicial economy.” *National Wine & Spirits*, 976 N.E.2d at 708 (quoting *Hayworth v. Schilli Leasing, Inc.*, 669 N.E.2d 165, 168 (Ind. 1996)). Under this subtype, a “defendant seeks to prevent a plaintiff from asserting a claim which the plaintiff had previously litigated and lost against another defendant.” *Parklane Hosiery*, 439 U.S. at 326 n.4, 99 S. Ct. 645.

Id. at 647-648.

[13] Here, Defendants sought to prevent Sauter as the plaintiff from asserting a claim which he had previously litigated and lost against Brack. Thus, defensive issue preclusion, which is viewed with less circumspection and is more likely to promote judicial economy, guides our analysis. *See id.* at 648. We discuss the conditions of defensive issue preclusion step by step.

[14] First, there is no dispute that the trial court entered summary judgment in Cause No. 247, resolving the claims in Sauter’s 2019 Complaint in Brack’s favor, and this Court affirmed the judgment in *Sauter I*. The requirement of a final judgment on the merits was satisfied.

[15] Second, as for the “identity of the issues” requirement, issue preclusion forecloses any subsequent re-litigation of the same fact or issue “where that fact or issue was necessarily adjudicated in a former suit and the same fact or issue

is presented in the subsequent lawsuit.” *Miller*, 212 N.E.3d at 646 (citing *Tofany*, 616 N.E.2d at 1037). Sauter alleged in his 2019 Complaint that Telecom defaulted on the Note by failing to make payments and that Brack as guarantor was liable to him for the Junior Debt. *Sauter I* at *2. Sauter’s claims turned on the terms of the Note, the Subordination Agreement, and Brack’s personal Guaranty. Specifically, while the Note obligates Telecom to pay quarterly installments, “Section 4 of the Subordination Agreement adds a condition to that obligation—*i.e.*, when Lake has issued a notice that Telecom is in default on the Senior Debt,” and at that point, installments are not payable until Lake has provided written notice that such payments may be made, or Telecom has paid the Senior Debt in full. *Id.* This Court noted that Sauter disagreed that the Subordination Agreement changed the structure of Telecom’s obligations under the Note, but we observed “the suspension of the payment obligation arises through the plain terms of the Subordination Agreement—a trilateral bargain struck between Lake, the principal obligor, and the original payee of the Note.” *Id.* We found that Lake issued a notice of default, Telecom’s obligation to pay Sauter on the Note was suspended, and Brack’s obligation to pay Sauter based on his Guaranty was similarly suspended. *Id.* at *3-4.

[16] Sauter’s claims in his 2023 Complaint similarly turn on the terms of the Note, the Subordination Agreement, and the Guaranty. Sauter’s breach of contract claim was based on Telecom’s payment obligations under the Note and Brack’s Guaranty, the promissory estoppel claim was based on the promises set forth in

the Note, and the unjust enrichment claim was similarly based on Sauter's expectations of payment in accordance with the Note and the Guaranty. Sauter also requested a declaratory judgment that the Subordination Agreement was unenforceable. The impact of the Subordination Agreement on Telecom's obligations under the Note and Brack's obligations based on his Guaranty was litigated in Cause No. 247, and in *Sauter I* we expressly declined to adopt Sauter's "proffered reading of the interplay between the Subordination Agreement and the Note." *Id.* at *2. Sauter attempted to re-litigate the impact of the Subordination Agreement which was an issue "necessarily adjudicated in the prior proceeding." *Miller*, 212 N.E.3d at 649 (citing *National Wine & Spirits*, 976 N.E.2d at 706). The identity of the issues requirement was sufficiently satisfied.

[17] Third, Sauter was a party to the prior action in Cause No. 247—he was the plaintiff who brought the claims against Brack in his 2019 Complaint, and the trial court entered summary judgment against him. The requirement that the party to be estopped was a party in the prior action was satisfied.

[18] Further, Sauter had a full and fair opportunity to litigate the proper interpretation of the provisions of the Note and Subordination Agreement, the application and interplay of those provisions, and the extent to which the instruments were enforceable. Sauter alleged that Telecom defaulted on the Note and that Brack as guarantor was liable to him for the balance of the Junior Debt. Sauter and Brack filed competing motions for summary judgment and designated materials consisting of the relevant executed agreements and

instruments. Sauter presented arguments related to the Subordination Agreement in particular and the extent to which its terms affected Telecom's obligations under the Note and Brack's obligation based on his Guaranty. Sauter had ample opportunity to raise any challenge or argument related to the instruments including the pertinent provisions of the Subordination Agreement.

[19] Finally, applying collateral estoppel to Sauter would not be otherwise unfair under the circumstances. The Indiana Supreme Court stated:

While Indiana has not defined the meaning of “unfairness,” the Seventh Circuit has provided guidance in *Reed v. Illinois*, 808 F.3d 1103 (7th Cir. 2015). In that decision, Judge Posner, writing for the panel, initially acknowledged these amorphous and undefined concepts often “lack precision,” but yet concluded they still must be given concrete meaning because “they are elements of legal doctrine.” *Id.* at 1108. The panel furnished a rule of thumb: unfairness for defensive collateral estoppel is “to deny, without a good reason, a party’s right to press a potentially winning argument.” *Id.* This principle emanates from a “desire not to deprive a litigant of an adequate day in court,” which might arise where a plaintiff was “laboring under a mental or physical disability that impeded effective litigation.” *Id.* (internal citation and quotation marks omitted). In *Reed*, the plaintiff, a pro se litigant in a personal injury suit, failed “to establish the applicability to her case of the federal laws against disability discrimination.” *Id.* Based on her acute speech disability, lack of legal representation, and her denied request for help, the majority panel concluded that collateral estoppel could not be fairly extended to Reed. *Id.*

Miller, 212 N.E.3d at 654-655. Here, Sauter was represented by counsel in Cause No. 247 and presented argument related to the proper interpretation and application of the terms of the Subordination Agreement, the Note, and Brack's

Guaranty before the trial court and this Court. Further, the claims in his 2023 Complaint were ultimately based on the provisions and promises in the agreements and instruments signed by the parties. Applying collateral estoppel was not unfair under the circumstances.

[20] Finding that Sauter is collaterally estopped from raising his claims, we affirm the trial court's Order of Dismissal.

[21] Affirmed.

Mathias, J., and Kenworthy, J., concur.

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