

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 28, 2015

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. 2014AP1558

Cir. Ct. No. 2013CV11160

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

ERIK REICHERTZ,

PLAINTIFF-RESPONDENT,

v.

MARK GULLICKSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
MARY M. KUHNMUENCH, Judge. *Affirmed.*

Before Curley, P.J., Brennan, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Appellant Mark Gullickson appeals an order dismissing his motion to vacate the default judgment entered against him. Gullickson argues that: (1) the circuit court did not have personal jurisdiction over him; (2) his procedural due process rights were violated when the circuit court

entered judgment against him; and (3) he is entitled to equitable relief. We reject all of these arguments. Therefore, we affirm.

¶2 This case has its genesis in a real estate transaction. Erik Reichertz offered to purchase Gullickson's property. Gullickson accepted the offer. Reichertz then learned that Gullickson performed work on the property without required permits. The parties amended the contract to require Gullickson to correct the defects and code violations prior to closing, but he did not do so. Reichertz then sued for breach of contract.

¶3 Reichertz's lawyer mailed authenticated copies of the summons and complaint to Attorney S.A. Shapiro, who had previously represented Reichertz, and asked Shapiro to admit service on behalf of Gullickson. Shapiro refused to admit service on Gullickson's behalf. Reichertz then attempted to have Gullickson personally served five separate times between January 18 and January 26, 2014, but was unsuccessful. The process server left his card at the door each time he attempted to serve Gullickson, noting the last four times that the previously left card had been taken.

¶4 Reichertz filed a Summons by Publication with the circuit court on February 11, 2014, because his attempts at personal service had been unsuccessful. He mailed a copy to Gullickson on February 13, 2014, and had the newspaper publish the summons on February 26, March 5 and March 12, 2014. Reichertz also mailed a copy of the Summons by Publication to Shapiro and again asked Shapiro if he would admit service on Gullickson's behalf, explaining that he would seek a default judgment. Again, Shapiro refused to admit service.

¶5 On April 4, 2014, the circuit court entered an order for judgment against Gullickson for \$21,000 plus costs because he failed to answer the

complaint. On May 30, 2014, the circuit court taxed costs against Gullickson and entered judgment. On June 10, 2014, Attorney Shapiro moved to vacate the judgment on Gullickson's behalf. After a hearing, the circuit court denied the motion.

¶6 Gullickson first argues that the circuit court did not have personal jurisdiction over him because Reichertz mailed the summons to him thirteen days before he published the summons in the newspaper, which Gullickson contends is too many days prior to publication. He bases his argument on WIS. STAT. § 801.11(1)(c) (2013-14),¹ which provides in part: “If the defendant’s post-office address is known ..., there shall be mailed to the defendant, *at or immediately prior to the first publication*, a copy of the summons and a copy of the complaint.” (Emphasis added.)

¶7 Gullickson has pointed to no authority for the proposition that mailing the summons thirteen days in advance of publication in the newspaper is at odds with the statutory mandate that the summons be mailed “at or immediately prior” to publication. The statute does not require simultaneous mailing. Reichertz’s counsel explained at the hearing on the motion to vacate the judgment that he mailed the summons to Gullickson on February 13, 2014, because he wanted to ensure that Gullickson received it before it was published, and was uncertain how long mail delivery would take. We conclude that Reichertz complied with the statute by mailing the summons thirteen days before it was published.

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶8 Even if mailing the summons thirteen days in advance were considered to be a defect in service, the error would not deprive the circuit court of personal jurisdiction because it is a technical error that did not prejudice Gullickson. *See Burnett v. Hill*, 207 Wis. 2d 110, 121, 557 N.W.2d 800 (1997) (the circuit court is not deprived of personal jurisdiction if the error in service is technical and does not prejudice the defendant). Mailing the summons thirteen days in advance of publication, rather than mailing it sometime closer to the date of publication, gave Gullickson *more* notice of the action against him, not less. We reject Gullickson’s argument that the circuit court did not have personal jurisdiction over him.

¶9 Gullickson next argues that Reichertz violated his procedural due process rights because Reichertz did not notify him in advance that judgment would be entered against him on May 30, 2014. Gullickson explains that he thought a default judgment hearing was scheduled for June 17, 2014, based on a copy he received of Reichertz’s letter to the circuit court clerk stating that a hearing was scheduled for that date.

¶10 The Wisconsin statutes provide that “[n]o service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them.” *See* WIS. STAT. § 801.14(1). The circuit court entered an order for judgment against Gullickson on April 4, 2014, based on Gullickson’s failure to answer the complaint. Because Gullickson was already in default, he was not entitled to notice before the circuit court taxed costs and entered the judgment on May 30. Moreover, the circuit court took no substantive legal action on May 30. Without a hearing, the judgment clerk taxed costs and entered judgment based on the circuit

court's April 4 order. *See* WIS. STAT. § 814.10(1). Gullickson's due process rights were not violated.

¶11 Finally, Gullickson argues that he is entitled to equitable relief from the default judgment because Reichertz had “unclean hands.” He argues that Reichertz engaged in misconduct by requesting judgment prior to June 17, 2014, the date Gullickson believed the motion for judgment had originally been scheduled. The decision to grant equitable relief is committed to the circuit court's discretion. *Pietrowski v. Dufrane*, 2001 WI App 175, ¶5, 247 Wis. 2d 232, 634 N.W.2d 109. “Under the clean-hands doctrine, a party who ‘has been guilty of substantial misconduct’ of the matters in litigation such that the party ‘has in some measure affected the equitable relations subsisting between the two parties ... shall not be afforded relief when he [or she] comes into court.’” *State v. Kaczmariski*, 2009 WI App 117, ¶15, 320 Wis. 2d 811, 722 N.W.2d 702 (citation omitted; brackets in original).

¶12 The circuit court properly exercised its discretion in concluding that Gullickson was not entitled to equitable relief because Reichertz had not engaged in any misconduct. Reichertz acted in accord with the statutes in obtaining judgment. Moreover, Gullickson has pointed to nothing in the record that suggests that judgment was entered on May 30, rather than June 17, at Reichertz's behest. Instead, it appears that the judgment clerk entered the judgment because there was no substantive action left for the circuit court to take. The only potential misconduct that concerned the circuit court was that of Gullickson's lawyer, not Reichertz. The circuit court pointed out that Shapiro did not file a notice of appearance, Gullickson was not present in person at the hearing even though Shapiro had not filed a notice of appearance, and Shapiro was evasive with the circuit court about whether he was, in fact, representing Gullickson at the outset of

the hearing. While not explicitly ruling that Shapiro was acting in bad faith, the circuit court stated that “one very reasonable inference is that you are attempting to mislead the other side [about whether you are or are not representing Gullickson] ... and cause fraud upon this Court.” We reject Gullickson’s claim that the circuit court misused its discretion in concluding that he was not entitled to equitable relief.

By the Court.—Order affirmed.

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

