

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 22, 2005

Cornelia G. Clark
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. 2004AP2925

Cir. Ct. No. 2004CV1168

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**CHRISTOPHER SEAN ENGLISH, ANITA ENGLISH, AND C.S. ENGLISH
GOLF, LLC,**

PLAINTIFFS-APPELLANTS,

v.

MALEC HOLDINGS II, LTD.,

DEFENDANT-RESPONDENT,

TOWN BANK OF DELAFIELD (F/K/A DELAFIELD STATE BANK),

DEFENDANT.

APPEAL from an order of the circuit court for Waukesha County:
MARK GEMPELER, Judge. *Affirmed.*

Before Anderson, P.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Christopher and Anita English appeal from an order vacating a default judgment against Malec Holdings II, Ltd.¹ The circuit court determined that the affidavit of service in support of the motion for default judgment was insufficient. The Englishes argue that proper service of the summons and complaint was made because the person served was an actual agent of Malec, or otherwise the person in charge of Malec's office. We conclude the circuit court properly exercised its discretion in vacating the default judgment and affirm the order.

¶2 The Englishes commenced this action for damages occasioned by the termination of Christopher's employment as the Director of Golf/Head Professional at the Bristlecone Pines Golf Club owned and operated by Malec. When Malec did not timely file an answer, the Englishes moved for default judgment based on the process server's affidavit that on June 2, 2004, he made personal service of the summons and complaint by serving "Kathy Hintz for Malec Holdings II, Ltd." at "1500 East Arlene Drive, Hartland, WI." The motion was filed Friday, October 1, 2004. On Tuesday, October 5, 2004, a default judgment was entered for more than \$400,000.

¶3 On October 7, 2004, Malec filed an objection to the motion for default judgment. The motion included an affidavit from Hintz indicating that on the day of purported personal service, she was not an officer, director or managing agent of Malec, that she was located at 1325 East Bristlecone Drive when the process server presented her with the summons and complaint, that she refused to

¹ By an order of December 6, 2004, leave to appeal the nonfinal order was granted. *See* WIS. STAT. RULE 809.50 (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

accept the papers because she was not authorized to accept service, and that the papers were left on the floor. Upon learning that the default judgment had been entered, Malec moved to vacate the default judgment.

¶4 The circuit court determined that the affidavit of service was deficient in several respects because it did not indicate “due diligence on an officer of the corporation,” did not indicate that an authenticated copy of the summons and complaint was served, and did not demonstrate that Hintz was an officer of the corporation. The default judgment was vacated.

¶5 WISCONSIN STAT. § 801.11(5)(a) provides that a court of this state may exercise personal jurisdiction over a corporation by service of a summons:

By personally serving the summons upon an officer, director or managing agent of the corporation or limited liability company either within or without this state. In lieu of delivering the copy of the summons to the officer specified, the copy may be left in the office of such officer, director or managing agent with the person who is apparently in charge of the office.

¶6 A circuit court has discretion in deciding whether to grant a default judgment. *Holman v. Family Health Plan*, 227 Wis. 2d 478, 483, 596 N.W.2d 358 (1999). Before granting default judgment, the circuit court must be satisfied that the summons and complaint were actually served. *See Honeycrest Farms, Inc. v. A.O. Smith Corp.*, 169 Wis. 2d 596, 601, 486 N.W.2d 539 (Ct. App. 1992) (WIS. STAT. § 806.02(2) establishes the procedure for default judgments and requires a plaintiff who seeks a default judgment to file with the motion for a default judgment proof of service of the summons). This case turns on what level of proof the circuit court requires to establish that proper service of the summons and complaint was made. The circuit court has discretion concerning the nature of

the proof it may consider when deciding if proper service was made. *See Honeycrest Farms*, 169 Wis. 2d at 603-04.

¶7 Here, the process server's affidavit indicated that he had utilized the personal service option under WIS. STAT. § 801.11(5)(a). However, there was no indication in the process server's affidavit that Hintz was an officer, director or managing agent of the corporation, or that the summons had been left in the office of an officer, director or managing agent with the person apparently in charge of the office. The affidavit simply stated that Hintz had been served at a certain address. Without more in support of the motion for default judgment, the circuit court was left to guess that personal service occurred. Although the record created on the motion to vacate the default judgment may have established actual personal service or substitute service,² it remains a truism that when the default judgment was entered, the record did not establish personal service on the corporation. *See Kenosha Hosp. & Med. Ctr. v. Garcia*, 2004 WI 105, ¶28, 274 Wis. 2d 338, 683 N.W.2d 425 ("The record does not show that the secretary served at the Kenosha plant was an officer, director, or managing agent of the corporation or was in charge of the office of an officer, director, or managing agent of the corporation."), 2004 WI 137, 276 Wis. 2d 359, 688 N.W.2d 462 (on motion to clarify remand).

¶8 The circuit court has discretion in deciding whether to grant relief from a default judgment. *Holman*, 227 Wis. 2d at 483. We read the circuit

² The circuit court acknowledged that "outside the parameters of the affidavit," there was perhaps "ample evidence" that Hintz was an officer of the corporation. The circuit court did not decide whether actual personal or substitute service was made because Malec agreed to admit service in the event the default judgment was vacated. Therefore, we need not decide the issue of whether proper service was in fact made.

court's decision to be that it erroneously exercised its discretion in granting default judgment in the first place because the affidavit of the process server did not in fact establish personal service. As we recognized in *Dietrich v. Elliott*, 190 Wis. 2d 816, 823, 528 N.W.2d 17 (Ct. App. 1995), a circuit court's discretionary powers permit it to "correct erroneous conclusions of law and to address issues not properly dealt with under the original judgment." It was a proper exercise of discretion for the circuit court to consider whether the default judgment should have been entered in the first place since Malec timely filed its objection to the motion for default judgment and moved for relief from the default judgment within a short time after its entry. See *Holman*, 227 Wis. 2d at 486 (plaintiffs not prejudiced by vacating the default judgment since they had prompt notice that the default judgment was being challenged). Nor was it an erroneous exercise of discretion to require sufficient details about service to establish actual personal service on Malec. See *Horrigan v. State Farm Ins. Co.*, 106 Wis. 2d 675, 681, 317 N.W.2d 474 (1982) ("This court has held that when a statute prescribes how service is to be made, compliance with the statute is required for personal jurisdiction even where the defendant has actual notice of the summons and complaint."); *Dietrich*, 190 Wis. 2d at 827 ("Wisconsin requires strict compliance with its rules of statutory service, even though the consequences may appear to be harsh.").

By the Court.—Order affirmed.

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

