

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 4, 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. 2005AP63-FT

Cir. Ct. No. 2004CV10

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

FINANCE SERVICE CORPORATION,

PLAINTIFF-RESPONDENT,

V.

HAROLD E. DREES,

DEFENDANT-APPELLANT,

**WILLIAM A. THATCHER, TABETH R. THATCHER AND DONALD
COULTER,**

DEFENDANTS.

APPEAL from a judgment and an order of the circuit court for
Marathon County: DOROTHY L. BAIN, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Harold Drees appeals a default judgment granting Finance Service Corporation a foreclosure and an order confirming the sheriff's sale.¹ Drees argues the circuit court erred by granting default judgment because: (1) it did not consider whether prejudice resulted from his failure to timely serve the answer; (2) it never struck his answer that was filed but not served; and (3) Finance Service's complaint did not comply with WIS. STAT. § 846.103(2). Drees also argues that Finance Service did not provide timely notice of the confirmation of sale hearing. We reject Drees's arguments and affirm the judgment and order.

BACKGROUND

¶2 On January 7, 2004, Finance Service commenced this foreclosure action. The complaint sought, among other things, a deficiency judgment against Drees and a three-month redemption period. On February 9, Drees filed a letter with the court that stated "as a reply to plaintiff's action we regard their claims as false and erroneous and request a hearing to prove so at the courts [sic] convenience." Finance Service never received a copy of the letter.

¶3 On April 6, Finance Service moved for default judgment. At a May 4 hearing on the motion, the circuit court inquired what Drees's defense was. Drees indicated he was not challenging the foreclosure, but rather the amounts sought by Finance Service, contending its financial accounting was inaccurate. The court asked the parties to submit additional information regarding payments and set a second hearing.

¹ This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶4 On June 4, Drees filed a notice of retainer and an amended answer. At the June 8 hearing, Drees argued, through counsel, that the relief Finance Service sought in its complaint did not exist because it conflicted with the applicable statutes. Drees again challenged the amount due under the mortgage. He also argued that his February 9 letter was an answer that joined issue and, therefore, the appropriate remedy for his failure to serve the answer was costs to Finance Service for its motion rather than a default judgment in its favor.

¶5 The circuit court stated, “The answer was filed only with the Court. Obviously it is a violation of the statute, and the case law would support my finding that it was not adequately served, and therefore, does not constitute an answer.” It then pointed out that three subsequent documents, which indicated they were served on opposing counsel, were filed pro se by Drees but never received by counsel. The court concluded, “And based on that, based on my ability to exercise my discretion, I am going to find that a timely and an appropriate answer was not filed.” The court granted default judgment in Finance Service’s favor, inserted a tentative amount of judgment and instructed the parties to work out the details, including the amount, redemption period and attorney fees. A June 15 hearing was scheduled.

¶6 Judgment was entered and contained the following:²

On June 15, 2004, at 10:30 A.M., subsequent to the granting of the default judgment, the parties appeared before the Court to stipulate to the following:

1. The amount due the plaintiff ...;
2. There shall be a three month redemption period ...;

² The record does not contain the hearing transcript.

3. That plaintiff shall not be entitled to a deficiency judgment

¶7 On November 30, 2004, Finance Service filed a notice of motion and motion for confirmation of sale. It served the notice on Drees's counsel by certified mail with return receipt requested and by facsimile. At the motion hearing, Drees argued Finance Service had not given proper notice of the confirmation of sale hearing. The circuit court disagreed and confirmed the sale.

STANDARDS OF REVIEW

¶8 We review a circuit court's decision to grant a default judgment under the erroneous exercise of discretion standard. *Williams Corner Investors v. Areawide*, 2004 WI App 27, ¶10, 269 Wis. 2d 682, 676 N.W.2d 168. A court properly exercises its discretion when it examines the relevant facts, applies a proper standard of law and, using a demonstrated rational process, reaches a conclusion that a reasonable judge could reach. *Loy v. Bunderson*, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982). We affirm a circuit court's discretionary determination when the record shows that discretion was exercised and there is a reasonable basis for the court's decision. *Williams Corner*, 269 Wis. 2d 682, ¶10.

¶9 Drees also challenges the adequacy of the confirmation of sale notice. Whether Finance Service complied with the notice statute involves the application of undisputed facts to a legal standard, a question of law we review independently. See *GMAC Mortgage Corp. v. Grisvold*, 215 Wis. 2d 459, 481, 572 N.W.2d 466 (1998).

DISCUSSION

Default Judgment

¶10 Drees argues the circuit court did not properly exercise its discretion when it granted a default judgment because it did not consider whether Finance Service was prejudiced by his failure to serve his answer. Drees relies on *Split Rock Hardwoods v. Lumber Liquidators*, 2002 WI 66, 253 Wis. 2d 238, 646 N.W.2d 19. In *Split Rock*, Lumber Liquidators timely served its answer on Split Rock.³ However, Lumber Liquidators failed to file the answer with the court until forty-five days after serving Split Rock. Split Rock moved to strike the answer and for default judgment for Lumber Liquidators' failure to file the answer "within a reasonable time after service," as required by statute. The *Split Rock* court concluded that before a court may enter default judgment based on a defendant's failure to timely file its answer, the court must consider whether prejudice resulted from the defendant's untimely filing. *Id.*, ¶33.

¶11 Drees argues the circuit court should have similarly considered whether Finance Service was prejudiced by his failure to serve his answer. We are unpersuaded. *Split Rock* interpreted the filing, not service, requirement of the civil procedure statutes. Therefore, the *Split Rock* prejudice analysis is inapplicable to the facts of this case.

³ The answer was not timely under the statutory time limits. However, Split Rock granted Lumber Liquidators an extension of time to answer, and the answer was timely under that extended deadline.

¶12 Furthermore, it is service, not filing, that is the critical act in determining whether a defendant has timely answered.⁴ See *id.*, ¶31. As the *Split Rock* court stated:

The Wisconsin rules expect that answers will be timely served and promptly filed. Courts ought to have authority to impose a serious sanction for failure to timely “serve,” and an appropriate sanction, however modest, for failure to file “within a reasonable time after service.”

Id., ¶29. Accordingly, Drees’s failure to serve his answer raises a different set of concerns than a defendant that timely serves, but fails to file, an answer. A prejudice determination aids in determining the “appropriate sanction, however modest” for failure to file; however, it is unnecessary to establish the “serious sanction” warranted for failure to serve.

¶13 Secondly, Drees argues the court did not properly exercise its discretion when it granted default judgment because it did not first strike his untimely answer, again citing *Split Rock*. There, our supreme court stated that when a party moves for default judgment, “the movant must show that no issue of law or fact has been joined. Thus, when an answer has been served late or filed late, a motion to strike the late answer is a prerequisite to a default judgment.” *Id.*, ¶37. However, Drees never served his answer and, therefore, never joined issue. Accordingly, no motion to strike was necessary.

⁴ Indeed, “[t]he filing of any paper required to be served constitutes a certification by the party or attorney effecting the filing that a copy of such paper *has been timely served* on all parties required to be served” WIS. STAT. § 801.14(4) (emphasis added).

¶14 Finally, Drees argues that the circuit court erred by granting default judgment because Finance Service's complaint sought relief not available under the law. The complaint sought the following relief:

1. For the foreclosure and sale of the mortgaged premises in accordance with Section 846.103(2), Wisconsin Statutes, providing for a three month redemption period;
2. That plaintiff may have judgment and execution against Harold E. Drees for any deficiency remaining unpaid after applying the proceeds of the sale as provided by law;

....

However, WIS. STAT. § 846.103(2) provides, in relevant part:

the plaintiff in a foreclosure action of a mortgage ... may elect by express allegation in the complaint to waive judgment for any deficiency When the plaintiff so elects, judgment shall be entered as provided in this chapter, except that no judgment for deficiency may be ordered nor separately rendered against any party who is personally liable for the debt secured by the mortgage and the sale of the mortgaged premises shall be made upon the expiration of 3 months from the date when such judgment is entered. ...

¶15 Drees contends Finance Service's complaint violated the statute because it sought both a deficiency and a shortened three-month redemption period. Therefore, he argues the complaint was deficient and the circuit court could not properly grant default judgment. To obtain default judgment, the complaint must contain allegations that state a claim for relief. *Tridle v. Horn*, 2002 WI App 215, ¶11, 257 Wis. 2d 529, 652 N.W.2d 418. However, Drees does not show that Finance Service's complaint failed to state a claim. Rather, he only establishes that the complaint requested relief not allowed under the statute. Drees cites no authority that such a deficiency precludes default judgment. Further, Drees stipulated to the relief granted in the default judgment: a three-month

redemption period with no deficiency judgment. Accordingly, he waived any objection to the relief granted.

Notice of Confirmation of Sale Hearing

¶16 Drees argues that Finance Service did not provide timely notice of the confirmation of sale hearing, which was held on December 6, 2004.

WISCONSIN STAT. § 846.165(1) provides, in relevant part:

No sale on a judgment of mortgage foreclosure shall be confirmed *unless 5 days' notice has been given to all parties* that have appeared in the action. Such *notice shall be given either personally or by registered mail* directed to the last-known post-office address, mailed at least 5 days prior to the date when the motion for confirmation is to be heard (Emphasis added.)

Finance Service prepared the required notice and served it on Drees's counsel on November 29, 2004, by certified mail with return receipt requested and by facsimile. Drees argues that the notice was defective because it was required to be served on him, not his attorney.

¶17 Finance Service counters, and we agree, that WIS. STAT. § 846.165(1) must be read in conjunction with WIS. STAT. § 801.14(2), which requires service of papers on represented parties be made on the parties' attorney.

Section 801.14(2) provides:

Whenever under these statutes, service of pleadings and other papers is required or permitted to be made upon a party represented by an attorney, *the service shall be made upon the attorney unless service upon the party in person is ordered by the court*. Service upon the attorney or upon a party shall be made by delivering a copy or by mailing it to the last-known address Delivery of a copy within this section means: handing it to the attorney or to the party; transmitting a copy of the paper by facsimile machine to his or her office Service by mail is complete upon mailing. Service by facsimile is complete upon transmission. The

first sentence of this subsection shall not apply to service of a summons or of any process of court or of any paper to bring a party into contempt of court. (Emphasis added.)

As our supreme court summarized, “the black-letter law is that once an action has begun and the attorney has appeared in the action on behalf of a party, service of papers may be upon the attorney.” *In Re Petition of Wis. Elec. Power Co.*, 110 Wis. 2d 649, 657, 329 N.W.2d 186 (1983). Thus, when § 846.165(1) is read together with § 801.14(2), the notice of confirmation of sale is properly given to a represented party by serving it on the party’s attorney.⁵ Therefore, Finance Service gave proper notice by timely serving Drees’s counsel.

By the Court.—Judgment and order affirmed.

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

⁵ On reply, Drees counters that even if service on his attorney is permitted, Finance Service did not serve his attorney in the manner required by WIS. STAT. § 846.165(1): personally or by registered mail. However, because Finance Service served Drees’s counsel in a manner allowed by WIS. STAT. § 801.14(2), notice was proper.

