COURT OF APPEALS
DECISION
DATED AND FILED

December 2, 2008

David R. Schanker
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. 2007AP2341
2008AP583

Cir. Ct. Nos. 1996SC24199
2007CV4903

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

NO. 2007AP2341
CIR. CT. NO. 2007CV4903

SHANK HALL, INC.,

PLAINTIFF-RESPONDENT,

V.

GARY HOROWITZ AND INVESTMENT TAX, INC.,

DEFENDANTS-APPELLANTS.

GUARANTY BANK & TRUST,

GARNISHEE.

NO. 2008AP583
CIR. CT. NO. 1996SC24199

SHANK HALL, INC.,

PLAINTIFF-RESPONDENT,

V.

GARY HOWARD A/K/A GARY HOROWITZ AND INVESTMENT TAX, INC.,

DEFENDANTS-APPELLANTS.

APPEAL from orders of the circuit court for Milwaukee County: ELSA C. LAMLEAS AND MICHAEL G. MALMSTADT, Judges. *Affirmed*.

Before Curley, P.J., Fine and Kessler, JJ.

¶1 KESSLER, J. In these consolidated appeals, Gary Howard a/k/a Gary Horowitz and Investment Tax, Inc. (collectively, "Horowitz"), appeal from: (1) a non-earnings garnishment order directing that Horowitz's bank release $12,115.24 to Shank Hall, Inc., which has an unsatisfied small claims judgment against Horowitz, as well as an order denying Horowitz's motion to vacate and dismiss the underlying small claims judgment (appeal number 2007AP2341); and (2) an order denying Horowitz's motion for relief from the 1996 small claims judgment (appeal number 2008AP583).[1] We affirm.

BACKGROUND

¶2 On May 1, 2007, Shank Hall filed a non-earnings garnishment claim against Horowitz, pursuant to WIS. STAT. §§ 812.01-812.07 (2005-06).[2] Shank

[1] The Honorable Elsa C. Lamelas entered the orders in the garnishment action. The Honorable Michael G. Malmstadt entered the order denying Horowitz's motion for relief from the small claims judgment.

[2] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

Hall claimed Horowitz owed it $12,115.24 (including post-judgment interest) pursuant to a 1996 small claims judgment.[3] Shank Hall sought to garnish the funds in Horowitz's Guaranty Bank & Trust bank account.

¶3 Shank Hall moved for summary judgment on its garnishment claim. Horowitz moved to dismiss the garnishment claim on a variety of grounds, including that the garnishment action should be dismissed because the 1996 judgment was void because the court lacked personal jurisdiction over Horowitz.

¶4 On August 6, 2007, the trial court heard arguments from the parties. Shank Hall argued that the judgment was unsatisfied, that the bank had indicated it held funds that could satisfy the judgment, and that the non-earnings garnishment should be ordered. Horowitz argued the garnishment action should be dismissed because he had not been properly served in the 1996 small claims action.

¶5 The trial court denied Horowitz's motion to vacate and dismiss, concluding that the motion was "not the appropriate vehicle by which to attack the small claims action that creates the underlying obligation." The trial court noted that the motion for summary judgment on the garnishment had not been opposed, and concluded that judgment in Shank Hall's favor was appropriate.

¶6 On August 13, 2007, Horowitz moved to stay the garnishment order pending appeal. The trial court denied the motion on August 21, 2007. It also issued the written garnishment order, as well as an order that explicitly denied

[3] The underlying small claims judgment involved Shank Hall's allegation that Horowitz was negligent in connection with Shank Hall's tax returns. Service was by publication. Horowitz did not answer Shank Hall's complaint, and default judgment was entered against him.

Horowitz's motion to dismiss and granted Shank Hall's motion for summary judgment. It indicated that the garnishment order was "final for the purposes of an appeal." On October 4, 2007, Horowitz appealed from the orders approving the garnishment and denying Horowitz's motion to dismiss.[4] This became appeal number 2007AP2341.

¶7 On November 9, 2007, Horowitz moved for relief from judgment in small claims case number 96SC24199, citing WIS. STAT. § 806.07(1)(d) (authorizing relief where a judgment is void). The trial court held a hearing on Horowitz's motion.[5] Horowitz asserted that in 1996, Shank Hall had not exercised due diligence in its attempts to serve him. Specifically, he drew the court's attention to the process server's notes that concerned his attempts to serve Horowitz on August 3, 6 and 7, 1996, at his last known address of 500 W. Bradley Road. These notes stated: "Spoke w/ Receptionists ~~at~~ They laughed when I asked for def. Thev'e [sic] moved & they have new Alias. Marietta Weidenbaum goes by Marietta Aienseola & Gary goes by a New 1st name & New Spelling of old. He may be living in Apt. Cpx–White Oaks."[6] (Strike-through and abbreviations in original.) Horowitz presented affidavits at the motion hearing asserting that he did in fact live at an apartment complex known as White Oaks, located at 9100 N.

[4] Prior to filing his notice of appeal, Horowitz obtained new counsel and on September 28, 2007, filed a motion for reconsideration and a motion to stay the August 21, 2007 order. In the motion for reconsideration, Horowitz argued for the first time that the garnishment action had to have been brought within five years pursuant to WIS. STAT. § 815.04. Shank Hall opposed the motions. The trial court did not ultimately take any action on the motions. As we explain later in this opinion, these motions are not part of this appeal and will not be addressed.

[5] The motion was heard and decided by the Honorable Michael G. Malmstadt, who happens to be the same judge who granted the small claims judgment in 1996.

[6] An almost identical report was filed concerning attempts to serve Investment Tax, Inc.

White Oak Lane in Milwaukee, from 1995 until sometime in 2001. He argued that the process server had failed to exercise due diligence in attempting to serve him because the server did not pursue the lead that Horowitz might be living at an apartment complex called White Oaks. Horowitz contended that this lack of due diligence rendered the subsequent service by publication improper.

¶8 In response, Shank Hall argued that it had exercised due diligence in trying to serve Horowitz. It noted that Horowitz had an attorney representing him throughout the relevant time period. Shank Hall's counsel also asserted (without providing affidavits in support) that Horowitz and his attorney were aware of the 1996 lawsuit, and that Shank Hall tried unsuccessfully to locate Horowitz after judgment was entered, including going to an apartment complex called White Oaks Apartments. Finally, Shank Hall argued that the trial court could not grant Horowitz relief from judgment because WIS. STAT. § 799.29(1)(c) (1995-96) limited the time to move for relief from judgment to six months.

¶9 The trial court concluded that Shank Hall had exercised due diligence in attempting to serve Horowitz in 1996. It noted that being told someone might be at "White Oaks" is not sufficient. It explained: "I don't know what White Oaks we're talking about. White Oaks, it's like how many pine lakes are there in Wisconsin, how many White Oaks Apartments developments are there. I don't know." It also noted that the server had been told Horowitz might be living "under his old [last] name with a different spelling and a new first name." The trial court said that under these circumstances, it was not reasonable to expect the server to continue to try to personally serve Horowitz. The court denied the motion for relief from judgment.

¶10 Horowitz appealed, which became appeal number 2008AP583. The two cases were subsequently consolidated for appeal.

DISCUSSION

¶11 Horowitz's opening brief on appeal raises numerous issues and subissues.[7] We have organized them into two main issues and will examine each in turn.

I. Challenges to the garnishment orders.

¶12 A trial 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 court could reach." ***Flottmeyer v. Circuit Court for Monroe County***, 2007 WI App 36, ¶17, 300 Wis. 2d 447, 730 N.W.2d 421. Horowitz argues the trial court that heard his motion to dismiss the garnishment action erroneously exercised its discretion in three ways: (1) it refused to consider Horowitz's challenge to the underlying small claims judgment; (2) it "erred in failing to consider [Horowitz's] argument that the garnishment was filed over 10 years after judgment was entered"; and (3) it failed to schedule a hearing date for and consider Horowitz's motion for reconsideration concerning the late filing of the garnishment action. We reject these arguments.

¶13 First, Horowitz argues that the trial court in the garnishment action should have considered his challenge to the underlying small claims judgment. Even if this were true (a proposition we do not decide), Horowitz fails to show

[7] In his reply brief, Horowitz explicitly withdrew one issue concerning the 1996 service of a summons and complaint prior to filing. We therefore do not consider that issue.

how he was prejudiced, given that he was able to challenge whether the small claims judgment was void when he moved to vacate the small claims judgment and got a hearing on that motion. For this reason, we need not further consider Horowitz's challenge to the trial court's exercise of discretion concerning a hearing on this issue. *See* ***Hannemann v. Boyson***, 2005 WI 94, ¶57, 282 Wis. 2d 664, 698 N.W.2d 714 ("An error does not require reversal unless it affects the substantial rights of the party seeking to set aside the judgment."); ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (unnecessary to decide non-dispositive issues).

¶14 Second, Horowitz argues the trial court "erred in failing to consider [his] argument that the garnishment was filed over 10 years after judgment was entered." The fact that the garnishment was filed ten years after judgment is a fact, not an argument. Horowitz's motion to dismiss the garnishment stated: "Per Wis. Stat. § 812.11(4), even if Defendant was properly served, Defendant argues Plaintiff did not assert his default judgment of $5,216 from the period of the award, October 2, 1996 until the service of garnishment, May 22, 2007. A period of ten years and 233 days." The section Horowitz referenced, § 812.11(4), provides: "The garnishee may state any claim of exemption from execution on the part of the defendant or other objection, known to the garnishee, against the right of the plaintiff to apply upon the plaintiff's demand the debt or property disclosed." Specifically how that section might apply to the garnishment action was not explained in the written motion or at the motion hearing. Horowitz offered no written or oral argument in opposition to Shank Hall's motion for summary judgment on the garnishment, which the trial court noted on the record. The trial court cannot be faulted for not considering an argument that was not made.

¶15 Horowitz's third challenge to the trial court's discretion is related to his second challenge, as it appears to involve the argument he wished he had raised *before* the garnishment order was issued. After the trial court granted summary judgment for Shank Hall and ordered the garnishment, Horowitz secured new counsel and moved for reconsideration, contesting the garnishment for the first time on grounds that the "garnishment action is procedurally defective because the limitation periods to enforce the 1996 small claims judgment, without renewal under [WIS. STAT. § 806.23], had passed," and citing WIS. STAT. §§ 815.04 and 806.15(1). On appeal, Horowitz argues the merits of the reconsideration motion and contends the trial court erroneously denied him a hearing on his motion. However, the motion for reconsideration was never decided and was not referenced in Horowitz's notice of appeal. Issues arising from that motion are not part of this appeal and will not be addressed.

II. Challenges to the underlying small claims judgment.

¶16 Horowitz argues that the trial court erroneously denied his motion for relief from the small claims judgment, which Horowitz brought on grounds that the judgment was void because Shank Hall did not exercise due diligence in trying to serve Horowitz in 1996. In response, Shank Hall argues there was due diligence, and also asserts that Horowitz's motion for relief from the default judgment is time-barred. We begin with Shank Hall's second argument.

A. Seeking relief from the default judgment after ten years had passed.

¶17 As Shank Hall points out, relief from default judgments in small claims actions is governed by WIS. STAT. § 799.29. Although § 799.29(1)(a) permits a trial court to reopen default judgments, motions to reopen a default judgment (other than a default judgment entered in an ordinance violation matter)

must now be brought "within 12 months after entry of judgment unless venue was improper." Sec. 799.29(1)(c).[8] When Shank Hall got its default judgment in 1996, however, motions seeking to reopen and vacate default judgments had to be made "within 6 months after entry of judgment unless venue was improper." Sec. 799.29(1)(c) (1995-96).[9]

¶18 Horowitz did not challenge the default until 2007, well beyond the applicable six-month period, but contends the challenge is proper because a void judgment may be attacked at any time. *See* ***Neylan v. Vorwald***, 124 Wis. 2d 85, 97, 368 N.W.2d 648 (1985) ("'When a court or other judicial body acts in excess of its jurisdiction, its orders or judgments are void and may be challenged at any time.'") (citation omitted); *see also* ***West v. West***, 82 Wis. 2d 158, 166, 262

[8] WISCONSIN STAT. § 799.29(1) provides:

> MOTION TO REOPEN. (a) There shall be no appeal from default judgments, but the trial court may, by order, reopen default judgments upon notice and motion or petition duly made and good cause shown.
>
> (b) In ordinance violation cases, the notice of motion must be made within 20 days after entry of judgment. In ordinance violation cases, default judgments for purposes of this section include pleas of guilty, no contest and forfeitures of deposit.
>
> (c) In other actions under this chapter, the notice of motion must be made within 12 months after entry of judgment unless venue was improper under s. 799.11. The court shall order the reopening of a default judgment in an action where venue was improper upon motion or petition duly made within one year after the entry of judgment.

Horowitz does not contend that the venue of the underlying small claims action was improper.

[9] The six-month time limit was changed to twelve months by 2003 Wis. Act 138, § 3m, and is applicable "to actions commenced or claims made on" or after July 1, 2004. 2003 Wis. Act 138, §§ 36, 37.

N.W.2d 87 (1978) ("A void judgment may be expunged by a court at any time. Where, as here, the claim is made that the judgment is void for want of personal jurisdiction, all that is needed is the determination that, in fact, jurisdiction was not acquired in the proceedings that led up to the entry of the judgment.") ("Laches is not a defense.").

¶19 Shank Hall does not directly attack the holdings in ***Neylan*** and ***West*** other than to point out the cases did not involve small claims default judgments. Noting that Horowitz brought his motion under WIS. STAT. § 806.07, Shank Hall contends that WIS. STAT. § 799.29(1)(c) and not § 806.07 governs as a result of the command in WIS. STAT. § 799.04(1) that "[*e*]*xcept as otherwise provided in this chapter*, the general rules of practice and procedure in chs. 750 to 758 and 801 to 847 shall apply to actions and proceedings under this chapter." (Emphasis added.) Thus, Shank Hall asserts that § 806.07(2)'s "reasonable time" requirement is trumped by the more specific limitation in § 799.29(1)(c).[10] *See* ***King v. Moore***, 95 Wis. 2d 686, 689-90, 291 N.W.2d 304 (Ct. App. 1980) (The time set by the small claims statute within which a small claims defendant must make a motion to vacate a default judgment takes precedence over the time limit in § 806.07.).

[10] WISCONSIN STAT. § 806.07(2) provides:

> The motion shall be made within a reasonable time, and, if based on sub. (1) (a) or (c), not more than one year after the judgment was entered or the order or stipulation was made. A motion based on sub. (1) (b) shall be made within the time provided in s. 805.16. A motion under this section does not affect the finality of a judgment or suspend its operation. This section does not limit the power of a court to entertain an independent action to relieve a party from judgment, order, or proceeding, or to set aside a judgment for fraud on the court.

¶20 Although this case raises the intriguing question of whether the holdings of ***Neylan*** and ***West*** apply to small claims actions, we conclude we need not decide that issue. *See* ***Hoffman***, 227 Wis. at 300. Even if we assume that Horowitz could seek relief from the small claims judgment pursuant to WIS. STAT. § 806.07(1)(d), we affirm because we agree with the trial court that Shank Hall exercised due diligence in attempting to serve Horowitz.

B. The trial court's order denying the motion.

¶21 At issue is the trial court's order denying Horowitz's motion for relief from the default judgment on grounds that it was void due to a lack of due diligence in efforts to personally serve him. Our supreme court has summarized the applicable standards of review in such cases:

> The legal issues concerning the reopening of a default judgment and whether personal service was sufficient are dependent on the interpretation and application of statutes, and therefore are questions of law which an appellate court reviews de novo. The procedural issues involve questions of law, and are therefore reviewed de novo as well. A [trial] court's findings of fact are reviewed to determine whether such findings are contrary to the great weight and clear preponderance of the evidence.

Richards v. First Union Sec., Inc., 2006 WI 55, ¶12, 290 Wis. 2d 620, 714 N.W.2d 913 (citations omitted). "[T]he burden of proof is on the party seeking, pursuant to [WIS. STAT.] § 806.07, to set aside or vacate a default judgment, where the question of proper service is involved." ***Richards***, 290 Wis. 2d 620, ¶2. "[T]he test for whether reasonable diligence for personal service has been satisfied is dependent upon the facts of each case." ***Haselow v. Gauthier***, 212 Wis. 2d 580, 587, 569 N.W.2d 97 (Ct. App. 1997). "Substitute service is authorized after the

plaintiff, using due diligence, exhausts information or 'leads' reasonably calculated to effectuate personal service." ***Id.***

¶22 Horowitz argues Shank Hall did not demonstrate due diligence in trying to personally serve him. Specifically, he argues that: (1) the process server's failure to "make at least one follow up attempt at service" at the White Oaks apartment complex constituted a lack of due diligence; and (2) there was a lack of due diligence because the record does not contain evidence that the post office ever responded to the process server's request for an updated mailing address.

¶23 The argument at the hearing on Horowitz's motion to vacate the default judgment focused primarily on whether the process server should have tried to locate Horowitz at an apartment complex called White Oaks (Horowitz's first argument). The trial court accepted the process server's written notes at face value (as did Horowitz) and concluded that it was not reasonable to expect the server to try to find Horowitz at a vague location (no street address given) where the same source who indicated Horowitz might be at an apartment complex called White Oaks also indicated that Horowitz was using an alias. We agree with the trial court. Under the circumstances presented, a suggestion that Horowitz might be living at an apartment complex identified only as "White Oaks" under an alias is not a sufficient "'lead[]' reasonably calculated to effectuate personal service." ***Id.***

¶24 Horowitz argues that the trial court erroneously relied on Shank Hall's counsel's bald assertions that Horowitz was avoiding service, and that the trial court rejected Horowitz's claim because he failed to seek to reopen the judgment during the pendency of the garnishment action. While the trial court did

at one point state that Horowitz "cannot avail himself at this late date of a claim that wasn't properly served," and discussed with counsel what proof was in the record, the trial court's comments on these issues came after it had already denied the motion. The challenged comments were made in response to Horowitz's counsel's continuing challenge to the ruling, which ultimately evoked a rebuke from the trial court that it was not the time for a debate. We conclude that the trial court did not rely on bald assertions, and that the record supports the trial court's conclusion that Shank Hall exercised due diligence in trying to serve Horowitz, given the vague information available about where Horowitz might be living under a new name.

¶25 Finally, we address Horowitz's two-paragraph argument that Shank Hall failed to exercise reasonable diligence in ascertaining Horowitz's mailing address. Horowitz fails to provide record cites explaining where and how this was raised below, but our independent review suggests Horowitz raised this issue in his motion to vacate the default judgment and then briefly mentioned it at oral argument. At the motion hearing, counsel for Shank Hall told the trial court that it was "handing to the court a return to sender unopened envelope showing … that the summons was mailed to the last known address as required by statute." This letter is not in the record.[11] The trial court did not make specific findings with respect to Shank Hall's efforts to communicate with Horowitz through the mail and ascertain if his address had changed.

[11] The record does contain photocopies of two envelopes that appear to have been sent on October 4, 1996, from the Clerk of Circuit Court to Gary Howard and Investment Tax, Inc. with the printed message from the post office noting "MOVED LEFT NO ADDRESS[,] UNABLE TO FORWARD [and] RETURN TO SENDER." However, letters referenced at the motion hearing that were sent prior to entry of the default judgment, including the unopened summons, are not in the record.

¶26 We decline to further consider this argument because it was not adequately raised in the trial court below, *see* ***Hoida, Inc. v. M&I Midstate Bank***, 2004 WI App 191, ¶25, 276 Wis. 2d 705, 688 N.W.2d 691 (appellate court will not consider issue not properly raised in trial court), and because it was not adequately briefed on appeal, *see* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992) (appellate court may decline to review inadequately briefed issue); *see also* ***Keplin v. Hardware Mut. Cas. Co.***, 24 Wis. 2d 319, 324, 129 N.W.2d 321 (1964) (court not required to sift through the record for facts); ***Manke v. Physicians Ins. Co. of Wisc., Inc.***, 2006 WI App 50, ¶60, 289 Wis. 2d 750, 712 N.W.2d 40 (appellants bear "responsibility to present a complete record for the issues on which they seek review, and we assume that any missing material that is necessary for our review supports the [trial] court's determination").

CONCLUSION

¶27 For the foregoing reasons, we reject Horowitz's challenges to the orders entered in the garnishment case and to the order denying Horowitz's motion to vacate the default judgment in the underlying small claims judgment.

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.

Nos. 2007AP2341(D)
2008AP583(D)

¶28 FINE, J. (*dissenting*). I must respectfully dissent from the Majority's decision to uphold the determination of the circuit court in case number 2008AP0583, and thus the order granting the garnishment of Gary Howard's bank account. The crux of my disagreement with the Majority can be summarized by that old Wendy's commercial asking "Where's the beef?"[1] We may only sustain a circuit court's findings of fact if they are not "clearly erroneous," *see* WIS. STAT. RULE 805.17(2), which means, of course, there must be at least *some* evidence to support those findings. Here, as I explain below, there is *no* evidence that the process server exercised the diligence required by the rules before Shank Hall resorted to "serving" Howard by publication. Thus, I would reverse.

I.

¶29 In August of 1996, Shank Hall sued Howard and his company in small-claims court, claiming that Howard was negligent in connection with Shank Hall's tax returns. Service was by publication. Howard and his company did not answer Shank Hall's complaint, and default judgment was entered against them in September of 1996.

¶30 Shank Hall filed its garnishment action, case number 2007AP2341, in May of 2007, alleging that it had a judgment against Howard and his company,

[1] For those who are curious as to the etiology of that famous phrase, some of the commercials can be seen at: www.youtube.com/watch?v=aISkVvi5iI8 (last accessed Nov. 18, 2008). The Majority, as with the unnamed fast-food restaurant compared to *Wendy's* in one of the commercials, has given us a "very big fluffy bun," but, in my view, no beef.

that they owed Shank Hall some $12,000 on the judgment, and that Guaranty Bank had money belonging to them that was subject to garnishment. Guaranty Bank's answer admitted that it held enough money to satisfy Shank Hall's judgment. Insofar as this Record reveals, the first time that Howard realized that he had a judgment entered against him was some eleven years after that judgment was entered, when he awoke to find that there were garnishment proceedings attempting to take his money. The garnishment order was entered on August 21, 2007.

¶31 In November of 2007, Howard and his company sought relief under WIS. STAT. RULE 806.07(1)(d) ("On motion … the court … may relieve a party … from a judgment … for the following reasons: … [t]he judgment is void.") from the small-claims default judgment in case number 2008AP0583, claiming that the service by publication was improper and that, accordingly, the default judgment was void. The circuit court addressed their claim on the merits and held that the service was proper. It is that order that the Majority discusses and upholds.

¶32 Inasmuch as the validity of the garnishment order entered in case number 2007AP2341 depends on whether the 1996 default judgment can be challenged now, and, if it can, whether the Record before the circuit court in case number 2008AP0583 shows that service-by-publication was permitted, and in light of the Majority's at least tacit concession that Howard's challenge to the default judgment is timely, I turn to the latter issue.

II.

¶33 A judgment against a person is void unless the court entering that judgment has personal jurisdiction over that person. ***State v. Campbell***, 2006 WI 99, ¶43, 294 Wis. 2d 100, 120–121, 718 N.W.2d 649, 659. There is personal

jurisdiction over a defendant in a civil case when the defendant is timely served with a copy of the summons and complaint. WIS. STAT. RULE 801.02(1); *see* WIS. STAT. § 799.12(1) ("Except as otherwise provided in this chapter, all provisions of chs. 801 to 847 with respect to jurisdiction of the persons of defendants, the procedure of commencing civil actions, and the mode and manner of service of process, shall apply to actions and proceedings under this chapter."). Shank Hall does not argue to the contrary. Unless the small-claims court authorizes otherwise, and Shank Hall does not contend that it did so here, service must be made as provided by WIS. STAT. ch. 801. Sec. 799.12(2) ("Any circuit court may by rule authorize the service of summons in some or all actions under this chapter, except eviction actions, by mail under sub. (3) in lieu of personal or substituted service under s. 801.11.").

¶34 As we have seen, Howard and his company were served by publication. WISCONSIN STAT. RULE 801.11(1)(c) tells us when service by publication suffices to give the court personal jurisdiction over a defendant. It provides:

> If with reasonable diligence the defendant cannot be served under par. (a) or (b), service may be made by publication of the summons as a class 3 notice, under ch. 985, and by mailing. If the defendant's post-office address is known or can with reasonable diligence be ascertained, 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. The mailing may be omitted if the post-office address cannot be ascertained with reasonable diligence.[2]

(Footnote added.) Thus, two methods of service must be tried first, and *only if neither can be accomplished "with reasonable diligence"* may service be made by publication. *See* ***Welty v. Heggy***, 124 Wis. 2d 318, 323, 369 N.W.2d 763, 766 (Ct. App. 1985).

¶35 The first and preferred way for a court to get jurisdiction over a defendant is service on the defendant personally. WIS. STAT. RULE 801.11(1)(a). The second way for a court to get personal jurisdiction over a defendant is by substituted service under RULE 801.11(1)(b): "If with reasonable diligence the defendant cannot be served under par. (a), then [service may be made] by leaving a copy of the summons at the defendant's usual place of abode."

¶36 The critical issue is whether the Record on this appeal shows that the process server used by Shank Hall to serve Howard and his company exercised the requisite two layers of "reasonable diligence" under WIS. STAT. RULE 801.11(1)(a) and (b) before Shank Hall resorted to publication under RULE 801.11(1)(c). Howard and his company have the burden to show a lack of reasonable diligence. *See* ***Haselow v. Gauthier***, 212 Wis. 2d 580, 587, 569 N.W.2d 97, 100 (Ct. App. 1997).

[2] WISCONSIN STAT. § 799.12(4) incorporates the "reasonable diligence" standard set out in WIS. STAT. RULE 801.11: "If with reasonable diligence the defendant cannot be served by personal or substituted service under s. 801.11, … service may be made by mailing and publication under sub. (6)." Section 799.12(6)(a) authorizes service by publication either "as provided in s. 801.11 (1) (c) or as" set out in § 799.12(6)(b) and (c). Howard and his company only contend that Shank Hall did not exercise "reasonable diligence" in trying to serve them personally.

¶37 Where the "basic facts regarding plaintiffs' diligence are undisputed" whether those facts show "reasonable diligence" is "a question of law." ***Welty***, 124 Wis. 2d at 324, 369 N.W.2d at 767. The Record here reveals the following:

- Shank Hall's small-claims summons and complaint were filed on August 8, 1996.

- Shank Hall's small-claims summons and complaint bore the following caption: "Shank Hall, Inc., 1434 N. Farwell Avenue, Milwaukee, WI 53202 Plaintiff vs. Gary Howard a/k/a Gary Horowitz and Investment Tax, Inc. 500 W. Bradley Road, Fox Point, WI 53217 Defendant." (Some uppercasing omitted.)

- Affidavits executed on August 8, 1996, by Shank Hall's process server certified that neither "Gary Howard" nor "Investment Tax Inc." could be found when the process server "attempted service at 500 W. Bradley Rd. in the City [*sic*] of Fox Point, County of Milw., State of Wisconsin on the following dates: 8-3,6,7."[3]

- The process server's affidavits in connection with his attempt to serve Howard and "Investment Tax Inc." show checked boxes for the following preprinted reasons for not serving them: "moved, no forwarding address, neighbors know nothing, no telephone listing,"

[3] Howard and his company agree that it was proper under a Milwaukee County circuit-court rule for Shank Hall to try to serve him before filing the summons and complaint. *See* WIS. STAT. § 799.12(7) ("Any circuit court may by rule authorize service of the summons and complaint prior to filing and authentication thereof, provided the appropriate fee under s. 814.62 is paid before the summons is issued and the summons is not reusable for a different defendant.").

and indicated that he requested a return-address form from the Post Office on "8-6." (Uppercasing omitted.)

- The process server's affidavit in connection with the attempt to serve Howard recites: "Spoke w/ Receptionists ~~at~~ They laughed when I asked for def. Thev'e [*sic*] moved & they have new alias. Marietta Weidenbaum goes by Marietta Aienseola & Gary goes by a New 1st name & New Spelling of old. He may be living in Apt. Cpx–White Oaks."

- The process server's affidavit in connection with the attempt to serve "Investment Tax Inc." recites: "Spoke w/ Rec. and they laughed when I asked for def. Theve [*sic*] moved & have new alias. Marietta Weidenbaum goes by Marietta Aienseola & Gary goes by a New 1st name & New Spelling of old. He may be living in Apt. Cpx–White Oaks."

- Gary Horowitz submitted an affidavit that averred that he was an accountant "doing business as Gary Howard d/b/a INVESTMENT TAX, INC.," that he uses the "surname 'Howard' in business settings to avoid discrimination due to my jewish [*sic*] heritage," that "[f]rom December 1, 1995 through sometime in 2001, I resided in unit #115 at the White Oaks Apartments located at 9100 N. White Oak Lane, Milwaukee, WI," and that he was not aware of the Shank Hall lawsuit until his bank account at Guaranty Bank "was garnished by Shank Hall, Inc."

- Howard's sister submitted an affidavit averring that he "lived at the Porticos Apartments, whose address is 500 W. Bradley Road, Fox

Point, WI 53217 from 1989 thru the fall of 1995," when he "moved to the White Oaks Apartments."

- An affidavit submitted by an employee of the Wisconsin Electric Power Company asserted that the company's "records reflect that Gary A. Horowitz became a customer, began using, and was billed for electrical service at 9100 N. White Oak Lane, Apt. 115, Bayside, Wisconsin, on December 1, 1995."

Based on the process server's affidavits, it is apparent that he knew three critical things before Shank Hall served Howard and his company by publication: (1) neither "Gary Howard" nor "Investment Tax Inc." was at 500 West Bradley Road when he attempted service there; (2) "Howard" may have moved to the White Oaks Apartments and may have been living there under a name other than "Howard"; and (3) Gary Howard was also known as Gary Horowitz. Further, as late as July 24, 1995, Shank Hall was in contact with a lawyer representing Howard and his company. Shank Hall does not dispute this or any of the averments in the affidavits submitted by Howard and his company to the circuit court in case number 2008AP0583.

¶38 The *sine qua non* of "reasonable diligence" is the following of any "leads or information reasonably calculated to make personal service possible." ***West v. West***, 82 Wis. 2d 158, 166, 262 N.W.2d 87, 90 (1978). As the trial judge in ***West*** observed, "'If you have information as to the possible whereabouts of a defendant you must exhaust such information.'" ***Id.***, 82 Wis. 2d at 165, 262 N.W.2d at 90. That clearly was not done here. As we have seen, the process server did not ask anyone at the White Oaks apartment complex whether they knew either Gary Howard or Gary Horowitz, even though both those names were

on the summons and complaint he was attempting to serve and he was told that Howard had moved there. Further, there is nothing in the Record that indicates that Shank Hall or its lawyers tried to find out from the lawyer who was Howard's attorney at least as late as July of 1995 where Howard and his company could be served.

¶39 In denying the motion by Howard and his company to vacate the default judgment, the circuit court in case number 2008AP0583 relied on unsworn assertions by Shank Hall's lawyer to the effect that Howard was "a man who lived in the shadows" and that the lawyer felt "that we made quite literally extensive activities to try to find out where Mr. Howard, also know[n] as Mr. Horowitz, lives." That was, of course, improper because a lawyer's arguments are not evidence. *See* ***State v. Smalley***, 2007 WI App 219, ¶11, 305 Wis. 2d 709, 716, 741 N.W.2d 286, 289. Thus, for example, a lawyer's affidavit may not be used by a court in deciding a motion for summary judgment unless that affidavit is based on the lawyer's personal knowledge in connection with facts that are in issue. *See* ***Hopper v. City of Madison***, 79 Wis. 2d 120, 131, 256 N.W.2d 139, 144 (1977) (A lawyer's affidavit consisting of a "summary of evidence and his conclusions thereon" may not be used on summary judgment because it encompassed "matters outside his personal knowledge."); ***Fuller v. General Accident Fire & Life Assurance Corp.***, 224 Wis. 603, 610, 272 N.W. 839, 842 (1937) (A lawyer's affidavit must do more than attest to the merits of the client's cause.).

¶40 The undisputed evidence in the Record is that Shank Hall's process server did not exercise the necessary "due diligence" in trying to serve Howard and his company under either WIS. STAT. RULE 801.11(1)(a) or 801.11(1)(b) before Shank Hall resorted to service by publication. The whole of the Majority's bow to the circuit court and its rationale is this:

> The trial court accepted the process server's written notes at face value (as did Horowitz) and concluded that it was not reasonable to expect the server to try to find Horowitz at a vague location (no street address given) where the same source who indicated Horowitz might be at an apartment complex called White Oaks also indicated that Horowitz was using an alias. We agree with the trial court. Under the circumstances presented, a suggestion that Horowitz might be living at an apartment complex identified only as "White Oaks" under an alias is not a sufficient "'lead[]' reasonably calculated to effectuate personal service."

Majority, ¶23 (quoted source omitted). The flaw in the Majority's reasoning is that the circuit court could not merely take what the process server wrote and assume, without *any evidence* to support that assumption, that where "White Oaks" was located was not discoverable with reasonable diligence; indeed, *all the process server had to do was ask the folks at The Porticos, where he attempted service, where the White Oaks apartments were, or, for a further example, just look in a telephone directory*.[4] Further, the face of the summons and complaint the process server was purportedly "trying" to serve, gave *both* of the names Howard may have been using: Howard and Horowitz. Given that this is the only thing in the Record relevant to the names Howard was using, the Majority's use of the pejorative word "alias" is unfair. The simple fact as revealed by the Record is that the process server dumped out at the first speed bump in what the Rule and case law require to be diligent efforts to personally serve a defendant in a civil case before resorting to service by publication. The process server in this case was

[4] The rules of life tell us that any person who served process for a living in the Milwaukee area knew where the White Oak apartments were. But, I recognize that there is no evidence in the Record one way or the other on that. Nevertheless, there is also *nothing* in the Record that indicates that the process server even *asked* where White Oaks was or otherwise tried to find it; there could be *no* reasonable diligence unless the process server *had* done these things and *still* could not locate Howard.

far from diligent; Howard is entitled to contest Shank Hall's case against him. Sadly, both the circuit court and the Majority have deprived him of that right.

¶41 In my view, the default judgment entered in 1996 is void. Therefore, the garnishment order must be vacated.