

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 20, 2021

Sheila T. Reiff
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. 2020AP1628

Cir. Ct. No. 2019CV178

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

RAMSEY HILL EXPLORATION, LLC,

PLAINTIFF-RESPONDENT,

v.

SAND TECHNOLOGIES, LLC,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Pierce County:
JOSEPH D. BOLES, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Sand Technologies, LLC, challenges the denial of its motion to reopen and vacate a default judgment, arguing that improper service of process rendered the judgment void. We affirm.

BACKGROUND

¶2 Ramsey Hill Exploration, LLC, filed a Pierce County lawsuit to collect money that it claimed was due from Sand Technologies under a contract for washed sand. Service of the lawsuit was arranged with a process server.

¶3 The process server’s affidavit of service averred that service of process was initially attempted on Sand Technologies by seeking to serve an officer of the company or its registered agent at the registered office listed with the Wisconsin Department of Financial Institutions at an address in Buffalo City, Wisconsin. However, this was a residential address. The individual who resided at the registered office address told the process server that he did not have anything to do with Sand Technologies and that the registered agent did not reside or conduct business at that address.

¶4 The process server attempted to locate another address where Sand Technologies conducted business in Wisconsin, and he was able to locate an address in Mondovi, which was on an invoice sent to Sand Technologies. The process server went to that address in an attempt to serve the registered agent. The address appeared to be a sand mine located next to a residence. The process server kept records of discussions he had with an adult male at that address who identified himself as “Jake Devlaeminck”—misspelled in the affidavit of service but later correctly identified as Devlamick—who represented himself as the “residence owner [and] General Manager of Sand Technologies.” Devlamick further stated that Sand Technologies’ registered agent was in Minnesota at that

time and “not around” the Mondovi location much. Devlamick also stated that he was “in charge of the operation” and “anything that comes up goes to him and then he provides the information to [the registered agent].” The process server then contacted Ramsey Hill’s lawyers to relay this information, and he received authorization to serve Devlamick.

¶5 No timely answer was filed on behalf of Sand Technologies. Eight days after the time for filing an answer had expired, Sand Technologies’ Minnesota counsel sent an email to Ramsey Hill’s attorneys acknowledging receipt of the summons and complaint from Sand Technologies. The email stated, “I understood this matter was resolved; I will check with my client.” Minnesota counsel also inquired as to when service had been accomplished, and Ramsey Hill’s attorneys provided Minnesota counsel a copy of the affidavit of service. Minnesota counsel did not enter an appearance, request additional time to answer, or seek other relief.

¶6 Approximately six weeks later, Ramsey Hill filed a motion for default judgment, which the circuit court granted. An affidavit of service stated that the notice of motion and motion for default judgment had been mailed to Sand Technologies at the Mondovi address as well as to its registered office address. Ramsey Hill’s attorney further averred in an affidavit that those pleadings mailed to Sand Technologies at both addresses were never returned to Ramsey Hill as undeliverable. The notice of motion and motion for default judgment contained the hearing date and time. Sand Technologies filed nothing in response to the default judgment motion, and no representative of Sand Technologies appeared at the default judgment hearing.

¶7 Six months later, Sand Technologies, with new Wisconsin counsel, filed a motion to reopen and vacate the default judgment as void, pursuant to WIS. STAT. § 806.07(1)(d) (2019-20).¹ Sand Technologies argued that Ramsey Hill failed to effectuate proper service and the circuit court therefore lacked personal jurisdiction, rendering the judgment void. The court denied relief from the default judgment. Sand Technologies now appeals.

DISCUSSION

¶8 Defects in the service of process can deprive a circuit court of personal jurisdiction, and a judgment issued by a court lacking personal jurisdiction is a nullity under WIS. STAT. § 806.07(1)(d). See *Wengerd v. Rinehart*, 114 Wis. 2d 575, 578-79, 338 N.W.2d 861 (Ct. App. 1983). We will not reverse an order denying a motion for relief from judgment under § 806.07 unless there has been a clearly erroneous exercise of discretion. *State ex rel. M.L.B. v. D.G.H.*, 122 Wis. 2d 536, 541, 363 N.W.2d 419 (1985). Whether a judgment or order is void for lack of jurisdiction is a matter of law that we review de novo. *State ex rel. R.G. v. W.M.B.*, 159 Wis. 2d 662, 666, 465 N.W.2d 221 (Ct. App. 1990).

¶9 Pursuant to WIS. STAT. § 183.0105(1), Sand Technologies' registered agent, Timothy Barth, was required to reside in Wisconsin and maintain a business office identical with the registered office. However, Barth did not reside or conduct business at the address provided by Sand Technologies as its registered agent office in Wisconsin. Moreover, the organizational information

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

filed with the Department of Financial Institutions by Sand Technologies showed a post office box in Watertown, Minnesota, as its principal office.

¶10 WISCONSIN STAT. § 801.11(5)(a) provides that service may be made and personal jurisdiction established, on a limited liability company by personally serving the summons upon an officer, director or managing agent either within or without this state. In lieu of delivery of 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. *Id.*

¶11 Sand Technologies relies upon our decision in *Bar Code Resources v. Ameritech Information Systems, Inc.*, 229 Wis. 2d 287, 599 N.W.2d 872 (Ct. App. 1999), for the proposition that Ramsey Hill had the burden to establish its compliance with the statutory service requirements under WIS. STAT. § 801.11(5)(a) in response to Sand Technologies' motion to reopen the default judgment. According to Sand Technologies, Ramsey Hill failed to show proper service, resulting in a lack of personal jurisdiction, therefore rendering the default judgment void. It argues that Ramsey Hill served neither an officer, director or managing agent, nor a person apparently in charge of the office of any officer, director or managing agent of Sand Technologies. Sand Technologies further argues it does not have an office in Mondovi, and it does not have any officers, directors or managing agents in Mondovi. In addition, Sand Technologies asserts that there "is no individual at Sand Technologies named 'Jake Devlaeminck,'" whom it contends is a "non-existent individual." We reject these arguments.

¶12 First of all, Sand Technologies is disingenuous in arguing that it does not employ a person named "Devlaeminck" and that he is non-existent. The record confirms that this person is clearly the same one as its employee

Devlamick; his name was merely misspelled. Moreover, *Bar Code* was decided before our supreme court held that the burden of proof is on the party seeking to set aside the judgment or vacate the default judgment where the question of proper service is involved.² See *Richards v. First Union Sec., Inc.*, 2006 WI 55, ¶27, 290 Wis. 2d 620, 714 N.W.2d 913. Sand Technologies therefore has the burden to prove that Ramsey Hill failed to effectuate proper service.

¶13 In *Richards*, the court held that the “managing agent” discussed in WIS. STAT. § 801.11(5)(a) referenced “a person possessing and exercising the right of general control, authority, judgment, and discretion over the business or affairs of the corporation, either on an overall or part basis, *i.e.*, everywhere or in a particular branch or district.” *Richards*, 290 Wis. 2d 620, ¶33. The court also discussed the rationale behind the requirement that a managing agent be some person “invested by the corporation with general powers involving the exercise of judgment and discretion”—because “the agent must be one who could reasonably be expected to apprise the corporation of the service and pendency of the action.” *Id.*, ¶34.

¶14 This is not a case where the process server simply failed to locate the correct office. See *Bar Code*, 229 Wis. 2d at 292. Nor did Devlamick tell the process server that he did not believe that he was the proper person to be served. See *Carroll v. Wisconsin Power & Light Co.*, 273 Wis. 490, 493, 79 N.W.2d 1 (1956). To the contrary, it is undisputed that Devlamick represented himself as the “General Manager of Sand Technologies” and stated that he was “in charge of

² In its reply brief, Sand Technologies concedes that it “does have the burden on the WIS. STAT. § 806.07 motion,” but it contends that it met that burden.

the operation” and that “anything that comes up” goes to him and then he “takes it to [the registered agent].”

¶15 Service of process upon Devlamick was therefore reasonably certain to result in the LLC having actual notice of the service and the pendency of the action. *See Richards*, 290 Wis. 2d 620, ¶34. In fact, Sand Technologies received actual notice of the process served, as evidenced by its Minnesota counsel’s email to Ramsey Hill’s attorneys acknowledging receipt of the summons and complaint from Sand Technologies. Despite this reality, and the fact that notice of the default judgment motion and hearing were mailed to Sand Technologies’ registered office address and the Mondovi address, Sand Technologies filed nothing in response and did not appear at the default motion hearing.

¶16 Sand Technologies nevertheless notes that *Bar Code* adopted a two-part analysis regarding compliance with the alternative service option under WIS. STAT. § 801.11(5)(a):

- (1) Objectively, was the location where the summons and complaint were presented “the office of such officer, director or managing agent?”
- (2) Subjectively, was it reasonable for the process server to conclude that the person presented with the summons and complaint was “the person who is apparently in charge of the office?”

¶17 Sand Technologies argues that “the question of whether Ramsey Hill’s process server reasonably believed that he was serving ‘the person who is apparently in charge of the office’ is only reached *if* and only *if* [the] process server was objectively at ‘the office of such officer, director or managing agent.’” Because the process server failed to present any evidence of compliance with the

first part of the *Bar Code* two-part analysis, Sand Technologies insists we may not reach the second part of the analysis.

¶18 Even if we applied *Bar Code*'s two-part analysis as to whether a party has complied with the alternative service option under WIS. STAT. § 801.11(5)(a), Sand Technologies' arguments still fail. Based on the undisputed facts, the answer to both parts of the analysis in the present case is yes. Indeed, Sand Technologies neither argues that a question of fact is at issue, nor that it is entitled to an evidentiary hearing; it argues only that the circuit court objectively decided the service issue the wrong way.

¶19 Upon our review of the record on appeal, we do not discern that there was a material question of fact raised by the competing affidavits. In support of the motion to reopen, Devlamick submitted an affidavit averring that he was not an officer, director or managing agent of Sand Technologies, and further that he was not a person in charge of Sand Technologies. A close examination, however, reveals that Devlamick's affidavit does not directly conflict with the process server's affidavit. Devlamick does not deny that he told the process server: (1) that he was the general manager of Sand Technologies; (2) that he was "in charge of the operation;" and (3) that "anything that comes up goes to him and then he takes it to [the registered agent]."

¶20 Someone who identifies himself as the "General Manager of Sand Technologies" would reasonably be viewed as a managing agent. Sand Technologies will also not now be heard to deny that its employee represented facts to the process server that the circuit court relied upon to deny Sand Technologies' motion to reopen. Furthermore, Sand Technologies stating it does not have an office in Mondovi does not make it so, and Sand Technologies has the

burden to prove that Ramsey Hill's service of process was somehow defective. The Mondovi address was on an invoice sent to Sand Technologies and Devlamick told the process server that Barth was not around that address much, implying that Barth was there from time to time. The record on appeal is devoid of evidence that Sand Technologies did business in any other location in Wisconsin other than Mondovi. The individual residing at the registered office address in Buffalo City told the process server that he did not have anything to do with Sand Technologies, and the address Sand Technologies listed with the State of Wisconsin as its registered office address was a post office box. The record does not reveal the whereabouts of Sand Technologies' officers, the location of its offices, or the persons in control of its day-to-day operations.

¶21 The circuit court was entitled to infer from the facts of record that the location where the summons and complaint were presented was “the office of an officer, director, or managing agent.” An adjudication by a court that it has personal jurisdiction is entitled to “strong prima facie effect, and only by clear negation of the facts necessary to confer jurisdiction should it be ignored.” *Minneapolis Threshing Mach. Co. v. Ashauer*, 142 Wis. 646, 649, 126 N.W. 113 (1910). Given the representations Devlamick made to the process server, which are undisputed, Sand Technologies failed to clearly negate the court's adjudication. It was also reasonable for the process server to conclude that the person presented with the summons and complaint was “the person who [was] apparently in charge of the office.” As the court correctly found, service was thus proper under WIS. STAT. § 801.11(5)(a), and the court had personal jurisdiction over Sand Technologies.

¶22 While default judgments are disfavored, Sand Technologies only moved for relief under WIS. STAT. § 806.07(1)(d)—not any other subsection of

§ 806.07, such that the circuit court, in its discretion, could have weighed the equities and determined if the case should be reopened. As a result, any potentially meritorious defense claimed by Sand Technologies is irrelevant.³

By the Court.—Order affirmed.

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

³ In its reply brief, Sand Technologies argues that Ramsey Hill “could have/should have served Sand Technologies via publication as prescribed by WIS. STAT. § 801.11(5)(d).” Alternatively, Sand Technologies contends Ramsey Hill “could have elected pursuant to WIS. STAT. § 183.0105(8)(b) to serve Sand Technologies by ‘registered or certified mail.’” It is well established that we will not consider arguments raised for the first time in a reply brief. *Northwest Wholesale Lumber, Inc. v. Anderson*, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995). But in any event, we need not address these issues because we conclude service was proper under § 801.11(5)(a).

