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**DISTRICT II/IV**

July 8, 2015

To:

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Circuit Court Judge  
Waukesha County Courthouse  
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Waukesha, WI 53188

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You are hereby notified that the Court has entered the following opinion and order:

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2014AP2207

Michael Lenz v. Mary Nelson, Alberto Ciarletta, and Richard  
Chandler (L.C. # 2014CV342)

Before Blanchard, P.J., Lundsten and Higginbotham, JJ.

Michael Lenz, pro se, appeals an order dismissing his lawsuit for lack of personal jurisdiction based on a lack of sufficient diligence to effectuate personal service prior to attempting service by publication. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21.<sup>1</sup> We summarily affirm.

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

On February 14, 2014, Lenz commenced a 42 U.S.C. § 1983 action against three employees of the Wisconsin Department of Revenue, purportedly in their individual capacities, for actions taken “within the scope of their respective employments with the State of Wisconsin.” The caption lists each defendant’s address at the Wisconsin Department of Revenue.

In a letter to the circuit court filed February 28, 2014, Lenz advised that he attempted to serve the defendants at their places of employment, but “service was refused by the employer.” Lenz also informed the court that his process server emailed each defendant at their known work email addresses on February 24, in an attempt to set up a time and place to serve the pleadings. The defendants did not respond to the emails, and Lenz asked the court to subpoena each defendant. The court denied this request. Nearly two months later, Lenz filed a proof of publication affidavit with the circuit court, indicating that Lenz had published notice of the lawsuit against the defendants on three separate occasions in the Wisconsin State Journal.

On May 14, 2014, the Wisconsin Department of Justice (DOJ) filed an appearance in the case and answered on behalf of the defendants. In the answer, the defendants raised the affirmative defense that “[s]ervice in this action as to one or more defendants was improper and thus the court lacks personal jurisdiction as to those defendants.”

On May 15, 2014, Lenz filed a Motion For Default Judgment and Motion to Strike Answer and Affirmative Defenses. Lenz also filed a Motion to Show Authorization to Represent, contending that DOJ did not have lawful authority to represent the defendants. After a hearing, the circuit court entered an order dismissing the case for lack of personal jurisdiction.

The court found a lack of diligent attempts to secure service on the individuals prior to publication. This appeal follows.

WISCONSIN STAT. § 801.11 governs personal jurisdiction and service of process. The statute requires that personal service under § 801.11 be attempted with “reasonable diligence” before an alternative method of service is employed. *Loppnow v. Bielik*, 2010 WI App 66, ¶10, 324 Wis. 2d 803, 783 N.W.2d 450. If with reasonable diligence the defendants cannot be served under § 801.11(1)(a) and (b), service may be made by publication of the summons, and by mailing the summons and complaint to any available addresses. WIS. STAT. § 801.11(1)(c). “Substitute service is authorized after the plaintiff, using due diligence, exhausts information or ‘leads’ reasonably calculated to effectuate personal service.” *Haselow v. Gauthier*, 212 Wis. 2d 580, 587-88, 569 N.W.2d 97 (Ct. App. 1997).

Whether a plaintiff acts with “reasonable diligence” depends on the facts of each case. *Id.* at 587. When the facts are in dispute, reasonable diligence is treated as a finding of fact to be affirmed unless clearly erroneous. *See id.* at 588 n.4 The burden is on the plaintiff to prove that the defendants were properly served. *See Hagen v. City of Milwaukee Emp.’s Ret. Sys. Annuity & Pension Bd.*, 2003 WI 56, ¶12, 262 Wis. 2d 113, 663 N.W.2d 268.

Here, the record supports the circuit court’s finding that Lenz failed to exercise reasonable diligence. As the court noted, Lenz’s affidavits show only one attempt to personally serve the defendants at DOR, and a single email sent to each defendant’s email address attempting to set up a time and place to serve the pleadings. These attempts fail to meet the reasonable diligence standard. Lenz stopped short of pursuing any leads or information

reasonably calculated to make personal service possible. See *Loppnow*, 324 Wis. 2d 803, ¶14.

As the circuit court here stated:

Well, there are lots of ways to get information, and some can be easily determined. Google searches provide all kinds of information. There are white pages. There are telephone books that are online .... Driver's records as an example are public record.... There may be prior information of the individuals if they're involved in prior court proceedings at some point. So there are any number of ways where there is or may be the ability to serve them ....

Additionally, the process server knew where the defendants worked, as he attempted to serve process at their places of employment, but did not follow up with DOR to see whether he could find out more information. He also failed to pursue that lead by contacting other DOR employees as to the defendants' whereabouts, and did not follow up with any other people who knew the defendants to see if he could find the home addresses. As mentioned in *Loppnow*, internet "locate-and-research" tools are also used frequently and cited in reasonable diligence affidavits. See *Loppnow*, 324 Wis. 2d 803, ¶5 & n.3.

Lenz argues that he contacted the Postmaster General for the defendants' addresses. As the circuit court noted, this allegation is not documented in Lenz's affidavits. Lenz insists that "[t]he assertion was made in the Verified Brief – duly sworn before a Notary Public." However, these arguments are made for the first time in the reply brief, and arguments made for the first time in a reply brief are generally not considered. See *Northwest Wholesale Lumber, Inc. v. Anderson*, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995).

Moreover, the circuit court correctly noted that Lenz failed to follow the statutory publication requirements because he did not mail the summons to the defendants at a known address. Lenz argues that WIS. STAT. § 801.11(1)(c) provides that mailing may be omitted if the

defendant's address cannot be ascertained with reasonable diligence. However, as the circuit court observed, there is nothing in Lenz's affidavits that indicates reasonable diligence was exercised in attempting to determine the defendants' addresses.

Contrary to Lenz's perception, the defendants were not barred from challenging service of process simply because the defendants did not timely file an answer. *See Honeycrest Farms, Inc. v. A.O. Smith Corp.*, 169 Wis. 2d 596, 602-03, 486 N.W.2d 539 (Ct. App. 1992). The defendants did not receive notice of the lawsuit because they were not properly served, so they could not be expected to timely file an answer to the complaint. Lenz failed to exercise reasonable diligence in personally serving the defendants, and he also failed to follow statutory requirements governing service by publication. The circuit court lacked personal jurisdiction over the defendants, and it properly dismissed the case.

Because our resolution of personal jurisdiction is dispositive of the appeal, we need not reach other issues raised by Lenz. *See Norwest Bank Wis. Eau Claire, N.A. v. Plourde*, 185 Wis. 2d 377, 383 n.1, 518 N.W.2d 265 (Ct. App. 1994).

Therefore,

IT IS ORDERED that the order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*