

**IN THE COURT OF APPEALS OF IOWA**

No. 8-091 / 07-1215  
Filed March 14, 2008

**PREFERRED TOOLING, L.L.C.,**  
Plaintiff-Appellee,

**vs.**

**ROY AHERN,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Butler County, John S. Mackey,  
Judge.

Defendant appeals the district court's decision refusing to set aside a  
default judgment against him. **REVERSED AND REMANDED.**

Thomas A. Lawler of Lawler & Swanson, P.L.C., Parkersburg, for  
appellant.

G.A. Cady III of Hobson, Cady & Cady, Hampton, for appellee.

Considered by Eisenhauer, P.J., and Baker, J., and Brown, S.J.\*

\*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

**BROWN, S.J.****I. Background Facts & Proceedings**

On August 23, 2006, Preferred Tooling, L.L.C., filed suit against Roy Ahern seeking payment under a contract for the production of certain goods. Preferred Tooling is an Iowa corporation, while Ahern is a resident of Wisconsin. Preferred Tooling filed notice with the Iowa Secretary of State. Notice of the suit was mailed to Ahern on September 7 by certified mail.

Ahern did not respond to the suit, and on November 16, 2006, Preferred Tooling filed notice in district court that it intended to take a default judgment. An affidavit was filed stating this notice had been mailed to Ahern on November 10. On December 18, the district court entered an order finding Ahern in default and entering judgment against him for \$23,450.

On February 7, 2007, Ahern filed a motion seeking to set aside the default judgment. He claimed he never received original notice. Ahern stated that he first knew about the suit on December 11, 2006, when he received notice of Preferred Tooling's intent to take a default judgment. He stated he then contacted his attorney, who drafted a letter requesting a copy of the complaint. Before a response was received, however, the district court had entered a default judgment for Preferred Tooling.

At a hearing Ahern testified he owns a business which manufactures and sells floating boat docks. He stated he had been traveling to attend boat shows to promote his products. The district court entered an order on April 23, 2007, which determined the default judgment was the result of inadvertence and

excusable neglect. The court entered an order setting aside the default judgment.

On May 2, 2007, Preferred Tooling filed a second application for default judgment. A hearing on the application was held on May 15.<sup>1</sup> At that time defendant's counsel had filed an appearance, but no answer had yet been filed. The court entered a ruling on May 30, finding "defendant has had more than ample time to file his answer herein and has failed to do so." The court granted the application for a default judgment and entered judgment against Ahern for \$23,450.

In the meantime, on May 25, 2007, Ahern filed an answer and a counterclaim alleging breach of contract and raising claims under the Uniform Commercial Code. Ahern also filed a motion for new trial, claiming Preferred Tooling had not properly complied with the provisions of Iowa Rule of Civil Procedure 1.972 in seeking a default judgment. He claimed neither he nor his attorneys had received notice as required by rule 1.972(2). The district court denied the motion for new trial. Ahern appealed the decision of the district court granting a default judgment to Preferred Tooling.

## **II. Standard of Review**

We review the district court's decision for the correction of errors at law. Iowa R. App. P. 6.4; *Central Nat'l Ins. Co. v. Ins. Co. of N. Am.*, 513 N.W.2d 750, 753 (Iowa 1994). Generally, doubts are resolved in favor of setting aside a

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<sup>1</sup> This hearing was not recorded. According to the appellate briefs, no evidence was taken at the hearing. The matter was submitted based on the record and statements of counsel.

default judgment. *Wilson v. Liberty Mut. Group*, 666 N.W.2d 163, 166 (Iowa 2003). This is because trial on the merits is favored over a default judgment. *Id.*

### III. Merits

Ahern contends Preferred Tooling failed to follow the provisions of Iowa Rule of Civil Procedure 1.972(2), and thus was not entitled to a default judgment.

Rule 1.972(2) provides:

Requests for entry of default under rule 1.972(1) shall be by written application to the clerk of the court in which the matter is pending. No default shall be entered unless the application contains a certification that written notice of intention to file the written application for default was given after the default occurred and at least ten days prior to the filing of the written application for default. A copy of the notice shall be attached to the written application for default.

Notice to a party must be “sent by ordinary mail to the last-known address of the party claimed to be in default.” Iowa R. Civ. P. 1.972(3)(a). When a party is represented by counsel, notice must be sent by the same method to the attorney. Iowa R. Civ. P. 1.972(3)(b).

In the present case, Preferred Tooling filed an application for default judgment on May 2, 2007. The application does not contain a certification that written notice of the intention to file the application for default was sent to Ahern or his attorneys. Furthermore, no copy of the notice was attached to the application for default. The application contains only a certification of service which states Ahern’s attorneys were sent a copy of the application for default judgment on May 1, 2007.

A party seeking a default judgment must follow the requirements of rule 1.972(2) “by giving the required ten-day written notice before seeking the default

and by filing with the application for default the required certification that notice was given.” *Dolezal v. Bockes Bros. Farms, Inc.*, 602 N.W.2d 348, 352 (Iowa 1999). Rule 1.972(2) requires a party to send written notice of the intention to file an application for default judgment on the opposing party. See *Baltzley v. Sullins*, 641 N.W.2d 791, 792 (Iowa 2002). The rule gives a party a ten-day period of time to respond to the notice and avoid default. *Id.* at 793.

Where a party fails to follow the notice and certification requirements of rule 1.972(2), the district court is “without authority to enter the order of default and the subsequent default judgment against the defendants.” *Dolezal*, 602 N.W.2d at 352. A defendant’s failure to file an answer does not change the applicability of rule 1.972(2). *Id.* at 353. Furthermore, a party is not required to file a motion to set aside the default judgment under rule 1.977 because that rule is not the appropriate method of correcting an irregularity under rule 1.972(2). *Id.*

Preferred Tooling claims Ahern failed to preserve error because he did not resist the entry of default judgment on the grounds now raised at the time the default judgment was entered. Ahern did raise these issues, however, in a motion for new trial. The district court was aware of the issues and ruled on them. We conclude Ahern sufficiently preserved error on the issues raised on appeal. See *Meier v. Senecaut*, 641 N.W.2d 532, 540 (Iowa 2002) (noting the record must show the district court was aware of the claim or issue and decided it).

Preferred Tooling also claims Ahern waived the issues raised on appeal because the right to certification is a procedural right which may be waived.

Preferred Tooling points out that Ahern's counsel was at the hearing on the motion for default judgment, and that he received notice of the hearing. It points out Ahern has not given a reason for failing to respond after the first deferred judgment was set aside. The supreme court rejected a similar argument in *Dolezal*, 602 N.W.2d at 352, stating, "The rule makes no distinction between excusable neglect and an intention not to defend." We conclude that the fact Ahern's counsel appeared at the default hearing, after receiving the court's order setting the date of the hearing, did not waive Ahern's claims that Preferred Tooling failed to follow the procedural prerequisites for a default judgment. See rule 1.972(2) ("*No default shall be entered unless the application contains a certification . . .*") (emphasis added).

We conclude the district court erred in granting Preferred Tooling a default judgment because plaintiff did not meet the requirements of rule 1.972(2). There is no evidence to show Preferred Tooling sent Ahern or his attorneys written notice of its intent to seek a default judgment ten days (or ever) before filing the application for default judgment with the district court. Thus, the district court was without authority to enter a default judgment in the case.

We reverse the decision of the district court and remand for further proceedings.

**REVERSED AND REMANDED.**