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IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 20-1663

LINCOLN SAVINGS BANK v. SIMPSON FURNITURE COMPANY, et al

Appeal from the Iowa District Court for Black Hawk County
The Honorable Linda Fangman and David
Odekirk, Judges

APPELLANT'S AMENDED FINAL BRIEF
AND
REQUEST FOR ORAL ARGUMENT

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STATEMENT OF THE CASE

A. Nature of the Case. In this action mortgages on Debra Emmert's personal residence and other property were foreclosed and a sizable personal judgment was entered against her. The primary issues are whether a default judgment should have been entered against Ms. Emmert even though she was not properly served and was not mailed the 10 day notice of default required by Iowa R. of Civ. P. 1.972(3).

B. Course of Proceedings. Plaintiff Lincoln Savings Bank ("LSB") filed this action on July 24, 2019. Its petition sought foreclosure of mortgages on a Johnson County condominium and a Black Hawk County commercial property. A personal judgment against Debra Emmert ("Ms. Emmert") was also requested. (Petition; App. P. 95)

LSB never attempted to personally serve Ms. Emmert with this petition. Instead an acceptance of service on her behalf was sent to Attorney Phillip Brooks by LSB. Attorney Brooks signed and filed the same. (Acceptance of Service; App. P. 226)

Attorney Brooks had filed an appearance and otherwise represented Ms. Emmert in an earlier replevin action filed by LSB seeking the recovery of Simpson Furniture's inventory and other personal property. No foreclosure or

personal judgment against Ms. Emmert was requested. (LACV137426 Replevin Petition and Appearance of Brooks; App. P. 21;81) However, Attorney Brooks at no time filed an appearance, answer or any other pleading in the foreclosure action which is the subject of this appeal. Nor is there any showing that Attorney Brooks was ever authorized to do so, as Ms. Emmert testified that she had not authorized Brooks to accept service on her behalf and that he was not representing her in this foreclosure. (Transcript P. 6-10; App. P. 520-521) (Docket; App. P. 5-19)

On December 31, 2019 LSB filed an application for default against Ms. Emmert and other parties. This motion contained a certification by LSB's attorney stating that Ms. Emmert had been served "via an acceptance of service by Debra's attorney Phillip D. Brooks." (Dec. 31 Application for Default; ¶8 and Ex. B; App. P. 221-228) This motion also certified that LSB "…mailed to all Defaulting Defendants" a Rule 1.972 notice. However Ms. Emmert was not sent this notice. Instead it also was sent to Attorney Brooks. (Motion for Default ¶13 and Ex. G; App. P. 227) Brooks did not inform Ms. Emmert of this notice. (Transcript P. 9; App. P. 519-521)

The Trial Court granted LSB's motion for default against Ms. Emmert on December 31, 2019. (Order; App. P. 229-231)

LSB then acquired another mortgage on Ms. Emmert's Coralville condo which previously was held by another bank. It mailed to Ms. Emmert at her Coralville residence a notice to cure the default under the terms of this newly acquired mortgage. (Second Amended Petition ¶ 22A-22P and Exhibit LL1; App. P. 237, 377)

LSB then filed a second amended petition on August 5, 2020 which for the first time sought foreclosure of LSB's newly acquired mortgage and alleged that approximately $150,000.00 more debt was owed LSB which was secured by this additional mortgage. (Motion for Leave to Amend ¶7; App. P. 232-233) LSB filed a notice of mailing stating that a copy of this second amended petition was served on Ms. Emmert by certified mail "through counsel of record." However as stated above Ms. Emmert had no counsel of record at this time. (Notice of Mailing; App. P. 380-382)

LSB then proceeded to seek a default under this second amended petition. Its application contained a certification by its lawyer stating that "all of the Defendants were served with a copy of the Amended Petition via mail because they had properly been served with a copy of the Petition." LSB's counsel also certified that a Rule 1.972 notice was mailed to all defendants on September 1, 2020. (Second Application for Default ¶13 and 15 and attachment G and K; App. P. 383-391)

A second default was then entered against Ms. Emmert. (October 2, 2020 Order; App. P. 392)

Ms. Emmert on December 2, 2020 filed a resistance which informed the court of the lack of personal jurisdiction and the improper Rule 1.972 notices which had been given by LSB. (Resistance; App. P. 412) On the same day the trial court entered a foreclosure decree and a personal judgment against Ms. Emmert in excess of $6,000,000.00 and in rem judgments against her residential condominium and other real estate. (Judgment; App. P. 396) A timely notice of appeal was then filed on December 16, 2020. (Notice of Appeal; App. P. 425) This appeal was designated as appeal No. 20-1663.

Following LSB's efforts to enforce its judgment by execution and sheriff's sales of the Black Hawk and Johnson County properties Ms. Emmert filed a motion to set aside the judgment and quash these sheriff's sales. (Motion to Set Aside; App. P. 452) This motion was resisted by LSB. (Resistance; App. P. 467) Following a hearing this motion was denied. (March 4 Order; App. P. 549) Ms. Emmert then filed a motion to expand under Iowa R. of Civ. Proc. 1.904(3) on March 12, 2021. On March 25, 2021 this motion was largely denied. (1.904(3) Motion and March 25, 2021 Order, App. P. 552, 563)

LSB's collection efforts included two praecipes requesting separate executions directed to the Black Hawk County Sheriff and the Johnson County

Sheriff. The clerk complied with these praecipes and issued these executions. Both of these executions were outstanding at the time that a sheriff's sale of the Black Hawk County property was held on January 20, 2021. LSB also directed the Johnson County sheriff to hold a sheriff's sale of Ms. Emmert's residence. This sheriff levied on the same, scheduled a sale and served and published notice of sale but LSB eventually cancelled this sale. (Praecipes, Returns and Executions; App. P. 427-449)

Following the trial court's ruling on the 1.904(3) motion a second notice of appeal was timely filed on April 20, 2021. (Second Notice of Appeal; App. P. 566)

On May 4, 2021 the two appeals were consolidated by the Supreme Court and numbered as No. 20-1663.

C. Facts. Ms. Emmert and her then-husband Dale Emmert operated a retail furniture business known as Simpson Furniture. Over the course of time this business became indebted to LSB for over $5,000,000.00 in borrowings. LSB sought to collect this debt by foreclosing mortgages on the Johnson County condominium which was the residence of Ms. Emmert and on a Black Hawk County commercial property used in the Simpson Furniture operation. (Petition ¶13-27; App. P. 95-117) Ms. Emmert contends that the signature which LSB

claims to be hers on at least one Johnson County mortgage is a forgery. (Emmert Resistance; App. P. 412; Transcript P. 6-10; App. P. 520-525)

The facts pertaining to the lack of proper service and notice on Ms. Emmert are detailed in the Course of Proceeding section above. LSB did not attempt to serve Ms. Emmert with a copy of its initial petition. Instead, it mailed Attorney Brooks, who represented Ms. Emmert in the earlier replevin action filed by LSB, an acceptance of service. Attorney Brooks signed and filed this acceptance. (December 31, 2020 Motion for Default; ¶8 and Exhibit 8; App. P. 221-228) LSB claims to also have served Ms. Emmert with notice of its second amended petition by mailing the same to Brooks by certified mail. (October 1, 2020 Application for Default ¶ 13 and Ex. G; App. P. 380-382) Further, LSB did not send the required Rule 1.972 notice to Ms. Emmert prior to obtaining either of its two default judgments. Instead LSB mailed these 1.972 notices to Attorney Brooks. LSB took these actions even though it knew where Ms. Emmert lived and had previously mailed correspondence to her at her Coralville residence. (Second Amended Petition ¶32 and Exhibit LL-1; App. P. 377) (Motion to set Aside ¶6; App. P. 453; Resistance ¶7; App. P. 473.)

Attorney Brooks never filed an appearance, answer or anything else on behalf of Ms. Emmert in this foreclosure action. (Docket; Appendix P. 6)

In its resistance to the motion to set aside filed by Ms. Emmert LSB presented correspondence and emails between LSB's counsel and Attorney Brooks. These emails largely pertain to out of court attempts to resolve this matter. At no point in this correspondence does LSB's counsel ask if Attorney Brooks was going to represent Ms. Emmert in the yet-to-be-filed foreclosure action or if he was authorized to accept service on her behalf. Nor did Attorney Brooks give LSB's counsel any indication or assurance that he would be doing so. (March 3 Resistance Attachments; App. P. 467) In fact, prior to the filing of foreclosure action Attorney Brooks advised LSB's counsel that he would not be representing Ms. Emmert "if the matter took a more adversarial approach." (March 3 Resistance Ex. 5, P. 1; App. P. 492)

D. Routing Statement. The issue as to whether Iowa R. Civ. Proc. 1.972 (3) requires notice of impending default to be sent to a litigant as well as to counsel has never been decided by this court. This case also involves Iowa R. Civ. Proc. 1.442(1) which requires in certain cases personal service when an amended petition is filed. This aspect of this rule also does not appear to have yet been considered by the Supreme Court. Finally, the failure to provide Ms. Emmert with proper service results in significant constitutional issues being present in this case. Accordingly, the Iowa Supreme Court should retain this case so that

these rules and related issues can be addressed. Iowa R. App. Proc. 6.1101(2)(a) and (c)

ARGUMENT

I. The Trial Court erred when it entered a default judgment against Defendant Debra Emmert despite no proper Iowa R. Civ. Proc. 1.972 notice being given her.

A. Standard of Review.

The resolution of this issue turns on the interpretation of rules of civil procedure. Therefore the standard of review is for the correction of errors at law. Hasselman v Hasselman, 596 NW2d 541, 543 (Iowa 1999)

B. Error Preservation.

This appeal issue arises from a default judgment. The proper way to challenge a default judgment which was entered despite the failure to send proper Iowa R. Civ. Proc. 1.972 notice is by direct appeal. Accordingly error is preserved on this issue. Dolezal v. Bockes Brothers Farms, Inc., 602 NW2d 348, 353 (Iowa 1999)

C. Argument.

Under Iowa law a trial court commits error if it issues a default judgment without proper Rule 1.972 notice having first been sent or

without there being proper certification by Plaintiff's counsel that this notice has been given. Any such judgment is void. Dolezal, 602 NW2d at 351. LSB seeks to avoid this rule by contending that mailing Rule 1.972 notice to Attorney Brooks, who represented Ms. Emmert in earlier litigation but not in this case, was somehow sufficient. This contention, however, is contrary to the plain language of the rule, ignores the reason why this rule was enacted, and violates established principals of statutory construction. Therefore, because LSB failed to provide proper notice and filed misleading certifications this court should rule that the judgment entered against Ms. Emmert is void.

Out of fairness it should first be noted that LSB put the trial court at a considerable disadvantage because neither its first nor second motions for default contained accurate certifications under Iowa R. of Civ. Proc. 1.972(2). Specifically, the certification included in LSB's first application for default claimed that Ms. Emmert was served by an acceptance of service filed by "her attorney" Mr. Brooks. However Brooks has never been Ms. Emmert's attorney in this matter. LSB's certification also assured the court that Rule 1.972 notice "was mailed to all Defendants." However, this certification is inaccurate because no such notice was sent

to Ms. Emmert but was instead also sent to Attorney Brooks. (First Application for Default, ¶8 and 13 and Exhibit B and G; App. P. 221-228)

The certification provided by LSB in its second application for default was even more misleading. In it LSB represented that Ms. Emmert was served with LSB's second amended petition by certified mail "through counsel of record." However, Attorney Brooks, who was the one sent this certified mailing, was never counsel of record in this action. LSB also again certified that Rule 1.972 notices were "mailed to all Defendants." This also is false, as Ms. Emmert's notice was not sent to her but instead to Attorney Brooks. (Second Default Application ¶13 and 15, Exhibit G and K; App. P. 385-387)

A busy trial court should be able to rely on Rule 1.972(2) certifications especially when, as in this case, the pleadings are lengthy. The seriously inaccurate certifications filed by LSB therefore easily could have misled the trial court into believing that Ms. Emmert had been properly served and had received proper Rule 1.972 notice.

Further, these false certifications are an independent reason for why the judgment in this matter is void, as under Rule 1.972 both proper notice to the defendant and accurate certification to the court must be given or

else the resulting judgment is void. Dolezal v. Bockes Brothers, 602 NW2d 348, 353 (Iowa 1999)

1. The Plain Language of the Rule at Issue.

The clear language of Iowa R. Civ. P. 1.972 (3) provides for notice to the individual litigant under subparagraph (a). It also separately provides for notice to counsel under subparagraph (b). There is no language in this rule which allows for one of these notices to substitute for the other. Therefore LSB clearly needed to send notice to Ms. Emmert under subparagraph (a) of this rule. Since there is no ambiguity in this rule there is therefore no need to construe it further and LSB should be found to have violated it. State v. Wieder, 709 NW2d 538, 541 (Iowa 2006)

And there is an even more fundamental reason why notice to Attorney Brooks was not sufficient: Mr. Brooks was never Ms. Emmert's attorney in this case. Since Attorney Brooks never filed an appearance, answer, or other pleading on her behalf there is no way that LSB could reasonably have assumed that Attorney Brooks represented Ms. Emmert in this matter even though he may have represented her in other matters. Indeed Brooks specifically told LSB's counsel that he would not represent Ms. Emmert in a

foreclosure and thereafter engaged only in out-of court attempts at settlement. (March 3 Resistance Ex. 5, P. 1; App. P. 492) Therefore, subparagraph (b) of Rule 1.972(3) cannot be considered a substitute for the requirement of mailing notice to Ms. Emmert under subparagraph (a) of this rule. See, Perpetual Savings and Loan Association v. Van Atten 233 NW 46, 747 (Iowa 1930) (holding that notice to attorney who had ongoing "limited continuing employment" with client but was not involved in the matter at issue was not sufficient.)

The requirements for sending separate notice to both counsel and a litigant is also demonstrated by Rule 1.972(3)(d) which requires that the notice must be substantially as set forth in Form 10 in Iowa R. Civ. Proc. 1.1901. This model form requires that it be addressed "To: (defendant)." If the rule and form drafters felt that notice would be sufficient if sent to only an attorney they would have required it to be addressed to counsel and not to the defendant. Indeed, the form drafters clearly contemplated that some forms would pertain to counsel and others would involve the individual litigant. For example, Form 5 is the model affidavit of financial status form and contains a signature line for "Petitioner/Respondent," thereby clearly

contemplating the involvement of the litigant and not just the attorney. Conversely, Form 14 contains a signature line labelled "Attorney's signature" which requires completion by only counsel. The point is that the drafters clearly knew the difference between a form which is written for a litigant and a form geared toward an attorney and required that Form 10 be addressed and sent to the litigant and not just to counsel.

In summary, Rule 1.972(2) requires (1) always mailing notice to the party in default and (2) that a copy of this notice also be sent to counsel if counsel is known to be involved. Because LSB failed to comply with this requirement the judgment entered against Ms. Emmert is void. Dolezal, 602 NW2d at 351-352

b. The History and Policy Behind the Rules.

Current Iowa R. of Civ. P. 1.972 and 1.973 were originally designated as Iowa R. of Civ. P. 231 and 232 and were enacted in 1998. Dolezal, 602 NW2d at 350 The need for these rules was explained in Central National Ins. Co. of Omaha v. Ins. Co. of North America, 513 NW2d 750 (Iowa 1994). In Central National the Iowa Supreme Court ruminated on the problems caused by the frequent practice of a default being entered against litigants who were not

aware that they were at risk for the same due to a misunderstanding over a lawyer's involvement or other "bungle." As a way of reducing the time-consuming use of court resources spent on attempts to set aside these default judgments the court proposed a solution through a rule requiring that "(n)otice to all defaulting parties -- not just those represented by counsel--should be given." Central Nat. Ins. Co. 513 NW2d at 757

This history is important because a statute or rule which has been enacted in order to alleviate an identified problem will be construed to remedy this problem. Lee v. Grinnell Mutual Reinsurance Co., 646 NW2d 403, 407 (Iowa 2002) Iowa R. of Civ. P. 1.972 should therefore be construed as requiring notice to both a lawyer if a lawyer is known to be involved in a case and to the litigant. As recognized in Central National, notifying just a lawyer, especially one who is not the attorney of record in an action, is unlikely to remedy confusion on the part of a litigant because the uninvolved lawyer is unlikely to notify the named default. Further, a lawyer who is not counsel of record may have declined representation, may be "at odds" with the client, have a conflict, may be waiting for a promised retainer fee, or may otherwise have no

involvement in the case. Under those circumstances sending notice to the uninvolved lawyer is both unfair to the lawyer and ineffective as to the litigant. Indeed, the wisdom of Rule 1.972(2) and (3) being interpreted to require that both the attorney and the litigant be notified is demonstrated by the present case because if LSB had simply mailed its 1.972 notice to Ms. Emmert at her home address (which it used for other mailings to her) this present dispute would have been avoided.

c. Other Rules of Construction Mandate that Rule 1.972 Requires Notice to Both Attorney and Litigant.

Under Iowa law the same principles of construction which apply to statutes also apply to procedural rules. Hindman v. Reaser, 72 NW2d 559, 561 (Iowa 1955) One of these principles requires that a rule be interpreted so that no part of it is made superfluous. Albaugh v. The Reserve, 930 NW2d 676, 683 (Iowa 2019) But making part of Rule 1.972 superfluous is exactly what LSB seeks to do. Specifically LSB contends that subpart 3(a) of Rule 1.972 is unnecessary and that notice can instead be sent to an attorney even if this attorney is not the attorney of record. Under Hindman, however, subparagraph (3)(a) cannot simply be ignored. Instead every part of this rule is presumed to have a purpose. Miller v. Westfield Ins. Co.,

606 NW2d 301, 305 (Iowa 2000) The purpose behind subpart(3)(a) is to make sure that there is no confusion between a litigant and counsel and to limit the number of defaults being entered. It is clearly written to accomplish this important purpose and should not be ignored.

Finally, the fact that there is neither the word "and" nor the word "or" between subparagraph (3)(a) and (3)(b) does not help LSB. Instead this court looks to the purpose of a rule and does not scrutinize it to determine if its provisions are conjunctive or not. Indeed, if anything rules requiring notice should be broadly interpreted to require apprising Iowans that their legal rights may be in jeopardy. TLC Home Health Care v. Iowa Department of Human Service, 638 NW2d 708, 713 (Iowa 2002)

For the above reasons the default judgment erroneously entered against Ms. Emmert should be found to be void.

II. The Trial Court erred when it entered a default judgment against Debra Emmert despite her not being properly served with notice of this action.

A. Standard of Review. This issue involves the interpretation of rules of civil procedure and is reviewed for errors at law. Hasselman v.

Hasselman, 596 NW2d 541, 543 (Iowa 1999) It also involves constitutional issues which are reviewed de novo. War Eagle Village Apartments v. Plummer, 775 NW2d 714, 717 (Iowa 2009)

B. Error Preservation. Obtaining a judgment against a defendant without first providing this defendant with statutorily sufficient service of process or by utilizing a service method which violates due process results in a void judgment which may be challenged at any time. Therefore this issue is properly raised on appeal. Dimmitt v. Campbell, 151 NW2d 562, 565 (Iowa 1967)

C. Argument. In order to obtain jurisdiction over a defendant his or her opponent must provide the defendant with service of process which complies with the requirements of the rules of civil procedure. It is the Plaintiff's burden to show that it has met this requirement. Mokhtarian v. GTE Midwest, Inc. 578 NW2d 666, 669 (Iowa 1998) Service must also comply with the procedural due process requirements of Section 1 of the 14th Amendment to the United States Constitution and with Article I, §9 of the Iowa Constitution. War Eagle Village Apartments v. Plummer, 775 NW2d 714, 719 (Iowa 2009) The failure to provide a defendant with either statutorily compliant or constitutionally sufficient notice results in any subsequent judgment being void. Dimmitt, 151 NW2d at 565 As

explained below neither statutory nor constitutional requirements have been met in this matter.

1. Service of the Original Petition. Iowa R. Civ. Proc. 1.305 lists the people who are authorized to receive service on behalf of a Defendant. Nowhere in this rule does it provide that an attorney can be served or that an attorney is authorized to accept service on behalf of a litigant. Therefore, the acceptance of service signed by Attorney Brooks is not effective under this rule. Further, LSB did not seek court permission under Iowa R. Civ. Proc. 1.306 to use an alternative method of service. And it would have been unlikely to obtain this permission because LSB always knew where Ms. Emmert lived, mailed her correspondence at her residence and therefore could simply have had the sheriff serve her at her home. (Second Amended Petition ¶32 and Exhibit LL-1; App. P. 237, 256, 377)

Further, the Iowa Supreme Court has determined that unless an attorney is specifically authorized to do so acceptance of service by the attorney is insufficient to obtain jurisdiction over the defendant. This is true even though the attorney is representing the client in other matters or even the present matter. Beauchamp v. Iowa District Court, 328 NW2d 527, 528 (Iowa 1983); In re: Marriage of Meyer, 285 NW2d 10, 11 (Iowa 1979); Arthur v. Iowa District Court, 553 NW2d 325, 327 (Iowa 1996) Although

an attorney of record may receive routine notices pertaining to ongoing litigation in which he or she is involved this authority does not extend to the acceptance of service of process absent a client's express authority to do so. cf., Robinson v. State, 687 NW2d 591, 594 (Iowa 2004) with Marriage of Meyer, 285 NW2d at 11. Indeed, if an attorney of record such as the one in Beauchamp is not a proper person to serve an attorney who is not of record – such as Attorney Brooks – must therefore also be found to be unauthorized.

The trial court, however, concluded otherwise and ruled that "…Debra Emmert was represented by legal counsel and was given proper notice through counsel…" (March 25 Order; App. P. 563) Under Mokhtarian it was LSB's burden to prove that Attorney Brooks had this necessary express authority to accept service on behalf of Ms. Emmert. However, the only evidence regarding express authorization came from Ms. Emmert who testified that she did not give such authorization to Attorney Brooks. (Transcript P. 6-10; App. P. 520-525) And this evidence is reinforced by Brooks' email to LSB's counsel informing them that he would not be representing Ms. Emmert in an adversarial proceeding such as a foreclosure. (March 3 Resistance Ex. 5, P. 1; App. P. 492) Because

LSB failed to provide any contrary evidence the trial court therefore erred when it entered judgement against Ms. Emmert.

In addition to being void under Iowa R. of Civ. Proc. 1.305, the judgment against Ms. Emmert is also void under the procedural due process provisions of the 14th Amendment to the United States Constitution and Article I, §9 of the Iowa Constitution. Specifically, serving or obtaining an acceptance of service from an attorney who is not authorized by the client to accept the same violates procedural due process. Marriage of Meyer, 285 NW2d at 10, 11 (Iowa 1979) Accordingly, LSB's foreclosure decree and judgment, which took away Ms. Emmert's property rights in her Coralville residence and inflicted an immense personal judgment against her, should be found to be void.

2. Service of the Second Amended Petition. Another and independent constitutional and rule question exists in this matter. Specifically, LSB's second amended petition was filed on August 5, 2020 and alleged that Ms. Emmert owed LSB an additional approximate $150,000.00 and sought foreclosure of another mortgage on Ms. Emmert's residence. (March 20 Motion for Leave to Amend ¶6-7; App. P. 232-234) Neither this debt nor this mortgage were mentioned or in any way at issue in LSB's original petition.

LSB did not serve Ms. Emmert with notice of this amended petition. Instead, it mailed notice to Attorney Brooks by certified mail. (Second Application for Default ¶13 and Exhibit G.; App. P. 383-391)

This was a violation of Iowa R. Civ. P. 1.442(1), as Ms. Emmert had on December 31, 2019 been found to be in default and the second amended petition asserted an entirely new claim involving an additional mortgage and debt. Accordingly, under this rule LSB was required to serve Ms. Emmert with a copy of the second amended petition in the manner required by Iowa R. Civ. Proc. 1.305. Neither service by certified mail nor service on a lawyer is authorized under this rule. Therefore, LSB's improperly obtained judgment is void. See, Beauchamp v. Iowa District Court, 328 NW2d 527, 528 (Iowa 1983) (holding that service upon a lawyer is not service authorized by rules of civil procedure)

Further, when by an amended petition a plaintiff seeks to increase the amount to be collected or to otherwise materially change the relief it seeks due process requires proper notice of the amendment to the defendant. The failure to do so in this case was therefore a violation of Ms. Emmert's due process rights under the Iowa and United States Constitutions and the resulting judgment is void. See, In re: D.E.D., 476 NW2d 737, 739-740

(Iowa App. 1991) (Reversed on other grounds in In re: P.L., 778 NW2d 33 (Iowa 2010); In re: Donna M., 637 A2d 795, 799 (Conn. App. 1994)

III. The Trial Court erred when it failed to set aside the judgment and quash the sheriff's sale in this matter.

A. Standard of Review. This issue involves the interpretation of rules of civil procedure which is reviewed for errors at law. Hasselman v. Hasselman, 596 NW2d 541, 543 (Iowa 1999) It also involves constitutional issues which are reviewed de novo. War Eagle Village Apartments v. Plummer, 775 NW2d 714, 717 (Iowa 2009)

B. Error Preservation. The specific grounds for setting aside the judgment and quashing the sheriff's sale discussed in this brief were argued in the motion to set aside filed on January 29, 2021 and/or in Ms. Emmert's 1.904(3) motion filed on March 12, 2021. Each of these grounds was in turn ruled on by the trial court in its March 4, 2021 order or in its March 25, 2021 order. (Motion to Set Aside, App. P. 452; 1.904(3) Motion, App. P. 552; March 4 Order; App. P. 549; March 25, 2021 Order, App. P. 563) Accordingly error has been preserved because these grounds were raised by Ms. Emmert and ruled on by the court.

C. Argument.

1. The Timeliness of the Motion to Set Aside. The trial court concluded that the motion to set aside was not timely because it was not filed within 60 days of the judgment. (March 4 Order; App. P. 549) The only judgment in this matter was entered when the Foreclosure Judgment Entry and Decree was issued on December 2, 2020. The previous orders finding Ms. Emmert in default which were entered on October 2, 2020 and December 31, 2019, did not specify any dollar amount and contemplated that a subsequent decree would be entered. Therefore, they were not judgments. Hills Bank v. Converse, 772 NW2d 764, 771 (Iowa 2009) Underneath Iowa R. of Civ. Proc. 1.977 an application to set aside a judgment must be filed within 60 days of the judgment. Ms. Emmert's motion was filed on January 29, 2021 which was 57 days after the December 2, 2019 judgment. Therefore this motion was timely filed.

Further, as explained below the judgment at issue was void because of the failure to provide Ms. Emmert with service as prescribed by the rules of civil procedure or required by due process. The 60 day time limit included in Iowa R. of Civ. Proc. 1.977 applies only if the judgment is valid. If the judgment is void there is no time limit to challenge this

void judgment. Holmes v. Polk City Savings Bank, 278 NW2d 32, 35 (Iowa 1979)

2. Improper Service of Petition and Second Amended Petition. As explained above LSB not once but twice failed to properly serve Ms. Emmert in this matter. First, Ms. Emmert was not properly served at the start of this action. Secondly, she was not properly served with LSB's second amended petition. The facts, legal authorities and rules which apply to these failures are discussed in detail under Issue II and will not be restated here. In summary, under Iowa law an attorney's ongoing representation of the client in another matter is not authorization for the attorney to accept service of process on behalf of the client and any resulting judgment is void. Beauchamp v. Iowa District Court, 328 NW2d 527, 528 (Iowa 1983); Lutz v. Darbyshire, 297 NW2d 349, 354 (Iowa 1980). Additionally, under Iowa R. of Civ. Proc. 1.442(1) LSB was required to give Ms. Emmert personal service of its amended petition in the manner specified in Iowa R. Civ. Proc. 1.305. LSB failed to do this and instead mailed notice to Attorney Brooks by certified mail. (Notice of Mailing filed August 14, 2020; App. P. 380) This notice by mail does not comply with either Iowa R. of Civ. Proc. 1.305 or 1.442(1) and the resulting judgment therefore is also void. See, Beauchamp and Lutz,

above. Finally, the failure to give Ms. Emmert notice of neither the original petition nor the amended petition resulted in a deprivation of Ms. Emmert's right of due process under the 14th Amendment to the United States Constitution and Article I, §9 of the Iowa Constitution and is a separate reason why the judgment in this matter is void. War Eagle Village Apartments v. Plummer, 775 NW2d 714, 719 (Iowa 2009); In re: Donna M., 637 A2d 795, 799 (Conn. App. 1994) Accordingly the trial court should have set aside the judgment and the sheriff's sale which enforced the same.

3. Multiple Executions Outstanding at Same Time. Ms. Emmert's motion to set aside discussed the fact that LSB had two executions outstanding at the same time, one to the Black Hawk County Sheriff and one to the Johnson County Sheriff. (Motion to Set Aside, App. P. 452) Further LSB directed both sheriffs to levy on real properties in their respective counties and each sheriff did so. (Executions, Returns and Praecipi; App. P. 427-449) Having multiple executions outstanding at the same time is a violation of Code §626.3. Further, since the Black Hawk County sale was held while the Johnson County execution was also outstanding the Black Hawk sale is void and/or otherwise invalid and should be set aside. See,

DuTrac Community Credit Union v. Hefel, 893 NW2d 282, 295 (Iowa 2017)

The trial court, however, concluded that since LSB "did not act upon" the Johnson County execution there was no violation of §626.3. (March 25 Order, App.P. 563) However LSB executed on the Johnson County property, directed a sheriff's sale and caused Ms. Emmert to be served with notice of the same. (Praecipes, Notice and Executions; App. P. ___) Therefore, LSB clearly "acted on" the Johnson County execution and in so doing illegally subjected Ms. Emmert with the threatened loss of her personal residence. Further, the purpose of Code §626.3 is to limit the amount of collection actions and resulting emotional and other distress caused to a beleaguered debtor and therefore serves the commendable purpose of providing the debtor with time, "breathing room" and the ability to salvage what he can by selling or refinancing his non-levied on property even though his property in a different county has been levied on. Additionally, Code §626.3 minimizes the sale expense and other court costs which occur with multiple executions and which the debtor will have to pay in order to redeem the property. Finally under the plain language of the statute it is the simultaneous existence of two executions which is prohibited and not just the "acting on" of these executions. For

these reasons the multiple executions were void and the resulting sale should be set aside.

4. Excusable Neglect or Mistake. Finally, even if the judgment is this matter was only voidable – and not void – it still should have been set aside under Iowa R. Civ. Proc. 1.977. The failure to act because service of process has not properly been made or notice of default properly given certainly constitutes excusable surprise, neglect or mistake. The trial court's contrary conclusion is therefore erroneous. See, No Boundary, LLC v. Hoosman, 953 NW2d 696, 699-700 (Iowa 2021). This is especially true because LSB never served Ms. Emmert, Attorney Brooks was not authorized to accept service on her behalf and Ms. Emmert was not informed of the foreclosure or threatened default. (Transcript P. 6-10; App. P. 520-525)

The bottom line on this issue – and, indeed, all issues in this appeal - is that LSB made serious, repeated and on-going mistakes in this case. LSB's errors could easily have been avoided if it had simply consulted the Iowa Rules of Civil Procedure while pursuing an action which involved many millions of dollars and a debtor's homestead. Further, it was LSB

who made these errors and not Attorney Brooks or Ms. Emmert and LSB should not be allowed to shift the blame for its mistakes to others.

CONCLUSION AND REQUESTED RELIEF

Ms. Emmert requests that the judgment entered against her in this matter be found to be void in all its aspects, including voiding the foreclosure and any judgment entered against her or the properties at issue. Ms. Emmert further requests that the sheriff's sale of the Black Hawk County property likewise be voided and set aside.

REQUEST FOR ORAL ARGUMENT

Appellant requests to be heard at oral argument in this matter.

Respectfully Submitted,

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COST STATEMENT

The undersigned states that there were no costs associated with the preparation of this document.

Dated this 20th day August, 2021

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Rule 1.972 Procedure for entry of default.

1.972(1) *Entry.* If a party not under legal disability or not a prisoner in a reformatory or penitentiary is in default under rule 1.971(1) or 1.971(2), the clerk shall enter that party's default in accordance with the procedures set forth in this rule without any order of court. All other defaults shall be entered by the court.

1.972(2) *Application.* 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. If the certification is filed, the clerk on request of the adverse party must enter the default of record without any order of court.

1.972(3) *Notice.*

a. To the party. A copy of the notice of intent to file written application for default shall be sent by ordinary mail to the last known address of the party claimed to be in default. No other notice to a party claimed to be in default is required.

b. Represented party. When a party claimed to be in default is known by the party requesting the entry of default to be represented by an attorney, whether or not that attorney has formally appeared, a copy of notice of intent to file written application for default shall be sent by ordinary mail to the attorney for the party claimed to be in default. This rule shall not be construed to create any obligation to undertake any affirmative effort to determine the existence or identity of counsel representing the party claimed to be in default.

c. Computation of time. The ten-day period specified in rule 1.972(2) shall begin from the date of mailing notice, not the receipt thereof.

d. Form of notice. The notice required by rule 1.972(2) shall be substantially as set forth in rule 1.1901, Form 10.

1.972(4) *Applicability.* The notice provisions of this rule shall not apply to a default sought and entered in the following cases:

a. Any case prosecuted under small claims procedure.

b. Any forcible entry and detainer case, whether or not placed on the small claims docket.

c. Any juvenile proceeding.

d. Against any party claimed to be in default when service of the original notice on that party was by publication.

[Report 1943; October 31, 1997, effective January 24, 1998; November 9, 2001, effective February 15, 2002]

Rule 1.973 Judgment on default. Judgment upon a default shall be rendered as follows:

1.973(1) Where the claim is for a sum certain, or which by computation, can be made certain, the clerk, upon request, shall make such computation as may be necessary, and upon affidavit that the amount is due shall enter judgment for that amount, and costs against the party in default.

1.973(2) In all cases the court on motion of the prevailing party, shall order the judgment to which the prevailing party is entitled, provided notice and opportunity to respond have been given to any party who has appeared, and the clerk shall enter the judgment so ordered. If no judge is holding court in the county, such order may be made by a judge anywhere in the judicial district as provided in rule 1.453. The court may, and on demand of any party not in default shall, either hear any evidence or accounting required to warrant the judgment or refer it to a master; or submit it to a jury if proper demand has been made therefor under rule 1.902.

[Report 1943; Report 1978, effective July 1, 1979; February 1, 1991, effective July 1, 1991; October 31, 1997, effective January 24, 1998; November 9, 2001, effective February 15, 2002]

Rule 1.974 Notice of default in certain cases. When any judgment other than one in rem has been taken by default against a party served with notice delivered to another person as provided in rule 1.305(1), the clerk shall immediately give written notice thereof, by ordinary mail to such party at that party's last known address, or the address where such service was had. The clerk shall make a record of such mailing. Failure to give such notice shall not invalidate the judgment.

[Report 1943; October 31, 1997, effective January 24, 1998; November 9, 2001, effective February 15, 2002]