NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 CA 2034

XAVIER UNIVERSITY OF LOUISIANA

VERSUS

MARCUS ALONZO CASTILLE

On Appeal from the 19th Judicial District Court
Parish of East Baton Rouge, Louisiana
Docket No. 528,014, Division "N"
Honorable Curtis A. Callaway, Judge Presiding

Joseph E. Fick, Jr.
Metairie, LA

Attorney for
Plaintiff-Appellee
Xavier University of Louisiana

E. Trent McCarthy
Baton Rouge, LA

Attorney for
Defendant-Appellant
Marcus Alonzo Castille

Edwin A. Lombard
Judge, Ad Hoc

BEFORE: BAGNERIS, LOVE, AND LOMBARD, JJ.[1]

Judgment rendered: JUN - 8 2007

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[1] The Honorable Dennis R. Bagneris, Sr., Judge, the Honorable Terri F. Love, Judge, and the Honorable Edward A. Lombard, Judge, all members of the Fourth Circuit Court of Appeal, are serving as judges *ad hoc* by special appointment of the Louisiana Supreme Court.

Defendant//appellant Marcus Alonzo Castille appeals the default judgment entered against him by the trial court. After review of the record in light of the applicable law and the appellant's arguments[1], we vacate the default judgment and remand the matter to the trial court.

Relevant Facts and Procedural History

On June 6, 2006, the plaintiff/appellee, Xavier University of Louisiana ("Xavier"), filed a petition, alleging that "Petitioner sold and/or provided to defendant on open account goods, wares, merchandise, care and/or services, all as itemized and set forth in the statement of account attached hereto." The sole attached document appears to be a one-page computer printout entitled "Account Detail Review Form – Student TSAAREV 5/2.01 (XAVIER)" which indicates that the appellant is the purported holder of the account and that on November 6, 2001, a check payment of $200.00 was made to an account, leaving a balance of zero and that thereafter, between November 7, 2001, and July 9, 2002, a finance charge ranging between $205.44 and $227.95 was posted to the account. In the blocks at the bottom of the form designated "query balance", "account balance" and "amount due" show, amounts of $1722.93, $15424.30, and $15424.30, respectively, is shown.

[1] No brief was filed by the appellee.

On February 15, 2005, Xavier filed a Motion to Appoint Special Deputy", indicating that the Sheriff of East Baton Rouge Parish was unable to effect service of process. The trial court signed the order appointing a special process server on February 17, 2005. The affidavit of service filed in the record indicates that the appellant was served at his place of employment on August 13, 2005.

On September 29, 2005, counsel for Xavier filed a motion for preliminary default. The attached Affidavit of Correctness, & Non-Military Status was signed by counsel for Xavier who declared that he was familiar with the account sued upon and that "the amount now due and owing is $15,424.30, together with 18% interest from date of judicial demand until paid, attorney's fees and all costs of these proceedings." The trial court granted and signed the preliminary default on October 3, 2005.

The record indicates, however, that when counsel, again certifying that this was a suit on an open account, moved to confirm the preliminary default in December 2005, Xavier was notified that the "judgment is not signed" because "[a]ffidavit of correctness has to be from an Officer of the Corporation, not attorney." Accordingly, the record contains an "Affidavit of Correctness of Note and Non-military Status" sworn to on May 30, 2006, by the Vice President of Fiscal Services for Xavier, declaring that Xavier "is the holder and owner of value *of the open contract herein sued upon* and said *contract* is delinquent; that the true and correct amount owed to [Xavier] on said contract by [appellant] is $15, 424.30 together with 18% interest from date of judicial demand until paid, plus attorney's fees and court costs, as prayed for . . ." (emphasis added).

On June 20, 2006, the trial court confirmed and made final the default judgment against the appellant "in the full sum of $15,424.30, together with 18% interest from the date of judicial demand until paid, with reasonable attorney's [sic] of 25% in accordance with R.S. 9:2781 and all cost."

This devolutive appeal was timely filed.

Standard of Review

Upon review, an appellate court is restricted to a determination of the sufficiency of the evidence offered in support of a default judgment. *Bates v. Legion Indem. Co.* 01-0552, pp. 3-4 (La. App. 1 Cir. 2/27/2002), 818 So.2d 176, 178.

Discussion

On appeal, the appellant argues that sufficient proof does not support confirmation of the default judgment and that the judgment is based upon a prescribed obligation.

Confirmation of a default judgment requires "proof of the demand sufficient to establish a *prima facie* case." La. Code Civ. Proc. art. 1702(A). A *prima facie* case is established when the plaintiff proves the essential allegations of the petition, with competent evidence, to the same extent as if the allegations had been specifically denied. *Sessions & Fishman v. Liquid Air Corp.,* 616 So.2d 1254, 1258 (La. 1993). Thus, the plaintiff must present competent evidence that convinces the court that it is probable that he would prevail at trial on the merits. *Id.* at 1258; *see also Thibodeaux v. Burton,* 538 So.2d 1001, 1004 (La. 1989) (to obtain a default judgment, the plaintiff "must establish the elements of a prima facie case with competent evidence, as fully as though each of the allegations in the

petition were denied by the defendant."). Specifically, La. Code Civ. Proc. art. 1702.1(A) provides that when a plaintiff seeks to confirm a default judgment, "along with any proof required by law, he or his attorney shall include in an itemized form with the motion and judgment that the suit is on an open account, promissory note, or other negotiable instrument, on a conventional obligation . . . and that the necessary invoices and affidavit, note and affidavit . . . are attached. *See also Ascension Builders, Inc. v. Jumonville,* 263 So.2d 875, 878 (1972) (a plaintiff seeking to confirm a default judgment must prove both the existence and the validity of his claim). Further, pursuant to La. Code Civ. Proc. art. 1702.1(A), "[I]f attorney fees are sought under R.S. 9:2781 and 2782, the attorney shall certify that fact and that a copy of the demand letter and if required, the return receipt showing the date received by the debtor are attached and that the number of days required by R.S. 9:2781(A) or 2782(A), respectively, have elapsed before the suit was filed.

In the context of the La. Code Civ. Proc. art. 1702(B)(3) requirement for setting forth the required proof when the demand is for a sum due on an open account, the affidavit of correctness refers to the validity of the account, i.e. the "correctness" of the sum due. Although this provision did away with the necessity of taking testimony in order to establish the validity of the account, the existence of the claim must still be supported by a statement of the account or invoices. *See Buddy Patterson Gateway gulf Service v. Howell,* 392 so.2d 140, 1410142 (La. App. 1 Cir. 1980) (itemized account must be introduced to establish the *prima facie* case). Accordingly, in order to establish both the existence and the validity of a demand for a

sum due on an open account, the plaintiff must present evidence of the account itself and an affidavit, or testimony, attesting to its correctness. *See Buddy Patterson Gateway Gulf Service v. Howell,* 392 So.2d 140, 141-142 (La. App. 1st Cir. 1980) ("although the statute does not explicitly state that the plaintiff must produce the itemized account, the language of the statute implies that the account must be submitted ... it would be meaningless to have an affidavit attesting to the *correctness* of an account if the account itself was not available for examination ... it is well established that the itemized statement of the account and the affidavit of correctness, are the basic requisites to obtain a default judgment in a suit on an open account") (emphasis in original).

Finally, in a suit on a promissory note, the note itself is the very foundation of the cause of action and where an obligation is based upon a promissory note but the plaintiff does not produce note or satisfactorily explain his failure to do so, and that failure is apparent on the record, he has failed to prove the *prima facie* case necessary to obtain a default judgment. *Lindsley-Feiber Motor Co. v. Brumfield,* 111 So.2d 555, 558-559 (La. App. 1st Cir. 1959).

In this case, there is no evidence to support the default judgment. First, although one might assume that the underlying obligation is based upon a college student debt, there is nothing in the record to support this assumption. Second, Xavier's petition states only generally that it "sold and/or provided to [the appellant] on open account goods, wares, merchandise, care and/or services, all as itemized and set forth in the statement of account attached hereto." The attached document, however,

shows only that interest is being charged on an amount purportedly owed by the appellant. There is nothing to indicate the exact nature of the appellant's purported underlying obligation. Next, the Affidavit of Correctness signed by Xavier's Vice President of fiscal affairs states that the underlying obligation is contractually based but, again, does not indicate the nature of the contract or provide a copy of the contract. Finally, Xavier claims attorney fees pursuant to La. Rev. Stat. 9:2781 but does not attach a copy of any demand letter sent to the appellant or that Xavier waited the requisite numbers of days to file suit after the appellant received the demand letter as required by La. Code Civ. Proc. 1702.1(A).

Conclusion

Clearly, there is insufficient evidence in this case to support a default judgment. Likewise, because the nature (and the subsequent history) of an existing obligation between the parties is unclear, the prescription issue is pretermitted. Accordingly, the default judgment is vacated and the matter is remanded to the trial court.

JUDGMENT VACATED; REMANDED.