NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2008 CA 1768

CLARENCE D. HORTON

VERSUS

MARY WILLIAMS, WIFE OF/AND DAVID B. WILLIAMS D/B/A DAVID WILLIAMS TRUCKING

On Appeal from the 21st Judicial District Court
Parish of Tangipahoa, Louisiana
Docket No. 2002-001541, Division "C"
Honorable Robert H. Morrison, III, Judge Presiding

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BEFORE: PARRO, McCLENDON, AND WELCH, JJ.

Judgment rendered March 27, 2009

PARRO, J.

Clarence D. Horton (Horton) appeals a judgment granting a motion for "directed verdict"[1] against him and dismissing his claims against David B. and Mary Williams, d/b/a/ David Williams Trucking (Williams) for wages and out-of-pocket expenses. For the following reasons, we affirm the judgment.

BACKGROUND

Horton was hired by Williams in October 1999 to drive a leased tractor-trailer. He was so employed until August 2001. Horton claimed he was owed over $25,000 for his driving time and for reimbursement of personal funds that he used for maintenance and repair of the tractor-trailer. When Williams refused to pay him after he had demanded payment, he filed this suit. After many continuances, the case finally came to trial in January 2008. When Horton had presented his case, Williams moved for a "directed verdict," which the court granted, stating there was a lack of evidence to support a finding that any money was owed to Horton. Horton filed this appeal, and Williams answered it, seeking penalties and attorney fees for a frivolous appeal.

DISCUSSION

Horton argues that he testified under oath concerning the money owed, and his accountant, Sheilia Horton-Carter (who was also his daughter), substantiated his claim with her testimony. Since no contrary evidence was presented by Williams, Horton claims it was legal error for the court to grant the motion. Louisiana Code of Civil Procedure article 1672(B) states:

> In an action tried by the court without a jury, after the plaintiff has completed the presentation of his evidence, any party, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal of the action as to him on the ground that upon the facts and law, the plaintiff has shown no right to relief. The court may then determine the facts and render judgment against the plaintiff and in favor of the moving party or may decline to render any judgment until the close of all the evidence.

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[1] We note that a directed verdict under LSA-C.C.P. art. 1810 is only applicable to a jury trial. The motion should have requested an involuntary dismissal under LSA-C.C.P. art. 1672(B). The judgment in this case grants the motion for directed verdict or, in the alternative, motion to dismiss. We will evaluate the judgment under the burden of proof and standard of review applicable to a motion under Article 1672(B).

The applicable standard to be used by a trial court to determine a motion for involuntary dismissal is whether the plaintiff has presented sufficient evidence to establish his case by a preponderance of the evidence. State Farm Mut. Auto. Ins. Co. v. Ford Motor Co., 04-1311 (La. App. 1st Cir. 6/15/05), 925 So.2d 1, 4. A trial court has much discretion in determining whether to grant a motion for involuntary dismissal, but it is required to weigh and evaluate all evidence in order to make such a determination. Taylor v. Tommie's Gaming, 04-2254 (La. 5/24/05), 902 So.2d 380, 384. An appellate court may not reverse a ruling on a motion for involuntary dismissal unless it is manifestly erroneous or clearly wrong. Boyd v. Allied Signal, Inc., 07-1409 (La. App. 1st Cir. 10/17/08), 997 So.2d 111, 118, writ denied, 08-2682 (La. 1/16/09), 998 So.2d 105.

The record shows there was an in-chambers settlement conference, after which the court ordered each party to provide the other with copies of every document or exhibit that they intended to use at trial, and that failure to do so within 60 days would result in exclusion of any exhibit or document from use at trial. They were also to present to the court a proposed reconciliation of amounts claimed versus payments made, along with the net amount of any remaining claim. Neither party complied with these orders.

After a telephone pre-trial conference, the court reiterated that counsel were to file a complete list of exhibits and witnesses with the clerk of court, and that failure to do so would result in the exclusion of any unlisted exhibit or the testimony of any unlisted witness at trial. When neither party filed the exhibit and witness list by the due date, Williams moved to dismiss Horton's case for failure to obey the court's orders. On the trial date, Horton filed an exhibit and witness list into the record. As a result of both parties' failure to obey the court's orders, the court ruled that it would not accept **any** documentation at the trial.[2] Therefore, Horton could only present his own and his daughter's testimony, without any supporting exhibits. Horton proffered a number of

[2] Neither party challenged this evidentiary ruling.

documents during trial in connection with his daughter's testimony. When the court granted Williams' motion for involuntary dismissal, it commented:

> I'm going to grant it. I have not heard evidence that would meet a preponderance test as to any amount that's been owing. Taking Mr. Horton's testimony at face value that he was trying to be helpful—it's very difficult to understand why in the face of continued problems that he was experiencing, that this would continue to be done and there's no substantiation as far as any amount that's claimed on the thing.
>
> [His daughter], in her own testimony, said it would be pretty simple to keep up with the revenue and expenses and to determine how much the driver was owed and yet we've been looking for that information that apparently was compiled in some form or fashion in 2000, or thereabouts and never presented to the Court or to Counsel in an effort to resolve this matter short of this trial.

Horton contends that his and his daughter's testimony established a *prima facie* case and that his claim should be evaluated under the Louisiana open account statute, LSA-R.S. 9:2781. LSA-R.S. 9:2781(D) states that an "open account" includes any account for which a part or all of the balance is past due, whether or not the account reflects one or more transactions and whether or not, at the time of contracting, the parties expected future transactions. Horton cites a fifth circuit case in which the court concluded that proof of a suit on open account may consist of one credible witness and other corroborating circumstances. See LSA-C.C. art. 1846; Riverland Food Corp. v. Carriage Meat Co., Inc., 449 So.2d 1131, 1133 (La. App. 5th Cir. 1984). We note, however, that in the Riverland case, the plaintiff produced a ledger card **during discovery** and at trial. The ledger was a business record kept contemporaneously with the entries shown, and it was ultimately the basis of the trial court's judgment and the appellate court's opinion on review.

This court has held that in proving an open account, the plaintiff first must prove the account by showing that the record of the account was kept in the course of business and by introducing supporting testimony regarding its accuracy. Once a *prima facie* case has been established by a plaintiff-creditor, the burden shifts to the debtor to prove the inaccuracy of the account or to prove that the debtor is entitled to certain credits. Heritage Worldwide, Inc. v. Jimmy Swaggart Ministries, 95-0484 (La. App. 1st Cir. 11/16/95), 665 So.2d 523, 527, writ denied, 96-0415 (La. 3/29/96), 670 So.2d

1233; Louisiana Eggs, Inc. v. Gunter Farms, Inc., 01-0932 (La. App. 1st Cir. 4/2/03), 844 So.2d 400, 402.

This court has reviewed the transcript of the trial and notes the following. Horton testified that Williams never paid him properly, but he was trying to help him out, since they were both ministers and he could tell Williams did not know the trucking business and was in trouble. Horton's only statement concerning the amount claimed was that Williams owed him "roughly $29,000." His daughter testified that she was hired as a consultant to help with bookkeeping for Williams in January 2001. In late 2001 or early 2002, she prepared a summary of the amounts still owed to her father. However, that summary was not prepared as a business record for Williams, but was done for her father after he had ceased working for Williams. She admitted that the summary was never presented to Williams before trial, and, due to the trial court's pre-trial ruling, it was not admitted into evidence. Her testimony did not present any facts about the amounts owed except as part of a proffer, during which she identified and read the amounts shown on various documents, including her estimates of unpaid wages and reimbursements. Her testimony was part of the proffer. Other than information in the proffered documents and her accompanying testimony, there is no accurate accounting in the record of the amounts Williams may have owed Horton.

As previously noted, the court's ruling regarding the inadmissibility of the proffered documents was not challenged. However, under the circumstances in which the court twice ordered counsel to produce the documents to each other and to the court, and counsel disobeyed both orders, the trial court's ruling to exclude the documents was not an abuse of discretion. We conclude that without the proffered documents and Ms. Horton-Carter's accompanying testimony, Horton did not establish his damages. Thus, since he did not establish a *prima facie* case, the burden of production of evidence never shifted to Williams. Because Horton did not prove his entitlement to back wages and expense reimbursement by a preponderance of the evidence, the trial court did not err in granting the motion for involuntary dismissal.

Williams answered the appeal, claiming that Horton's refusal to provide

documentation of his claim during discovery led to the court's ruling that none of his documents would be admitted at trial. Therefore, there was insufficient evidence in the record for anyone to reach any conclusion other than that reached by the trial court, and the appeal is frivolous.

Louisiana Code of Civil Procedure article 2164 states:

> The appellate court shall render any judgment which is just, legal, and proper upon the record on appeal. The court may award damages for frivolous appeal; and may tax the costs of the lower or appellate court, or any part thereof, against any party to the suit, as in its judgment may be considered equitable.

The courts have been very reluctant to grant damages under this article, as it is penal in nature and must be strictly construed. Bracken v. Payne and Keller Co., Inc., 06-0865 (La. App. 1st Cir. 9/5/07), 970 So.2d 582, 591-92. Damages for frivolous appeal are only allowed when it is obvious that the appeal was taken solely for delay or that counsel is not sincere in the view of the law he advocates, even though the court is of the opinion that such view is not meritorious. Carlin v. Wallace, 00-2892 (La. App. 1st Cir. 9/28/01), 809 So.2d 1017, 1023; Daisey v. Time Warner, 98-2199 (La. App. 1st Cir. 11/5/99), 761 So.2d 564, 569. This is true even when the appeal lacks serious legal merit. City Nat'l Bank of Baton Rouge v. Brown, 599 So.2d 787, 790 (La. App. 1st Cir.), writ denied, 604 So.2d 999 (La. 1992). We believe the appellant's contentions in his brief and in oral argument were brought in good faith. The issues raised were not so frivolous as to warrant damages on appeal, and we cannot say that this appeal was brought solely for the purpose of delay or that the appellant's counsel was not serious in the position he advocates. Consequently, we decline to award damages for frivolous appeal.

CONCLUSION

The judgment of February 4, 2008, dismissing the claims of Clarence D. Horton against Mary and David B. Williams, d/b/a David Williams Trucking, is affirmed. The answer to appeal by Williams requesting damages for frivolous appeal is denied. All costs of this appeal are assessed against Clarence D. Horton.

JUDGMENT AFFIRMED.