NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2008 CA 2579

CLIFTON D. EAKIN

VERSUS

RAFAEL AZUARA, JR.

Judgment Rendered: June 12, 2009.

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On Appeal from the
21st Judicial District Court,
In and for the Parish of Livingston,
State of Louisiana
Trial Court No. 119721

Honorable M. Douglas Hughes, Judge Presiding

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Mary E. Heck Barrios Denham Springs, LA	Attorney for Plaintiff-Appellee, Clifton D. Eakin
A. Shelby Easterly, III Denham Springs, LA	Attorney for Defendant-Appellant, Rafael Azuara, Jr.

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BEFORE: CARTER, C.J., WHIPPLE AND DOWNING, JJ.

Downing, J. concurs

CARTER, C. J.

Clifton D. Eakin filed suit in the Twenty-First Judicial District Court seeking rescission of a sale of immovable property, or in the alternative, reduction of the $575,000.00 purchase price he had paid. Mr. Eakin alleged that he believed he was purchasing "64 plus" acres from Rafael Azuara, Jr., but the actual size of the property he purchased was 52.7 acres. Mr. Eakin further alleged that Mr. Azuara knew about the acreage shortage at the time of the sale, but withheld that information from Mr. Eakin.

Mr. Azuara failed to respond to the petition, and a default judgment in favor of Mr. Eakin was subsequently confirmed. The trial court awarded $42,423.00 to Mr. Eakin, representing a reduction in the purchase price, as well as $2,500.00 for attorney fees, plus costs and legal interest. Mr. Azuara appealed to this court after his motion for new trial was denied. On appeal, Mr. Azuara essentially argues that the default judgment was not supported by sufficient evidence, alleging that the trial court erred in failing to find an "as is" waiver in the act of sale and in failing to find that there was no proof that Mr. Azuara had knowledge of the acreage shortage. For the following reasons, we vacate and set aside the trial court's judgment and remand the matter for further proceedings.

DISCUSSION

A judgment of default must be confirmed by proof of the demand sufficient to establish a *prima facie* case. LSA-C.C.P. art. 1702. In **Sessions & Fishman v. Liquid Air Corp.**, 616 So.2d 1254, 1258 (La. 1993), the Louisiana Supreme Court explained that a plaintiff seeking to confirm a default judgment must establish the required *prima facie* case with competent evidence and must do so as fully as if the defendant had denied each of the petition's allegations. The plaintiff must prove both the existence and the validity of the claim by presenting competent evidence

that convinces the court that it is probable that he would prevail on a trial on the merits. **Id.** Furthermore, "[t]here is a presumption that a default judgment is supported by sufficient evidence, but this presumption does not attach when the record upon which the judgment is rendered indicates otherwise." **Id.** Where the confirmation hearing is transcribed and contained in the record, as in this case, the presumption is inapplicable, and it is incumbent upon an appellate court to restrict its review to a determination of sufficiency of the evidence offered in support of the default judgment. **Nelson v. Merrick**, 06-2381 (La. App. 1 Cir. 9/19/07), 970 So.2d 1019, 1021; **Bates v. Legion Indem. Co.**, 01-0552 (La. App. 1 Cir. 2/27/02), 818 So.2d 176, 179. Judgments of default are reviewed generally under the manifest error standard. **Landry v. Boissenin**, 08-1240 (La. App. 1 Cir. 12/23/08), 4 So.3d 872, 873.

Mr. Eakin testified at the hearing on the confirmation of the default. He identified several documents that were introduced into evidence, including the parties' March 18, 2007 purchase agreement and April 24, 2007 act of cash sale, both of which contained an "as is" waiver of warranty of the condition of the property with an express waiver of redhibition rights.[1] The purchase agreement provided that the property measured "approximately 64 acres (to be controlled by record title)." The act of cash sale contained a detailed property description

[1] A purchaser is entitled to a warranty against redhibitory vices, unless expressly waived. To be effective, a waiver of warranty against redhibitory defects must be clear and unambiguous, contained in the contract, and brought to the attention of the buyer or explained to him. LSA-C.C. art. 2548; **Shelton v. Standard/700 Associates**, 00-0227 (La. App. 4 Cir. 1/31/01), 778 So.2d 1265, 1269, aff'd, 01-0587 (La. 10/16/01), 798 So.2d 60; **Jeffers v. Thorpe**, 95-1731 (La. App. 4 Cir. 1/19/96), 673 So.2d 202, 205, writ denied, 96-1721 (La. 10/4/96), 679 So.2d 1390. In this case, the waiver was contained in two contracts signed by Mr. Eakin, the purchase agreement and the act of cash sale document. Further, in the purchase agreement, Mr. Eakin placed his initials next to the waiver of warranty clause, indicating that it was brought to his attention, and Mr. Eakin does not contend that he was unaware of the waiver language in the act of sale document. Thus, the waiver in the instant case appears to meet all of the requirements to be effective.

outlining boundaries without stating the total acreage, instead referring to "78.5 acres, more or less" and specifically excluding 15.03 of those acres from the sale. Mr. Eakin also identified a May 2, 2007 survey prepared for Mr. Azuara, which revealed that the property was actually 52.70 acres. Additionally, Mr. Eakin testified that the survey was completed eight days subsequent to the sale of the property. Mr. Eakin maintained that had he known the property was only 52.70 acres, he would not have agreed to pay the full purchase price of $575,000.00. Mr. Eakin testified about the value of the difference in the acreage. Completely absent from Mr. Eakin's testimony, however, was any discussion about Mr. Azuara's representations regarding the size of the property or Mr. Azuara's knowledge of the deficiency in the acreage prior to or at the time of the sale. In fact, Mr. Eakin did not even mention Mr. Azuara's name throughout his testimony.

It is well settled that a seller with knowledge of a redhibitory defect who, rather than informing the buyer of the defect, opts to obtain a waiver of warranty implied by law, commits fraud, which vitiates the waiver because it is not made in good faith. LSA- C.C. art. 2548; **Helwick v. Montgomery Ventures, Ltd.**, 95-0765 (La. App. 4 Cir. 12/14/95), 665 So.2d 1303, 1306, writ denied, 96-0175 (La. 3/15/96), 669 So.2d 424. The documents provided by Mr. Eakin at his motion to confirm the default judgment revealed that this sale was of certain described immovable property and it was subject to an "as is" waiver of warranty. Additionally, the survey that showed that the actual acreage was less than what was stated in the purchase agreement and described in the act of cash sale, was dated eight days after the act of cash sale and six weeks after the purchase agreement. Mr. Eakin's testimony did not expose any actual or constructive knowledge on the part of Mr. Azuara as to the deficiency in the acreage, nor did the testimony reveal proof that Mr. Azuara knowingly misrepresented or concealed

the true amount of acreage prior to or at the time of sale. Competent evidence on the knowledge issue was necessary to establish Mr. Eakin's *prima facie* case and to overcome the "as is" waiver in the act of cash sale.[2] As the element of Mr. Azuara's knowledge was lacking in Mr. Eakin's evidence, the default judgment was erroneously entered and a new trial is required under the terms of LSA-C.C.P. art. 1972(1).

CONCLUSION

Accordingly, the default judgment entered in this matter is vacated and set aside. The matter is remanded for further proceedings. All costs of this appeal are assessed to the plaintiff-appellee, Clifton D. Eakin. We issue this memorandum opinion in compliance with Uniform Rules – Courts of Appeal, Rule 2-16.1B.

DEFAULT JUDGMENT VACATED AND SET ASIDE; REMANDED.

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[2] Nothing in this opinion should be construed as a finding or even a suggestion of fraud or bad faith on Mr. Azuara's part. The only issue before us is whether Mr. Eakin established a *prima facie* case with sufficient and competent evidence. Furthermore, as a general rule in the absence of fraud or concealment, when an act of sale specifies that property is sold according to boundaries for a set price, the sale is for all of the property within the described boundaries, whether it be more or less than any measure mentioned. "More or less" acreage measurements contained in a property description must yield to the designated boundaries. See LSA-C.C. art. 2495; **Fitzgerald v. Hyland** 199 La. 381, 395, 6 So.2d 321, 325 (1942). This, however, is an issue to be resolved in the trial court.