

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 CA 1506

TRIPLE S MARINE, L.L.C.

VERSUS

DAIGLE TOWING SERVICE, L.L.C.

Judgment Rendered: JUL 29 2010

On Appeal from the Sixteenth Judicial District Court
In and for the Parish of St. Mary
State of Louisiana
Docket No. 119518

Honorable Lori A. Landry, Judge Presiding

David M. Thorguson
Gerard J. Bourgeois
Morgan City, Louisiana

Counsel for Plaintiff/Appellee
Triple S Marine, L.L.C.

Francis J. Lobrano
Wm. Allen Schafer
Belle Chasse, Louisiana

Counsel for Defendant/Appellant
Daigle Towing Service, L.L.C.

BEFORE: DOWNING, GAIDRY AND McCLENDON, JJ.

PMC
By EJP
EJP
EJP

McCLENDON, J.

In this suit for damages to a marine vessel, the defendant appeals from the rendition of a default judgment in favor of the plaintiff. For the following reasons, the judgment of the trial court is reversed, and the case is remanded for further proceedings.

FACTUAL AND PROCEDURAL HISTORY

On December 18, 2008, the plaintiff, Triple S Marine, L.L.C., filed a petition for damages against the defendant, Daigle Towing Service, L.L.C., asserting that defendant was liable to the plaintiff for damages resulting from a marine collision. Specifically, plaintiff alleged that its employee was operating its vessel, the *M/V Cody Paul*, and moving the Moncla Rig #101 in Bayou Shaffer in St. Mary Parish, when defendant's employee, who was operating defendant's vessel, the *M/V Masson Ray*, caused the derrick of the rig to hit the top of the mast of the *M/V Cody Paul*, causing extensive damage. Defendant was personally served on December 23, 2008, and on February 4, 2009, a preliminary default was entered. On February 13, 2009, following a hearing, the preliminary default was confirmed. Judgment was signed on that date in favor of plaintiff and against defendant in the amount of \$24,746.13, together with legal interest and costs. Thereafter, on February 25, 2009, a motion for new trial was filed by the defendant on the grounds that the judgment was contrary to the law and the evidence. Following a hearing on April 28, 2009, the motion for new trial was denied, and defendant appealed.¹

On appeal, defendant asserts that the trial court erred in confirming the preliminary default without determining whether the record contained sufficient evidence to prove a prima facie case against the defendant.

DISCUSSION

A judgment by default may be entered against a defendant who fails to answer within the time prescribed by law. LSA-C.C.P. art. 1701A. Louisiana

¹ On March 3, 2010, we denied plaintiff's motion to dismiss defendant's suspensive appeal. However, the appeal was converted to a devolutive appeal, because defendant failed to furnish its bond within the delay set by the trial court.

Code of Civil Procedure article 1702 specifies the procedure and evidence necessary to confirm a default and provides in pertinent part:

A. A judgment of default must be confirmed by proof of the demand sufficient to establish a prima facie case. If no answer is filed timely, this confirmation may be made after two days, exclusive of holidays, from the entry of the judgment of default.

...

B.(2) When a demand is based upon a delictual obligation, the testimony of the plaintiff with corroborating evidence, which may be by affidavits and exhibits annexed thereto which contain facts sufficient to establish a prima facie case, shall be admissible, self-authenticating, and sufficient proof of such demand. The court may, under the circumstances of the case, require additional evidence in the form of oral testimony before entering judgment.

A prima facie case is established when the plaintiff proves the essential allegations of its petition, with competent evidence, to the same extent as if the allegations had been specifically denied. **Crescent City Const., Inc. v. Camper**, 03-1727, p. 5 (La.App. 1 Cir. 12/30/04), 898 So.2d 408, 413. In other words, a plaintiff must present competent evidence that convinces the court that it is more probable than not that he would prevail in a trial on the merits. **Signlite, Inc. v. Northshore Service Center, Inc.**, 05-2444, p. 4 (La.App. 1 Cir. 2/9/07), 959 So.2d 904, 906. There is a presumption that a default judgment has been rendered upon sufficient evidence to establish a prima facie case and is correct, and appellant has the burden of overcoming that presumption. However, this presumption does not apply where testimony is transcribed and contained in the record. **Id.**, 05-2444 at p. 4, 959 So.2d at 906-07. Because there is a transcript of the testimony in the record before us, the presumption of the validity of the confirmation of the default judgment does not apply.

When reviewing a confirmation of default judgment, an appellate court is restricted to determining whether the record contains sufficient evidence to prove a prima facie case. **Arias v. Stolthaven New Orleans, L.L.C.**, 08-1111, p. 5 (La. 5/5/09), 9 So.3d 815, 818. This determination is a factual one governed by the manifest error standard. **Id.**

Confirmation of the default judgment is similar to a trial at which the defendant is absent. At the hearing on the confirmation of default, the rules of evidence generally apply. **Crescent City Const., Inc.**, 03-1727 at pp. 5-6, 898 So.2d at 413 (citing 1 Frank L. Maraist, Louisiana Civil Law Treatise: Civil Procedure § 12.3, at 452-53 (2d ed. 2008)). "Because at a default confirmation there is no objecting party, to prevent reversal on appeal, both plaintiff and the trial judge should be vigilant to assure that the judgment rests on admissible evidence" that establishes a prima facie case. **Arias**, 08-1111 at p. 7, 9 So.3d at 820 (citing George W. Pugh, Robert Force, Gerald A. Rault, Jr., & Kerry Triche, Handbook on Louisiana Evidence Law 677 (2007)). Thus, inadmissible evidence, except as specifically provided by law, may not support a default judgment even though it was not objected to because the defendant was not present. **Arias**, 08-1111 at p. 7, 9 So.3d at 820 (citing 19 Frank L. Maraist, Civil Law Treatise: Evidence and Proof § 1.1, at 5 (2d ed.2007)).

Generally, hearsay evidence is not admissible evidence. LSA-C.E. art. 802. Hearsay evidence does not sustain the burden of proving the prima facie case necessary for confirmation of default in such proceedings. **Crescent City Const., Inc.**, 03-1727 at p. 6, 898 So.2d at 413. Louisiana Code of Evidence article 801C defines hearsay as a statement, other than one made by the declarant while testifying at the present trial or hearing, offered in evidence to prove the truth of the matter asserted. Hearsay is regarded as unreliable because it is based on statements made by persons who are not before the court, have not been sworn, and are not available for cross examination. **Id.**

In support of its confirmation of the default judgment, Shaun Roberie, the vice-president and CFO for plaintiff, testified at the hearing on behalf of the plaintiff. Mr. Roberie testified that on the date of the accident the *M/V Cody Paul* was moving a drilling rig to the shore along the bank of Bayou Shaffer. Another vessel, the *M/V Masson Ray*, was helping the *M/V Cody Paul* move the rig. When the *M/V Masson Ray* was instructed to stop pushing, it did not, causing the rig's derrick to hit the top of the *M/V Cody Paul*, damaging the radar, lights horn

and AIS system. During Mr. Roberie's testimony, plaintiff introduced the accident report, as well as a statement from Danny Vidrine, a crew member on the drilling rig, and statements from crew members on the *M/V Cody Paul*.

Mr. Roberie further testified that the cost of repairs to the *M/V Cody Paul* totaled \$14,746.13. Mr. Roberie also stated that the vessel was not useable for three days while it was being repaired and that those three days resulted in a loss of revenue of between thirty-three and thirty-five hundred dollars per day, or approximately ten thousand dollars.

Because it is unclear from the record whether he had firsthand knowledge of the accident, the testimony of Mr. Roberie fails to establish a prima facie case. Further, we find the corroborating evidence insufficient. The crew members' statements were not in affidavit form, nor were they, or the accident report, authenticated or verified in any way. Thus, absent other competent evidence, we conclude that the trial court was manifestly erroneous in finding that plaintiff presented sufficient evidence to establish a prima facie case against the defendant. We therefore reverse the decision of the trial court and set aside the default judgment.

CONCLUSION

For the foregoing reasons, we conclude that the plaintiff, Triple S Marine, L.L.C., failed to establish a prima facie case that supported the April 28, 2009 confirmation of default judgment rendered in its favor and against the defendant, Daigle Towing Service, L.L.C. Accordingly, the judgment is reversed, and the case is remanded to the trial court for further proceedings. Costs of this appeal are assessed to Triple S Marine, L.L.C.

REVERSED AND REMANDED.