

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT

2016 CA 1109

SUN INDUSTRIES, L.L.C. (FORMERLY SUN ELECTRICAL
AND INSTRUMENTATION, L.L.C.)

VERSUS

UATC & ASSOCIATES, INC.

Judgment rendered: AUG 16 2017

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On Appeal from the
Eighteenth Judicial District Court
In and for the Parish of West Baton Rouge
State of Louisiana
No. 42, 180 Div. C

The Honorable Alvin Batiste, Judge Presiding

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Craig L. Kaster
Teresa D. Cop
T. Michael Murphy
Allyson S. Jarreau
Zachary, LA

Attorneys for Plaintiff/Appellee
Sun Industries, L.L.C.
(Formerly Sun Electrical and
Instrumentation, L.L.C.)

Ernest L. Jones
New Orleans, LA

Attorney for Defendant/Appellant
UATC & Associates, Inc.

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BEFORE: WELCH, CRAIN, AND HOLDRIDGE, JJ.

HOLDRIDGE, J.

Defendant/appellant, UATC & Associates, Inc. appeals a judgment that denied and dismissed its petition to annul a confirmation of default judgment. We reverse the judgment dismissing the petition to nullify and render judgment vacating the judgment confirming the preliminary default.

FACTUAL AND PROCEDURAL HISTORY

Plaintiff/appellee, Sun Industries, L.L.C., filed a petition for damages against UATC for default and breach of contract.¹ After UATC failed to answer the petition, Sun Industries filed a Motion for Entry of Preliminary Default.² The motion was signed by the trial court on June 9, 2015. On June 18, 2015, Sun Industries filed a “Motion and Order To Set For Hearing” in order to confirm the default judgment against UATC.³ The trial court granted the motion and ordered that the confirmation of default hearing be set for September 2, 2015. All parties were mailed a notice of the hearing date on June 15, 2015. On July 1, 2015, the trial court held the confirmation of default hearing with only counsel for Sun

¹ On May 19, 2015, UATC was served with Sun Industries’ petition.

² A defendant’s failure to comply with Louisiana Code of Civil Procedure articles 1001 and 1002 exposes a party to a judgment by default. Specifically, a defendant is required to file an answer within fifteen (15) days after service of the petition. La. C.C.P. art. 1001. When the defendant in the principal or incidental demand fails to answer within the time prescribed by law, judgment by default may be entered against him. La. C.C.P. art. 1701(A). A judgment by default is commonly called a “preliminary default.”

³ Louisiana Code of Civil Procedure article 1702(A) provides:

A judgment of default must be confirmed by proof of the demand that is sufficient to establish a prima facie case and that is admitted on the record prior to confirmation. The court may permit documentary evidence to be filed in the record in any electronically stored format authorized by the local rules of the district court or approved by the clerk of the district court for receipt of evidence. 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. When a judgment of default has been entered against a party that is in default after having made an appearance of record in the case, notice of the date of the entry of the judgment of default must be sent by certified mail by the party obtaining the judgment of default to counsel of record for the party in default, or if there is no counsel of record, to the party in default, at least seven days, exclusive of holidays, before confirmation of the judgment of default.

Industries present, and confirmed the default judgment against UATC in the amount of \$257,334.37, together with legal interest, attorney's fees, and costs.

On August 25, 2015, UATC filed a "Petition for Nullity of Judgment, Preliminary and Permanent Injunction and for Damages" seeking to annul the confirmation of default judgment for fraud or ill practice pursuant to La. C.C.P. art. 2004(A). In its petition, UATC alleged that the confirmation of default judgment signed on July 1, 2015, was null for fraud or ill practice because the trial court granted Sun Industries' motion to set the confirmation of default hearing on September 2, 2015, but confirmed the default judgment at an earlier date. UATC further alleged that the motion and order setting the confirmation of default hearing signed by the trial court and sent to all parties was official notice that it would have to appear in court on September 2, 2015, and assert any defenses or a judgment confirming the default judgment would be rendered on that date.

On March 2, 2016, the trial court denied and dismissed UATC's nullity claim with prejudice. The trial court signed the judgment on March 16, 2016. UATC now appeals, assigning as error that "[t]he trial court erred in dismissing [its] petition without a trial."

DISCUSSION

In the instant matter, UATC asserts that the trial court erred in confirming a default judgment against it in favor of Sun Industries. Specifically, UATC alleges that the confirmation of default judgment hearing held on July 1, 2015 constituted fraud or ill practice pursuant to La. C.C.P. art. 2004(A) because UATC was served with notice that a hearing on the confirmation of default was set for September 2, 2015.

Louisiana Code of Civil Procedure article 2004(A) provides that a final judgment obtained by fraud or ill practices may be annulled. "[Louisiana Code of

Civil Procedure article 2004(A)] is not limited to cases of actual fraud or intentional wrongdoing, but is sufficiently broad to encompass all situations where a judgment is rendered through some improper practice or procedure which operates, even innocently, to deprive the party cast in judgment of some legal right, and where the enforcement of the judgment would be unconscionable and inequitable.” *Wright v. Louisiana Power & Light*, 2006-1181 (La. 3/9/07), 951 So.2d 1058, 1067. The purpose of an action for nullity is to prevent injustice which cannot be corrected through a new trial or an appeal reviewing a decision of the trial court. *Advanta Bank Corp. v. First Mount Zion Baptist Church*, 2003-732 (La. App. 5 Cir. 12/30/03), 865 So.2d 165, 168. In deciding a case on a nullity, the issue for the reviewing court is whether a judgment was rendered through some improper practice or procedure. *W.G.T. v. E.A.A.*, 2014-4 (La. App. 5 Cir. 9/10/14), 150 So.3d 339, 348. The abuse of discretion standard applies to appellate review of a trial court decision concerning whether a judgment should be annulled for fraud or ill practice. *Homer National Bank v. Nix*, 566 So.2d 1071, 1073 (La. App. 2 Cir. 1990), writ denied, 569 So.2d 985 (La.1990).

Sun Industries argues that UATC failed to provide evidence that it was deprived of any legal right to constitute fraud or ill practice pursuant to La. C.C.P. art. 2004(A). Sun Industries argues that “[i]t was only by the fault of UATC that [it] failed to appear and assert any defense.” Sun Industries further argues that confirming a default judgment without notice to opposing counsel does not in itself constitute fraud or ill practice. In its appellate brief, Sun Industries distinguishes the instant matter from the Louisiana Supreme Court case *Kem Search, Inc. v. Sheffield*, 434 So.2d 1067, 1070 (La. 1983), which held that a judgment may be annulled when a party fails to defend a suit because of the failure of the opposing party to warn him that a default would be taken when the parties had an agreement

to give notice of the action to be taken on the suit. Sun Industries argues that unlike *Kem Search*, the parties in the instant matter did not have an agreement that would give UATC any reasonable belief that Sun Industries agreed to refrain from obtaining a confirmation of default judgment.

In *Kem Search*, the Supreme Court held that a judgment has been obtained by fraud or ill practice (1) when the circumstances under which the judgment was rendered show the deprivation of legal rights of the litigant who seeks relief, and (2) when the enforcement of the judgment would be unconscionable and inequitable. *Kem Search*, 434 So.2d at 1070. Conduct that prevents an opposing party from having an opportunity to appear or to assert a defense constitutes a deprivation of the party's legal rights. *Id.* This conduct includes one being deprived of the knowledge of the existence of the defense relied upon or the opportunity to present the defense by some fraud or ill practice on the part of the opposing party. *Hymel v. Discover Bank*, 09-286 (La. App. 5 Cir. 12/8/09), 30 So.3d 51, 54.

Under the unique circumstances of this case, UATC was deprived of the opportunity to appear in court and assert a defense because it received a notice from the trial court that the confirmation of default hearing would be held on September 2, 2015. By sending a notice of a hearing on the confirmation of default, the trial court tacitly suggested to UATC that it did not have to file an answer until September 2, 2015, since an answer can be filed anytime until the confirmation of default judgment was signed. *See* La. C.C.P. art. 1002; *Martin v. Martin*, 95-2557 (La. App. 1 Cir. 9/27/96), 680 So.2d 759, 762, writ denied, 96-2622 (La. 12/13/96), 692 So.2d 1065. The notice sent by the trial court on June 15, 2015, advising the parties that the confirmation of default hearing would be held on September 2, 2015, is a valid reason for UATC's nonappearance at the hearing

held on July 1, 2015 and for UATC not filing an answer prior to the confirmation of default hearing on that date. *See Meshell v. Russell*, 589 So.2d 86, 89 (La. App. 2 Cir. 1991).

Accordingly, confirming the default judgment without giving another notice of the accelerated hearing to UATC improperly deprived it of its legal rights under the circumstances of this case.⁴ Enforcement of the confirmation of default judgment in Sun Industries' favor would be unconscionable and inequitable.⁵ Therefore, we find an abuse of the trial court's discretion in determining that the confirmation of default judgment was not rendered through fraud or ill practice and a miscarriage of justice would result by depriving UATC its day in court.

CONCLUSION

For these reasons, we reverse the March 16, 2016 judgment dismissing the petition for nullity, and render judgment annulling the July 1, 2015 judgment confirming the preliminary default. All costs of the appeal are assessed to Sun Industries, L.L.C. The matter is remanded for further proceedings.

MARCH 16, 2016 JUDGMENT REVERSED; JULY 1, 2015 ANNULLED; CASE REMANDED.

⁴ "Ill practice" has been broadly defined as any improper practice or procedure which operates, even innocently, to deprive a litigant of some legal rights. *Foret v. Terrebone Ltd.*, 631 So.2d 103, 105 (La. App. 5 Cir. 1994).

⁵ When the enforcement of a judgment would be unconscionable and inequitable, courts are obliged to strike down such a judgment. *Morton Bldg., Inc. v. Redeeming Word of Life Church*, 2001-1837 (La. App. 1 Cir. 10/16/02), 835 So.2d 685, 692, writ denied, 2002-2733 (La. 1/24/03), 836 So.2d 46.