

NOT DESIGNATED FOR PUBLICATION

SAMMY S. PRICE * **NO. 2010-CA-1139**
VERSUS * **COURT OF APPEAL**
KAKI INC., 250 S. BROAD * **FOURTH CIRCUIT**
INC., AHMAD T. ELBARQA, * **STATE OF LOUISIANA**
ABC INSURANCE COMPANY, *
AND XYZ INSURANCE
COMPANY * * * * *

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2008-11253, DIVISION "B-15"
Honorable Rosemary Ledet, Judge

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Judge Dennis R. Bagneris, Sr.

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(Court composed of Chief Judge Joan Bernard Armstrong,
Judge James F. McKay, III, and Judge Dennis R. Bagneris, Sr.)

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REVERSED

In this appeal, plaintiff, Sammy S. Price, seeks review of the trial court's granting of the petition to annul default judgment filed by Kaki, Inc. and 250 S. Broad, Inc. (collectively, defendants). For the following reasons, we reverse.

STATEMENT OF FACTS/PROCEDURAL HISTORY

On October 29, 2008, Mr. Price filed a suit against defendants alleging that the defendants' employee, Ahmad T. Elbarqa, attacked Mr. Price with a baseball bat. Mr. Price alleged that the attack took place during the course and scope of Mr. Elbarqa's employment and that the defendants were vicariously liable for the resulting damages as the employers of Mr. Elbarqa.

After obtaining a preliminary default, Mr. Price filed a motion to confirm default judgment. In support of the motion to confirm default judgment, Mr. Price attached the police report prepared as a result of the attack; the certified medical records from Tulane Medical Center; the medical bill from Tulane Medical Center; the certified copy of the motion and order for preliminary default; and an itemized calculation sheet for damages. Mr. Price presented no testimony. The duty judge entered judgment in favor of Mr. Price on April 13, 2009.

On July 29, 2009, the defendants filed a petition to annul default judgment pursuant to La. C.C.P. art. 2004. In the petition to annul, the defendants alleged that Mr. Price failed to set forth the *prima facie* case necessary to obtain a default judgment as required by La. C.C.P. art. 1702.

Mr. Price filed a motion to dismiss the petition to annul default judgment. The court denied the motion to dismiss. Thereafter, a hearing was held on the petition to annul default judgment pursuant to La. C.C.P. art. 2004. During oral argument, the trial court noted that failure to prove a *prima case* face was the basis for the granting of the petition to annul default judgment pursuant to La. C.C.P. art. 2004. On April 15, 2010, the court rendered judgment granting the petition to annul default judgment pursuant to La. C.C.P. art. 2004.

Mr. Price filed a notice of intent to file supervisory writ. This court ordered the trial court to consider Mr. Price's notice of intent to file supervisory writ as a notice of appeal. *Price v. Khaki, Inc.*, 2010-0715 (La. App. 4 Cir. 5/26/10). The trial court granted an order of appeal.

STANDARD OF REVIEW

When reviewing the trial court's findings on an action in nullity, the reviewing court does not review whether the judgment was right or wrong, but whether the trial court's findings were reasonable. *Hymel v. Discover Bank*, 2009-0286, p.3 (La. App. 5 Cir. 12/8/09), 30 So.3d 51, 53-54; *West v. Melancon*, 2005-1183, p.3 (La. App. 4 Cir. 4/26/06), 929 So.2d 809, 811. Trial courts are permitted discretion in determining whether a judgment should be annulled because of fraud or ill practices, to which discretion reviewing courts will defer. *Hymel*, 2009-0286, p.3, 30 So.3d at p.54.

DISCUSSION

Mr. Price argues the district court erred by reversing the default judgment based on failure to prove a *prima facie* case when such challenge was not made until after the delay for a new trial and appeal had expired. In other words, Mr. Price argues that a petition for nullity is not the proper procedural vehicle to challenge a default judgment on the grounds of failure to prove a *prima facie* case. Mr. Price further argues that defendants failed to prove any fraud or ill practice. Hence, Mr. Price concludes the district court erred in granting the petition to annul the default judgment pursuant to La. C.C.P. art. 2004.

A final judgment may be annulled for vices of either form or substance. La. C.C.P. art. 2002. A final judgment obtained by fraud or ill practices may be annulled. La. C.C.P. art. 2004. The Code does not define “fraud” or “ill practices.” Thus, the jurisprudence developed two criteria to determine whether a judgment has been rendered through fraud or ill practices and is therefore subject to nullification: (1) whether circumstances under which the judgment was rendered show the deprivation of legal rights of the litigant seeking relief and (2) whether enforcement of the judgment would be unconscionable or inequitable. *Belle Pass Terminal, Inc. v. Jolin, Inc.*, 2001-0149, p.6 (La. 10/16/01), 800 So.2d 762, 766.

A nullity action is not a substitute for a motion for new trial or an appeal from a default judgment. *West v. Melancon*, 2005-1183, p.3 (La. App. 4 Cir. 4/26/06), 929 So.2d 809, 811; *Payne v. Glass*, 41,232, (La. App. 2 Cir. 8/23/06), 939 So.2d 526. Additionally, a nullity action is not the solution to legal rights lost through a litigant’s neglect or a failure to act. *Payne*, 41, 232, p.6, 939 So.2d at 530. [citation omitted]. As the *Payne* court stated: “[t]he absence of a valid and sufficient reason for a party’s failure to defend a suit in which a default judgment

has been taken, when defenses could and should have been pleaded, precludes that party from later maintaining an action for nullity of the judgment for fraud or ill practices based on those defenses.” *Id.*, citing *Phillips v. Patin*, 517 So.2d 190, 192 (La. App. 1 Cir. 1987).

In this instance, the defendants failed to file a response such as an answer or exception to the petition and citation. In their brief, defendants’ reason for failing to respond is that “[d]ue to a language barrier, the defendants in this matter did not respond or take any action on the Petition for Damages because they did not own or operate the premises in which this tort occurred and it was unclear to them as to why they were being sued.” However, that defense could have, and should have been, pleaded prior to the taking of the default judgment. Defendants’ “language barrier” has not prevented them from owning and operating a business and does not constitute a valid and sufficient reason for failing to act.

Defendants cite cases where Louisiana courts have invalidated a confirmation of a default judgment for failure to establish a prima facie case. Defendants are correct. However, all the cases except one involve a party timely appealing a default judgment rendered against them. In this case, the defendants did not timely appeal the default judgment rendered against them. The one exception is *Power Marketing Direct, Inc. v. Foster*, 2005-2023 (La. 9/6/06) 938 So.2d 662. In *Power Marketing*, litigation was filed in both Louisiana and Ohio. Counsel for the plaintiff in the Louisiana case had contact with opposing counsel in the Ohio proceedings. *Id.*, p.1, 938 So.2d at 664. The court determined that failure to notify opposing counsel prior to obtaining the default judgment was an ill-practice due to the contact. *Id.*, p.18, 938 So.2d at 674. In this case, there was no

opposing counsel to notify prior to obtaining the default judgment. Therefore, defendants' reliance upon *Power Marketing* is misplaced.

Defendants would have this Court find that failure to prove a prima facie case is an "ill-practice" and entitles the defendants to annul the default judgment obtained by Mr. Price. This we decline to do as the jurisprudence is clear: in order to prevail on a petition to annul, the defendants are required to prove both a deprivation of legal rights **and** that enforcement of the judgment would be unconscionable or inequitable. The defendants failed to show that there was a deprivation of their legal rights. The defendants neglected or failed to act. The defenses available to the defendants could have and should have been pled. The defendants' failure to timely avail themselves of those defenses precludes them from maintaining an action for nullity of the judgment for fraud or ill practices based on those defenses. The trial court's granting of the petition to annul default judgment pursuant to La. C.C.P. art. 2004 based on failure to prove a prima facie case is contrary to the jurisprudence. Thus, the granting of the petition to annul default judgment pursuant to La. C.C.P. art. 2004 is not reasonable.

Accordingly, we reverse the judgment of the trial court granting the petition to annul default judgment pursuant to La. C.C.P. art. 2004.

REVERSED