NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 CA 2123

TOWER CREDIT, INC.

VERSUS

LAVERNE MCKNIGHT AND JAMES MCKNIGHT

On Appeal from the 19th Judicial District Court
Parish of East Baton Rouge, Louisiana
Docket No. 621,402, Division "D"
Honorable Janice Clark, Judge Presiding

Richard D. Bankston **Baton Rouge, LA**	**Attorney for** **Plaintiff-Appellant** **Tower Credit, Inc.**
Laverne McKnight **James McKnight** **Baton Rouge, LA**	**Defendants-Appellees**

BEFORE: PARRO, GUIDRY, AND DRAKE, JJ.

Judgment rendered NOV 07 2014

PARRO, J.

Tower Credit, Inc. (Tower), appeals a default judgment rendered in its favor in a suit on a promissory note against Laverne McKnight and James McKnight. Tower appeals that portion of the judgment that reduced the attorney's fee it had proposed. For the following reasons, we vacate the judgment in part and remand the attorney fee issue to the trial court, with instructions.

BACKGROUND

Tower is the holder in due course of a certain promissory note executed by the McKnights, as makers, in favor of Tower, as lender, in the amount of $54,499.34. According to Tower, despite amicable demand, the McKnights failed to pay any installment on the note since February 1, 2013. Subsequently, Tower sued to collect $63,820.12, which it alleged was the unpaid principal and interest. Tower also sought the contractual attorney's fee of 25% of the amount of the unpaid debt.

Later, Tower moved for a preliminary default, which the trial court granted. Tower then moved for confirmation of the preliminary default, and filed a proposed judgment. The trial court confirmed the default, but at the same time changed the proposed attorney fee award from 25% of the unpaid debt to a flat $950.

Tower filed a devolutive appeal, asserting two assignments of error:

1. The lower court erred in reducing the 25% attorney's fee to $950.
2. The lower court erred in changing a proposed default judgment without a hearing.

APPLICABLE LAW

Standard of Review

The appellate jurisdiction of courts of appeal encompasses both law and facts. LSA-Const. art. V, § 10(B). A court of appeal may not overturn a judgment of a trial court absent an error of law or a factual finding that was manifestly erroneous or clearly wrong. Stobart v. State through Dept. of Transp. and Dev., 617 So.2d 880, 882 & n.2 (La. 1993). When the court of appeal does find that a reversible legal error or manifest error of material fact was made in the trial court, it must redetermine the facts de novo from the entire record and render a judgment on the merits. Arias v. Stolthaven New

Orleans, L.L.C., 08-1111 (La. 5/5/09), 9 So.3d 815, 818.

Those general appellate review parameters narrow when a default judgment is before a court of appeal, in which case the review is restricted to a determination of the sufficiency of the evidence offered in support of the judgment. See id. Further, that determination is a factual one governed by the manifest error standard of review. Id. That standard means the court conducting the review "must do more than simply review the record for some evidence which supports or controverts the trial court's finding. The reviewing court must review the record in its entirety to determine whether the trial court's finding was clearly wrong or manifestly erroneous." Stobart, 617 So.2d at 882.

Default Judgment

Louisiana Code of Civil Procedure articles 1701 through 1704 govern default judgments. In an ordinary proceeding, such as the present case, a defendant generally must file an answer within fifteen days after receiving service of citation. LSA-C.C.P. art. 1001. If the defendant chooses to first file an exception, the law extends the deadline for filing an answer until after the exception is resolved. See id. When the defendant fails to file an answer within the time prescribed by law, the plaintiff may request that the court enter a judgment by default. LSA-C.C.P. art. 1701(A). As the supreme court noted in Arias, when a defendant has failed to answer in timely fashion, the procedure for obtaining a default judgment is a straightforward, two-step process. Arias, 9 So.3d at 819. Step one, the default judgment, or "preliminary default," may be sought by oral motion in open court or written motion, and consists of a minute entry. Id. Step two, confirming the default, is also uncomplicated. The supreme court summarized the process in Arias:

> [T]he judgment of default may be confirmed after two days, exclusive of holidays, from the entry of the judgment of default, that is, on the third "judicial day" after the lapse of two days, which are not judicial holidays, from the entry of the preliminary default.
>
> Confirmation of a default judgment is similar to a trial and requires, with admissible evidence, "proof of the demand sufficient to establish a prima facie case." The elements of a prima facie case are established with competent evidence, as fully as though each of the allegations in the petition were denied by the defendant.

Arias, 9 So.3d at 819-20 (citations and footnote omitted).

Attorney's Fees

It is well recognized that the Louisiana Supreme Court has full and exclusive authority to regulate all aspects of the practice of law, including the client-attorney relationship. E.g., Chittenden v. State Farm Mut. Auto Ins. Co., 00-0414 (La. 5/15/01), 788 So.2d 1140, 1148. Further, "[c]ourts are vested with the responsibility of both monitoring and analyzing the attorney-client relationship, even when it is based on a written contract between the parties." In re Interdiction of DeMarco, 09-1791 (La. App. 1st Cir. 4/7/10), 38 So.3d 417, 427. However, that responsibility must be carried out with restraint, especially when the parties have signed a contract that sets the terms of the attorney-client relationship. Id. Part of any attorney-client relationship is the fee the attorney may charge the client for professional services. Any court-ordered reduction in an attorney's fee must rest upon a factual finding that the excessive fee amount was never earned. Id. Absent a showing that the fee charged was clearly excessive, a contractual relationship between an attorney and client should not be altered. Id. Specifically, unless the attorney-client contract produces an excessive, unearned, or incommensurate fee when measured by the factors in Rule 1.5(a) of the Louisiana State Bar Association Rules of Professional Conduct (RPC), the fee charged must be considered reasonable and enforceable. Id.

Further, an appellate court must use the "clearly wrong" or "manifestly erroneous" standard of review in considering a trial court's factual findings relating to the reasonableness of a contractual attorney fee. Id. at 428. The "abuse of discretion" standard of review would apply to appellate review of an amount awarded by a trial court as a reasonable fee after a finding that a contractual fee was clearly excessive. Id.

DISCUSSION

Tower's first assignment of error urges that the trial court erred in reducing the amount of its attorney's fee from 25% to $950. Its second assignment of error urges that the trial court erred procedurally, by modifying the proposed default judgment

without a hearing. To facilitate our discussion of those assignments of error, we begin our analysis with the second one.

Procedural Insufficiency

Tower makes two arguments in support of its second assignment of error that the trial court failed to follow proper procedure when it denied the requested attorney's fee without a hearing. One argument is statutory; the other, constitutional. However, neither raises a question of sufficiency of evidence. As we have already noted, our review of default judgments may only reach sufficiency of the evidence issues. Arias, 9 So.3d at 818. Thus, this assignment lacks merit.

Fee Reduction

Tower's other assignment of error, assignment one, asserts that the trial court erred by reducing Tower's proposed attorney's fee, decreasing it from 25% of principal and interest to a flat $950. Tower argues that the trial court should have honored the provision in the promissory note the McKnights executed that said, if collection proceedings were required, the McKnights would pay Tower an attorney's fee of 25% of the unpaid debt.

The record on appeal clearly shows that the McKnights' promissory note to Tower does contain such a 25% attorney's fee provision. However, as already noted, the courts have full authority to review any attorney's fee. DeMarco, 38 So.3d at 427. Here, the record lacks the factual information we need to perform our role in that review process.

As pointed out in DeMarco, assessing whether a contract produces an attorney's fee that is excessive must be done using the factors in RPC Rule 1.5(a). DeMarco, 38 So.3d at 427-28. Here, the record on appeal does not contain written reasons for judgment. Such written reasons could have illuminated which Rule 1.5(a) factors the trial court saw as important in this case, the facts the court applied those factors to, and the weight the trial court assigned the factors. Further, the record on appeal provides us with a paucity of facts to which the Rule 1.5(a) factors would be applied, such as the amount of time the lender's legal counsel expended in this matter, the

likelihood of the representation precluding other legal work, and whether the fee was contingent or fixed.

While Tower's appellate brief contains many representations about facts to which Tower would have us apply the Rule 1.5(a) factors, we may not do so. It is impossible for us to consider those representations because "appellate briefs are not part of the record, and an appellate court has no authority to consider on appeal facts referred to in argument of counsel, in such briefs, . . . [that] are outside the record." Niemann v. Crosby Development Co., 11-1337 (La. App. 1st Cir. 5/3/12), 92 So.3d 1039, 1045.

We note that our jurisprudence holds that the inadequacy of the record is imputable to the appellant, in this case, Tower. See, e.g., id. at 1044. On the other hand, we also note that a trial court's reduction of an attorney's fee must rest upon a factual finding that there was an excessive fee amount that was never earned. DeMarco, 38 So.3d at 427. We have carefully reviewed the record here, but have located no such factual finding by the trial court. Implicitly, the trial court found the proposed 25% attorney's fee excessive, but the record does not show how the court arrived at that reduction. The record does show what documents Tower's counsel filed into the record at the trial court, but they total only eighteen pages.

Thus, taken together, the absence of a factual finding of excessiveness by the trial court, the absence of written reasons for judgment, and the relative sparseness of this particular record on appeal, all leave this court with an inadequate factual basis upon which to assess the trial court's reduction of the attorney's fee.

In support of its argument that the trial court erred in reducing its attorney's fee, Tower points to an array of cases analyzing attorney fee awards in collection cases. We have reviewed them all, but they differ factually from the case here because they all appear to have had a record that was much more fleshed out. For example, in People's Nat. Bank of New Iberia v. Smith, 360 So.2d 560, 563 (La. App. 4th Cir. 1978), the court of appeal noted that it was able to review the following work by the lender's counsel: pleadings, motion for summary judgment and supporting memorandum, deposition with transcript, trial with transcript, and post-trial memorandum. By

contrast, the record here is bare bones: a petition with promissory note attached, motions and orders for preliminary and confirmed defaults, and a motion and order for appeal. Thus, unlike in the cases Tower cites, the record here supplies insufficient facts to assess the Rule 1.5(a) factors.

Louisiana Code of Civil Procedure article 2164 provides that an "appellate court shall render any judgment which is just, legal, and proper upon the record on appeal." Under that Article, the supreme court has explained that an appellate court may remand a matter to the trial court to permit that court to take additional evidence where necessary to reach a just decision and prevent a miscarriage of justice. E.g., Alex v. Rayne Concrete Service, 05-1457 (La. 1/26/07), 951 So.2d 138, 155. Procedurally, remand is appropriate here, because the record lacks the evidence that would allow us to resolve whether there is merit to Tower's assignment alleging the trial court erred in reducing the proposed attorney's fee.

CONCLUSION

Reluctantly, we vacate the judgment in part, and remand this matter to the trial court for the taking of evidence on the issue of the appropriate attorney's fee, for the issuing of written reasons for judgment on that issue, and for the rendering of a new judgment on that issue. Each party is to bear its own costs of this appeal.

JUDGMENT VACATED IN PART; REMANDED, WITH INSTRUCTIONS.