

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT

NUMBER 2014 CA 1379

MICHAEL CANADAS

VERSUS

DARYL AND JULIE PINION

Judgment Rendered: MAR 06 2015

Appealed from the
Twenty-First Judicial District Court
In and for the Parish of Tangipahoa
State of Louisiana
Docket Number 2012-0002361

The Honorable Bruce C. Bennett, Judge Presiding

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BEFORE: WHIPPLE, C.J., McCLENDON, AND HIGGINBOTHAM, JJ.

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WHIPPLE, C.J.

This matter is before us on appeal by defendants, Daryl¹ and Julie Pinion, from a judgment of the trial court confirming a default judgment in favor of plaintiff, Michael Canadas. For the reasons that follow, we vacate and remand.

FACTS AND PROCEDURAL HISTORY

On July 23, 2012, Canadas filed a petition for declaratory judgment alleging that a fence owned by the Pinions, the adjacent property owners, encroached approximately 11.9 feet upon his property, and that despite amicable demand, the Pinions have failed to remove the fence. Canadas further contended that the Pinions have placed debris on his property and have refused to remove the debris. Canadas thus requested that the Pinions be ordered to remove the fence and debris on his property. Canadas attached his affidavit of March 30, 2012, to the petition for declaratory judgment.

On May 15, 2014, Canadas filed a motion for preliminary default, averring that defendant Julie Pinion was personally served with this suit on July 27, 2012 and that Daryl Pinion was served via domiciliary service on July 27, 2012. Canadas further averred that no answer or responsive pleadings had been filed by the Pinions and that, accordingly, he requested that a preliminary default be entered against them. On May 19, 2014, the trial court entered a preliminary judgment by default against Daryl and Julie Pinion.

A judgment confirming the preliminary judgment by default was signed by the trial court on July 16, 2014. The judgment decreed that the Pinions' fence encroached on Canadas's property by 11.9 feet and ordered the Pinions to remove the fence. A second affidavit from Canadas, dated July 8, 2014 and identified as "Exhibit A," as well as a survey plat of the property, identified as "Exhibit B,"

¹Although this defendant's name is shown as "Daryl Pinion" throughout these proceedings, the motion and order granting a suspensive appeal herein sets forth that his name is actually "Darryl Pinion." For ease, we have referred to this defendant as captioned and as shown in the judgments rendered herein.

were attached to the judgment. There is no minute entry or transcript in the record indicating how these exhibits were received or that a hearing was conducted in connection with the confirmation of default judgment.

The Pinions then filed the instant suspensive appeal from the judgment of the trial court, contending that (1) the trial court committed manifest error in confirming a default judgment where no evidence was admitted into the record; and, in the alternative, (2) that the trial court committed legal error and manifest error by confirming a default judgment based on incompetent and insufficient evidence.

DISCUSSION

In an ordinary proceeding, the defendant in a principal action must file an answer within fifteen days after service of the citation. LSA-C.C.P. art. 1001. If a defendant in the principal demand fails to answer within the time prescribed by law, a judgment by default may be entered against him. LSA-C.C.P. art. 1701(A). The judgment may be obtained by oral motion in open court or by written motion mailed to the court, either of which shall be entered in the minutes of the court, but the judgment shall consist merely of an entry in the minutes. LSA-C.C.P. art. 1701(A). 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(A). The plaintiff has the burden of proving with competent evidence the essential elements of his claim as fully as if each of the allegations in the petition had been specifically denied. Assamad v. Percy Square and Diamond Foods, L.L.C., 2007-1229 (La. App. 1st Cir. 7/29/08), 993 So. 2d 644, 646, writ denied, 2008-2138 (La. 11/10/08), 996 So. 2d 1077. See also Sessions & Fishman v. Liquid Air Corporation, 616 So. 2d 1254, 1258 (La. 1993). In other words, the 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. Carter v. Amite City Ford, Inc., 2003-1536 (La. App. 1st Cir. 6/25/04), 885 So. 2d 1190, 1192. Moreover, the elements of a prima facie case must be established with **competent** evidence establishing a prima facie case, as fully as though each of the allegations in the petition were denied by the defendant. Arias v. Stolthaven New Orleans, L.L.C., 2008-1111 (La. 5/5/09), 9 So. 3d 815, 820.

Proof of the demand must be admitted on the record prior to confirmation. LSA-C.C.P. art. 1702(A).² A plaintiff seeking to confirm a default must prove both the existence and the validity of his claim. Arias v. Stolthaven New Orleans, L.L.C., 9 So. 3d at 820. Moreover, a default judgment cannot be different in kind from what is demanded in the petition and the amount of damages must be proven to be properly due. LSA-C.C.P. art. 1703.

Confirmation of a default judgment is similar to a trial at which the defendant is absent. Frank L. Maraist & Harry T. Lemmon, Civil Procedure, § 12.3 at 326 in 1 *Louisiana Civil Law Treatise* (1999). The plaintiff must present admissible evidence which establishes a prima facie case. LSA-C.C.P. art. 1702(A). At the hearing on the confirmation of default, the rules of evidence generally apply. Maraist & Lemmon, Civil Procedure, § 12.3 at 327.

Louisiana Code of Civil Procedure articles 1702 and 1702.1 specify certain situations where a plaintiff may confirm a default judgment without a hearing. Upon a plaintiff's compliance with the prescribed procedures in those situations, the trial court may either sign the judgment or direct that a hearing be held. See LSA-C.C.P. arts. 1702(C) & (E). Although it is not clear from Canadas's petition for declaratory judgment whether he was seeking relief in the form of a boundary or petitory action, none of the situations are present in

²Louisiana Code of Civil Procedure article 1702(A) was amended by La. Acts 2013, No. 78, § 1 to add the requirement that all of the proof required to establish a prima facie case supporting confirmation of a default judgment must be placed into the court record prior to judgment. See Comment (a), La. Acts 2013, No. 78, § 1.

the instant case that would allow the trial court to simply sign a judgment that confirms the default judgment upon the passage of the time prescribed by LSA-C.C.P. art. 1702(A).

In the instant case, a preliminary default was entered on May 19, 2014. Thereafter, a judgment was signed on July 16, 2014, declaring that the defendants' fence encroaches on Canadas's property and ordering the Pinions to remove the encroaching fence. Although the judgment states that the judgment was entered by the court "after reviewing the pleadings, exhibits and affidavit of Petitioner," the judgment does not indicate that the matter was "heard" before the trial court. Moreover, the record contains no minute entry or transcript indicating that the matter was heard by the trial court during which evidence that would establish a prima facie case. There is no indication that a hearing occurred. While an affidavit from Canadas and a survey plat are attached as exhibits to the judgment, there is nothing on the record before us to indicate that these exhibits were offered into evidence at a hearing held for the purpose of confirming the default judgment or admitted on the record prior to confirmation. See LSA-C.C.P. art. 1702; Carter v. Amite City Ford, Inc., 885 So. 2d at 1192-1193; see and compare Williams Law Firm v. Board of Supervisors of Louisiana State University, 2003-0079 (La. App. 1st Cir. 4/2/04), 878 So. 2d 557, 562; and Ray Brandt Nissan, Inc. v. Gurvich, 98-634 (La. App. 5th Cir. 1/26/99), 726 So. 2d 474, 476. Thus, these items attached to the judgment as exhibits cannot be viewed as evidence properly before the trial court. In sum, on the record before us, there is nothing to show Canadas presented or established a prima facie case to warrant judgment in his favor in this matter. See Carter v. Amite City Ford, Inc., 885 So. 2d at 1192-1193.

Accordingly, we conclude that the trial court erred in entering the July 16, 2014 confirmation judgment against the Pinions.³

CONCLUSION

For the above and foregoing reasons, the July 16, 2014 judgment of the trial court is vacated and this matter is remanded to the trial court for further proceedings. Costs of this appeal are assessed to the plaintiff/appellee, Michael Canadas.

VACATED AND REMANDED.

³In light of this decision, we preterm discussion of the remaining alternative assignment of error in this appeal.