NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2015 CA 0633

MICHELLE BARNETT

VERSUS

THE STATE OF LOUISIANA DEPARTMENT OF HEALTH & HOSPITALS, KATHY KLIEBERT IN HER OFFICIAL CAPACITY, AND JOSHUA HARDY

Judgment Rendered: NOV 09 2015

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On Appeal from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
No. C632951

The Honorable Timothy E. Kelley, Judge Presiding

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BEFORE: GUIDRY, HOLDRIDGE, AND CHUTZ, JJ.

Chutz, J. - Concurs

HOLDRIDGE, J.

Defendant appeals a confirmation of default judgment taken against him. For the reasons that follow, we vacate the judgment and remand this matter for further proceedings.

FACTUAL AND PROCEDURAL HISTORY

On August 22, 2014, Michelle Barnett, an employee of the Louisiana Department of Health and Hospitals (DHH), filed suit against DHH, Kathy Kliebert, in her official capacity as Secretary of DHH, and Joshua Hardy, an employee of DHH. In her petition, Ms. Barnett asserted various claims against the parties. With regard to Mr. Hardy specifically, Ms. Barnett asserted claims of defamation and intentional infliction of emotional distress.

After the named parties were served, an attorney at DHH requested an extension of time to file an answer on behalf of the DHH defendants, which was informally granted by Ms. Barnett's counsel. The parties dispute whether Mr. Hardy was sued in his official capacity or his individual capacity and whether this informal extension applied to him in addition to DHH and Secretary Kliebert. Ms. Barnett contends she sued Mr. Hardy solely in his individual capacity, and the extension did not pertain to him.

Consequently, when Mr. Hardy failed to answer her petition, Ms. Barnett obtained a preliminary default judgment against him. Based on Ms. Barnett's testimony alone, the trial court subsequently confirmed the default and, on October 23, 2014, rendered judgment against Mr. Hardy and in favor of Ms. Barnett awarding her $50,000.00 in damages.[1]

Mr. Hardy filed a "Motion to Annul Default Judgment and/or Motion for New Trial;" however, the basis for his request for nullity was La. C.C.P. art. 2004,

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[1] The judgment rendered against Mr. Hardy was in his individual capacity.

which requires a direct action by ordinary proceeding with petition and citation.[2] Although Ms. Barnett's case was allotted to Judge William Morvant, Judge Timothy Kelley, the duty judge who confirmed the default judgment, heard and denied both of Mr. Hardy's motions in open court on January 12, 2015.[3] Thereafter, Mr. Hardy filed a motion for a suspensive appeal of the October 23, 2014 default judgment and the January 12, 2015 denial of his motion to annul and alternative motion for new trial. Judge Morvant signed an order granting the suspensive appeal on February 12, 2015. On March 31, 2015, Judge Kelley signed a judgment memorializing the denial of Mr. Hardy's motions to annul and for new trial. In May 2015, Judge Morvant signed Mr. Hardy's unopposed motion to supplement the appellate record with the March 31, 2015 judgment.

Mr. Hardy now appeals the default judgment taken against him as well as the denial of his motion to nullify the judgment pursuant to La. C.C.P. art. 2004. Since the purpose of a nullity action is to prevent injustice which cannot be corrected through the appeal of a default judgment, we first address the merits of Mr. Hardy's appeal of the default judgment. See Belle Pass Terminal, Inc. v. Jolin, Inc., 01-0149 (La. 10/16/01), 800 So.2d 762, 766.

In reviewing a default judgment, this court is restricted to determining the sufficiency of the evidence offered in support of the judgment. This determination

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[2] See Johnson v. Cain, 08-0936 (La.App. 1 Cir. 11/14/08), 999 So.2d 51, 53 writ denied, 09-0295 (La. 4/3/09), 6 So.3d 773; see also Bracken v. Payne & Keller Co., Inc., 14-0637 (La.App. 1 Cir. 8/10/15) (unpublished). Although Mr. Hardy alleged nullity on the basis of Ms. Barnett's failure to also serve the attorney general and the office of risk management, he at no time contended that the judgment was an absolute nullity pursuant to La. C.C.P. art. 2002.

[3] Based on the record before us, it appears Judge Kelley's hearing and ruling on Mr. Hardy's motions may have been in violation of the provisions governing the random allotment of cases. La. C.C.P. arts. 253.1-253.3; La. Uniform Dist. Crt. Rules 9.2 and 9.3. However, we note that neither party raised an objection. See Oliver v. Cal Dive Int'l, Inc., 02-1122 (La.App. 1 Cir. 4/2/03), 844 So.2d 942, 948-49 writs denied, 03-1230, 03-1796 (La. 9/19/03), 853 So.2d 638, 648.

is a factual one governed by the manifest error standard of review. Arias v. Stolthaven New Orleans, L.L.C., 08-1111 (La. 5/5/09), 9 So.3d 815, 818.

A judgment of default must be confirmed by proof of the demand sufficient to establish a prima facie case. La. C.C.P. art. 1702. The plaintiff has the burden of establishing a prima facie case by proving with competent evidence the essential elements of his claim as fully as if each of the allegations of the petition had been specifically denied. Sessions & Fishman v. Liquid Air Corp., 616 So.2d 1254, 1258 (La. 1993). Simply stated, the plaintiff must present evidence sufficient to convince the court that it is probable he would prevail at a trial on the merits. Arias, 9 So.3d at 820. When a demand is based on a delictual obligation, the testimony of the plaintiff, together 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. La. C.C.P. art. 1702B(2).

Confirmation of a default judgment is similar to a trial, and the plaintiff is required to adhere to the rules of evidence despite there being no opponent to urge objections. Arias, 9 So.3d at 820; Gorman v. Miller, 12-0412 (La.App. 1 Cir. 11/13/13), 136 So.3d 834, 840 writ denied, 13-2909 (La. 3/21/14), 135 So.3d 620. "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, 9 So.3d at 820 (quoting George W. Pugh, Robert Force, Gerald A. Rault, Jr., & Kerry Triche, *Handbook on Louisiana Evidence Law* 677 (2007)). 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. Id. (citing 19 Frank L. Maraist, *Civil Law Treatise: Evidence and Proof* §

1.1, at 5 (2d ed. 2007)). Thus, it has been repeatedly recognized that hearsay evidence is not admissible in a proceeding to confirm a default judgment, unless it falls within a hearsay exception or is expressly authorized by La. C.C.P. art. 1702. Balakrishnan v. Louisiana State Univ. Sch. of Med., 05-1266 (La.App. 4 Cir. 9/13/06), 939 So.2d 595, 598 writ denied, 06-2756 (La. 1/26/07); 34 So.3d 261; Cunningham v. M & S Marine, Inc., 05-0805 (La.App. 4 Cir. 1/11/06), 923 So.2d 770, 773. Absent any such exception or authorization, hearsay evidence does not sustain the burden of proving a prima facie case necessary for the confirmation of a default judgment. See McRay v. Booker T. Washington Nursing Home, 30,399 (La.App. 2 Cir. 4/8/98), 711 So.2d 772, 775.

With the foregoing precepts in mind, we must examine the record to determine whether Ms. Barnett presented sufficient admissible evidence of her claims against Mr. Hardy to support the confirmation of the default judgement. Ms. Barnett asserted claims of defamation and intentional infliction of emotional distress against Mr. Hardy. According to her petition, these claims were primarily based on her allegation that Mr. Hardy told other DHH employees that she had committed an ethics violation, violated state law, and was not qualified for promotion to a higher position.[4]

Four elements are necessary to establish a claim for defamation: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault (negligence or greater) on the part of the publisher; and (4) resulting injury. The fault requirement is generally referred to in the jurisprudence as malice, actual or implied. Kennedy v. Sheriff of East Baton Rouge, 05-1418 (La. 7/10/06), 935 So.2d 669, 674. In Louisiana, defamatory words have traditionally been divided into two categories: those that are defamatory per se and

[4] Although she made a general claim in her petition that Mr. Hardy harassed her, she set forth no specific facts supporting her conclusory allegation.

those that are susceptible of a defamatory meaning. Kennedy, 935 So.2d at 674-75. When a plaintiff proves publication of words that are defamatory per se, falsity and malice (or fault) are presumed but may be rebutted by the defendant. Injury may also be presumed. When the words at issue are not defamatory per se, a plaintiff must prove, in addition to defamatory meaning and publication, falsity, malice (or fault), and injury. Kennedy, 935 So.2d at 675. Regardless of which category is implicated, the plaintiff must prove publication. See Id.

To recover damages for intentional infliction of emotional distress, a plaintiff must prove that: (1) the conduct of the defendant was extreme and outrageous; (2) the emotional distress suffered by the plaintiff was severe; and (3) the defendant desired to inflict severe emotional distress or knew that severe emotional distress would be certain or substantially certain to result from his conduct. White v. Monsanto Co., 585 So.2d 1205, 1209 (La. 1991). Louisiana recognizes a cause of action for intentional infliction of emotional distress in a workplace setting. This state's jurisprudence has limited the cause of action to cases which involve a pattern of deliberate, repeated harassment over a period of time. Nicholas v. Allstate Ins. Co., 99-2522 (La. 8/31/00), 765 So.2d 1017, 1026. Moreover, the employer's conduct must be intended or calculated to cause severe emotional distress, not just some lesser degree of fright, humiliation, embarrassment, or worry. Id. at 1027. The distress suffered by the employee must be more than a reasonable person could be expected to endure. Id.

At the confirmation hearing, the sum of Ms. Barnett's evidence in support of her defamation claim consisted of her following testimony:

> Q Now, the defamation claim involves Mr. Hardy stating to your subordinates and fellow employees that you committed an ethics violation while employed at DHH.
>
> A. That's correct.

Q. And who told you that Mr. Hardy made those statements?

A. One of my former staff members, Annette Giroir, and one of his former staff members, Michael Corrone (phonetic), as well as other individuals.

Ms. Barnett's testimony on this matter is clearly hearsay and, as such, is inadmissible and cannot support her defamation claim, and particularly, its required element of publication. In addition, we note that Ms. Barnett offered no testimony regarding any alleged harassment or other actions (besides the foregoing hearsay testimony regarding Mr. Hardy's purported defamation) to support her claim for intentional infliction of emotional distress.[5]

What is more, Ms. Barnett offered no corroborating evidence to substantiate her claims regarding Mr. Hardy's allegedly tortious actions, much less to establish the causal relationship between those actions and her purported damages, *i.e.* her emotional distress and the considerable physical effects she claims have resulted therefrom. Specifically, she testified that she: had to undergo counseling and take psychotropic drugs; developed Graves Disease; had a "thyroid storm;" and had to be hospitalized to have her thyroid removed. However, she presented no evidence, medical or otherwise, to corroborate her claim that these alleged injuries were a result of Mr. Hardy's actions. See Assamad v. Percy Square and Diamond Foods,

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[5] In addition to testifying, Ms. Barnett also offered into evidence an affidavit she executed wherein she made various allegations regarding instances of "harassment" by Mr. Hardy. However, this affidavit is hearsay, as it is an out of court statement offered for the truth of the matter asserted and therefore cannot support the confirmation of a default judgment. See La. C.E. 801. As previously explained, hearsay is not admissible in a proceeding to confirm a default judgment unless it fits within a hearsay exception or is authorized by La. C.C.P. art. 1702. While La. C.C.P. art. 1702B(2) does permit corroborating evidence by affidavit in delictual actions, such as Ms. Barnett's, it does not provide an exception for the affidavit of a plaintiff in such an action. Simply put, when a demand is in tort, "the plaintiff must produce his or her testimony, but may use affidavits for the corroborating evidence, including medical testimony." Frank L. Maraist, *Civil Law Treatise: Civil Procedure* § 12.3 (2d ed. 2007). Ms. Barnett's affidavit certainly cannot be construed as corroborating evidence of her own testimony and/or claim. See Suire v. Lafayette City-Parish Consol. Gov't, 04-1459 (La. 4/12/05), 907 So.2d 37, 58 (noting that the corroboration required by La. C.C. art. 1846 "must come from a source other than the plaintiff"). Consequently, Ms. Barnett cannot rely on her own affidavit, which is inadmissible hearsay, to sustain her burden of proving a prima facie case necessary for the confirmation of a default judgment.

L.L.C., 07-1229 (La.App. 1 Cir. 7/29/08), 993 So.2d 644, 650 writ denied, 08-2138 (La. 11/10/08), 996 So.2d 1077 (holding that plaintiff's uncorroborated testimony regarding her blood pressure and anxiety problems was insufficient to prove they were causally related to workplace harassment).

For all of the foregoing reasons, we find that the trial court was manifestly erroneous in concluding that Ms. Barnett sufficiently established, with competent evidence, the elements of a prima facie case, and thus, the trial court was clearly wrong in confirming the default judgment. Therefore, we vacate the default judgment, and consequently, we pretermit discussion of Mr. Hardy's assignments of error pertaining to the alleged nullity of the judgment.

CONCLUSION

The default judgment is hereby vacated, and this case is remanded for further proceedings. Costs of this appeal are assessed to Michelle Barnett.[6]

VACATED AND REMANDED.

[6] In his final assignment of error, Mr. Hardy argues that he should not have been required to post a suspensive appeal bond in this matter pursuant to La. R.S. 13:4581, and he requests that the appeal bond securing the October 23, 2014, default judgment be cancelled. He further contends that under La. R.S. 13:4521, he should not have been required to pay advance court costs for this appeal, and he requests a refund of such costs. However, we express no opinion regarding the merits of his arguments since we find that his requests have essentially been rendered moot by our disposition in this matter.