

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2015 CA 1009

VERNON NICHOLAS

VERSUS

**BBT CONSTRUCTION MANAGEMENT, LLC
AND AHMAD TRENCH**

Judgment Rendered: DEC 23 2015

On Appeal from the Twenty-Third Judicial District Court
In and for the Parish of Ascension
State of Louisiana
No. 111,605

Honorable Jessie M. LeBlanc, Judge Presiding

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BEFORE: McDONALD, McCLENDON, AND THERIOT, JJ.

McDonald, J. dissents. No evidence of personal liability of Mr. Trench; only BBT.

McCLENDON, J.

The issue presented in this case is whether the evidence introduced by the plaintiff against a limited liability company and its sole member to confirm a default judgment was sufficient to establish a prima facie case against the individual member. The trial court rendered judgment against both defendants. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

On January 23, 2014, Vernon Nicholas entered into a Residential Building Contract for the construction of a home in Ascension Parish. Amhad Trench signed the contract as the manager of BBT Construction Management, LLC (BBT). In February 2014, Mr. Nicholas paid BBT the entire amount of the contract price, or \$332,418.00. Mr. Nicholas additionally paid BBT \$3,515.00 for design fees. In July 2014, BBT ceased work on the project after completing approximately forty percent of the work required under the contract. On December 1, 2014, Mr. Nicholas filed a Petition for Damages. In his petition, Mr. Nicholas asserted that BBT and Mr. Trench were liable, jointly and *in solido*, to him for the damages, costs, and expenses related to the defendants' breach of contract and unjust enrichment resulting from the defendants' conversion of the unused portion of the contract price. Mr. Nicholas further alleged that a portion of the work completed was defective and that BBT and Mr. Trench refused to resume work or correct defective work on the project.

The defendants failed to answer or file any responsive pleadings within the statutory time limits, and on January 26, 2015, the trial court entered an order of preliminary default. On February 6, 2015, Mr. Nicholas filed a Motion for Confirmation of Default with eight accompanying exhibits. Those exhibits included copies of the Residential Building Contract; Mr. Nicholas's check in the amount of \$66,483.60 dated February 3, 2014, payable to BBT; a statement showing a transfer on February 5, 2014, from Mr. Nicholas's federal credit union account to BBT's account in the amount of \$265,934.40; the building permit for the home identifying the contractor as BBT; an affidavit of Mr. Nicholas; correspondence

from a representative of the subdivision developer; an affidavit of Brandon Williams, a licensed residential contractor, who inspected Mr. Nicholas's home; and a photograph of Nicholas's home taken during construction.

On February 10, 2015, the trial court signed a judgment in favor of Mr. Nicholas and against BBT and Mr. Trench in the full sum of \$222,418.00 plus legal interest and court costs. Mr. Trench has appealed, asserting that the trial court erred in confirming the default against him. Specifically, he contends that he is not individually liable for the debt of BBT as no evidence was presented to support such a finding.

DISCUSSION

The appellate jurisdiction of courts of appeal extends to 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, Dept. of Transp. and Dev.**, 617 So.2d 880, 882, n.2 (La. 1993). In reviewing default judgments, the appellate court is restricted to determining the sufficiency of the evidence offered in support of the judgment. **Arias v. Stolthaven New Orleans, L.L.C.**, 08-1111 (La. 5/5/09), 9 So.3d 815, 818. This determination is a factual one governed by the manifest error standard of review. **Id.**

A defendant's failure to comply with Louisiana Code of Civil Procedure articles 1001 and 1002 exposes the party to a judgment of default. The law and procedure relative to default judgments is set forth in Louisiana Code of Civil Procedure article 1701, *et seq.* Specifically, a defendant is generally required to file an answer within fifteen days after service of citation upon him. LSA-C.C.P. art. 1001. Notwithstanding the specified delay periods for answering, a defendant may file his answer at any time prior to confirmation of a default judgment against him. LSA-C.C.P. art. 1002. However, 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. LSA-C.C.P. art. 1701A; **Arias**, 9 So.3d at 818-19. Thereafter, the judgment of default may be confirmed after two days,

exclusive of holidays, from the entry of the judgment of default. LSA-C.C.P. art. 1702A.

Confirmation of a default judgment is similar to a trial and requires, with admissible evidence, "proof of the demand that is sufficient to establish a prima facie case and that is admitted on the record prior to confirmation." LSA-C.C.P. art. 1702A; **Arias**, 9 So.3d at 820. 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 820. In other words, the plaintiff must present competent evidence that convinces the court that it is probable that he would prevail at trial on the merits. **Id.** Further, there is a presumption that a default judgment is supported by sufficient evidence, but this presumption may be rebutted by the record upon which the judgment is rendered.

Id.

The issue presented in this case is the personal liability of Mr. Trench.¹

Louisiana Civil Code article 24 provides:

There are two kinds of persons: natural persons and juridical persons.

A natural person is a human being. A juridical person is an entity to which the law attributes personality, such as a corporation or a partnership. The personality of a juridical person is distinct from that of its members.

A limited liability company is an entity to which the law attributes personality and is, therefore, a juridical person. **Ogea v. Merritt**, 13-1085 (La. 12/10/13), 130 So.3d 888, 894. See also LSA-R.S. 12:1301(10).² However, in narrowly defined circumstances, an individual member has been subjected to personal liability for

¹ BBT did not appeal the judgment against it, and therefore the liability of BBT is not before this court.

² Louisiana Revised Statutes 12:1301(10) provides:

(10) "Limited liability company" or "domestic limited liability company" means an entity that is an unincorporated association having one or more members that is organized and existing under this Chapter. No limited liability company organized under this Chapter shall be deemed, described as, or referred to as an incorporated entity, corporation, body corporate, body politic, joint stock company, or joint stock association.

obligations for which the limited liability company would otherwise be solely liable.

Ogea, 130 So.3d at 895.

The liability protection afforded to the members, managers, employees, and agents of a limited liability company, as well as the exceptions thereto, are "solely and exclusively" found in LSA-R.S. 12:1320, which provides:

- A. The liability of members, managers, employees, or agents, as such, of a limited liability company organized and existing under this Chapter shall at all times be determined solely and exclusively by the provisions of this Chapter.
- B. Except as otherwise specifically set forth in this Chapter, no member, manager, employee, or agent of a limited liability company is liable in such capacity for a debt, obligation, or liability of the limited liability company.
- C. A member, manager, employee, or agent of a limited liability company is not a proper party to a proceeding by or against a limited liability company, except when the object is to enforce such a person's rights against or liability to the limited liability company.
- D. Nothing in this Chapter shall be construed as being in derogation of any rights which any person may by law have against a member, manager, employee, or agent of a limited liability company because of any fraud practiced upon him, because of any breach of professional duty or other negligent or wrongful act by such person, or in derogation of any right which the limited liability company may have against any such person because of any fraud practiced upon it by him.

Thus, Section B describes limited liability as a general rule for members of a limited liability company; however, Section D provides enumerated exceptions to the general rule of limited liability. Mr. Nicholas asserts that the exceptions in Section D apply in this matter as Mr. Trench was engaged in the construction profession when he designed and constructed the work for Mr. Nicholas and, therefore, was not acting solely in his capacity as a member of BBT. Mr. Nicholas maintains that Mr. Trench is personally liable because, as the licensed contractor on the job, it was Mr. Trench's responsibility to ensure that the work was done properly and that Mr. Trench's personal involvement and inaction was a breach of a professional duty or other negligent or wrongful act. However, Mr. Trench contends that he was not a party to the construction contract, having signed as the manager of BBT, and all payments made under the contract were paid to BBT. He therefore

challenges the sufficiency of the evidence upon which the trial court cast him in judgment individually.

Initially, as to Mr. Nicholas's contention that Mr. Trench breached a professional duty, we find that Mr. Nicholas failed to present any evidence that Mr. Trench was a "professional" within the meaning of LSA-R.S. 12:1320D. As the supreme court recently held in **Nunez v. Pinnacle Homes, L.L.C.**, 15-0087 (La. 10/14/15), --- So.3d ---, ---, an individually licensed contractor is not a "professional" within the meaning of LSA-R.S. 12:1320D. The court stated the legislature, in enacting LSA-R.S. 12:1301, *et seq.*, was "most certainly aware that a 'profession' is different from other occupations and trades" and that contracting is not included among the professional corporations listed in Title 12 of the Revised Statutes. The supreme court further stated that there was no indication that the legislature intended for licensed contractors to owe a separate, non-contractual duty to their customers as may members of the enumerated professions. **Nunez**, --- So.3d at ---. Thus, Mr. Trench was not engaged in a "profession" simply by being licensed by the state as a contractor, and Mr. Nicholas failed to present evidence to show that Mr. Trench was a "professional" subject to the personal liability exception set forth in LSA-R.S. 12:1320D. We further recognize that the record merely establishes the license of BBT and not of Mr. Trench.³

However, Mr. Nicholas also contends that Mr. Trench committed a "negligent or wrongful act" for which he can be held personally liable under LSA-R.S. 12:1320D. In **Ogea**, the supreme court identified four factors to consider in determining whether a member of a limited liability company may be held personally liable for his negligent or wrongful acts:

- 1) whether a member's conduct could be fairly characterized as a traditionally recognized tort;
- 2) whether a member's conduct could be fairly characterized as a crime, for which a natural person, not a juridical person, could be held culpable;
- 3) whether the conduct at issue was required by, or was in furtherance of, a contract between

³ We note that the case of **Matherne v. Barnum**, 11-0827 (La.App. 1 Cir. 3/19/12), 94 So.3d 782, *writ denied*, 12-0865 (La. 6/1/12), 90 So.3d 442, cited by Mr. Nicholas in his appellate brief, predates the **Ogea** and **Nunez** cases.

the claimant and the LLC; and 4) whether the conduct at issue was done outside the member's capacity as a member.

Ogea, 130 So.3d at 900-01. A court is to evaluate each situation on a case-by-case basis and consider each of the above factors when determining whether the general rule of limited liability must yield to the exception for a member's "negligent or wrongful act." LSA-R.S. 12:1320D; **Ogea**, 130 So.3d at 905.

In his affidavit, Mr. Nicholas attested that construction began in March 2014, but that the defendants abandoned the project in July 2014, after completing forty percent of the construction. This was further supported by the affidavit of Brandon Williams.

Mr. Nicholas further attested that in spite of his numerous requests, the defendants refused to resume work on the project. As a result of their refusal, Mr. Nicholas advised the defendants that he wished to terminate the contract and "requested that the defendant refund the unused portion of the contract price." He further attested that the defendants have refused to refund to him the unused portion of the contract price and that Mr. Trench verbally threatened to physically harm Mr. Nicholas if Mr. Nicholas continued to contact him about refunding the unused portion of the contract price.

Upon our review of the record, we find that Mr. Trench failed to rebut the presumption that the default judgment was supported by sufficient evidence. In reviewing the **Ogea** factors, we find that Mr. Trench's actions could be characterized as a tort, with a duty owed to Mr. Nicholas to return the unused funds. The record establishes that Mr. Trench refused to do so. This failure to refund the unused funds could be considered a delictual action or tortious conversion.⁴ Additionally, Mr. Trench's failure to return the unused portion of the contract price could be perceived as a crime of theft.⁵ Further, Mr. Trench's failure

⁴ See **Dual Drilling Co. v. Mills Equip. Investments, Inc.**, 98-0343 (La. 12/1/98), 721 So.2d 853, 857; **Aymond v. State, Dept. of Revenue and Taxation**, 95-1663 (La.App. 1 Cir. 4/4/96), 672, So.2d 273, 275-76; **Whitley v. Manning**, 623 So.2d 100, 102 (La.App. 1 Cir.), writ denied, 627 So.2d 656 (La. 1993).

⁵ Louisiana Revised Statutes 14:67A defines theft as the "misappropriation or taking of anything of value which belongs to another."

to refund the unused funds was clearly not required by or in furtherance of the contract between Mr. Nicholas and BBT. Finally, even if Mr. Trench was acting within the structure of the limited liability company that factor alone would not be determinative.

Considering the above, the record supports the finding that Mr. Trench committed a negligent or wrongful act that subjects him to the narrow personal liability exception set forth in LSA-R.S. 12:1320D. Accordingly, we find no manifest error in the trial court's conclusion that the evidence was sufficient to support the judgment. Therefore, we affirm the judgment in favor of Mr. Nicholas and against Mr. Trench personally.

CONCLUSION

For the foregoing reasons, the February 10, 2015 judgment of the trial court in favor of Vernon Nicholas and against Ahmad Trench, individually, is affirmed. Costs of this appeal are assessed against Mr. Trench.

AFFIRMED.