

NOT DESIGNATED FOR PUBLICATION

ALMA GILLS SPEARS * NO. 2003-CA-0712
VERSUS * COURT OF APPEAL
SOLOMON GILLS, JR. * FOURTH CIRCUIT
* STATE OF LOUISIANA
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2001-19453, DIVISION "J"
Honorable Lloyd J. Medley, Judge
* * * * *
Judge Terri F. Love
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(Court composed of Chief Judge William H. Byrnes III, Judge Terri F. Love,
Judge Edwin A. Lombard)

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REVERSED

This is an appeal from the granting of a default judgment. For the

reasons set forth below, we reverse.

STATEMENT OF FACTS AND PROCEDURAL HISTORY:

On November 26, 2001, plaintiff/appellee, Alma Gills Spears (Spears), filed a petition for accounting of partnership property and funds against Solomon Gills, Jr. (Gills). On April 16, 2002, the petition was amended to name Deone Lawrence (Lawrence) as an additional defendant. Both the petition and amended petition requested an accounting and an order to compel the defendants to produce receipts, invoices and records pertaining to the management of certain rental properties. The properties at issue were inherited and co-owned by Spears and Gills, and managed by Lawrence.

Lawrence was served with the petition and amended petition on April 20, 2002. Gills was not served until September 19, 2002. On May 9, 2002, Spears filed a motion for default against Lawrence. Neither Spears or her attorney signed the motion for default, but the trial court entered an order for preliminary default nevertheless. On July 2, 2002, the default was confirmed and judgment was rendered in favor of Spears.

The default judgment failed to specifically name a defendant, but made reference to the motion for preliminary default “entered on May 16, 2002”. We note from a review of the record that the motion for default

against Lawrence was entered on May 9, 2002, not May 16, 2002.

Also at issue here is the fact that the default judgment did not address the request for accounting or production of documents as prayed for in the pleadings. Instead, Spears was awarded \$64,800.00. The record contains an affidavit of correctness of account wherein Spears claimed that she was owed \$64,800.00 for rents collected and wrongfully retained by Lawrence.

A motion for devolutive appeal was filed on September 3, 2002. Lawrence and Gills have jointly appealed the July 2, 2002 default judgment in spite of the fact that Gills was not served with the original or amended petition until September 19, 2002, and was not a party to the default judgment.

The record does reveal that subsequent to the filing of this appeal, a motion for default was filed against Gills on October 18, 2002. No answer was filed, and a default judgment was rendered against Gills on December 13, 2002. That judgment was not appealed, and is clearly not before the court on this appeal.

ARGUMENT:

Lawrence's first assignment of error argues that the motion for default was not signed as required by La. C.C.P art. 863, and it is therefore invalid. Specifically, Lawrence submits that article 863 requires, "that every

pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated”.

Lawrence reasons that because the motion for default is invalid, the judgment confirming the default is also invalid. Other than article 863, Lawrence cites no legal authority in support of this argument.

The second assignment of error pertains to the fact that the judgment confirming the default references the motion for default entered on May 16, 2002, when in fact, the motion for default was entered on May 9, 2002. Again, Lawrence provides no authority, but contends that the judgment rendered on July 2, 2002 purportedly confirmed a non-existent default judgment, and is therefore invalid.

Lawrence’s third assignment of error asserts that the judgment confirming the default went beyond the scope of, and was different in kind from, the demand in the petition. La. C.C.P. art 1703; Spear v. Tran, 96-1490 (La. App. 4 Cir. 9/18/96), 682 So. 2d 267.

Finally, although not indicated as an assignment of error, Lawrence argues that the default judgment is invalid because it did not name the defendant that it is rendered against.

There has been no appellee brief filed in this appeal.

DISCUSSION:

At the outset, we agree with Lawrence that there are technical errors surrounding the rendering of the default judgment. Specifically, the motion for default was not signed by Spears or her attorney, the default judgment did not provide the name of the defendant that it is rendered against, and it contains an incorrect date for the entry of the motion for default. Without addressing the merits of these errors, we find that the dispositive issue in this appeal is the fact that the default judgment went far beyond the scope of the original demand. The remaining issues concerning the technical errors of the default judgment are pretermitted.

The original and amended petition prayed only for an accounting of rents collected by Lawrence and/or Gills, and the production of documents in connection therewith. The default judgment, on the other hand, is a money judgment in favor of Spears in the amount of \$64,800.00. This sum purports to be the amount of rent that Spears claimed was collected by Lawrence as manager of the rental properties, and not turned over to Spears.

We find that the trial court committed manifest error in rendering a default judgment that went beyond the scope of the original demand. It is well settled that “a default judgment may not...go beyond the scope of the prayer in the petition.” Graham v. Metzler, 402 So. 2d 768 (La. App. 4 Cir. 1981), citing La. C.C.P. art. 1703. Article 1703 provides, “A judgment by

default shall not be different in kind from that demanded in the petition.” In overturning a default judgment in the case of Spear, this court recognized that at a confirmation hearing, “the claimant is limited to those matters of which the defendant has been properly notified through service of process.” We further stated in Spear that “the defendant has a due process right to know what is at stake when a default is threatened.”

The well-established appellate standard of review dictates that this court may not overturn a judgment of the lower court absent an error of law or finding of fact that is manifestly erroneous or clearly wrong. Rosell v. ESCO, 549 So. 2d 840 (La. 1989). In the present case, Spears was permitted to enlarge her pleadings by claiming for the first time that Lawrence owed her \$64,800.00. In light of article 1703 and the jurisprudence cited herein, the trial court was clearly wrong.

CONCLUSION:

For the reasons hereinabove stated, we find that the trial court committed manifest error. Accordingly, the default judgment granted by the trial court is reversed.

REVERSED