

NOT DESIGNATED FOR PUBLICATION

**LOUISIANA MACHINERY
COMPANY, L.L.C.**

*

NO. 2003-CA-0858

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COURT OF APPEAL

VERSUS

*

FOURTH CIRCUIT

**J.L.J. CONSTRUCTION CO.,
INC.**

*

STATE OF LOUISIANA

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**APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2002-12726, DIVISION "H"
Honorable Michael G. Bagneris, Judge**

Judge Edwin A. Lombard

(Court composed of Judge Patricia Rivet Murray, Judge Michael E. Kirby,
Judge Edwin A. Lombard)

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AFFIRMED

This appeal is from a default judgment on a suit for open account entered in favor of plaintiff/appellee, Louisiana Machinery Company, LLC., and against defendants/appellants, J.L.J. Construction Co., Inc. and James L. Jones. For the reasons hereinafter stated, we affirm.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Appellee, as lessor, and appellants, as lessees, entered into an equipment rental contract. After an alleged default of the contract, appellee brought an action for return of the leased equipment. The equipment was thereafter returned and appellee amended the petition to recover rental payments allegedly owed by appellants. On November 22, 2002, the amended petition was personally served on JLJ Construction Co., Inc., through its agent for service, James L. Jones. Responsive pleadings were not filed, and a preliminary default was granted on December 27, 2002. Confirmation of the default judgment was rendered on January 3, 2003.

The record indicates that the clerk of court did not sign the certification that was provided by appellee; however, the clerk did stamp and

sign a certification for both the preliminary default and the confirmation of the default. The clerk's certifications, stamped onto the bottom of appellee's motion for preliminary default, indicate that the record had been examined again as of the date of the request for confirmation, and that no responsive pleadings had been filed. The record further shows that the stamped certifications were signed by the deputy clerk who examined the record. The trial court signed a motion and order for devolutive appeal on March 19, 2003.

Timeliness of Appeal

Before reaching the merits of this appeal, we consider whether the appeal was timely filed.

In the case of a default judgment, La. Code Civ. Proc. art. 1913 (West 2003) states in pertinent part:

B. Notice of the signing of a default judgment against a defendant on whom citation was not served personally, or on whom citation was served through the secretary of state, and who filed no exceptions or answer, shall be served on the defendant by the sheriff, by either personal or domiciliary service, or in the case of a defendant originally served through the secretary of state, by service on the secretary of state.

C. Notice of the signing of a default judgment against a defendant on whom citation was served personally, and who filed no exceptions or answer, shall be mailed by the clerk of court to the defendant at the address where personal service was obtained or to the last known address of the defendant.

D. The clerk shall file a certificate in the record showing the date on which, and the counsel and parties to whom, notice of the signing of the judgment was mailed.

When notice of the signing of a judgment is required by Article 1913, the delays for new trial motions and appeals do not run unless and until the clerk mails the required notice. *Potter v. Patterson*, 96-1172 (La. App. 4 Cir. 3/19/97), 690 So. 2d 1118; *Juengain v. Johnson*, 571 So.2d 167, 168 (La. App. 4 Cir.1990); *Gould v. HANO*, 595 So.2d 1238, 1241 (La. App. 4 Cir.1992); *Fruge v. City of New Orleans*, 595 So.2d 1200, 1201 (La. App. 4 Cir.1992). Until the clerk's certificate of mailing is in the record, the presumption is that the notice was not mailed. *Police Jury of Ascension Parish v. Schaffert*, 428 So. 2d 977 (La. App. 1 Cir. 1983); *In Re: Salmon*, 318 So. 2d 897 (La. App. 2 Cir. 1975); *Broussard v. Annaloro*, 265 So. 2d 648 (La. App. 3 Cir. 1972).

In this case, there is no notice of signing of judgment in the record as required by Article 1913. Thus, the time period for the filing of a motion for new trial and for the filing of a devolutive appeal has not commenced to run. Accordingly, the appeal is timely filed.

Assignment of Error

The only issue on appeal is whether the confirmation of the default judgment is fatally defective under Article 1702.1 of the Louisiana Code of Civil Procedure.

Default judgment may be entered if a defendant fails to answer within the time prescribed by law, La. Code Civ. Proc. art 1701 (West 2003), and when based upon a sum due in an open account, the default judgment may be obtained without a hearing in open court. La. Code Civ. Proc. art. 1702 (West 2003). Article 1702.1 of the Louisiana Code of Civil Procedure governs confirmation of a default judgment without a hearing in open court and provides in pertinent part:

- A. When the plaintiff seeks to confirm a default judgment as provided in Article 1702(B)(1) and (C), along with any proof required by law, he or his attorney shall include in an itemized form with the motion and judgment a certification that the suit is on an open account, . . . , and that the necessary invoices and affidavit, . . . , are attached. If attorney fees are sought under R. S. 9:2781 or 2782, the attorney shall certify that fact and that a copy of the demand letter and if required the return receipt showing that the date received by the debtor are attached and that the number of days required by R.S. 9:2781(A) or 2782(A), respectively, have elapsed before suit was filed.
- B. The certification shall indicate the type of service made on the defendant, the date of service, and the date a preliminary default was entered, and shall also include a certification by the clerk that the record was examined the clerk, including therein the date of the examination and a statement that no answer or other opposition has been filed.

La. Code Civ. Proc art. 1702.1 (West 2003).

On appeal, the appellants argue that the trial court committed manifest error in signing the default judgment because the certificate that was

submitted by appellee was not signed by the clerk as required by La. Code Civ. Proc. art. 1702.1 (B) (West 2003). Appellants contend that the requirements of Article 1702.1 are mandatory and, accordingly, that any failure to strictly adhere to its provisions renders a default judgment invalid. The appellants do not dispute the proof submitted by appellee as to the debt owed on open account, questioning only the validity of the clerk's certificate.

Appellee responds that all of Article 1702.1 requirements to confirm a default on an open account were met. Specifically, a certificate was submitted pursuant to Article 1702.1 which indicated the following: 1) that personal service was made on November 22, 2002; 2) that the motion for preliminary default was entered on December 27, 2002; 3) that appellee's claim was a suit on open account, and 4) that invoices and a statement of account evidencing the debt were attached. Appellee submits that at the bottom of this certification, a Certification of Clerk as required by Article 1702.1 (B) was included for the clerk of court to certify that the record had been examined and that no responsive pleadings were filed. Appellee concedes that the clerk did not sign the certification that was presented by appellee, but instead, as per its common practice, utilized its own stamp to certify that the record had been examined again, and that responsive

pleadings had not been filed.

After thorough review of the record, we find that the documentation submitted by appellee complies with the mandated requirements of articles 1702 and 1702.1. We further find that the clerk's stamped certificate, when examined together with the other evidence presented, is sufficient for confirmation of the default judgment.

Conclusion

The trial court committed no error in granting the default judgment based upon the proof submitted and, accordingly, we affirm the judgment.

AFFIRMED.