

NOT DESIGNATED FOR PUBLICATION

GLYNN HYER, * **NO. 2004-CA-0464**
INDIVIDUALLY AND ON *
BEHALF OF CARLY LYNN * **COURT OF APPEAL**
HYER AND CASEY * **FOURTH CIRCUIT**
ELIZABETH HYER, * **STATE OF LOUISIANA**
BENEFICIARIES *

VERSUS *

*
CAROLINE A. LAMPARD, *
A/K/A CAROLINE SENS *
* * * * *

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2003-11733, DIVISION "J"
Honorable Nadine M. Ramsey, Judge
* * * * *
Judge Roland L. Belsome
* * * * *

(Court composed of Judge Charles R. Jones, Judge James F. McKay III,
Judge Roland L. Belsome)

Irl R. Silverstein
635 Lafayette Street
Gretna, LA 70053
COUNSEL FOR PLAINTIFF/APPELLEE

November 3, 2004

Gilbert R. Buras, Jr.
365 Canal Street
Suite 2800, One Canal Place
New Orleans, LA 70130

COUNSEL FOR DEFENDANT/APPELLANT

DISMISSED IN PART; VACATED IN PART; REVERSED IN PART AND REMANDED IN PART

The defendant, Caroline S. Lampard A/K/A Caroline Sens (“Mrs. Sens”), appeals the granting of a default judgment, which removed her as co-trustee of Carly Lynn Hyer and Casey Elizabeth Hyer (“beneficiaries”) and assessed her with damages in the sum of \$17,967.00, and the denying of her motion for new trial. For the reasons expressed, we dismiss the default judgment in part, vacate the default judgment in part, reverse the denying of the Motion for New Trial in part, and remand part of the case for further proceedings.

PROCEDURAL HISTORY

Glynn Hyer (“Mr. Hyer”), individually and on behalf of the beneficiaries, filed a petition for the removal of co-trustee, Mrs. Sens, and for damages. The petition states in part:

- I. Mrs. Sens violated the duties imposed upon her as co-trustee, by collection and receiving rental income due to the Trust from its properties, but has failed to apply said proceeds to the Trust and has further failed to account for the receipt of said proceeds to plaintiff, as co-trustee.
- II. Mrs. Sens’ breach of fiduciary duty as outlined above is sufficient to constitute her removal as co-trustee.
- III. Mr. Hyer seeks to recover from Mrs. Sens all losses, which

the Trust and its beneficiaries have incurred as a result of the actions and/or omissions and/or breaches of fiduciary duty as set forth in the preceding paragraph.

Mrs. Sens was served on September 23, 2003. Thirty days later, on October 23, 2003, a district court duty judge confirmed a default judgment. The record reflects that at the confirmation of the default, Mr. Hyer's counsel prayed for judgment removing Mrs. Sens as a co-trustee and also seeking to recover from her the sum of \$17,967.00 on behalf of the beneficiaries, that being the total of the mortgage balance of \$12,167.00 and an additional \$5,800.00 to redeem the taxes. The October 23, 2003, judgment reflected the prayer in the record.

On the same day of the default judgment, the defendant filed a motion for new trial. The district court denied this motion on January 5, 2004. Mrs. Sens filed a Motion for Suspensive Appeal on January 15, 2004, and it was perfected on February 4, 2004.

ANALYSIS

The two issues before this Court are the following: (1) whether the trial court was manifestly erroneous in rendering a default judgment given that the judgment grants relief for which the plaintiff did not pray, the plaintiff presented no evidence to the district court to support the judgment rendered, and the award of money for damages is contrary to law and (2)

whether the district court was manifestly erroneous in denying the motion for new trial.

The October 23, 2004, judgment was twofold. Mrs. Sens was removed as co-trustee and was assessed with damages. A question arose as to whether Mrs. Sens' appeal regarding her removal of co-trustee was timely. R.S. 9:1791 sets forth a 30-day period within which to perfect an appeal from a Judgment removing

a trustee. It states as follows:

A judgment or an order of court appointing or removing a trustee shall be executed provisionally. An appeal from an order or judgment appointing or removing a trustee must be taken and the security therefor furnished within thirty days from the date of the order or judgment notwithstanding the filing of an application for a rehearing or a new trial. The appeal shall be docketed and heard by preference.

The judgment removing Mrs. Sens as co-trustee was rendered on October 23, 2002. Mrs. Sens filed a Motion for Suspensive Appeal on January 15, 2004 and it was perfected on February 4, 2004. It is apparent that the Suspensive Appeal Bond was not perfected within in the 30-day period. Accordingly, this portion of the appeal, regarding the removal of Mrs Sens as co-trustee, is dismissed.

This Court further finds that the district court was manifestly

erroneous in granting relief for which Mr. Hyer did not pray for in his petition. La. C.C.P. art. 1703 provides:

A judgment by default shall not be different in kind from that demanded in the petition. The amount of damages awarded shall be the amount proven to be properly due as a remedy.

The confirmation hearing does not give the claimant a right to *carte blanche*. This Court stated in *Spear v. Tran*, 96-1490 (La.App. 4 Cir. 9/18/96), 682 So.2d 267, 271, the following:

The claimant is limited not only to those matters for which he can present a *prima facie* case, but he is also limited to those matters of which the defendant has been properly notified through service of process. "A judgment by default shall not be different in kind from that demanded in the petition." LSA-C.C.P. ART. 1703.

* * *

The defendant has a due process right to know what is at stake when a default is threatened.

Mr. Hyer's petition does not set forth any facts relating to any mortgages on the Trust property nor does the Petition state that the defendant is responsible for a default on a mortgage. Thus, the judgment by default was different from that demanded in the petition. The Petition in this matter did not properly notify Mrs. Sens and she had a due process right to know what was at stake when she was threatened by default.

CONCLUSION

This Court finds that Mrs. Sens' appeal regarding her removal as co-trustee was not filed timely. We further find that the district court was manifestly erroneous in entering a default judgment regarding damages on the basis of granting more than what was in the petition. Accordingly, the portion of the default judgment regarding the removal of co-trustee, Mrs. Sens, is dismissed, the portion of the default judgment regarding damages is vacated, the denial of the Motion for New Trial is reversed in part, and the case is remanded to the trial court for further proceedings consistent herewith.

**DISMISSED IN PART; VACATED IN PART; REVERSED IN PART
AND REMANDED IN PART**