NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 2172

GERALD J. DUPONT

VERSUS

GERALD CANNELLA, JR. AND CORRENT'S TRUCKING, LLC

RHP

Judgment Rendered: AUG - 3 2011

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On Appeal from the City Court of Plaquemine
In and For the City of Plaquemine
Trial Court No. C08231

Honorable Michael M. Distefano, Judge Presiding

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Gerald J. Dupont Plaquemine, LA	Plaintiff/Appellee Pro Se
Ashly Van Earl Plaquemine, LA	Defendant/Appellant Corrent's Trucking, LLC

* * * * * * * * * *

BEFORE: PARRO, GUIDRY, AND HUGHES, JJ.

HUGHES, J.

This is an appeal from a default judgment in a suit on a contract. For the reasons that follow, we reverse.

FACTS AND PROCEDURAL HISTORY

This action was filed in the Plaquemine City Court by *pro se* plaintiff Gerald J. Dupont on July 30, 2008. In his handwritten petition, Mr. Dupont alleged that on March 3, 2008 he signed an agreement with Gerald Cannella, Jr., in which Mr. Cannella agreed to excavate and remove dirt from Mr. Dupont's property "at \$1^{00}/yard for 30,000 (plus) yards of dirt." Mr. Dupont further alleged that he had received three payments: (1) $9,940 on April 24, 2008; (2) $7,895 on May 28, 2008; and (3) $520 on July 16, 2008. Mr. Dupont stated that these three payments total $18,355, "leaving a balance of $11,645.00 unpaid." Mr. Dupont also alleged that Mr. Cannella "left the pond in terrible condition." He sought to recover the alleged unpaid balance "plus cleanup and proper shaping of the ponds [sic]."

Attached to the petition was a typed document, dated March 3, 2008, and entitled "**NOTICE OF INTENT.**" The document stated:

> As per recent negotiations undertaken by Gerald Cannella, Jr., and Gerald J. Dupont[,] I[,] Gerald Cannella, Jr., owner of Bucky's Trucking, LLC, intend to undertake the following project:
>
> I will excavate and remove dirt at a $1.00 per yard taken off of the property referenced above and owned by Gerald J. Dupont. Tramdem [sic] trucks will be charged for 10 yards per truck and Triaxle trucks will be charged 15 yards per truck. The total yardage needed is approximately 30,000(plus).
>
> I further agree to pump and dry the pond out prior to excavating such. Additionally, I will enlarge the perimeter of the pond as previously agreed by the parties to this agreement.

The document also contained signatures purporting to be those of Gerald J. Dupont and Gerald Cannella, Jr.

A second typed document was attached to the petition, which was styled as a letter, dated July 10, 2008, and bearing the letterhead of "Corrent's Trucking, LLC." The letter was directed to Gerald Dupont and stated, in pertinent part:

> Enclosed is the final payment for dirt that was removed from your property on Hwy. 1148. All work has been completed as we agreed.

The letter was signed by "Latrell Corrent" on behalf of Corrent's Trucking, LLC ("Corrent's Trucking") and Bucky's Trucking, LLC ("Bucky's Trucking").

Both Gerald Cannella, Jr. and Corrent's Trucking were named as defendants. Personal service was made on Mr. Cannella, as stated in a service return filed in the record; however, the date of service was not recorded (though it was noted that the citation had been issued July 30, 2008). Citation was also issued, on the same date, for Corrent's Trucking, and the return filed in the record shows personal service was made on August 5, 2008, through "Latrell Corrent."

Thereafter, on August 22, 2008, a default judgment[1] was rendered against Corrent's Trucking in the amount of $11,645, "plus cleanup and proper shaping of the ponds," along with court costs.

On August 25, 2008 Mr. Cannella and Corrent's Trucking jointly filed exceptions of lack of subject matter jurisdiction and want of amicable demand, which were set for hearing on September 3, 2008. Minutes of the trial court reflect that, on September 3, 2008, the matter was rescheduled to

[1] In contrast to LSA-C.C.P. arts. 1701-1704 (which require district court litigants seeking a final judgment on the basis of default to first obtain a "judgment of default," and after two days, to obtain a "confirmation of the default judgment"), LSA-C.C.P. art. 4904 allows a city court litigant to obtain a final judgment on the basis of default without a "prior default." For ease of discussion herein, we refer to the final judgment on the basis of default obtained by the plaintiff in this case as a "default judgment." See **Medline Industries, Inc. v. All-Med Supply & Equipment**, 94-1504, p. 3 n.2 (La. App. 1 Cir. 4/7/95), 653 So.2d 830, 832 n.2.

September 24, 2008, due to a hurricane. The September 24, 2008 minutes indicate that a status conference was set for October 29, 2008. The appellate record does not reveal what, if any, action was taken on October 29, 2008.

On November 19, 2008 Corrent's Trucking filed a "Motion for New Trial and Petition for Nullity of Default Judgment." The motion asserted that Corrent's Trucking had not been served with the default judgment, and that pursuant to a trial court order, made during a November 5, 2008 status conference, fifteen days had been allowed by the court for the filing of related motions and memoranda. It was further asserted in the motion that insufficient proof of the plaintiff's claim had been submitted to the trial court, and, for this reason, it was claimed that the default judgment had been improperly granted and a new trial was sought. Corrent's Trucking further petitioned the court to declare the default judgment a nullity, asserting the court lacked subject matter jurisdiction (claiming the contract value exceeded the $25,000 jurisdictional limit of the court) and that certain acts of ill practice had occurred (i.e., that the plaintiff was aware that Corrent's Trucking had not been a party to the contract at issue, that the plaintiff's acceptance of final payment constituted a compromise; and that the plaintiff had terminated the contract and that he was paid for all dirt removed).

A hearing on the Corrent's Trucking motion was subsequently held by the trial court on February 24, 2010. Neither Mr. Dupont, nor anyone representing him, attended the hearing. At the close of the hearing, the matter was taken under advisement by the trial judge. Written reasons were issued by the court on March 17, 2010, stating the opinion of the court that testimony was not required prior to rendition of the default judgment in the case, and that, by means of the plaintiff's "detailed petition and

attachment[s], a [*prima facie*] case was proven." A judgment was thereafter signed, denying Corrent's Trucking's motion for new trial and/or nullity.

Corrent's Trucking has appealed, urging the trial court erred in: (1) rendering a default judgment when the plaintiff failed to allege or establish a *prima facie* case against the defendant; (2) failing to find that the default judgment was an absolute nullity due to a lack of subject matter jurisdiction, in that the suit was based on a contract in excess of the $25,000 jurisdictional limit of the court; and (3) failing to find ill practices existed sufficient to render the default judgment a relative nullity, as no allegations were made, nor any facts established, to make the defendant a party to the contract that formed the basis for the plaintiff's claims or to establish that an obligation was owed by Corrent's Trucking to the plaintiff.

LAW AND ANALYSIS

Motion to Supplement

The defendant/appellant, Corrent's Trucking, filed a motion with this court, requesting that the appellate record be supplemented with certain service returns, not originally included in the record on appeal. By order of this court, on March 14, 2011, the motion was referred to this panel for disposition. Finding merit in this request, we have granted the motion and obtained the supplementation from the trial court.

Rule to Show Cause

On December 15, 2010 this court, *ex proprio motu*, issued an order directing the parties to show cause why this appeal should not be dismissed, on the following grounds: (1) it appeared from the record that the defendant's request for new trial, as to the August 22, 2008 ruling, was not timely filed, rendering the subsequent appeal untimely; and (2) it was unclear from the record which judgment was appealed. On March 14, 2011

the rule to show cause was referred to this panel for disposition. Our review of the record, along with supplements thereto, reveal that the appeal was timely taken. Therefore, we recall the rule to show cause and maintain the appeal.

Judgment Appealed

At the outset, we note that the defendant's motion for devolutive appeal stated that the defendant desired to appeal from the "final judgment" rendered "on March 17, 2010 on a Motion for New Trial and Petition for Nullity." This description of the judgment appealed presents an ambiguity. The trial court issued written reasons on March 17, 2010, denying the defendant's motions for new trial and for nullity of the default judgment previously rendered on August 22, 2008. However, the trial court did not sign a written judgment, so stating, until June 4, 2011.[2]

A judgment denying a motion for new trial is an interlocutory order, which is appealable only when expressly provided by law pursuant to LSA-C.C.P. art. 2083(C) (as amended by 2005 La. Acts, No. 205, § 1, effective January 1, 2006); an interlocutory order is not a final, appealable judgment. See **McClure v. City of Pineville**, 2005-1460, p. 3 (La. App. 3 Cir. 12/6/06), 944 So.2d 805, 807, writ denied, 2007-0043 (La. 3/9/07), 949 So.2d 446. However, when a motion for appeal refers by date to the judgment denying a motion for new trial, but the circumstances indicate that the appellant actually intended to appeal from the final judgment on the

[2] Even though the defendant's appeal was taken prior to the signing of the judgment denying the motion for new trial and for nullity, any prematurity in the filing of the appeal was cured by the signing of judgment. See LSA-C.C.P. art. 2087(D) (stating: "An order of appeal is premature if granted before the court disposes of all timely filed motions for new trial or judgment notwithstanding the verdict. The order becomes effective upon the denial of such motions."); **Oliver v. Oliver**, 411 So.2d 596 (La. App. 1 Cir.1982). See also **Overmier v. Traylor**, 475 So.2d 1094 (La. 1985); **Davis v. Witt**, 2001-894 (La. App. 3 Cir. 8/1/01), 796 So.2d 38.

merits, the appeal should be maintained as being taken from the judgment on the merits. Factors showing such an intent include: the appellant's assertion to that effect, whether the parties briefed issues on the merits of the final judgment, and whether the language of the order granting the appeal indicated that it was from the judgment denying a new trial. When it is clear that reference to the judgment denying a new trial was merely due to inadvertence, a court may conclude that an appellant actually intended to appeal from the judgment on the merits. See **Dural v. City of Morgan City**, 449 So.2d 1047, 1048 (La. App. 1 Cir. 1984). See also **McClure v. City of Pineville**, 2005-1460 at p. 3, 944 So.2d at 807.

In this case, the defendant identified the judgment sought to be appealed as the "final" judgment rendered "on March 17, 2010." The March 17, 2010 date could only have applied to the motion for new trial, and the judgment was not otherwise identified in the language of the motion for appeal. Notwithstanding, the defendant's arguments before this court make it clear that the judgment intended for appeal was the August 22, 2008 default judgment against the defendant,[3] and additionally, the denial of the motion for new trial and for nullity of the default judgment. Thus, the appeal should be maintained. See **Dural v. City of Morgan City**, 449 So.2d at 1049; **Fuqua v. Gulf Insurance Company**, 525 So.2d 190, 192 (La. App. 3 Cir. 1988).

Default Judgment

In a city court, when a defendant fails to answer timely, *and the plaintiff proves his case*, a default judgment in favor of the plaintiff may be rendered, without the necessity of a prior default. See LSA-C.C.P. art.

[3] All of the defendant/appellant's assignments of error raise issues related to the validity and propriety of the rendition of that default judgment.

4904(A). The plaintiff may obtain a default judgment only by producing relevant and competent evidence that establishes a *prima facie* case. When the suit is for a sum due on an open account, promissory note, negotiable instrument, or other conventional obligation, *prima facie* proof may be submitted by affidavit. See LSA-C.C.P. art. 4904(B). See also LSA-C.C.P. arts. 1701 - 1704. For a plaintiff to obtain a default judgment, he must establish the elements of a *prima facie* case with competent evidence, as fully as though each of the allegations in the petition were denied by the defendant. See **Arias v. Stolthaven New Orleans, L.L.C.**, 2008-1111, p. 7 (La. 5/5/09), 9 So.3d 815, 820; **Thibodeaux v. Burton**, 538 So.2d 1001, 1004 (La. 1989).

In the instant case, it appears from the plaintiff's petition that the obligation sued upon was contractual, in part,[4] which would be a conventional obligation subject to rendition of a default judgment pursuant to LSA-C.C.P. art. 4904. However, the documentation presented in support of the claim did not establish that Corrent's Trucking was a party to the contract at issue.

It was Mr. Cannella, either personally and/or on behalf of Bucky's Trucking, who agreed to "excavate and remove dirt at a $1.00 per yard taken off of the property referenced above and owned by Gerald J. Dupont." Mr. Cannella also agreed to "pump and dry the pond out prior to excavating . . . [and to] enlarge the perimeter of the pond." The plaintiff, Mr. Dupont,

[4] Although we find it unnecessary to resolve the issue in disposing of this appeal, we note that to the extent the plaintiff sought to recover for his pond being left "in terrible condition," such damage would seem to be delictual. Since LSA-C.C.P. art. 4904(C) authorizes rendition of default judgments, without a hearing, "[w]hen the sum due is on an open account, promissory note, negotiable instrument, or other conventional obligation," the implication of this language is that if the claim does not fit within any of these categories, a hearing is required. See **French Market Foods of La., Inc. v. Atterberry Idealease, Inc.**, 2007-1035, p. 2 (La. App. 3 Cir. 1/30/08), 975 So.2d 152, 155.

further asserted in his petition that $11,645 was owed to him and had not been paid.[5]

The only evidence offered to show Corrent's Trucking was involved in this contractual relationship was a copy of a letter purportedly written by "Latrell Corrent," whose legal relationship to Corrent's Trucking was not revealed, and which stated, "Enclosed is the final payment for dirt that was removed from your property on Hwy. 1148. All work has been completed as we agreed." This letter, alone, does not prove that Corrent's Trucking was an obligor on the Cannella/Dupont contract. Accordingly, we find the trial court erred in granting a default judgment against Corrent's Trucking.[6]

CONCLUSION

For the reasons assigned herein, we grant the motion to supplement the record, recall the rule to show cause and maintain the appeal, and reverse the judgment of the trial court, granting a default judgment in favor of Gerald J. Dupont and against Corrent's Trucking, LLC. All costs of this appeal are to be borne by Gerald J. Dupont.

MOTION TO SUPPLEMENT RECORD GRANTED; RULE TO SHOW CAUSE RECALLED; APPEAL MAINTAINED; DEFAULT JUDGMENT REVERSED.

[5] It was implied, though not directly stated by the plaintiff, that Mr. Cannella had removed 30,000 yards of dirt, since the payments alleged to have been made ($18,355), when added to the amount alleged to have been owed ($11,645), amounted to $30,000 (at $1 per yard).

[6] Having decided the appeal on this basis, we find it unnecessary to address the remaining assignments of error.