

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2009 CA 0062

JANE FORD NEWMAN

VERSUS

JOHN A. NEWMAN

Judgment Rendered: September 11, 2009.

* * * * *

On Appeal from the
21st Judicial District Court,
In and for the Parish of Tangipahoa,
State of Louisiana
Trial Court No. 80300

The Honorable Ernest G. Drake, Jr., Judge Presiding

* * * * *

Nicole R. Dillon
Frank J. Divittorio
Hammond, LA

Attorney for Defendant/Appellant,
John A. Newman

Mark M. Dennis
Covington, LA

Attorney for Plaintiff/Appellee,
Jane Ford Newman

* * * * *

BEFORE: CARTER, C.J., GUIDRY AND PETTIGREW, JJ.

CARTER, C. J.

John Newman appeals a default judgment partitioning community property.

FACTS AND PROCEDURAL HISTORY

John Newman and Jane Ford Newman were divorced in 1986. In 2006, Jane, now Jane Coates, petitioned the court for a partition of the parties' community property. In her detailed descriptive list, Ms. Coates listed the community assets as a house that was appraised for \$175,000.00, less the \$20,000.00 value of land, which she states is Mr. Newman's separate property. Under the subheading of her separate property, Ms. Coates lists a \$50,000.00 investment in the house.

Mr. Newman was served with the petition but did not answer the petition or make an appearance of record. On motion of Ms. Coates, a preliminary default was entered. After a hearing, the trial court rendered judgment confirming the default judgment and purporting to partition the community estate that existed between Mr. Newman and Ms. Coates. The judgment includes calculations showing the subtotal of gross equity to be \$105,000.00, arrived at by deducting the value of land (\$20,000.00), which is noted to be Mr. Newman's separate property, and the reimbursement due Ms. Coates (\$50,000.00), from the appraised value of the house (\$175,000.00). The total due Ms. Coates upon sale of the property is stated to be \$102,500.00 (reimbursement of \$50,000.00 plus half of the gross equity of the property, which is calculated to be \$52,500.00), and the total due Mr. Newman upon sale of the property is stated to be \$72,500.00 (the \$20,000.00 value of his separate property plus half of the gross equity of the property, which is stated to be \$52,500.00). The judgment concludes "that

there be judgment herein in favour of Ms. Coates and against Mr. Newman in the amount of \$102,500.00.”

Mr. Newman has appealed, asserting multiple assignments of error alleging that the default judgment improperly provides relief different from that requested in the petition, that the judgment was improperly based on hearsay evidence, and also asserting errors based upon LSA-R.S. 9:2801, which sets forth the procedures for partitioning community property. Additionally, Mr. Newman filed in this court a peremptory exception raising the objection of prescription, contending that Ms. Coates’ claim for reimbursement has prescribed by virtue of ten-year liberative prescription.

DISCUSSION

Confirmation of a default judgment is similar to a trial and requires, with admissible evidence, proof of the demand sufficient to establish a prima facie case. LSA-C.C.P. art. 1702A; **Arias v. Stolthaven New Orleans, L.L.C.**, 08-1111 (La. 5/5/09), 9 So.3d 815, 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. In other words, the plaintiff must present competent evidence that convinces the court that it is probable that she would prevail at trial on the merits. A plaintiff seeking to confirm a default must prove both the existence and the validity of her claim. **Arias**, 9 So.3d at 820. A default judgment cannot be different in kind from what is demanded in the petition and the amount of damages must be proven to be properly due. LSA-C.C.P. art. 1703.

In her petition to partition, Ms. Coates contends that community property existed. The only community asset listed in her detailed descriptive list is the house. Louisiana Civil Code article 2340 provides that things in

the possession of a spouse during the existence of a community property regime are presumed to be community, but either spouse may prove that they are separate property. Although it is not so clear in her detailed descriptive list, the record establishes that the house was built on land that is Mr. Newman's separate property, using funds that were Ms. Coates' separate property. Louisiana Civil Code article 2367.1 provides that "[b]uildings, other constructions permanently attached to the ground, and plantings made on the land of a spouse with the separate assets of the other spouse belong to the owner of the ground." And, in fact, on appeal, Ms. Coates acknowledges that the house that was built on Mr. Newman's separate property is owned by Mr. Newman.

An essential element of Ms. Coates' claim for partition of community property is proof that the property (here, the house) is in fact community property. Considering the record before us, we find that in seeking to confirm the default judgment, Ms. Coates failed to meet her burden of offering proof of her demand sufficient to establish a prima facie case. Specifically, Ms. Coates failed to prove the existence and validity of her claim. Accordingly, the default judgment must be set aside.

Mr. Newman has filed with this court a peremptory exception raising the objection of prescription, contending that Ms. Coates' claim for reimbursement has prescribed. Resolution of this issue will depend on a determination of what rights Ms. Coates has with regard to the property. Although neither party has requested that this matter be remanded for consideration of this issue, we find it appropriate to vacate the trial court's judgment for lack of proof necessary to confirm the default judgment and

remand this matter for further proceedings, including consideration of Mr. Newman's arguments regarding prescription.

CONCLUSION

For the reasons stated herein, the judgment of the trial court is vacated, and this matter is remanded to the trial court for further proceedings. Costs of this appeal are assessed to Jane Ford Newman Coates.

JUDGMENT VACATED, CASE REMANDED.