

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 CA 2194

JONAH NOVAK

VERSUS

LARRY DUET, WESTSIDE WHOLESALE, INC. AND D&C, INC. d/b/a

SCHRIEVER AUTO PARTS, INC.

Judgment Rendered: May 6, 2011.

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On Appeal from the
32nd Judicial District Court,
In and for the Parish of Terrebonne
State of Louisiana
District Court No. 155,128

The Honorable John R. Walker, Judge Presiding

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BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.

CARTER, C.J.

D&C, Inc. d/b/a Schriever Auto Parts (D&C) appeals a default judgment taken against it by Jonah Novak in a suit arising out of an automobile accident. For the following reasons, we reverse and remand for new trial.

FACTS AND PROCEDURAL HISTORY

On June 16, 2008, plaintiff/appellee, Jonah Novak, was involved in an automobile collision with defendant/appellee, Larry Duet. In August 2008, Novak filed his original petition for damages against Duet and Westside Wholesale, Inc. (Westside), alleging the vehicle driven by Duet was owned by Westside at the time of the accident. Novak then filed a first supplemental and amending petition naming Schriever Auto Parts, Inc. (Schriever) as an additional defendant, alleging that Schriever was the owner of the vehicle at the time of the accident because Duet was acting as its purchasing agent. Thereafter, in April 2009, Novak filed a second supplemental and amending petition substituting D&C, Inc. d/b/a Schriever Auto Parts, Inc. (D&C) for Schriever as owner of the vehicle at the time of the accident.

Pursuant to Novak's motion for preliminary default, an order was issued by the district court on August 5, 2009, directing that preliminary default be entered against D&C.

On December 14, 2009, Novak filed a motion to confirm the default judgment against D&C. A hearing was held on March 9, 2010, on Novak's motion to confirm. Novak testified at the hearing and filed into evidence a copy of his medical records and expenses, vehicle repair estimates, and the police accident report. Based on the testimony and evidence presented, the district court confirmed the default judgment against D&C and awarded Novak \$14,726.67 in

damages, interest, and court costs. Notice of signing judgment was served on D&C on March 22, 2010.

D&C filed a motion for new trial on March 30, 2010. Following the hearing on D&C's motion for new trial, the motion was denied in open court. D&C then filed a motion to reconsider the denial of the motion for new trial, which was also denied.

D&C now appeals.

DISCUSSION

When reviewing default judgments, the appellate court is restricted to determining the sufficiency of the evidence offered in support of the judgment. *Arias v. Stolthaven New Orleans, LLC*, 08-1111 (La. 5/5/09), 9 So. 3d 815, 818. This determination is governed by the manifest error standard of review. *Id.*

D&C argues that the confirmation of the default judgment by the trial court was improper under La. Code Civ. Proc. Ann. art. 1702. In support of its argument, D&C asserts Novak failed to present sufficient evidence to establish a *prima facie* case of liability on its part for the negligent actions of Duet.

The confirmation of a default judgment requires "proof of the demand sufficient to establish a *prima facie* case." La. Code Civ. Proc. Ann. art. 1702(A) (emphasis supplied); *Arias*, 9 So. 3d at 820. In order to prove his case, "the plaintiff must present competent evidence that convinces the court that it is probable that he would prevail at trial." *Arias*, So. 3d at 820. A plaintiff seeking to confirm a default judgment must prove both the existence and the validity of his claim. *Id.* 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. La. Code Civ. Proc. Ann. art 1703; *Arias*, So. 3d at 820. Although courts recognize a presumption that a default judgment is supported by sufficient evidence, that

presumption does not attach when the record upon which the judgment is rendered indicates otherwise. *Sessions & Fishman v. Liquid Air Corp.*, 616 So. 2d 1254, 1258 (La. 1993).

Where, as here, the record contains a complete transcript of the confirmation proceedings, there is no presumption that the trial court's judgment was based upon sufficient evidence. *Holloway v. Gulf Motors, Inc.*, 588 So. 2d 1322, 1326 (La. App. 2d Cir. 1991). The record in this case reveals that the default judgment was not supported by sufficient evidence.

Novak's second supplemental and amending petition alleged that D&C should be held liable because Duet, acting as purchasing agent for D&C, was driving a vehicle owned by D&C. However, at the hearing on confirmation of the default judgment, the evidence presented by Novak only supported his claim for damages. He failed to submit any evidence in support of his claim that D&C was owner of the vehicle or that Duet was acting as a purchasing agent for D&C.

The only testimony given at the hearing was that of Novak, and he did not testify as to ownership of the vehicle. Likewise, the documentary evidence submitted by Novak did not establish that Duet was acting as a purchasing agent for D&C or that D&C was owner of the vehicle. In fact, the police accident report submitted by Novak lists Westside, Duet's company, as the owner. The other documentary evidence presented by Novak, a copy of his medical records and expenses and a vehicle repair estimate, did not support Novak's claim of liability. No evidence linking D&C to the vehicle driven by Duet was presented. While the documents submitted support Novak's claim for damages, they do not prove the existence and validity of his claim for liability against D&C.

Novak argues that the evidence presented was sufficient to confirm the default judgment. He bases this contention on the fact that Duet and Westside

denied the allegation in Novak's original petition that Duet was driving a vehicle owned by Westside and admitted the allegation in Novak's second supplemental and amending petition that Duet was acting as a purchasing agent and driving a vehicle owned by D&C. Novak claims these answers amount to judicial confessions and were admissible in the hearing on the confirmation of the default judgment. In order for Novak to have established a *prima facie* case of liability against D&C, it was necessary for him to prove the essential allegations of his petition, with competent evidence, to the same extent as if the allegations had been specifically denied. *Power Marketing Direct, Inc. v. Foster*, 05-2023 (La. 9/6/06), 938 So. 2d 662, 670. As discussed above, the allegations of Novak's petition were not proven with competent evidence. In fact, Novak's own exhibits contradicted his assertion as to D&C's liability. *See Carboline Co. v. Hymel*, 335 So. 2d 45, 46 (La. App. 4th Cir. 1976). Moreover, Duet and Westside's answers do not amount to confessions on the part of D&C. "A judicial confession is a declaration made by a party in a judicial proceeding. That confession constitutes full proof *against the party who made it.*" La. Civ. Code Ann. art. 1853 (emphasis added). The confessions made by Duet and Westside are not binding against D&C, and the allegations in Novak's petition alone are insufficient to prove liability.

Because no evidence establishing ownership of D&C or that Duet was acting as a purchasing agent for D&C was presented at the hearing to confirm the default judgment, Novak did not establish a *prima facie* case of D&C's liability under the facts. Accordingly, the default judgment was not properly granted. For that reason, we will not consider any issues raised by D&C's motion for new trial. Those issues should be addressed on remand.

DECREE

For the foregoing reasons, the default judgment is reversed and the case is remanded to the district court for further proceedings. Costs of this appeal are assessed to plaintiff/appellee, Jonah Novak.

REVERSED AND REMANDED.