NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2006 CA 0094

GLENN J. LEBLANC AND JACKLYN V. GIROIR

VERSUS

R & R HARRIS, INC.

JUDGMENT RENDERED: November 3, 2006

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On Appeal from The City Court of Houma
In and For the Parish of Terrebonne
State of Louisiana
Docket Number 05-02236

Honorable Jude Thaddeus Fanguy, Judge Presiding

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Glenn J. LeBlanc Jacklyn V. Giroir Houma, LA	Plaintiffs/Appellees In Proper Person
Randall M. Alfred Houma, LA	Counsel for Defendant/Appellant R & R Harris, Inc.

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BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.

McCLENDON, J.

In this appeal, a defendant challenges a default judgment, asserting that the failure to provide notice in a city court proceeding prior to the taking of the default judgment constituted an "ill practice" rendering the default judgment a nullity. However, because an appeal is not the proper procedural vehicle to assert a claim of nullity for the first time based on ill practices, we dismiss the appeal.

BACKGROUND

On August 19, 2005, plaintiffs, Glenn J. LeBlanc and Jacklyn V. Giroir, filed this lawsuit in Houma City Court against their builder, R & R Harris, Inc., seeking to recover costs for supplies utilized and labor expended in remedying drainage problems on their property. On September 8, 2005, R & R Harris, Inc. filed a motion to transfer the case to the court's regular docket, as well as a motion for extension of time to answer. The city court granted both motions, giving R & R Harris, Inc. until October 3, 2005, to file an answer. On September 20, 2005, the parties were served with notice of the court's rulings.[1]

On November 4, 2005, plaintiffs appeared in city court to present their case. R & R Harris, Inc. was not present. At the outset of the proceeding, the judge stated he was not sure why the plaintiffs were present, and plaintiffs replied that they were told to be present. The judge inquired and was informed by Mr. LeBlanc that R & R Harris, Inc. had not filed an answer in the proceedings. Plaintiffs put on their evidence of the costs incurred in remedying the drainage problems. Thereafter, the judge granted

[1] Although the record contains a service receipt showing that R & R Harris, Inc.'s attorney was personally served with the trial court's rulings, in its brief, R & R Harris, Inc. insists that it did not receive copies of the executed motions, suggesting that the cause thereof was the significant disruption in telephone and mail service in the aftermath of Hurricane Katrina.

judgment in favor of plaintiffs for the full amount of damages they sought, $1,517.20.

R & R Harris, Inc. filed a motion for a suspensive appeal, acknowledging therein that notice of the judgment had been mailed to it on November 30, 2005.

DISCUSSION

In this appeal, R & R Harris, Inc. contends that the trial judge committed reversible error when it permitted the plaintiffs to take a default judgment without prior notice by certified mail of their intent to take the default judgment as mandated by Louisiana Code of Civil Procedure article 1702(A). Appellant submits that because it made a general appearance in the proceeding by filing the motions for extension of time to answer and to transfer the case to the regular docket, the rendition of the judgment constituted an "ill practice" because of the lack of notice. R & R Harris, Inc. asks that this court annul the judgment or remand the case for further proceedings upon proper prior notice being given to all parties.

However, it is clear that Article 1702(A) does not apply in a city court proceeding. Louisiana Code of Civil Procedure article 4904 provides that in a suit in a city court, if a defendant fails to answer timely or appear at the trial, and the plaintiff proves his case, a final judgment in favor of the plaintiff may be rendered without the necessity of a prior default. Thus, in a city court proceeding, if a defendant fails to answer, a plaintiff may obtain a default judgment without first entering a preliminary default.

Although it has been held that Article 1702(A) does not apply in a city court proceeding, obtaining a default judgment without notice to a defendant who has made a general appearance in the proceeding may constitute an ill practice that renders the default judgment a nullity under Article 2004 of the

Code of Civil Procedure. **Campbell v. Select Car Co., Inc.**, 38,443, p. 6 (La. App. 2 Cir. 5/12/04), 874 So.2d 391, 394, writ denied, 2004-1747 (La. 10/15/04), 883 So.2d 1057. In **Campbell**, after a default judgment was obtained in a city court, the defendant filed a motion for a new trial, arguing that the lack of prior notice of the proceeding rendered the default judgment a nullity. In that case, evidence was presented to the court indicating that the defendant, who filed answers to interrogatories, received formal notice of the trial date and was told by his opponent's attorney that the trial date had been postponed. The court ruled that the absence of notice to the defendant after his appearance constituted an ill practice requiring nullity of the default judgment. The court stressed that the defendant had actual notice of the trial, which would imply that the warning of the citation (*i.e.* answer the suit or be defaulted) no longer applied. Id.

A final judgment obtained by ill practices may be annulled. LSA-C.C.P. art. 2004(A).[2] The term "ill practices" encompasses all situations where a judgment is rendered through some improper practice or procedure which operates, even innocently, to deprive the party cast in judgment of some legal right, if the enforcement of the judgment would be unconscionable and inequitable. See **Kem Search, Inc. v. Sheffield**, 434 So.2d 1067, 1070 (La. 1983). Thus, when a defendant fails to appear and defend, an important factor in determining whether the judgment should be annulled is whether the failure to appear was justified. F. Maraist and H. Lemmon, Civil Procedure, § 12.6 at 338 (1999).

However, there is no evidence in the record before us regarding the circumstances surrounding the obtaining of the default judgment. Such evidence is essential to ascertain whether the failure to provide notice prior

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[2] An action to annul a judgment on the basis of ill practices must be brought within one year of the discovery of ill practices by the plaintiff in the nullity action. LSA-C.C.P. art. 2004(B).

to the default constituted an ill practice. An appeal is not the proper procedural vehicle to challenge the validity of the default judgment on the basis of ill practices. Rather, the appropriate remedy for the defendant is to bring an action for nullity, at which time R & R Harris, Inc. can introduce evidence in support of its claim that the absence of prior notice constituted an ill practice rendering the default judgment a nullity. See **Roach v. Pearl**, 95-1573, p. 3 (La. App. 1 Cir. 5/10/96), 673 So.2d 691, 693; LSA-C.C.P. art. 2004.

Accordingly, for the above reasons, the appeal is dismissed at appellant's cost.

APPEAL DISMISSED.