NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2010 CA 0320

DARREL P. ST. PIERRE D/B/A P&L TOWING, INC.

VERSUS

JAMBON & ASSOCIATES, LLC AND JOSH J. JAMBON

Judgment Rendered: October 29, 2010

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Appealed from the
Seventeenth Judicial District Court
In and for the Parish of Lafourche
State of Louisiana
Docket Number 109781

The Honorable John E. LeBlanc, Judge Presiding

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BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

WHIPPLE, J.

This matter is before us on appeal by defendant, Jambon & Associates, LLC (hereinafter "Jambon"), from a judgment rendered on confirmation of default in favor of plaintiff, P&L Towing, Inc. (hereinafter "P&L"). For the following reasons, we vacate the judgment and remand to the trial court for further proceedings.

FACTS AND PROCEDURAL HISTORY

On July 18, 2008, P&L filed a "Petition on Open Account and for Breach of Contract" naming Jambon as a defendant. Therein, P&L contended that Jambon failed to make payments due in connection with Jambon's lease of a barge from P&L in 2006. Accordingly, P&L sought judgment for the unpaid balance on Jambon's account in the amount of $87,178.25, as well as legal interest, attorney's fees, and costs. On August 20, 2008, Jambon was personally served with notice of the suit through its registered agent for service, Josh J. Jambon. Jambon failed to answer the suit.

On September 30, 2008, P&L filed a motion for preliminary default, which was signed by the trial court on October 3, 2008. On December 18, 2008, the matter was heard before the trial court. After receiving testimony and evidence, the trial court confirmed the preliminary default and rendered judgment in favor of P&L, but in the amount of $81,379.75, plus legal interest and costs. A written judgment in accordance with the trial court's ruling was signed by the trial court on December 19, 2008.

On December 29, 2008, Jambon filed a motion for new trial, which was denied by the trial court after a hearing on November 3, 2009. A judgment denying the motion for new trial was signed by the trial court on December 8, 2009. Jambon then filed the instant suspensive appeal from the December 19, 2008 judgment, assigning the following as error:

1. The evidence presented by P&L at the confirmation hearing on December 18, 2008 was insufficient to justify and support the confirmation judgment because that evidence did not present a prima facie case against Jambon;

2. The trial court committed a legal error by concluding that charter hire continues after a vessel is returned by the charterer to the owner and an off charter survey performed until repairs are made; and

3. The trial court committed error in failing to annul the preliminary and confirmation default judgments and in failing to grant Jambon's motion for a new trial.

After the appeal was lodged and the matter docketed, all parties jointly requested that this court "grant the appeal of Jambon & Associates, L.L.C." However, the parties also jointly requested that this court "vacate the judgment rendered in this matter on December 19, 2008, and remand the case to the district court for further proceedings upon representing to the court that all parties agree that insufficient evidence to sustain the judgment was submitted below and that the appeal should therefore be granted."

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. 1702(A). In order to confirm a default judgment when the sum due is on an open account or a promissory note or other negotiable instrument, an affidavit of the correctness thereof shall be prima facie proof. LSA-C.C.P. art. 1702(B)(3). In order to confirm a default judgment when a demand is based upon a conventional obligation, affidavits and exhibits annexed thereto which contain facts sufficient to establish a prima facie case shall be admissible, self-authenticating, and sufficient proof of such demand. However, the court may, under the circumstances of the case, require additional evidence in the form of oral testimony before entering judgment. LSA-C.C.P. art. 1702(B)(1).

The elements of a prima facie case must be established with competent evidence, as fully as though each of the allegations in the petition were denied by the defendant. Arias v. Stolthaven New Orleans, L.L.C., 2008-1111 (La. 5/5/09), 9 So. 3d 815, 820. A plaintiff seeking to confirm a default must prove both the existence and the validity of his claim. Moreover, 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.

When reviewing a default judgment, an appellate court is restricted to a determination of the **sufficiency of the evidence** offered in support of a default judgment. Grevemberg v. G.P.A. Strategic Forecasting Group, Inc., 2006-0766 (La. App. 1st Cir. 2/9/07), 959 So. 2d 914, 918. When a default judgment recites that the plaintiff has produced due proof in support of his demand and that the law and evidence favor the plaintiff and are against the defendant, there is a presumption that the default judgment has been rendered upon sufficient evidence to establish a *prima facie* case and is correct, and the appellant has the burden of overcoming that presumption. Grevemberg v. G.P.A. Strategic Forecasting Group, Inc., 959 So. 2d at 918. However, that presumption does not apply where, as here, the testimony is transcribed and is contained in the record. Grevemberg v. G.P.A. Strategic Forecasting Group, Inc., 959 So. 2d at 918. In such a case, the reviewing court must determine from the record whether the evidence on which the judgment is based was **sufficient and competent**. Bates v. Legion Indemnity Company, 2001-0552 (La. App. 1st Cir. 2/27/02), 818 So. 2d 176, 179. Accordingly, no presumption of correctness would apply herein if we were to determine the merits of the appeal. Instead, this court would be required to review the record and determine whether the evidence upon which the judgment

is based was sufficient and competent. Bates v. Legion Indemnity Company, 818 So. 2d at 179.[1]

DISPOSITION OF THE APPEAL

Pursuant to LSA-C.C.P. art. 1972, a motion for new trial shall be granted, upon contradictory motion of any party, when the verdict or judgment appears clearly contrary to the law and the evidence. In addition, a discretionary ground for a new trial is set forth in LSA-C.C.P. art. 1973, which authorizes the court to grant a new trial in any case if there is good ground for it. Guidry v. Millers Casualty Insurance Company, 2001-0001 (La. App. 1st Cir. 6/21/02), 822 So. 2d 675, 680. Generally, the court's discretion in ruling on a motion for new trial is great, and its decision will not be disturbed on appeal absent an abuse of that discretion. Moran v. G & G Construction, 2003-2447 (La. App. 1st Cir. 10/29/04), 897 So. 2d 75, 83, writ denied, 2004-2901 (La. 2/25/05), 894 So. 2d 1148.

The proper vehicle for a substantive change in a **judgment** is a timely **motion for a new trial** or a timely **appeal**. Avants v. Kennedy, 2002-0830 (La. App. 1st Cir. 12/20/02), 837 So. 2d 647, 653-654, writ denied, 2003-0203 (La. 4/4/03), 840 So. 2d 1215, citing LaBove v. Theriot, 597 So. 2d 1007, 1010 (La. 1992). Further, the Louisiana Supreme Court has also recognized that, on

[1]The petition filed by P&L herein was for a suit on open account and for breach of contract. Specifically, the petition alleged that Jambon and P&L entered into a contract in 2006, through which Jambon leased Barge BWS104 from P&L. The petition further alleged that on October 4, 2006, Barge BWS104 was damaged when it struck a bridge piling in Lafourche Parish while being operated by Jambon. P&L contended that pursuant to the contract, Jambon was required to return the barge in the same condition it was in prior to its lease. P&L further contended that Jambon had agreed that P&L would advance the costs of repair, which would be invoiced along with the contracted daily rate. Finally, P&L contended that Jambon had failed to comply with the terms as agreed upon, had failed to make payments on account when due, and was in default. At the confirmation hearing, P&L essentially relied upon the testimony of Darrel St. Pierre, the owner and operator of P&L and documents identified by him. Thus, P&L sought judgment for the balance due on the account, plus attorney's fees and costs.

its own motion and with the consent of the **parties**, the **trial** court may **amend** a **judgment** substantively. LaBove v. Theriot, 597 So. 2d at 1010.

In the matter before us, the parties have specifically agreed that the default judgment was based on evidence, which they now agree is legally insufficient to sustain the judgment rendered below. Given the procedural posture of this case and the unusual nature of the **joint** motion, urging us to "grant the appeal," but to "vacate the judgment" by consent and remand for further proceedings, including, presumably, a new trial, this court invited the trial court to file a per curiam in regard to the parties' request. In response, the trial court expressed no opposition to the motion, stating as follows:

> This Per Curiam is being submitted in response to a request from the First Circuit in the above-referenced matter. After a phone conference with counsel for both parties and in consideration of the Joint Motion to Grant Appeal, Vacate Judgment and Remand [the] matter for further proceedings, this Court has no opposition to the joint motion. The record is on appeal; and therefore, I am unable to review the evidence. However, I am satisfied that if the parties agree that the evidence was insufficient, then the appeal should be granted, judgment vacated and the matter remanded to this Court to be set for trial upon issue being joined.

It is well settled that courts will not decide abstract, hypothetical, or moot controversies, or render **advisory opinions** with respect to **controversies**. Cases submitted for adjudication must be **justiciable** and ripe for decision. A **"justiciable controversy"** is one presenting an **existing actual and substantial dispute** involving the legal relations of parties who have **real, adverse interests.** A **"justiciable controversy"** is thus distinguishable from one that is moot. Further, jurisdiction, once established, may abate if a case becomes moot, inasmuch as the controversy must exist at every stage of the proceedings, including appellate stages. See In re E.W., 2009-1589 (La. App. 1st Cir. 5/7/10), 38 So. 3d 1033, 1036-1037.

As an appellate court, we are not empowered to render an advisory opinion on the merits (or lack thereof) of an appeal premised on the legal sufficiency of the evidence upon which the lower court's judgment was based where, as here, the parties have jointly represented to this court that the evidence submitted below was legally insufficient. Thus, in accordance with the above cited precepts, and considering the joint motion of the parties and the trial court's per curiam, we pretermit a decision on the merits of the assignments of error, vacate the judgment at issue on appeal, and remand for further proceedings as requested by the parties.

CONCLUSION

For the above and foregoing reasons, the December 19, 2008 judgment of the trial court is vacated. Costs of this appeal are assessed equally to the parties, pursuant to LSA-C.C.P. art. 2164.

JUDGMENT VACATED; REMANDED FOR FURTHER PROCEEDINGS.