NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2008 CA 0842

LOUISIANA WORKERS' COMPENSATION CORPORATION

VERSUS

ASCENSION POOLS, L.L.C.

Judgment Rendered: SEP 2 3 2008

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On Appeal from the
19th Judicial District Court
In and for the Parish of East Baton Rouge,
State of Louisiana
Trial Court Number 558,242

Honorable Timothy E. Kelley, Judge Presiding

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BEFORE: KUHN, GUIDRY, AND GAIDRY, JJ.

Disposition: AFFIRMED

KUHN, J.

The defendant appeals a confirmation of a default judgment rendered against it in favor of the plaintiff in the Nineteenth Judicial District Court. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

On August 16, 2007, the plaintiff, Louisiana Workers' Compensation Corporation (LWCC), filed suit against the defendant, Ascension Pools, L.L.C. (Ascension Pools), seeking recovery of unpaid premiums due on a policy of workers' compensation insurance issued to the defendant. The petition alleges that Ascension Pools is indebted to LWCC in the amount of $47,075.46, along with attorneys' fees and interest. The following exhibits are attached to the petition: (1) a certified copy of the continuing annual policy of insurance, number 104095, which was executed and became effective on January 24, 2004, reissued on January 24, 2005, and again on January 24, 2006; (2) a copy of the application of Ascension Pools for workers' compensation insurance coverage; (3) a copy of policy Endorsement LWCC38B, which increased the estimated premium in 2005 by less than $200.00 due to a payroll change; (4) an invoice, dated February 13, 2007, payable to LWCC by Ascension Pools, referencing the insurance policy number and reflecting $47,075.46 as the amount due; (5) a demand letter, dated March 21, 2007, from LWCC to Ascension Pools for the sum of $47,075.46, referencing the insurance policy number; and (6) a copy of LWCC's Policy Summary Statement, dated June 20, 2007, referencing the insurance policy number and reflecting a current balance of $47,075.46.

On October 4, 2007, LWCC filed a motion for preliminary default asserting that although the defendant was served with a copy of the suit in this matter on August 22, 2007, it did not file any responsive pleadings, and the legal delays for

filing had elapsed. On October 10, 2007, the district judge signed an order granting the motion and entering the preliminary default.

On November 2, 2007, the plaintiff filed into the record a certification by Chad Berry, counsel for the plaintiff, dated October 16, 2007, attesting that the suit arises from a contract and that "[a]ll necessary Invoices, Affidavits and/or Notes are attached to the original Petition filed herein." The certification further provided that the defendant was served with the original petition on August 22, 2007 through personal service, and that a preliminary default was entered and signed on October 10, 2007.

Additionally, on November 2, 2007, the plaintiff filed a motion to confirm the default judgment, asserting that the defendant had failed to file opposition to the petition and that all necessary proof was submitted along with the motion to confirm default judgment, including but not limited to a certified copy of the contract and the certification required by LSA-C.C.P. art. 1702.1(A) and (B). The plaintiff asserted in its motion that the sum due is based on a contract between the parties and that accordingly, a hearing in open court is not required under LSA-C.C.P. art. 1702(C), unless the district court, in its discretion, directs that such a hearing be held. Furthermore, the record also contains a clerk's certificate, signed on November 8, 2007, which certifies that the record was examined and there was no answer, opposition, or other responsive pleadings filed in the record by the defendant.

The plaintiff also filed into the record on November 2, 2007 an affidavit signed on October 16, 2007 by Lori Bell, the Collections Litigation Section Premium Audit Specialist for LWCC, who attested that she is well acquainted with the account of Ascension Pools and that the correct amount owed to LWCC

pursuant to the contract of insurance, Policy Number 104095, is $47,075.46, plus interest as prayed for, subject to no credit.

On December 3, 2007, the district judge signed a judgment finding the law and evidence to be in favor of the plaintiff, confirming the preliminary default and granting judgment in favor of LWCC and against Ascension Pools in the amount of $47,075.46, together with legal interest from judicial demand, all costs, and the attorneys' fees fixed in the sum of $5,000.00.[1] From this judgment, the defendant now appeals.[2]

LAW AND DISCUSSION

On appeal, the defendant contends that the district court erred in confirming the default judgment against it because LWCC did not submit sufficient, competent or admissible evidence establishing its *prima facie* case of entitlement. Pursuant to LSA-C.C.P. art. 1702(A), a judgment of default must be confirmed by proof of the demand sufficient to establish a *prima facie* case. Pursuant to LSA-C.C.P. art. 1702(B)(1), 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. According to Article 1702(B), the district court may, under the circumstances of the case, require additional evidence in the form of oral testimony before entering judgment. Pursuant to LSA-C.C.P. art. 1702(C), in those

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[1] Pursuant to the contract, attorneys' fees may be fixed at $500.00 or 25% of the unpaid balance, whichever is greater.

[2] On January 18, 2008, in the same captioned matter, Ascension Pools filed a petition to nullify the default judgment, based upon alleged fraud and ill practices. On February 19, 2008, LWCC filed an exception of no cause of action, asserting that Ascension Pools failed to plead a valid reason for its failure to defend the suit prior to the granting of the default judgment. According to the last minute entry in the record before us, on April 21, 2008, a hearing was held in the district court on the exception, with counsel for both parties present. The matter was argued and submitted. According to the minute entry, the "motion was granted," and the defendant was given fifteen days "to cure [the] defect."

proceedings in which the sum due is on an open account or a promissory note, other negotiable instrument, or other conventional obligation, a hearing in open court shall not be required unless the judge, in his discretion, directs that such a hearing be held. In the instant case, the district court did not require a hearing in open court prior to confirming the default.

For the 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. **Grevemberg v. G.P.A. Strategic Forecasting Group, Inc.**, 06-0766, p. 6 (La. App. 1st Cir. 2/9/07), 959 So.2d 914, 917. In other words, the plaintiff must present competent evidence that convinces the court that it is probable that he would prevail on a trial on the merits. **Grevemberg,** 06-0766 at p. 6, 959 So.2d at 917-18. 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. 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,** 06-0766 at p. 6, 959 So.2d at 918. Accordingly, in the instant case, the defendant has the burden of overcoming the presumption that the default judgment has been rendered upon sufficient evidence to establish a *prima facie* case and is correct.

Calculation of Premiums

The defendant points out that the Policy Summary Statement, dated June 20, 2007, reflects premiums, for each of the three annual policy terms, that are substantially higher than the estimated premiums set forth in each policy premium

statement. In the 2004 policy, the total estimated annual premium is $1,200.00. In the 2005 policy, the total estimated annual premium is $2,000.00, and in the 2006 policy, the total estimated annual premium is $5,627.00. The defendant contends this creates confusion regarding the amounts due and urges that when a contract of insurance is ambiguous, it should be interpreted in favor of the insured. The defendant argues that, for the final premium to become part of the contract of insurance, it must be made part of the policy by endorsement.

The defendant points out that the only change in the premium amount reflected in a policy endorsement is a "Change in Remuneration Endorsement" towards the back of the policy covering the period from January 24, 2005 through January 24, 2006, in which the estimated annual premium was increased from $5,067.00 to $5,223.00, due to a payroll change. The defendant notes that at no time during the three annual terms covered by the policy was an endorsement added to the policy reflecting an increase of the premium to the amounts sought in the plaintiff's petition.

Section E, entitled "Final Premium," on page six of each policy, provides, in pertinent part:

> The premium shown on the Information Page, schedules, and endorsements is an estimate. The final premium will be determined after this policy ends by using the actual, not the estimated, premium basis and the proper classifications and rates that lawfully apply to the business and work covered by this policy. If the final premium is more than the premium you paid to us, you must pay us the balance. If it is less, we will refund the balance to you.

Furthermore, Section A, on page one of each policy, provides, in pertinent part:

> This Policy includes at its effective date the Information Page and all endorsements and schedules listed there. It is a contract of insurance between you ... and us .... *The only agreements relating to this insurance are stated in this policy. The terms of this policy may not be changed or waived except by endorsement issued by us to be part of this policy.* (Emphasis added)

The plaintiff counters herein that by virtue of the terms of the contract, the total annual premium could not be precisely calculated until the end of the term of each annual policy period. Stated at the top of each of the three policy pages estimating the annual premium is the following:

> The premium for this policy will be determined by our Manuals of Rules, Classifications, Rates and Rating Plans. All information required below is subject to verification and change by audit.

Furthermore, section G on page six of the policy provides that the defendant will allow LWCC to examine and audit all of its records that relate to the policy. Section D on page six of each policy provides that all premiums must be paid when due. The plaintiff argues that the final total annual premium is calculated after the policy period has terminated, and there is no requirement to endorse the policy with the final premium, especially since the policy expires before such time as the premium is calculated. Rather, LWCC prepared the Policy Summary Statement reflecting that: (1) $4,941.00 is the total calculated premium due for 2004; (2) $37,871.00 is the total calculated premium due for 2005; and (3) $31,730.00 is the total calculated premium due for 2006. According to the Policy Summary Statement, the current balance of all premiums due after the deduction of total payments and adjustments is $47,075.46.

The plaintiff's Exhibit E reflects a letter by LWCC addressed to Ascension Pools containing an invoice date of February 13, 2007 and the policy number. The letter advises that the policy was cancelled on November 7, 2006, and that the final balance owed is $47,075.46. The letter contains a description of transactions as well as a previous balance and current invoice amount. In addition, the plaintiff's Exhibit D is a letter[3] by LWCC to Ascension Pools, dated March 21, 2007,

[3] The exhibit includes a first-class mail postage mark. However, the return receipt request is not signed by a representative of Ascension Pools, and there is no explanation in the record for the absence of the signature.

reflecting the policy number and demanding payment of $47,075.46 to its collection department within fifteen days.

We find the defendant's argument is without merit. The contract anticipates that the final premium is to be determined after each annual policy term ends. Contrary to the defendant's assertions, the policy unambiguously provides that only a change or waiver of a term of the contract requires an endorsement to the contract.

Promissory Notes

The defendant asserts that the exhibits attached to the plaintiff's original petition reflect that there were one or more promissory notes in existence comprising part of the debt allegedly owed by the defendant to the plaintiff. The defendant points out the plaintiff's Exhibit E, the letter with an invoice date of February 13, 2007, advising Ascension Pools that the policy had been cancelled, in which there is a notation under the charge column pertaining to a promissory note in the amount of $9,720.50. The notation is dated December 5, 2006. The defendant further points out three notations in the plaintiff's Exhibit F, the Policy Summary Statement. Under the heading of "Financial Transactions," there are references to two promissory notes, each in the amount of $9,720.50, and above these references is one reference to a "write-off," in the amount of $19,441.00, which appears to represent the sum of the two promissory notes. These promissory notes and any credit given for them are not mentioned elsewhere in the plaintiff's documentation. Furthermore, Lori Bell, LWCC's audit specialist, stated in her affidavit that the amount owed was subject to no credit.

The defendant asserts that the district court should have given credit for the sum of $19,441.00 and disregarded the balance claimed by the plaintiff. Furthermore, the defendant complains that the plaintiff failed to include copies of the promissory notes with its petition and failed to follow the procedures required

in obtaining a default judgment on the promissory notes, pursuant to LSA-C.C.P. art. 1702.1.

The defendant contends there can be only one of three explanations for the notations pertaining to the promissory notes: (1) the debt on the policy was reduced by promissory notes that are not in default; (2) the promissory notes are in default; or (3) the notations referencing the promissory notes are in error.

To the contrary, the plaintiff asserts herein that the most likely explanation is that no signed promissory note was ever returned to LWCC by the defendant. The plaintiff asserts that this would explain why the write-off notation appears on the Policy Summary Statement and is then reversed by the following two lines. The plaintiff points out that as the Policy Summary Statement details the credits and debits to the policy premium, it is evident that the notations cancel each other and do not change the balance owed. This also would explain why the plaintiff did not file suit pursuant to a promissory note, since no promissory note is in existence. The plaintiff points out that the final sum owing is consistently reflected in all of its documentation. We agree with the plaintiff that the sum due pursuant to the contract of insurance is clearly and consistently reflected in the documentation placed in evidence. Accordingly, we find the defendant's argument is without merit.

Competent Admissible Proof

Finally, the defendant contends herein that there is no proof that the exhibits attached to the plaintiff's petition were entered into evidence to be considered by the district court in connection with the default judgment. The defendant cites the case of **Louisiana Workers' Compensation Corporation v. Poston Industrial Maintenance Company, Inc**, 97-2612 (La. App. 4th Cir. 8/5/98), 716 So.2d 502, 504, in which the appellate court held that the record did not contain sufficient

evidence of terms and conditions of an insurance contract and the amount due under the policy to enter a default judgment in favor of a workers' compensation carrier and against an employer. The appellate court stated that there was no proof that the invoices and other attachments to the plaintiff's petition were admitted into evidence and no attestation to the contents thereof by an affiant with personal knowledge. The appellate court noted that the affidavit of the auditor attesting to the sum owed under the policy was attached to the petition rather than the invoices, and that the affidavit did not identify the account or policy number. Furthermore, the insurance policy was not included with the plaintiff's evidence.

In contrast, in the instant case the insurance policies for each year of coverage are included in evidence. Furthermore, the demand letter, as well as the Policy Summary Statement, reference the policy number and consistently reflect the amount due. In the instant case, the plaintiff's counsel states in his certification that all invoices are attached to the original petition. Furthermore, in the motion to confirm the default judgment, the plaintiff's counsel states that all necessary proof is submitted along with the motion, including but not limited to a certified copy of the contract and the certification required by LSA-C.C.P. art. 1702.1. Moreover, the affidavit of Lori Bell, LWCC's audit specialist, attests to the amount owed and refers specifically to the policy number. Pursuant to LSA-C.C.P. art. 1702(B)(1), when a demand is based upon a conventional obligation, affidavits and exhibits annexed thereto that contain facts sufficient to establish a *prima facie* case shall be admissible, self-authenticating, and sufficient proof of such demand.

Finally, the defendant cites cases involving suits on open account requiring that, under LSA-C.C.P. art. 1702(A)(3) and LSA-C.C.P. art. 1702.1, a plaintiff must present evidence of an itemized account, reflecting all the debits and credits

that produce the balance due, and an affidavit attesting to its correctness.[4] In the instant case, the plaintiff asserts that the Policy Summary Statement, which is referenced by the attorney's certification in the motion to confirm the default, reflects the debits and credits that produce the balance due. Regardless, a suit for unpaid insurance premiums is a suit in contract, not one on open account, as defined in LSA-R.S. 9:2781.[5] See **Fidelity and Casualty Company of New York v. A&M Construction, Inc.**, 96-1326, p. 3 (La. App 1st Cir. 3/27/97), 692 So.2d 28, 30.

Accordingly, we find that the plaintiff submitted sufficient, competent evidence establishing its *prima facie* case, pursuant to LSA-C.C.P. art. 1702(B)(1) and LSA-C.C.P. art. 1702.1.

CONCLUSION

For all of the foregoing reasons, the judgment of the trial court is affirmed. The defendant is assessed with all costs of this appeal.

AFFIRMED.

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[4] The defendant cites the cases of **Gulf States Asphalt Company, Inc. v. Baton Rouge Services, Inc.**, 89-1313 (La. App. 1st Cir. 11/14/90), 572 So.2d 148 and **Sessions & Fishman v. Liquid Air Corp.**, 92-2773 (La. 4/12/93), 616 So.2d 1254, which involve suits for balances owed on open accounts. These cases are distinguishable from the instant case, which involves a demand based upon a contract.

[5] In LSA-R.S. 9:2781(C), "open account" is defined as including any account for which a part or all of the balance is past due, whether or not the account reflects one or more transactions and whether or not at the time of contracting the parties expected future transactions. Section C of the statute further provides that "open account" shall include debts incurred for professional services, including, but not limited to, legal and medical services.