

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 0025

TABITHA N. ARNOLD

VERSUS

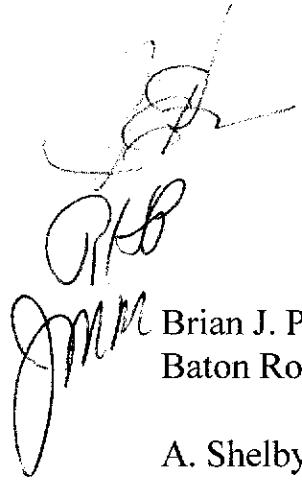
ALEC B. PIRIE

***DATE OF JUDGMENT:*** JUL 19 2010

ON APPEAL FROM THE TWENTY-FIRST JUDICIAL DISTRICT COURT  
NUMBER 116,510, DIV. F, PARISH OF LIVINGSTON  
STATE OF LOUISIANA

HONORABLE ELIZABETH P. WOLFE, JUDGE

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BEFORE: PARRO, KUHN, AND McDONALD, JJ.

**Disposition: VACATED AND REMANDED.**

KUHN, J.

Defendant-appellant, Alec B. Pirie, appeals the trial court's confirmation of a judgment by default, awarding a sum of money in favor of plaintiff-appellee, Tabitha N. Arnold, and attorney's fees. Finding the record devoid of any evidence of the actual business record of the alleged open account, we vacate the judgment and remand the matter to the trial court.

### **PROCEDURAL BACKGROUND**

Arnold filed her petition on July 2, 2007, alleging that between July 22, 2005 and September 30, 2005, she "loaned sums" totaling \$40,650.00 to Pirie "with the clear understanding ... that the sums loaned were not meant to constitute a donation, and were instead to be repaid."

After Pirie had failed to answer the petition, Arnold had a preliminary judgment by default entered against him on June 3, 2009. On July 17, 2009, Arnold filed into the record a pleading entitled, "Motion for Confirmation of Judgment on Petition to Recover Sums Due." According to the allegations in the pleading, proof of the amount of "\$40,650.00 for sums loaned" to Pirie was attached to the pleading as Exhibit P-1; and proof of demand as required by La. R.S. 9:2781 for attorney's fees was attached to the pleading as Exhibit P-2. Accompanying Arnold's pleading was an affidavit of correctness in which she attested:

[S]he is Obligee of the debt sued upon and is duly authorized to make this Affidavit, and is familiar with the sums owing of [Pirie], representing personal loans, which [Pirie] has failed to timely repay; and that as may be seen by pleadings and exhibits filed herein, the sum now due ... is ... \$40,650.00 ..., with legal interest from date of judicial demand, all costs of these proceedings and reasonable attorney's fees. ...

[T]hat all the allegations of fact made in the Petition are true, to the best of her knowledge and belief.

On July 23, 2009, the trial court signed a judgment stating “upon producing ... proof in support of the demand, the law and the evidence being in favor of [Arnold], and against [Pirie], for reasons this day orally assigned,” the sum of \$40,650.00 was awarded.<sup>1</sup> The judgment additionally awarded attorney’s fees of \$500.00 and cast all costs of the proceedings against Pirie. Pirie appealed.<sup>2</sup>

### DISCUSSION

If a defendant in the principal or incidental demand fails to answer within the time prescribed by law, judgment by default may be entered against him. The judgment may be obtained by oral motion in open court or by written motion mailed to the court, either of which shall be entered in the minutes of the court, but the judgment shall consist merely of an entry in the minutes. La. C.C.P. art. 1701A. A judgment of default must be confirmed by proof of the demand sufficient to establish a prima facie case. If no answer is filed timely, this confirmation may be made after two days, exclusive of holidays, from the entry of the judgment of default. La. C.C.P. art. 1702A.

When the sum due is on an open account, an affidavit of the correctness thereof shall be prima facie proof. La. C.C.P. art. 1702B(3). In those proceedings in which the sum due is on an open account, a hearing in open court shall not be

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<sup>1</sup> The record does not contain a transcript of the confirmation hearing, and at oral arguments before this court, counsel for Arnold verified that no confirmation hearing had been held. The record is also devoid of either oral or written reasons for judgment.

<sup>2</sup> Arnold challenges the efficacy of Pirie’s suspensive appeal, suggesting that it was neither timely nor properly supported. Notice of judgment was sent by the clerk of court on Friday, July 31, 2009. New trial delays elapsed on August 11, 2009. *See* La. C.C.P. art. 1974. Pirie then had thirty days or until September 10, 2009, to obtain his order of appeal. *See* La. C.C.P. art. 2123. Because the trial court signed the order of appeal on September 4, 2009, it was timely. Insofar as the sufficiency of the amount of bond furnished by Pirie, Arnold should have lodged her complaint with the trial court. *See* La. C.C.P. arts. 5123 and 2088A(5). Accordingly, the matter is not properly before us in this appeal.

required unless the judge, in his discretion, directs that such a hearing be held. The plaintiff shall submit to the court the proof required by law and the original and not less than one copy of the proposed final judgment. The judge shall, within seventy-two hours of receipt of such submission from the clerk of court, sign the judgment or direct that a hearing be held. The clerk of court shall certify that no answer or other pleading has been filed by the defendant. The minute clerk shall make an entry showing the dates of receipt of proof, review of the record, and rendition of the judgment. A certified copy of the signed judgment shall be sent to the plaintiff by the clerk of court. La. C.C.P. art. 1702C.

Under La. C.C.P. art. 1702B(3), the affidavit of correctness refers to the validity of the account, *i.e.*, the “correctness” of the sum due. This provision does away with the necessity of taking testimony in order to establish the validity of the account. The existence of the claim, however, is supported by a statement of the account or invoices. Thus, in order to establish both the existence and the validity of a demand for a sum due on an open account, it is necessary for a plaintiff to present evidence of the account itself and an affidavit, or testimony, attesting to its correctness. *Sessions & Fishman v. Liquid Air Corp.*, 616 So.2d 1254, 1258 (La. 1993). Louisiana courts have consistently interpreted the proof required to confirm a default judgment when the sum was due on an open account as requiring a statement of account or invoices and an affidavit certifying the correctness thereof. *Id.*

The record in this case contains no evidence of the business record of any account between Arnold and Pirie or testimony establishing such a business record.

Therefore, the trial court's confirmation of the judgment by default was not properly rendered under La. C.C.P. art. 1702.

La. C.C.P. art. 1702.1 provides an additional procedure by which litigants may confirm a default judgment in suits on open accounts. *See Sessions & Fishman*, 616 So.2d at 1260. In relevant part, La. C.C.P. art. 1702.1 states:

A. When the plaintiff seeks to confirm a default judgment as provided in Article 1702(B)(1) and (C), along with any proof required by law, he or his attorney shall include in an itemized form with the motion and judgment a certification that the suit is on an open account ... and that the necessary invoices and affidavit ... are attached. If attorney fees are sought under R.S. 9:2781 or 2782, the attorney shall certify that fact and that a copy of the demand letter and if required, the return receipt showing the date received by the debtor are attached and that the number of days required by R.S. 9:2781(A) or 2782(A), respectively, have elapsed before suit was filed.

B. The certification shall indicate the type of service made on the defendant, the date of service, and the date a preliminary default was entered, and shall also include a certification by the clerk that the record was examined by the clerk, including therein the date of the examination and a statement that no answer or other opposition has been filed.

This article provides that “*along with* any proof required by law,” the plaintiff or his attorney must include an itemized certification with the motion to confirm the default and the copy of the proposed final judgment. *Sessions & Fishman*, 616 So.2d at 1260. (Emphasis added.) No change in the law or the proof required to confirm a default was intended by the procedure allowed pursuant to this article. *See Sessions & Fishman*, 616 So.2d at 1260.

The plaintiff's or attorney's certification must indicate that: (1) the suit is one on an open account; (2) the necessary invoices and affidavit of correctness are attached; (3) the type of service made on the defendant; (4) the date this service was made; and (5) the date a preliminary default was entered. *Id.* If attorney's

fees are sought under La. R.S. 9:2781, then the certification must also show that: (1) attorney's fees are sought under La. R.S. 9:2781; (2) a copy of the demand letter and, if required, return receipt showing the date received by the debtor are attached; and (3) the number of days required by La. R.S. 9:2781(A) have elapsed before suit was filed. *See Sessions & Fishman*, 616 So.2d at 1260; La. C.C.P. art. 1702.1.

Assuming for purposes of this appeal that the pleading entitled "Motion for Confirmation of Judgment on Petition to Recover Sums Due," which was signed by Arnold's attorney, constitutes the requisite certification required under La. C.C.P. art. 1702.1, the record is nevertheless devoid of proof of the business record of the account required to support the confirmation of the judgment taken by default. Aside from the allegations in Arnold's pleading that between July 22, 2005 and September 30, 2005, she loaned sums totaling \$40,650.00 to Pirie, the record contains no other evidence of the business record of the alleged account. Furthermore, attachments of the statement of account, invoices, or affidavit to the petition are not sufficient to satisfy the requirements of La. C.C.P. art. 1702.1 (or La. C.C.P. art. 1702B(3)). *See Sessions & Fishman*, 616 So.2d at 1260 n.11. Such items must be offered in evidence either at a hearing under the provisions of La. C.C.P. art. 1702B(3) or with proper certification under La. C.C.P. art. 1702.1. Clearly mere allegations by the plaintiff or her attorney will not suffice. Thus, the trial court's confirmation of a judgment by default awarding Arnold the sum of \$40,650.00 on the basis of an alleged open account between the parties is not supported by La. C.C.P. art. 1702.1. Similarly, the record is devoid of a copy of the demand letter from Arnold to Pirie so as to support the award of \$500.00 in attorney's fees under La. R.S. 9:2781, albeit having failed to prove with evidence

the business record of the alleged account due, Arnold would not have been entitled to any attorney's fees.

Accordingly, having failed to establish her entitlement to a confirmation of a judgment by default under either La. C.C.P. arts. 1702 or 1702.1, the trial court's judgment in favor of Arnold is vacated and the matter is remanded.<sup>1</sup>

### **DECREE**

For these reasons, the trial court's confirmation of the judgment by default signed on July 23, 2009, which awarded a sum of money and attorney's fees in favor of Arnold and against Alec B. Pirie is vacated. The matter is remanded to the trial court for further proceedings. Appeal costs are assessed against plaintiff, Tabitha N. Arnold.

### **VACATED AND REMANDED.**

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<sup>1</sup> We expressly note that Arnold has not asserted, and the record does not support, her entitlement to a judgment by confirmation of default under La. C.C.P. art. 1702B(1) on the basis of a conventional obligation because she failed to provide the court with evidence of "corroborating circumstances" to prove up an alleged verbal contract in excess of \$500 as required by La. C.C. art. 1846. Because a confirmation of the judgment by default is not supported on any basis, we do not decide this day whether plaintiff's allegations establish a claim for recovery on an open account, *see Frey Plumbing Co., Inc. v. Foster*, 2007-1091 (La. 2/26/08), 996 So.2d 969, 972 (holding that to constitute an open account, there is no requirement that there must be one or more transactions between the parties, nor is there any requirement that the parties must anticipate future transactions); or on a conventional obligation, *see* La. C.C. art. 2907 (when the loan for consumption is of money, the borrower is bound to repay the same numerical amount in legal tender); *see also* La. C.C. arts. 1756 (defining an obligation) and 1906 (defining a contract).