6 Phil. 501

[G.R. No. 2900. October 23, 1906]

MAXIMO CORTES, PLAINTIFF AND APPELLEE, VS. MANILA JOCKEY CLUB ET AL., DEFENDANTS AND APPELLANTS.

D E C I S I O N

CARSON, J.:

Complaint in this action was filed on the 11th of August, 1905, in the Court of First Instance of Manila, praying that mandamus issue against the defendants to compel them to restore the plaintiff to his former membership in the association known as the "Manila Jockey Club," from which it is alleged he was unlawfully expelled by the defendants. The complaint further prays that the plaintiff be given damages in the sum of 5,000 pesos and that the proceedings be expedited by shortening the period allowed the defendants to appear, and defend the action. The court thereupon ordered the defendants to appear and file their demurrer or answer within six days after service of summons, but on motion of the defendants, they were allowed a further period of six days in which to file said demurrer or answer.

The demurrer was filed August 23, 1905, and set for hearing the following day, and on the 24th of August, 1905, the parties having appeared and submitted their arguments thereon, it was taken under advisement by the court. On the same day the plaintiff filed an amended complaint, and thereupon the court overruled the demurrer and ordered the defendants to answer the amended complaint on or before 8 o'clock a. m. of the 26th of August, 1905; at that hour defendant's counsel appeared and filed a demurrer to the amended complaint, which was overruled and the case set for hearing on the merits at 10 o'clock a. m. August 28. At the same time the court cautioned the defendants that if their answer was not filed at that time judgment in default would be entered against them. Exception was duly entered to this ruling and shortly before the hour fixed for the hearing, counsel for the defendants appeared in open court, and after setting out that he did not believe lie could obtain justice at the hands of the presiding judge, prayed for a change of venue; this motion was overruled, and to this ruling he also excepted and immediately thereafter left the court room, not to return during the trial of the cause.

At 10 a. m. of the same day, the hour fixe4 for the hearing, the defendants not having filed their answer, the court gave judgment in default and after hearing testimony offered in support of the allegations of the complaint, issued a writ of mandamus in accordance with the prayer thereof, and gave judgment in favor of the plaintiff and against the defendant company, the Manila Jockey Club, in the sum of 500 pesos. The defendants excepted to the judgment of the court and filed their bill of exceptions, which was approved in due form.

Appellants' assignments of error in this case are as follows:

(1) The court erred in ordering defendants to answer plaintiff's complaint, giving them only *one full* intervening day within which to do so, *in the absence of and without notice to defendants.*

(2) The court erred in setting the case for trial, on its merits, for August 28,1905, at 10 a. m., *there being no issue of fact joined, in the absence of and without notice to defendants.*

(3) The court erred in ordering defendants to answer plaintiff's amended complaint (not demur), giving them only owe full intervening day within which to do so, *without any motion or showing on the part of the plaintiff.*

(4) The court erred in setting the case for trial, on its merits, for August 28,1905, at 10 a. m., *without any motion or showing on the part of plaintiff.*

(5) The court erred in depriving the defendants of the legal right to question the legal sufficiency of plaintiff's amended complaint.

(6) Plaintiff's amended complaint does not state facts sufficient to constitute a cause of action.

Under the provisions of section 230 of the Code of Civil Procedure, the trial court in an action for mandamus is authorized, "in its discretion, to make such orders as it deems necessary for expediting proceedings."

Section 141 of that code provides that—

> "Rulings of the court upon minor matters, such as adjournments, postponements

> of trials, the extension of time for filing pleadings or motions, and other matters addressed to the discretion of the court in the performance of its duty shall not be subject to exception."

Section 503 of the same code provides that—

> "No judgment shall be reversed on formal or technical grounds,, or for such error as has not prejudiced the real rights of the excepting party."

In the light of these provisions of the Code of Civil Procedure, none of the first four specifications of error can be sustained, unless it affirmatively appears that there was an abuse of discretion on the part of the trial court and that the real rights of the appellants were prejudiced thereby.

The complaint expressly prays that the time be shortened within which the defendants might appear and demur or answer thereto. An examination of the bill of exceptions discloses that counsel for the defendants was furnished with notice of all orders expediting the proceedings immediately upon the filing of such orders by the court, and as counsel appeared at every stage of the proceedings prior to the hearing, there can be no doubt that he had actual notice of all such orders and an opportunity to be heard and to move for an extension of the time allowed thereby and to except to the issuance thereof.

Counsel for appellants did not move for an extension of the time allowed within which to answer the amended complaint, after his demurrer had been overruled, nor did he ask for a continuance when the cause was set for hearing. Instead of doing so, he presented himself in the court and moved for a change of venue, and upon this motion being overruled, voluntarily withdrew from the presence of the court and took no further part in the proceedings. It appears from the record that, on motion of counsel for the appellants, an extension of six. days was granted in the time allowed in which to demur or answer, and the court having shown its willingness to give the defendants full opportunity to prepare their defense, we can not hold that it would have unjustly denied a motion for the extension of the time allowed to file an answer to the amended complaint and to proceed to the trial upon the merits had counsel for appellants requested such an extension and made a reasonable showing in support of his motion.

Under all the circumstances we do not think that the trial court can be said to have abused its discretion in making these orders expediting the proceedings, nor that the defendants were in anywise prejudiced thereby.

These remarks dispose of the first four specifications of error, except in so far as it is alleged that the court erred! in setting the time for the hearing of the case without joinder in the pleadings on an issue of fact; but counsel for appellants can not be heard to urge this objection to the proceedings in the court below, because his demurrer having been overruled, he was directed to answer prior to the time set for the hearing; and had he obeyed this order, his answer (under the provisions of the code) would have brought the pleadings to an issue or else, in the event that his answer were of such a nature as to call for further pleading on the part of the plaintiff, it would be for the plaintiff to complain that the court was proceeding to trial on the merits without affording him a proper opportunity to reply to the answer filed by the defendants.

The fifth assignment of error is based upon the alleged arbitrary deprivation of defendants' right to test the legal sufficiency of the amended complaint. An examination of the record as set out in the bill of exceptions shows clearly that the defendants were not in fact deprived of this right. Counsel for defendants presented their demurrer to the amended complaint; the demurrer was duly filed but was overruled by the court, and to this ruling the defendants excepted, thus saving to themselves the right to have the action of the trial court reviewed on appeal and the error corrected.

Counsel insists that the reasons assigned for overruling the demurrer were erroneous; but granted that they were, error in overruling a demurrer is not equivalent to deprivation of the right to demur, so long as the right to have such in error reviewed and corrected was duly preserved to the defendant, as it was in this case.

Had the appellants assigned as error the action of the court below in overruling their demurrer, it would now become our duty to examine the demurrer and if the rulings thereon were erroneous to correct such error; but counsel made no such assignment of error in the printed brief in this court and expressly waived his right to have the action of the court in overruling the demurrer reviewed, except in so far as it involved his contention that the plaintiff's amended complaint does not state facts sufficient to constitute a cause of action, which contention is made the basis of the sixth assignment of error.

Appellants contend that the complaint is insufficient, first, because, as they allege, it does not appear that there is any legal duty on the defendants to do that for which mandamus is prayed to compel them to do; and second, because it does not appear that the plaintiff made formal demand upon the defendants to do that which this court is prayed to compel them to do.

It can not be denied that, admitting the truth of the facts set out in the complaint, there was a legal duty upon the defendant company, the Manila Jockey Club,, to restore the plaintiff to his rights of membership, nor does counsel for the defendants insist upon the contrary view; he does insist, however, that it is not shown that the members of the board of directors, who were joined with the defendant company, were under any such obligation.

The complaint expressly alleges that the board of directors, the governing body of the defendant company, administers and directs the affairs of the company; that by resolution, later approved at a general meeting, it expelled the plaintiff from membership, and that it continues to deprive him of his rights as a member of the club. We think it was proper and highly convenient to make the members of such a board joint defendants with the company, not merely because it appears that acting for and with the company they had deprived and continue to deprive the plaintiff of his legal rights as a member, but also because in the effective execution of the terms of the writ of mandamus of the court, directing the company to restore the plaintiff to membership and the enjoyment of the privileges thereof, affirmative action of some sort on the part of the members of the board would appear to be necessary, the administration and direction of the affairs of the company being confided to their hands. (La Bette County *vs*. United States, 112 U. S., 217.)

There seems to be some conflict in the American authorities as to the necessity for joinder with a joint stock company of the members of its board of directors in mandamus proceedings, but the weight of authority supports the view heretofore stated, and even in those jurisdictions where it is not held to be absolutely necessary, the joinder of the individual members is usually treated as mere surplusage and error without prejudice.r (Encyc. Pl. & Pr., vol. 13, 652 and 653;.notes and cases cited there.)

The last question to be considered is whether, under the circumstances set out in the complaint, action for mandamus would lie where it does not appear that formal demand had previously been made by the plaintiff on the defendants whom it is sought to coerce by the writ. No objection appears to have been urged in the court below on account of a want of a previous formal demand, and it is therefore too late to urge the objection now, even if we were to concede its materiality.

"The objection," says Tappon, in his work on mandamus, "as to the neglect of a demand, or the absence of a refusal, should, in order to prevent a waste of time, be objected to in the first instance, viz, on showing cause against the rule for the writ, and can not be made after the merits of the case have been discussed," and the same rule is laid down in High on Extraordinary Remedies, section 515. (City of Chicago *vs*. Sansum, 87 111., 182; Chicago, etc., K. Co., *vs*. Chase County, 49 Kans., 399; Owen *vs*. Gamble, 3 Per. & Dav., 123, note *d*.)

The judgment of the trial court is affirmed, with the costs of this instance against the appellants, and after the expiration of ten days judgment will be entered and the case remanded to the court below for action in accordance herewith. So ordered.

Arellano, C. J., Mapa, Johnson, and *Tracey, JJ.,* concur.

Willard, J., concurs in the result.

Torres, J., did not sit in this case.

Date created: May 02, 2014