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[G.R. No. 3498. March 12, 1907]

BEHN, MEYER & COMPANY, LIMITED, PLAINTIFF AND APPELLEE, VS. ARNALOT HERMANOS, SOCIEDAD EN COMANDITA, DEFENDANT AND APPELLANT.

D E C I S I O N

CARSON, J.:

The defendant society not having entered its appearance within the period prescribed by law, judgment by default was rendered in favor of the plaintiff company for 23,993.24 pesos, Philippine currency, with interest at the legal rate from the date of the filing of the complaint.

On the following day a motion to set aside the judgment was filed by the defendant society on the ground that it had been procured by fraud. This motion was supported by the affidavit of Ignacio Arnalot, the agent of the defendant society, wherein he undertook to establish, first, that the defendant had a good defense to the complaint in this action, and second, that he, as agent of the defendant society, had been induced to refrain from appearing to defend this action by certain false representations of the plaintiff company, whereby he was led to believe that the plaintiff company had brought this action in concert with other creditors of the defendant society, and that its sole object was to secure their respective rights by having judgment formally entered on all the claims against the defendant society on an equal footing. Counter affidavits, denying the facts on which the allegation of fraud were based, were filed by counsel for the plaintiff company.

The trial court was of opinion that the alleged fraud did not exist, and that the facts alleged in the affidavit would not constitute a good defense on a new trial, and denied the motion, whereupon the defendant excepted to the ruling of the court and to the judgment in default and brought the case here on appeal.

The affidavits of the agent of the plaintiff company, and of the attorney who represented it in the institution of the action, are positive, clear, and explicit in denial of the truth of the

relation of facts upon which the allegation of fraud is based. The statements of these witnesses are reasonable and consistent with each other and with the undisputed facts as they appear of record, and with these statements before us, uncontradicted, except by the unsupported statement of the agent of the defendant society, we can not say that the trial court erred in holding that the allegations of fraud had not been sustained.

It is not necessary to review the finding of the trial court as to the nonexistence of a good defense, because the allegation of fraud not having been sustained, the motion for a new trial was properly denied whether the defendant did or did not have a good defense, had not judgment been entered by default.

No motion for a new trial was made on the ground that the findings of fact by the trial court were contrary to the weight of the evidence, and the facts as found must be accepted as the facts of the case.

It is contended that these facts do not sustain the judgment because it does not appear from the findings of the trial court that the filing of the complaint was preceded by formal notarial demand for payment, in accordance with the provisions of articles 313 and 316 of the Code of Commerce. The necessity for such demand is based on appellant's allegation that the action was for the recovery of a commercial loan, which was not made payable on a day certain. It would appear to be true, from the terms of the first half of the second paragraph of the complaint, that the debt due from the defendant was originally a commercial loan, but it will be seen that the complaint alleges further, that on the 9th day of May, 1906, the account was stated, showing a balance due by the defendant, and that the defendant promised to pay the said balance, and it is on this promise to pay that the action is based, and not on the original loan.

The trial court found that these facts were proved at the trial, and as we are precluded from examining the record to review the findings of the trial court, we must accept them as correct, and hold that no notarial demand was necessary before instituting this action.

Counsel for appellants further contend that the trial court erred in rendering judgment by default, because it appears that said judgment was rendered before the time had elapsed within which the defendant was required to file its answer. It appears, however, that the judgment was not rendered until the day after the day on which the defendant was required by law to enter his appearance, and the provisions of section 128 of the Code of Civil Procedure clearly authorized the entry of judgment by default under such circumstances.

That section provides as follows:

> "*Default.*—In case a defendant fails to appear at the time required in the summons, or to answer at the time provided by the rule of court, the court shall, upon motion of the plaintiff, order judgment for the plaintiff by default, which shall be entered upon the docket * * *."

This language is so clear that it does not permit of doubt, and there can be no question that judgment in default may be entered in either case, and that it is not necessary, where the defendant fails to appear at the time required by the judgment, to wait until he is also in default as to his answer before ordering that judgment be entered against him.

The judgment of the trial court is affirmed, with the costs of this instance against the appellant.

After the expiration of twenty days let judgment be entered in accordance herewith, and ten days thereafter let the record be returned to the court wherein it originated for proper action. So ordered.

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

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