44 Phil. 749

[G.R. Nos. 19831, 19832, and 19833. March 31, 1923]

GARRIZ, TERREN & CO., PLAINTIFF AND APPELLANT, VS. THE NORTH CHINA INS. CO., LTD., ET AL., DEFENDANTS AND APPELLANTS.

D E C I S I O N

AVANCEÑA, J.:

The North China Ins. Co., Ltd., Phoenix Assurance Co., Ltd., and Law Union & Rock Ins. Co., Ltd., defendants in these three causes, issued insurance policies in favor of the plaintiff for P20,000, P10,000 and P10,000 respectively, covering all of the goods and merchandise belonging to plaintiff which were located in room No. 5, second story, of the building situated at Nos. 12-14, Escolta, Manila. In the policy of the Law Union & Rock Ins. Co., Ltd., there was included the furniture, consisting of shelves, tables, mirrors, and other household goods.

On October 1, 1921, when the three insurance policies were still in force, a fire took place in room No. 5 of the above-mentioned building where the insured goods were located, which were damaged by the fire and the water of the pumps. The plaintiff brought this action to recover the amount of the damages caused to the insured goods.

According to the plaintiff, the goods and merchandise existing on the day of the fire and covered by the insurance are those stated in Exhibit B with their respective values (P39,738.47). The goods that were identified by their remains immediately after the fire are specified in Exhibit D, also with their respective values (P36,320.37). These values given in both exhibits are the cost prices, including the expense for bringing them in here and placing them on the market. It should be noted that in Exhibit B there are included goods which do not appear in Exhibit D, the cost value of which is P3,418.10.

After the fire, the goods and merchandise saved were sold, the proceeds of the sale amounting to a total of P7,052.78. The original value of the furniture is P2,676, about which there is no question. The proceeds of the sale of the furniture after the fire amounted to P594.50, which is less by P2,081.50 than its value before the fire.

It is stipulated by the parties that the defendants, The North China Ins. Co., Ltd. and Phoenix Assurance Co., Ltd. paid the Bank of the Philippine Islands the sum of P8,294.66 for the benefit of the plaintiff and on account of the insurance.

The trial court held the plaintiff to be entitled to recover only for the damages caused to the goods described in Exhibit D, finding their value before the fire to be P25,534.80, and after deducting from this amount the sum of P8,294.66 paid to the Bank and the P7,052.78 obtained from the sale of the damaged goods, rendered judgment with the following dispositive part:

> "In view of the facts and findings above set forth, judgment is entered against the defendants, The North China Ins. Co., Ltd., Phoenix Assurance Co., Ltd. and Law Union & Rock Insurance Co., Ltd., for P10,188.14 (it should be P10,187.36), the same to be paid by them to the plaintiff *pro rata* and proportionately to the amount of their respective insurance policies, with interest thereon at the rate of six per centum per annum from December 15, 1921,
> the date of the filing of the complaints. Law Union & Rock Ins. Co., Ltd., must pay the plaintiff, in addition, the value of the furniture, which amounts to P2,082, with interest thereon at the rate of six per cent per annum from the same date. The defendants shall, moreover, pay the costs."

From this judgment both the plaintiff and the defendants have appealed.

The plaintiff's appeal is on the ground: (*a*) That the trial court should have declared it entitled to recover for the damages caused to the goods described in Exhibit B, and (*b*) that the trial court should have given the goods described in Exhibit D the value therein set out, which is the cost value (P36,320.37).

In their appeal, the defendants merely contend that the court should not have allowed the plaintiff anything under the conditions of the policies because it made false and fraudulent claims for losses.

There is no merit in the defendants' appeal. They allege that the plaintiff included in its claim goods which were not in existence at the time of the fire. They infer this from the fact that in Exhibit B, which, according to plaintiff, is the list of the goods that existed on the premises at the time of the fire, are included goods which do not appear in Exhibit D, which is the list of the goods that were identified by their remains after the fire.

But even supposing that really there were on the premises at the time of the fire no more goods than those described in Exhibit D, it does not necessarily follow that the plaintiff acted fraudulently in claiming damages for the goods described in Exhibit B, which are not included in Exhibit D. It may be an inexact claim, but not necessarily fraudulent. The plaintiff had reason to believe that it was exact. Exhibit B contains the goods that appeared in the inventory made by the plaintiff at the end of the year 1920, which were not removed nor sold up to the day of the fire, as shown by their books. The fact that some of those goods were not in existence on the day of the fire must not have necessarily been known by the plaintiff. On the other hand, they might have been taken away immediately after the fire and before the parties in interest inspected the premises, which they did on the following day. The mere fact that Exhibit B was prepared in accordance with the inventory and the books of the plaintiff is in itself alone sufficient to exclude the idea that it acted fraudulently, unless there is positive proof to the contrary which is not the case. Moreover, we cannot absolutely admit that in reality those goods were not in existence at the time of the fire simply because no remains of some of them were found afterwards, for, as plaintiff contends, they might have been completely destroyed.

But ignoring this side of the question, it appears that the defendants cannot set up this supposed fraudulent claim of the plaintiff, the same not having been alleged as a defense in their answer. And not only did they fail to allege this defense, but they admitted in their answer the allegation of the plaintiff that it had complied with all the conditions imposed upon it by the insurance policies. Moreover in the course of the trial they also admitted that the only

question between the parties was1 as to the merchandise in existence before the fire, the value of the goods in existence at the time of the fire and the amount of the loss. It is true that evidence was introduced, without the plaintiff's objection, which can now be used for the purpose of showing that the plaintiff acted fraudulently, but if the plaintiff did not object to this evidence it was because the same was material to the issues. In an action like this, fraud is an affirmative defense which must be alleged in order that it may be proved. When no allegation of fraud is made in the answer, no advantage can be taken, for the purpose of showing fraud, of any evidence which was introduced for other purposes.

With regard to plaintiff's appeal, the object of which is to recover damages for the goods described in Exhibit B, its contention is not sufficiently supported by the evidence, and we believe that it is entitled only to the amount of the damages caused to the goods described in Exhibit D, which are the only goods the existence of which prior to, and at, the time of the fire was established by their remains. While in our discussion on this point in connection with the defendants' appeal we said we were in doubt as to whether all of the goods described in Exhibit B were really in existence at the time of the fire, and gave the plaintiff the benefit of the doubt, yet in connection with its appeal we have to decide the question against it, since this fact constitutes its cause of action and it was incumbent upon it to establish the same by satisfactory evidence.

As to the value of the goods described in Exhibit D, we find the contention of the plaintiff correct that it must be the value stated in said exhibit, which is their cost value. Some witnesses testified in favor of the plaintiff and said that the market value of those goods on the date of the fire was approximately the same as that appearing on Exhibit D. Other witnesses, however, testified in favor of the defendants and affirmed that the prices of said goods had fallen on the day of the fire. Thus the evidence is conflicting, but we find that the preponderance is in favor of the plaintiff. Almost all of the goods damaged by the fire were of the exclusive agency of the plaintiff and about 80 per cent thereof was sold in no other place than the establishment of the plaintiff. So that the valuation made by the witnesses for the defendants was based only on similar articles, and with respect to some of these goods, they have considered the prices brought by them at the sales known as *baratillo* sales (bargain

sales) of old articles which have already fallen into disuse. It should be noted, furthermore, that the defendants' witnesses did not minutely examine the goods damaged by the fire, but in confused lots and without taking into account the material of each piece but only the color.

Our conclusion is that the plaintiff is entitled to recover from the defendants the amount of the damages caused to the goods described in Exhibit D, the value of which is P36,320,37 instead of P25,534.80, as estimated by the trial court.

According to this finding, the dispositive part of the judgment of the court below, above quoted, should read as follows:

> "In view of the facts and findings above set forth, judgment is entered against the defendants, The North China Ins. Co., Ltd., Phoenix Assurance Co., Ltd., and Law Union & Rock Insurance Co., Ltd., for P20,972.93, the same to be paid by them to the plaintiff *pro rata* and proportionately to the amount of their respective policies, with interest thereon at the rate of six per cent per annum from December 15, 1921, the date of the filing of the complaints. Law Union & Rock Ins. Co., Ltd. must pay the plaintiff, in addition, the value of the furniture, which amounts to P2,082, with interest thereon at the rate of six per cent per annum from that same date. The defendants shall, moreover, pay the costs."

With this modification, the judgment appealed from is affirmed without special pronouncement as to costs. So ordered.

Araullo, C.J., Street, Malcolm, Ostrand, Johns, and *Romualdez, JJ.,* concur.

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