45 Phil. 424

[G.R. No. 19295. November 20, 1923]

EMILIO G. MAPUA, PLAINTIFF AND APPELLEE, VS. FELIX MENDOZA, PRUDENCIO NAVOA, AND ISABEL PELAYO, DEFENDANTS AND APPELLANTS.

D E C I S I O N

MALCOLM, J.:

Emilio G. Mapua, the plaintiff in this case, recovered in the lower court on a default judgment, from the defendants jointly and severally, the sum of P38,200, representing double the amount which he had lost in a game of *monte*, with legal interest from January 30, 1922, and with costs. The defendants appeal and assign six errors.

The record before us and ancillary records in other cases are perfect examples of professional carelessness, closely akin to gross negligence in pleading and practice. This will partially explain why the court has had the case under advisement for so long a period of time, and why it is now necessary to pick our way as best we may through an accumulation of uncertain data to as just a conclusion as is possible.

Records Nos. 19413[1] and 18133,[2] the first a civil action brought by Felix Mendoza, one of the instant defendants, against Emilio G. Mapua, the instant plaintiff, and the second, an original action in mandamus brought by Emilio G. Mapua, the present plaintiff, against Felix Mendoza, one of the instant defendants, and Judge of First Instance Harvey, disclose that in these proceedings, Mapua set up a counterclaim for P38,200. But this was denied by the trial court and this denial was sustained here on the ground that a joint debt may not be set up against a separate demand. Encouraged, nevertheless, by this intimation, Mapua instituted the present action in the Court of First Instance of Manila against Felix Mendoza, and Prudencio Navoa and his wife Isabel Pelayo

(No. 19295).

The situation can best be visualized by making first a statement of the case which will disclose the outstanding proceedings and dates. Then our next task will be to apply the procedural law to the facts; after which, we shall be in a position to give attention to the merits of the controversy.

Turning directly to the record and the bill of exceptions, the following is noted:

Plaintiff's complaint was filed in the Court of First Instance of Manila on January 30, 1922. Summons were issued and served on the defendants that same day. As is customary, the latter were required to enter their appearance in the office of the clerk of the Court of First Instance of Manila within twenty days after the service of the summons, and to answer the complaint of the plaintiff within the time fixed by the rules of the court, which is ten days after appearance. The attorneys for the defendants, however, waited until February 21st of the same year to enter their appearance. On the supposition that this appearance was in time, and this point is not questioned, the defendants then had ten days within which to demur or answer.

No action having been taken by the attorneys for the defendants up to and including the last day permitted by the law and the rules, on March 6, 1922, the attorney for the plaintiff moved for a default judgment, and on this motion the trial judge noted as of March 8, 1922, "Como se pide." The proper orders for default were made on March 9 and March 11, 1922.

It appears that the attorneys for the defendants had presented in court on March 7, 1922, a motion for a bill of particulars, without, however, proving service on the attorney for the plaintiff. On March 13, 1922, the attorneys for the defendants renewed their motion for a bill of particulars and asked that the declaration of default be set aside. Copy of this unverified motion was received by the attorney for the plaintiff. Said motion was amended and amplified on March 17, 1922, in another motion which was subscribed to by counsel before a notary public.

In the meantime, however, trial was had on March 14, 1922, without the presence of the defendants, and the case for the plaintiff was submitted. The

trial court thereupon rendered judgment and handed down an appropriate order on the motions to raise the default against the defendants. The decision set out the complaint and the various steps in the proceedings, made findings of fact based on the testimony for the plaintiff, and, in conformity with the Gambling Law, Act No. 1757, gave sentence in favor of the plaintiff and against the defendants for P38,200, with legal interest and costs, as above indicated. The subsequent order on the motions to set aside the default against defendants stated various reasons leading to the conclusion that there was no ground for allowing said motions.

On appeal in this court, after the passage of considerable time, the bill of exceptions and the briefs were finally presented and the case was placed on the December, 1922, calendar. It then came to the knowledge of the court, through a motion filed by attorneys for the appellants after the case was submitted for decision, that the stenographic notes had not yet been written up and elevated to the appellate court. The evidence, however, is now before us.

The law applicable to the foregoing incidents in this case is full and clear. Abridging its provisions somewhat for the appropriate sections of the Code of Civil Procedure and the Rules of Court are, of course, familiar to the profession; the Code provides, in part, that the only pleadings allowed on the part of the defendant are (1) the demurrer to the complaint, and (2) the answer. (Sec. 89.) The defendants had ten days after they had entered their appearance to serve and file their demurrer or answer to the complaint. (Rules of the Court of First Instance of the Philippine Islands, No. 5.) The court could, however, in its discretion, have allowed an answer or other pleading to be made after the time limited by the Rules of the Court for filing the same. (Code of Civil Procedure, secs. 2, 110; Unson *vs*. Abrera [1909], 14 Phil., 146.) But if a defendant fails to appear at the time required in the summons or to answer at the time provided by the Rules of the Court, the court shall, upon motion of the plaintiff, order judgment for the plaintiff by default and shall proceed to hear the plaintiff and his witnesses, and to render final judgment. (Code of Civil Procedure, sec. 128.)

It is perfectly obvious that the defendants did not file their demurrer or answer to the complaint within the period fixed by the Code and the Rules. Nor did they make proper representations to secure additional time within which to

present an answer or other pleading. Judgment by default was thus properly rendered, unless there was some special reason for taking the case out of the general rule.

For a motion to set aside a default judgment to prosper, the moving party must show by an affidavit of merits that if the default is set aside, he has a just and valid defense to present. Motions to set aside judgments by default are addressed to the sound discretion of the court. (Coombs *vs*. Santos [1913], 24 Phil., 446; Daipan *vs*. Sigabu [1913], 25 Phil., 184.)

The situation here is somewhat complicated by the action of counsel for the defendants in filing a motion for a bill of particulars instead of presenting either a demurrer or an answer. They assert that as this motion was pending when the order of the default was made, it should be construed as tolling the time for them to demur or answer. It is, however, not incumbent upon us to settle the interesting question of whether the pendency of a motion to make the plaintiffs plead more definitely, or to file specifications, so as to furnish the adverse party with complete information as to the claims which he is required to meet, in conformity with section 108 of the Code of Civil Procedure, extends the time to demur or answer. While it is generally irregular to enter judgment by default whiles motion remains pending and undisposed of, yet, where such motion is filed out of time, it would not be reversible error to enter a judgment by default. (There can be noted the cases of Naderhoff *vs*. Geo. Benz & Sons [1913], 25 N. Dak., 165; 47 L. R. A., 853; D. S. Register & Co. *vs*. Pringle Brothers [1909], 58 Fla., 355; Shinn *vs*. Cummins [1884], 65 Cal., 97; Higley and Higley *vs*. Pollock [1891], 21 Nev., 198; Plummer *vs*. Weil [1896], 15 Wash., 427, holding that the motion filed by the defendant for a bill of particulars, is sufficient *ipso facto* to extend the time for answering.)

Without deciding, therefore, if the application for a bill of particulars extends the time for the defendants to demur or answer, it is sufficient to say that the application for such an order must be seasonably made. Here, as the defendants neither demurred nor answered, or filed their motion for a bill of particulars in time, and as their motion to set aside the default judgment showed no meritorious defense and was in itself defective, we reach the conclusion that there was no abuse of discretion on the part of the trial judge

in proceeding as he did and in refusing to set aside his order of default against the defendants.

On the merits, little need be said. The complaint alleged, and the plaintiff proved to the satisfaction of the court, that in a game of *monte* conducted by Felix Mendoza, Prudencio Navoa and Isabel Pelayo, the plaintiff was the loser to the extent of P19,100 as disclosed by the checks of record. Our Gambling Law permits any person who loses any money or valuable consideration or thing in any gambling house, or at any prohibited game such as *monte*, or his heirs, executors, administrators, or judgment creditors to recover within three years thereafter the money, consideration, or thing, together with an additional sum equal to the value thereof from the persons in charge of the game, or in control of the gambling house. The only doubtful point is as to the liability of Isabel Pelayo; but as to her, construing the provisions of articles 1406 and 1411 of the Civil Code in relation with sections 6, 7, 8 and] 1 of the Gambling Law, we decide that she is jointly and severally liable with her codefendants. (*See* Manresa, *Comentarios al Codigo Civil, vol. 9,* p. 645.) Moreover, no specific assignment of error is made or argued to this end.

While the records under consideration disclose that the plaintiff Emilio G. Mapua is a gambler who, not content to accept his losses without murmur, has seen fit to take advantage of the law to recoup himself, and while his action engenders no sympathy, we have, nevertheless, to apply the law, and in so doing find present no reversible error which would warrant us in disturbing the appreciation of the case as made by Judge Harvey.

Judgment is affirmed with costs against the appellants. So ordered.

Araullo, C.J., Johnson, Street, Avanceña, Villamor, Ostrand, Johns, and *Romualdez, JJ.,* concur.

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[1] Promulgated February 8, 1923, not reported.

[2] Decided January 9, 1922, by resolution.

Date created: June 10, 2014