

**E. C. MCCULLOUGH & CO., INC., PLAINTIFF AND APPELLANT,
VS. MARIANO VELOSO AND JOAQUIN SERNA, DEFENDANTS.
MARIANO VELOSO, APPELLANT.**

G.R. No. L-21455. April 05, 1924

Ponente: AVANCEÑA, J.

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AVANCEÑA, J.:

On March 23, 1920, the plaintiff corporation, E. C. McCullough & Co., Inc., sold to Mariano Veloso the property known as "McCullough Building," consisting of a land, with the building thereon, described in the certificate of title No. 13274, for the price of P700,000, Veloso having paid P50,000 cash on account at the execution of the contract, the balance of P650,000 to be paid, according to the contract, as follows: P50,000 on May 1, 1920; P100,000 on October 31 of the same year; P100,000 on April 1, 1921; P100,000 on April 1, 1922; P100,000 on April 1, 1923; P100,000 on April 1, 1924, and P100,000 on April 1, 1925, all of said amounts to draw interest at the rate of 7 per cent per annum, payable semestrally on the first days of April and October of each year. Veloso agreed, furthermore, to pay 10 per cent of the amount of the debt, as attorney's fee, in the event that a judicial action should be necessary for the collection of the whole or a part of the debt. Veloso assumed also the obligation to insure the property for not less than P500,000, as well as to pay all legal taxes that might be imposed upon the property, and in the event of his failure to do so, the plaintiff should pay said taxes at the expense of Veloso, with the right to recover of him the amounts thus paid, with interest at 7 per cent per year. To secure the payment of these amounts, Veloso mortgaged the property purchased, this encumbrance having been noted on the certificate of title No. 13274. It was, finally, stipulated that in case of failure on the part of Veloso to comply with any of the stipulations contained in the mortgage deed, all the instalments with the interest thereon shall become due, and the creditor shall then have the right to bring the proper action for the collection of the unpaid part of the debt.

On August 21, 1920, Mariano Veloso, in turn, sold the property, with the improvements thereon for P1,00,000 to Joaquin Serna, who agreed to respect the mortgage of the property in favor of the plaintiff and to assume Mariano Veloso's obligation to pay the plaintiff the balance due of the price of the estate on the respective dates when payments should be made according to the contract between Mariano Veloso and the plaintiff, dated March 20, 1920.

Veloso paid P50,000 on account of the P650,000, and Serna made several payments up to the total sum of P250,000. Subsequently, however, neither Veloso, nor Serna, made any payment upon the last instalments, by virtue of which delay, the whole obligation became due, and Veloso lost the right to the instalments stipulated in his contract with the plaintiff. Later on Clarke & Larkin, accountants, made a liquidation of the debt of Mariano Veloso in favor of the plaintiff, including the interest due, with the result that on March 26, 1923, Veloso owed exactly P510,047.34. The accuracy of this statement of the account is not disputed.

The plaintiff brings this action to recover of the defendant the sum due of P510,047.34 plus 10 per cent thereon as attorney's fee. The trial court sentenced the defendant to pay the plaintiff the sum claimed with interest thereon at

7 per cent per annum from March 26, 1923, when the liquidation was made of the defendant's debt, until full payment thereof. As to the 10 per cent on the amount due that the plaintiff claims as attorney's fee, the trial court allowed P2,000 only. The judgment contains, furthermore, an order providing that the payment of these amounts should be made within three months, and that, in the event of a failure to do so, the property mortgaged, described in the certificate of title No. 13274, shall be sold at public auction to the highest bidder and in the manner prescribed by law, the proceeds of the sale to be applied on the payment of the judgment, after deducting the fees of the court's officer, and in case the total amount of the judgment is not covered, a writ of execution shall be issued against other properties of the defendant Mariano Veloso until the whole amount of the judgment is covered. Both parties appealed from this judgment, the defendant in so far as he is sentenced to pay the plaintiff the sum of P510,047.34, and the mortgaged property is ordered sold for the payment of the judgment; and the plaintiff in so far as the 10 per cent on the amount due and claimed as attorney's fee was reduced to P2,000.

The defendant contends that having sold the property to Serna, and the latter having assumed the obligation to pay the plaintiff the unpaid balance of the price secured by the mortgage upon the property, he was relieved from this obligation and it then devolved upon Serna to pay the plaintiff. This means that as a consequence of the contract between the defendant and Serna, the contract between the defendant and the plaintiff was novated by the substitution of Serna as a new debtor. This is untenable. In order that this novation may take place, the law requires the consent of the creditor (art. 1205 of the Civil Code). The plaintiff did not intervene in the contract between Veloso and Serna and did not expressly give his consent to this substitution. Novation must be express, and cannot be presumed.

In connection with the contention of the defendant, the fact that the plaintiff did not oppose the sale subsequently made by the defendant to Serna of the mortgaged property does not mean anything. The mortgage is merely an encumbrance upon the property and does not extinguish the title of the debtor, who does not, therefore, lose his principal attribute as owner, that is, the right to dispose. This being so, the fact that the plaintiff recognized the efficaciousness of that sale cannot prejudice him, which sale the defendant had the right to make and the plaintiff cannot oppose and which, at all events, could not affect the mortgage, as the latter follows the property whoever the possessor may be. (Art. 1876 of the Civil Code.)

The defendant argues in this court that the law on novation is not applicable to the contract of mortgage. This is an error. But considering the matter from this standpoint of view of the defendant, leaving aside all question as to novation, his claim appears still more clearly to be groundless. The effects of a transfer of a mortgaged property to a third person are well determined by the Civil Code. According to article 1879 of this Code, the creditor may demand of the third person in possession of the property mortgaged payment of such part of the debt, as is secured by the property in his possession, in the manner and form established by the law. The Mortgage Law in force at the promulgation of the Civil Code and referred to in the latter, provided, among other things, that the debtor should not pay the debt upon its maturity after a judicial or notarial demand for payment has been made by the creditor upon him. (Art. 135 of the Mortgage Law of the Philippines of 1889.) According to this, the obligation of the new possessor to pay the debt originated only from the right of the creditor to demand payment of him, it being necessary that a demand for payment should have previously been made upon the debtor and the latter should have failed to pay. And even if these requirements were complied with, still the third possessor might abandon the property mortgaged, and in that case it is considered to be in the possession of the debtor. (Art. 136 of the same law.) This clearly shows that the spirit of the Civil Code is to let the obligation of the debtor to pay the debt stand although the property mortgaged to secure the payment of said debt may have been transferred to a third person. While the Mortgage Law of 1893 eliminated these provisions, it contained nothing indicating any change in the spirit of the law in this respect. Article 129 of this law, which provides for the substitution of the debtor by the third person in possession of the property, for the purposes of the giving of notice, does not show

this change and has reference to a case where the action is directed only against the property burdened with the mortgage. (Art. 168 of the Regulation.)

Finally, the fact that the plaintiff has received payments from Serna on account of Veloso's debt is of no importance, for this is, at most, a payment by a third person, which, while it may create a juridical relation between Serna and Veloso, cannot affect the relation between the latter and the plaintiff, except that the obligation thus paid is discharged.

With reference to the appeal of the plaintiff, it appears that the 10 per cent of the amount of the debt, which, according to the contract between the defendant and the plaintiff, must be paid by the former to the latter as attorney's fee in the event that judicial proceeding be instituted for the collection of the debt, was reduced by the trial court to P12,000. Following the doctrine laid down by this court in the case of *Bachrach vs. Golingo* (39 Phil., 138), and taking into account the amount of the debt and the work it may require on the part of the attorney to collect the same by judicial proceeding, we find that P15,000 is the reasonable amount which the plaintiff is entitled.

Wherefore the judgment appealed from is affirmed as to defendant's appeal, and modified as to plaintiff's, who is allowed P15,000 instead of P2,000 awarded by the trial court, without special finding as to costs. So ordered.

Araullo, C. J., Malcolm, Johns, and Romualdez, JJ., concur.

DISSENTING IN PART

JOHNSON, J.:

The question here is not one of the reasonableness of attorney's fees under section 29 of Act No. 190, between attorney and client. The contract simply provided for a certain amount to cover expenses of collection, in case the defendant failed to comply with his contract. If the defendant believed that the amount was unreasonable or unconscionable, that question should have been settled at the time the contract was executed and delivered, or during the trial of the cause in the court below.

CONCURRING AND DISSENTING:

STREET, J.:

I concur in the fundamental propositions involved in the case and in the action of the court in materially increasing the attorney's fee over the amount allowed by the trial judge. At the same time I wish to say that, considering the unusually large amount involved in the litigation and the nature of the service rendered, the amount finally allowed by this court is extremely conservative. The fee allowed should, in my opinion, have been not less than P20,000. The law applicable to the case is correctly stated in *Bachrach vs. Golingo* (39 Phil., 138).

CONCURRING AND DISSENTING

OSTRAND, J.:

I concur in the opinion of the court except in so far as it sets aside the contract between the parties in regard to the amount of the attorney's fees.

That the court has extensive powers of control over contracts between an attorney and his client I do not dispute. A lawyer is an officer of the court and as such is, in a large measure, subject to its control. By reason of the trust and confidence presumed to be reposed in the lawyer by his client, contracts between them are closely scrutinized in order to prevent overreaching and courts have not hesitated to summarily reform such contracts wherever it clearly appears that unfair advantages have been taken of the client.

But the contract here in question is not one between attorney and client; here the parties were presumably of equal intelligence and have dealt with each other at arm's length and on equal terms. In common with other ordinary contracts between competent parties, the contract before us should therefore not be interfered with unless it is fraudulent, unconscionable or contrary to public policy, and then only when put in issue by the pleadings and after due trial.

In this case the validity of the agreement for allowance of attorney's fees is not questioned in the pleadings and, as far as the record shows, the plaintiff was not apprised of the defendant's intention to dispute the fairness of the agreement until after the presentation of the evidence in the case.

The allowance of fees provided for in the contract may seem rather high, but considering that the amount involved in the case is nearly a half a million pesos and that every step in the foreclosure proceedings has been tenaciously contested, it can hardly be said that the agreement is so unconscionable per se as to justify the court in setting it aside without due process of law.

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