

APOLINARIO CRUZ, PLAINTIFF AND APPELLANT, VS. PATROCINIO KELLY, DEFENDANT AND APPELLEE. JOSE C. MARCELO, THIRD PARTY DEFENDANT.*G. R. No. L-4896. April 30, 1953*

Ponente: PARAS, C.J.

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On July 22, 1949, the plaintiff, Apolinario Cruz, filed a complaint in the Court of First Instance of Tarlac against the defendant, Fernando F. Yapcinco, for the collection of P6,000, plus interest and the amount of ten per cent of the total indebtedness as liquidated damages, and, in case of non-payment, for the foreclosure of the corresponding mortgage. The plaintiff is suing by virtue of an assignment from Jose C. Marcelo, the original mortgagee. The defendant filed an answer, praying that judgment be rendered ordering, among others, "the plaintiff to release the mortgage allagedly assigned to him by the mortgagee, Jose C. Marcelo, in favor of the defendant upon payment of the amount in Philippine currency equivalent to the consideration of the mortgage-contract in accordance with the Ballantyne scale of values as laid down in several cases already decided by the Supreme Court."

On September 21, 1949, the defendant filed a third party complaint against Jose C. Mercado praying, among others, that "judgment be rendered in favor of the defendant and against the plaintiff, and the third party defendant, ordering the discharge of the defendant's obligation and delivery of the transfer certificate of title No. 20458 to defendant upon payment of the sum of P200 Philippine currency," and that the "defendant be relieved of any obligation or responsibility to whatever rights or claims the plaintiff, Apolinario Cruz, may or might have in the premises adjudging the same, if any, against the third party defendant, Jose C. Marcelo." In view of the death of Fernando F. Yapcinco, the latter was substituted by the administratrix of his estate, Patrocinio Kelly.

On January 9, 1951, the Court of First Instance of Tarlar, *motu proprio*, issued an order dismissing the case on the ground that the obligation sued upon comes within the purview of the debt moratorium (Executive Order No. 25, as amended by Executive Order No. 32). The plaintiff has appealed.

We have heretofore held that the debt moratorium is a right granted by law to debtors which may be waived, because the waiver does not affect public interest or the rights of third parties. In the case at bar, there is not only a waiver consequent upon the failure of the defendant to invoke the defense, but also an express prayer by the latter in his answer, for a judgment releasing the mortgage upon payment of the indebtedness in accordance with the Ballantyne scale, and an express prayer in the third party complaint, for a judgment in favor of the defendant and against the plaintiff and the third party defendant, ordering the discharge of the defendant's obligation upon payment of P200, Philippine currency. Willingness to pay is, moreover, obvious from the allegation in the defendant's answer that he had offered to pay the original mortgagee who, however, refused to accept payment, and that he was always ready to settle the obligation and redeem the mortgaged property; and from the averment in the third party complaint that the defendant had made several offers of payment which were refused by the

third party defendant. Wherefore, the appealed order is reversed and the case remanded to the court of origin for further proceedings. So ordered without costs.

Feria, Pablo, Bengzon, Tuason, Montemayor, Reyes, Bautista Angelo and Labrador, JJ., concur.

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