

JUAN DE LEON, PETITIONER, VS. HON. JUDGE AGAPITO HONTANOSAS, PRESIDING JUDGE, COURT OF FIRST INSTANCE OF CEBU, BRANCH XI; WILLIAM DE LEON AND ROSE MARIE DE LEON, RESPONDENTS.

G.R. No. L-40377. October 29, 1975

Ponente: AQUINO, J.

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AQUINO, J.:

The question in this certiorari and prohibition case is whether the Court of First Instance of Cebu gravely abused its discretion in setting aside its order of default (not its judgment by default) against Rose Marie de Leon in Civil Case No. R-13986 entitled "Juan de Leon vs. William de Leon and Rose Marie de Leon".

The pleadings disclose the following facts:

On June 3, 1974 Juan de Leon filed a complaint against the spouses William de Leon and Rose Marie de Leon (his brother and sister-in-law, respectively) for the collection of the sum of P20,986 plus interest and P2,000 as attorney's fees. He asked for a writ of preliminary attachment.[1]

On the next day, June 4, the lower court issued the writ of attachment after Juan de Leon had posted a surety bond. The sheriff served the writ on June 5 on Rose Marie de Leon at Dumaguete City. He attached the supposed conjugal lot and building of the spouses located in that city.

The summons for the spouses was served upon William de Leon also on June 5 at their conjugal residence in Cebu City. On June 6 William sent to Rose Marie at Dumaguete City a telegram asking her to come to Cebu City because Juan de Leon had filed a collection suit against them. Rose Marie did not heed her husband's request. William did not answer the complaint.

On June 13 Rose Marie de Leon through counsel filed a motion to dissolve the writ of attachment on the ground that the real owner of the attached properties was her father, Marceliano P. Ferolino. She alleged that it was not she but her husband, William, who was indebted to Juan de Leon and that, without her knowledge and consent, William utilized the money for his own purposes. Juan de Leon opposed that motion. It was not promptly resolved by the lower court.

On July 1 the lower court granted Juan de Leon's ex parte motion to declare in default the spouses William de Leon and Rose Marie de Leon for not having filed their answer after the summons for them was served on William. The court directed the Clerk of Court to receive plaintiff's evidence.

On July 5 the lower court rendered a decision ordering the De Leon spouses to pay Juan de Leon the sums claimed in his complaint: P20,986 plus interest and P2,000 as attorney's fees and litigation expenses.

A copy of that decision was served on July 8 on William de Leon in Cebu City and on Rose Marie de Leon's counsel on July 18 at Dumaguete City. The lower court in its order of August 13 directed the issuance of the

corresponding writ of execution. However, on the following day it motu proprio suspended the execution.

Notwithstanding that a decision had already been rendered, the lower court heard on July 11 Rose Marie de Leon's motion to dissolve the writ of attachment. On July 15 (after the decision was rendered) Rose Marie filed her answer to the complaint wherein she admitted that she had issued to Juan de Leon a check for P30,486 which was dishonored. Her defense to the collection suit was that William de Leon was the real debtor of his brother, Juan.

After the parties had submitted memoranda on the pending incidents, the lower court in its order of October 2 ruled that Rose Marie de Leon's answer was out of order because she failed to ask for the setting aside of the order declaring her in default. The lower court also denied her motion to dissolve the writ of attachment. It lifted the order suspending the execution of its judgment.

A writ of execution was issued on October 15. The sheriff levied upon Lot 232-C-2, With an area of 1,791 square meters, and the improvements thereon (the properties which had been attached), located at Dumaguete City, on the assumption they were conjugal assets of the De Leon spouses. On November 29, the sheriff sold the said lot and improvements to Juan de Leon for the amount of his judgment credit, subject to the third-party claim of Marceliano P. Ferolino and other liens. In view of that third-party claim, Juan de Leon had posted an indemnity bond of P30,000 for the sheriff.

In the meanwhile, Rose Marie de Leon and her father, third-party claimant Ferolino, filed on October 28 a motion to reconsider the order dated October 2. In support of that motion, father and daughter executed an affidavit of merits wherein they admitted that the lot in question was sold by Ferolino to Rosemarie for P2,000. The affidavit did not state the alleged defenses of Rose Marie de Leon to the complaint. Juan de Leon opposed the motion for reconsideration.

The lower court in its order of November 22, 1974 reconsidered its October 2 order, set aside the order of default and the writ of execution and allowed Rose Marie de Leon to present evidence in her behalf. It scheduled the case for pre-trial. It did not formally set aside its judgment by default dated July 5, 1974. Plaintiff's motion for the reconsideration of the November 22 order was denied by the lower court in its order dated January 31, 1975.

On March 22, 1975 the instant petition for certiorari and prohibition was filed by Juan de Leon. William de Leon in his comment on the petition denied that there was a collusion between him and his brother, Juan. He explained that when Juan de Leon filed his complaint he (William) and his wife Rose Marie, who was vacationing in Dumaguete City, were not yet estranged.[2]

We hold that under the facts recited above the lower court committed a grave abuse of discretion in setting aside the order of default (without setting aside its judgment by default) and in scheduling the case for pre--trial.

Although Rose Marie de Leon was not personally served with summons, she was properly declared in default because the service of summons upon her husband was binding on her. On receiving the summons and copies of the complaint, William de Leon lost no time in apprising her of that fact by means of the following telegram: "Come immediately. Johnny filed case against us. Collection our account with him".

So, she was aware she and her husband had been summoned to answer the complaint. The writ of attachment, which was served on her, alerted her also to the filing of the complaint. Instead of answering the complaint or asking for an extension of time to plead, she instructed her lawyer to move for the dissolution of the writ of attachment. She had ample opportunity of avoiding a default before the judgment by default was rendered against her and her husband.

She was more interested in resisting the attachment than in answering the complaint. She was resisting the attachment not in her own behalf but in behalf of her father who, according to her theory, is the true owner of the attached properties and whose remedy is to sue the sheriff for damages or vindicate his claim to the properties by any proper action (Sec. 17, Rule 39 and sec. 14, Rule 57, Rules of Court; *Bayer Philippines, Inc. vs. Agana*, L-38701, April 8, 1975, 63 SCRA 355).

She was not interested at first in traversing the complaint because, as it turned out, she had no meritorious defenses to the collection suit. Indeed, on the basis of her answer, summary judgment could be rendered against her and in favor of plaintiff Juan de Leon.

Under the foregoing circumstances peculiar to this case, it cannot be reasonably argued that Rose Marie de Leon was not given her day in court.

Thus, it was held that the trial court did not err in denying defendant's motion to lift the order of default where his explanation for not having answered the complaint was that the summons was served on his wife at the time that he was in a distant province (*Asian Surety & Insurance Co., Inc. vs. Ong Ting*, 64 O.G. 1517, 17 SCRA 292).

WHEREFORE, the lower court's orders of November 22, 1974 and January 31, 1975 are set aside. It is understood that if the sale in favor of the judgment creditor or petitioner, Juan de Leon, had already been registered, then the one-year period within which the spouses William de Leon and Rose Marie de Leon could redeem the property in question should commence from the date that final judgment is entered in this case. Costs against respondent Rose Marie de Leon.

SO ORDERED.

Antonio, Concepcion, Jr., and Martin, JJ., concur.

Barredo, (Acting Chairman), J., concurs in the result.

[1] Juan de Leon alleged that he had loaned P30,486 to William de Leon and Rose Marie de Leon so that they could pay their creditors who had threatened to file civil and criminal actions. against them; that he made the loan because of his blood relationship to William de Leon; that he had to use his lifetime savings and to borrow money from his friends in order to forestall the imminent suit against the De Leon spouses; that Rose Marie de Leon issued to him a postdated check for P30,486 but the check bounced; that he later discovered that the De Leons did not use the money to pay their creditors; that one creditor filed a estafa case against the spouses and, as a result, they were confined for six days at the PC stockade in Cebu City; that the De Leons used the P30,486 to buy real and personal properties in the name of Rose Marie Ferolino (Mrs. De Leon's maiden name); that that the De Leons paid him P9,500, leaving a balance of P20,986, and that their creditors had aggregate claims in the sum of P90,000.

[2] William de Leon's comment is reproduced below:

“1. The claim of petitioner Juan de Leon is valid. My wife and I originally borrowed from him the sum of P30,486, the P30,000.00 of which was paid to my father-in-law, Marceliano Ferolino of Dumaguete for the house and lot which my wife, Rosemarie de Leon bought against my will because the amount we borrowed from my brother Juan de Leon was intended to pay our creditors who already threatened to sue us. But my wife argued that, at any rate, if we needed money for the creditors we could always mortgage the property which we did when creditors would no longer allow us any extensions. As a matter of fact, both of us sometime last year were placed in the PC stockade upon complaint of our creditors. Right now my wife is facing two criminal cases for estafa arising from postdated checks she issued to our creditors.

"Realizing the validity of my brother's claim, I chose not to resist the complaint. I, therefore, deny my wife's allegation of collusion. She herself admitted the existence of the obligation although she claims that I squandered the money. How could I squander the money when she holds the purse. In fact, it was she who issued the postdated check to my brother, petitioner herein, because the bank account is in her name, not mine.

"2. Regarding my wife's claim that we have a separation, this was not true at the beginning, for when the case was filed against us by my brother, petitioner herein, I immediately wired my wife who was then vacationing in her hometown, Dumaguete City, on June 6, 1974 — this was after our brief sojourn at the PC stockade in Cebu City -- so we could confer about the complaint. But for reasons then only known to her, she did not come to Cebu and I later learned she engaged the services of counsel in Dumaguete City. I thought at first that her claim of separation was only for purposes of her strategy in Court. It soon became clear to me, however, that she had no intention of ever returning to our conjugal abode for I have heard all sorts of rumors about her and I do not know her present whereabouts. She abandoned our child of very tender age who is now under my care.

"3. The property subject of the attachment, as stated earlier, was bought out of the money we obtained from my brother, petitioner Juan de Leon, in the sum of P30,000.00. It is not true that the title was transferred to us for purposes only of accommodation. There was no reason for the accommodation. If the price of the sale would appear too low, this was the idea of my father-in-law who made the suggestion to avoid the payment of the sales tax to the City of Dumaguete which is one percent of the sales price. As already stated, the purchase of the property in question was a source of misunderstanding between my wife and me because I was against the buying of that property as the money was intended to pay creditors, not to buy the property. As a matter of fact, a creditor who has not been paid has now sued my wife for estafa in Cebu City. The charges are pending before the City Court of Cebu and the Court of First Instance of Cebu.

"4. Regarding the technical aspects of the petition, I have no comments to make as from the very beginning I acknowledge the obligation due petitioner from us. My wife herself acknowledged this indebtedness as I gather from her Motion to Dissolve the Writ of Attachment."

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