

FEDERAL FILMS, INC., PETITIONER, VS. JUDGE OF FIRST INSTANCE OF MANILA, BRANCH IX, JOSE GUTIERREZ DAVID AND PABLO ROMAN, RESPONDENTS.

G.R. No. L-1260. May 27, 1947

Ponente: PARAS, J.

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PARAS, J.:

This is an original proceeding for certiorari instituted by the petitioner, Federal Films, Inc., for the purpose of annulling the order of the respondent Judge, Honorable Jose Gutierrez David, dated December 17, 1946, dismissing petitioner's appeal in civil case No. 73256, Pablo Roman, plaintiff, vs. Federal Films, Inc., defendant.

On September 27, 1946, the petitioner received notice of the judgment rendered by the respondent Judge in civil case No. 73256. The next day, September 28, the petitioner filed a petition to set aside the judgment. On October 8, 1946, the petitioner was notified of the order denying its petition. On October 17, 1946, the petitioner filed a motion for reconsideration based on the same grounds alleged in its petition to set aside, the order denying said motion having been served on the petitioner on October 31, 1946. On November 7, 1946, the petitioner filed its notice of appeal, record on appeal, and appeal bond. The question that arises—which was resolved by the respondent Judge adversely to the petitioner—is whether petitioner's appeal was perfected within the reglementary period of thirty days, counted from the date the petitioner was notified of the judgment and after deducting the time during which the petition to set aside was pending (Rule of Court No. 41, section 3).

At the outset, it must be ruled that the 30-day period was not interrupted by the filing on October 17, 1946, of petitioner's motion for reconsideration (which was a mere reiteration of its petition to set aside), in view of Rule of Court No. 37, section 4 (see Moran, Comments on the Rules of Court, Vol. I, p. 345). Hence our task is merely to determine the period transpiring between September 27 and November 7, 1946, and the period transpiring between September 28 and October 8, 1946, and thereafter to deduct the second from the first, the result showing the number of days used up by the petitioner for the perfection of its appeal.

Rule of Court No. 28 defines the manner of computing any period of time prescribed or allowed by the rules, or order of court, or by any applicable statute, as follows:

"How to compute time.—In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or a legal holiday, in which event the time shall run until the end of the next day which is neither a Sunday nor a holiday."

Vulgarly stated, this rule adopts the exclude-the-first and include-the-last day method for computing any period of time. By simple mathematical operation, we therefore find that from September 27 (the date petitioner received notice of the judgment) to November 7, 1946, when the appeal was perfected, there are actually 41 days, September 27 being excluded and November 7 included in the counting. We find also that from September 28 to

October 8, 1946, the period during which the petition to set aside was pending, there are actually 10 days, September 28 being excluded and October 8 included in the counting. Deducting 10 from 41, the result is 31. Which means that petitioner's appeal was filed one day late.

Petitioner's appeal may be considered as having been filed within 30 days only if the decision in the case of *Taroma vs. Cruz and Galinato* (68 Phil., 281), were still to be followed. After re-examining said decision, however, we are constrained, to overrule so much thereof as included the date of the filing of the motion for new trial and the date the movant was notified of the order of denial in the time consumed by the court in considering said motion for new trial and deducted from the 30-day period for perfecting the appeal. Indeed, we have recently refused to follow the *Taroma* decision, when invoked, in *G. R. Nos. L-381 to L-384, Vda. de Celis vs. Palileo*.^[1]

The petitioner complains about the motion which gave rise to the order sought to be annulled, because it was filed in the Court of First Instance on December 13, 1946, and set for hearing on the following day. Of course, section 4 of Rule of Court No. 26 requires that "notice of a motion shall be served by the applicant to all parties concerned, at least three days before the hearing thereof," but in the same breath the rule states that "the court, however, for good cause may hear a motion on shorter notice, specially on matters which the court may dispose of on its own motion." Even without holding that the respondent Judge could dismiss on his own initiative petitioner's appeal under section 13 of Rule of Court No. 41, we cannot say that the motion in question was heard on shorter notice without good cause, it appearing that the respondent Judge was appointed Justice of the Court of Appeals and was supposed to hold his last session in the Court of First Instance on December 14, 1946. Moreover, it is noteworthy that the petitioner, through counsel, received notice of the motion, filed a written opposition thereto on the merits, and appeared and argued at the hearing, with the consequence that no substantial right of the petitioner can be alleged to have been prejudiced.

The petition will therefore be, as the same is hereby, dismissed with costs against the petitioner. So ordered.

Pablo, Bengzon, Hontiveros, and Tuason, JJ., concur.

[1] Resolution of July 3, 1946.

DISSENTING

PERFECTO, J.:

Notice of judgment of the lower court was received by petitioner on September 27, 1946. Petitioner filed a petition to set aside the judgment on September 28. He was notified of the denial of said petition on October 8. Notice of appeal, record on appeal and the appeal bond were filed on November 7. The lower court dismissed the appeal on the ground of its alleged lateness. The question is whether the appeal was filed within the thirty days provided in Section 3 of Rule 41 which provides:

"How appeal is taken.—Appeal may be taken by serving upon the adverse party and filing with the trial court within thirty days from notice of order or judgment, a notice of appeal, an appeal bond, and a record on appeal. The time during which a motion to set aside has been pending shall be deducted."

There is no quarrel between the majority and us on the fact that from September 27, the date of notice of the judgment, to November 7, date of the appeal, forty-one days had elapsed. But, under the above-quoted provision, "the time during which a motion to set aside has been pending shall be deducted" in reckoning the thirty-day period within which appeal may be taken.

The motion to set aside the judgment has been pending since September 28, date of its filing, to October 8, when petitioner was notified of the denial of the petition. Therefore, the motion to set aside has been pending for eleven days, that is: September 28, 29, and 30 and October 1, 2, 3, 4, 5, 6, 7, and 8. Three days of September and eight days of October all in all make, in classical mathematics, eleven days. There should not be any question that the motion begun to be pending since September 28, the date of its filing, and remained so until October 8, when petitioner was notified of the order denying it.

But in counting the days during which the motion to set aside the judgment has been pending the majority arbitrarily exclude September 28. They invoke in support of their stand the provisions of Rule 28. The application of the rule is flagrantly wrong. Rule 28 applies only to periods of time "prescribed or allowed by these rules, by order of court, or by any applicable statute." Can the majority point out any part of the rules, or any order of court, or any statute prescribing or allowing any period of time within which a motion to set aside judgment should remain pending? There is none that can be pointed out.

The time of pendency of the motion cannot be fixed or determined, because it depends on many unpredictable circumstances, such as the time it will take either party to argue or file their memoranda, the time it will take the court to study the question or questions raised, the time it will take the clerk of court and other employees to deliver the corresponding order to the parties.

The majority expressly exclude September 28, the date when the motion to set aside was filed. The exclusion is an open violation of the provision of Section 3 of Rule 41 which says that "the time during which a motion to set aside has been pending shall be deducted" and, as a matter of fact, there should not be any dispute, unless truth is to be twisted, that the motion begun to be pending since September 28.

We feel that all discussion of the decisions in the Taroma and Celis cases cannot conceal the conclusive fact that the motion to set aside here in question has been filed on September 28, and since then it begun to be pending. Besides, in the Celis case mentioned by the majority there cannot be found any pronouncement of any doctrine, unless we can avail ourselves of the divination help of the Delphian oracle, or a spiritualistic medium, or a simple crystal-gazer. The absurdity of the majority's position can be conclusively shown if we take the hypothesis that the lower court had denied the motion to set aside in the afternoon of the same September 28. As, according to the majority, the motion should have begun to be pending only from September 29, the second day following the day of its filing, then the majority will have to declare as an absolute truth that the motion had not been pending at any time, although it took the court several hours before disposing of it. And anyone who should aver that it has been pending from 9 a. m., supposing that it was filed on that hour, until 4 p. m., when it was denied and the denial was notified to the parties, will commit a falsehood. We cannot agree with a proposition which leads to such a preposterous conclusion.

Whether the motion to set aside the judgment was or was not pending on September 27 seems to be a very simple question and easy to answer. Pending means "not yet decided; in continuance; in suspense." It means also "hanging; overhanging; imminent or impending." The word came from the Latin *pendens*, *pendentis*, from the verb *pendere*, which means to hang, to be suspended. Applied to a judicial process, it means "remaining undetermined; waiting decision." So it is self-evident that the motion begun to be pending since September 28, the very day of its filing.

But the majority declared that it begun to be pending only since September 29. What then was the condition of the motion on September 28? If it was not pending, was it decided, determined, or in any way acted upon? No. If it begun to be pending only on September 29, how could it have been decided on September 28, one day before?

Decision can only be rendered on something waiting to be decided. It is an action upon a pre-existent condition of

things. It is the disposition of a pre-existent controversy. It is the selection of two or more alternative solutions to a juridical or moral problem. So, if the motion was neither pending nor decided on September 28, what was its condition then? To properly answer this question there is an imminent peril of going to the extent of declaring that on September 28 it was not existing at all. That seems to be the only alternative not to incur in the falsehood of declaring that it was not pending on September 28. But the alternative drags us to fall in an evident untruth.

Such is the irony in man that, while there are no bounds to limit his ambition in unravelling the most recondite riddles of the universe and trying to answer the most esoteric and abstruse questions of metaphysics, it fails to see what is simple and obvious. There are many people who continue to identify the absolute certainty of number thirteen with aleatory bad luck. They never hesitate to undertake the adventure of exploring the farthest horizons of the unknown, but have no eyes to see the bridge of their nose. Perhaps that is the way the Einstenian principle of relativity works in human beings. What produces dejection is that the paradox in this case results in an unjust deprivation of petitioner's legal right to appeal against the lower court's decision.

Our opinion is that petitioner's appeal has been filed and perfected with the thirty-day period allowed by the rules, after deducting the eleven days within which the motion to set aside the judgment has been pending, as expressly provided by Section 3 of Rule 41. The reduction of said eleven-day period to only ten days, as made by the majority, is wholly groundless and arbitrary and, besides, contravenes a specific provision of Section 3 of Rule 41.

We vote to grant the petition and that a mandate be issued ordering the respondent lower court to give due course to the appeal of petitioner.

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