

ALFONSO RILI AND TRINIDAD VDA. DE MIRAFLORES, PLAINTIFFS AND APPELLEES, VS. CIRIACO CHUNACO ET AL., DEFENDANTS AND APPELLANTS.

G.R. No. L-2608. October 23, 1950

Ponente: MORAN, C.J.

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MORAN, C.J.:

This is an appeal taken by the defendant Ciriaco Chunaco from a judgment rendered against him upon the pleadings .

The original complaint filed in this case was duly answered with specific denial. An amended complaint was later filed on September 18, 1943, to which no answer was made. A second amended complaint was filed dated August 1944, which was answered on August 30, 1944. This answer, which according to the defendant himself, was intended as an answer to the second amended complaint, contained a mere general denial. On motion of the plaintiffs, upon the ground that the answer raised no issue of fact, a judgment was rendered on the pleadings against the defendants.

Defendant-appellant Ciriaco Chunaco was notified of the judgment on April 6, 1948. On April 20, 1948, or fourteen days after notice of judgment, a motion to set aside was filed which was denied and notice of denial was served upon the defendant on April 24, 1948. A second motion to set aside was filed on May 27, 1948, which was denied, and notice of the denial was served on the defendant on June 17, 1948. The notice and record of appeal together with the appeal bond were filed on June 18, 1948. They were thus filed out of time.

The period of thirty days within which an appeal may be taken, begun on April 6, 1948, when defendant was notified of the judgment. After fourteen days of that period had passed, the first motion to set aside was filed on April 20, 1948. The period of appeal started to run again on May 24, 1948, when defendant was notified of the order denying his motion to set aside. His second motion to set aside was but a reiteration of the first and could not have the effect of staying again the period to appeal. The notice and record of appeal as well as the appeal bond were filed on June 18, 1948, or twenty-five days after defendant was notified of the denial of his first motion to set aside, and thirty-nine days after notice of judgment.

A motion for execution of judgment was filed, but defendant in his turn filed a motion for relief under Rule 38 upon the ground of mistake and fraud. The mistake alleged is one of law, and the fraud is alleged -to consist of facts affecting the merits of the case. Further more, these grounds were existing and available at the time the first motion to set aside was filed. "A motion attacking a pleading or a proceeding shall include all objections then available, and all objections not so included shall be deemed waived" (Rule 26, section 8). The motion for execution was therefore rightly granted and the motion for relief under Rule 38 was rightly denied.

The judgment and orders appealed from are affirmed, the costs to be paid by appellant.

Paras, Feria, Pablo, Bengzon, Tuason, Montemayor, and Reyes, JJ., concur.

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