

**MANUEL R. OLAÑO, PLAINTIFF AND APPELLEE, VS. MANUEL BERNARDO, ET AL., DEFENDANTS. MANUEL BERNARDO, DEFENDANT AND APPELLANT.***G.R. No. L-13083. December 29, 1960*

Ponente: PAREDES, J.

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On February 18, 1956, while Ford automobile plate No. QC 483 (1955), owned by Manuel it. Olano, was parked at Georgia Street, Manila, a truck, bearing plate No. T-5592 (1955), then being driven by Daniel Morayo and belonging to Deluxe Bakery, Inc., of which Manuel Bernardo was the General Manager, bumped into and damaged the automobile in an estimated amount of P784.00. Because demands for the payment of said amount were refused, on April 5, 1956, a complaint for damages was filed in the Municipal Court of Manila, by Manuel Olano, against both the driver Morayo and Bernardo, the latter in his capacity as employer of Morayo and General Manager of the Bakery, registered owner of the truck. On April 24, 1956, the scheduled hearing of the case, not one of the defendants appeared. Before plaintiff was allowed to present his evidence, the record was consulted to find out whether summons were duly served upon the defendants. The record revealed that defendant Bernardo was duly served, but Morayo was not. Defendant Bernardo was declared in default. On May 21, 1956, the municipal court rendered a default judgment of the following tenor:

"For failure of the defendant Manuel Bernardo to appear on April 24, 1956, judgment by default is hereby entered, ordering the said defendant to pay the plaintiff the sum of P784.00; plus the sum of P100.00 as and for attorney fees; and the costs of the suit.

On motion of the plaintiff, the case against the defendant Manuel Morayo is dismissed without prejudice."

On May 30, 1956, defendant Bernardo filed a "Motion to Set Aside Decision" on two grounds: (1) that the court did not acquire jurisdiction over his person since no summons had been served upon him; and (2) that he was not the employer of Morayo, but the Deluxe Bakery, Inc. On June 2, 1956, the above motion was denied. No appeal was taken on the order denying the motion to set aside decision.

On June 13, 1956, Bernardo presented a Notice of Appeal, stating therein, among others, "that he is appealing the decision of this Court to the Court of First Instance of Manila". Notwithstanding the opposition of the plaintiff, the municipal court gave due course to the appeal.

On October 30, 1956, the plaintiff filed, with the CFI, a "Motion to Dismiss the Appeal of the Defendant", alleging that (1) the decision appealed from is not appealable; and (2) the CFI has no jurisdiction over the case, since no appeal was taken from the Order of the Municipal Court denying defendant's motion to set aside the decision. This motion was opposed by Bernardo on the same grounds as those he presented in the municipal court. On November 5, 1956, without the motion to dismiss appeal having been resolved, Bernardo asked the CFI for the dismissal of the complaint, claiming that the same failed to state facts sufficient to constitute a cause of action against him, there being no showing that he committed any wrong or should be responsible for damages

occasioned by the acts of the driver Morayo, and that the real party in interest is the De Luxe Bakery, Inc. since his personality is separate and distinct from the entity he represents as General Manager thereof. The motion to dismiss the complaint, was denied for lack of merit. On March 18, 1957, defendant Bernardo filed his answer to the complaint and after the customary admissions and denials, interposed defenses which were already contained in the previous pleadings he presented both before the municipal court and the trial court. On August 15, 1957, the trial court promulgated an Order dismissing the appeal, stating therein that the procedure undertaken by Bernardo was not that which the rules of court provided. This is an appeal from said order.

Whether the steps taken by defendant Bernardo in prosecuting his appeal are in accordance with the rules and jurisprudence on the matter, would seem to be the only issue posed. It clearly appears that Bernardo was declared in default and a default judgment was correspondingly entered against him in the municipal court; that his motion to set aside the decision was denied; that no appeal was taken from the order denying the motion to set aside the default judgment, and that the appeal to the CFI was on the judgment on the merits. In the case of *Lim Toco vs. Go Fay*, 81 Phil., 258; 45 Off. Gaz., (8) 3350, it was held:

"A defendant in default loses his standing in or is considered out of court, and consequently can not appear in court, adduce evidence, and be heard, and for that reason he is not entitled to notice. If he is not entitled to notice of the proceedings in the case and to be heard, he cannot appeal from the judgment rendered by the court on the merits." (See also *Gequillana vs. Buenaventura*, 87 Phil., 300; *Tecson vs. Melendres*, 88 Phil, 703; *Reyes vs. Roman Catholic Archbishop of Manila*, 88 Phil., 513; *Florentino & Co. Ltd. vs. Johnlo Trading Co.*, etc. 108 Phil., 661; 57 Off. Gaz., [37] 6608).

And Mr. Justice Moran commented:

"The defendant who is declared in default can not appeal, unless he files a motion under Rule 38 asking that the order of default be set aside upon the ground of fraud, accident, error, or mistake, or excusable neglect, and his motion is denied, in which case he may appeal from the order denying such motion, and he may, in the meantime, apply for a writ of preliminary injunction to stay the execution of the judgment rendered on the merits. And if the motion for a stay of execution is denied, the motion may be renewed on appeal" (*I Moran*, 1957 Ed. p. 485, and cases cited therein.)

In order to regain his standing in court, appellant Bernardo should have timely moved to set aside the order of default on the grounds provided in the rules and upon denial thereof, appeal the order of denial. This he failed to do. Although the appellant filed a motion to set aside the decision, he nevertheless did not appeal the order denying the said motion. Moreover, the grounds upon which he based his motion to set aside the default judgment, were not those provided for under Rule 38 of the Rules of Court, and the motion was not accompanied by any affidavit of merit (*Vda. de Valdez vs. Farinas*, 94 Phil., 850; *Tecson, et al. vs. Melendres*, *supra*).

Wherefore, the decision appealed from is affirmed, with costs against the defendant-appellant Manuel Bernardo.

Paras, C.J., Bengzon, Bautista Angelo, Labrador, Concepcion, Reyes, J.B.L., Barrera, and Gutierrez David, JJ., concur.

Judgment affirmed.

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