

SOLEDAD TAN, PLAINTIFF AND APPELLEE VS. CARLOS DIMAYUGA, ET AL., DEFENDANTS. WALTER MASON, DEFENDANT AND APPELLANT.

G. R. No. L-15241. July 31, 1962

Ponente: REGALA, J.

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REGALA, J.:

On July 24, 1957, the plaintiff-appellee Soledad Tan filed with the Court of First Instance of Rizal, suit for damages against Carlos Dimayuga, as a result of physical injuries sustained by her while being a passenger of a Circle taxicab owned by the latter. Answer to this complaint was filed by Dimayuga on August 7, 1957.

On September 4, 1957, said Dimayuga. filed a motion for leave to file a third party complaint, bringing in as third party defendant Walter Mason, whose car driven by him had a collision with the aforesaid taxicab that caused the injuries sustained by Soledad Tan. Mason was served summons on the third party complaint on December 19, 1957.

On January 3, 1958 Mason filed a "Motion to Dismiss the Third Party Complaint," containing a request to "set it for the consideration of the court on January 11, or as soon as the court be minded to entertain the same." Notice of this motion was received by Dimayuga on January 7, 1958.

On January 11, 1958, Dimayuga filed a motion to declare third party defendant Walter Mason in default, on the alleged ground that the reglementary period of fifteen days within which he should file his answer to the third party complaint had already expired and he had not yet filed his answer thereto. Acting on this motion, and still unaware of Mason's motion to dismiss, the court, on January 14, 1958, issued an order declaring him in default.

On January 27, 1958, the deputy clerk of the court below addressed a letter to Mason informing him that his motion to dismiss the third party complaint was received by the court only on January 21, hence, the same could no longer be acted upon.

On March 14, 1958, Soledad Tan, with leave of court, filed an amended complaint containing an alternative prayer for judgment in her favor and against either defendants Dimayuga or Mason. Dimayuga filed a timely answer to this amended complaint. On the other hand, Mason filed a motion to dismiss it as to him, but this was denied on October 10, 1958.

Accordingly, on October 28, 1958, Mason filed his answer to the amended complaint, including therein a counterclaim against Soledad Tan, a cross-claim against Carlos Dimayuga, and a third party complaint against Vicente Escalona, the driver of the taxicab owned by Dimayuga. On the following day, realizing that he had filed a third party complaint against Escalona without court permission, Mason filed a motion for leave to file said pleading. The motion was granted.

On November 7, 1958, Dimayuga filed two motions: (1) to strike out Mason's motion for leave to file third party complaint; and (2) to dismiss the cross-claim filed against him.

The above two motions were granted by the court below in an order dated November 15, 1958, the main part of which reads:

"The court notes that the facts alleged in the motion to dismiss cross-claim are true and the ground in support thereof to be meritorious.

"To allow the cross-claim to remain would be tantamount to setting aside the order of this court declaring him in default with respect to the third party complaint, filed against him by defendant Carlos Dimayuga. Needless to state that what cannot be done directly cannot be permitted to be done indirectly.

"As regards the motion to strike out the so-called 'motion for leave to file third party complaint' the court finds the said motion to be well taken as there is no proof of services, (sec. 6, Rule 26, Rules of Court.)

"Wherefore, the cross-claim against the defendant Carlos Dimayuga, filed by defendant Walter Mason is hereby dismissed, and the motion for leave to file third party complaint is hereby stricken out of the record of the case."

Mason moved for reconsideration of this order but was denied. Hence this appeal.

Briefly, the following are the assigned errors of the lower court: (1) in not setting aside the order of default; (2) in refusing to resolve defendant-appellant's motion to dismiss third party complaint of defendant Carlos Dimayuga; (3) in ordering the dismissal of defendant-appellant's cross-claim; and (4) in ordering the striking out from the record defendant-appellant's third party complaint.

The appeal is devoid of merit.

It must be remembered, that in the first place, that the order of default was rendered on January 14, 1958. For its setting aside, defendant-appellant's remedy should have been a petition for relief under Rule 38 of the Rules of Court, filed within sixty days after he learned of the order and not more than six months after such order was entered (section 3). The record, however, discloses that there was no such petition for relief filed, but that the first time Mason made prayer to set aside the default order was on December 16, 1958 in his "Petition and Motion for Reconsideration" of the order quoted above. Even granting for the sake of argument that this petition should be regarded as one for relief, still the order of default could no longer be reopened because said petition was filed eleven months after the entry of said order, clearly beyond the reglementary period provided for under section 3 of Rules 38.

Having thus neglected to have the order of default vacated, appellant lost every right to expect that his motion to dismiss Dimayuga's third party complaint would be acted upon by the lower court. Furthermore, there is showing that Mason was somewhat heedless about the said motion of January 3, 1958. As already stated, it contained a request to set it for hearing on January 11, 1958. It appears from the appellee's brief that in view of this request for hearing, Dimayuga, with his lawyer, appeared in court on that date, January 11, but neither Mason nor his attorney appeared. A search in the record by the clerk of court and Dimayuga's lawyer revealed no pleading or motion coming from Mason. From these allegations, it would appear that Mason did not see to it that his pleading has reached the court. If he were sincere in asking that his motion to dismiss be considered or heard on January 11, 1958, he or counsel should have appeared in court on that very date, for the proposed hearing, or at least to find out if the motion was already with the court.

Mason argues that having sent the motion to dismiss on January 3, 1958 by registered mail, he expected the lower court to have received it and he should not be made to suffer the consequences of the delay in the court's receiving said motion. But this does not warrant Mason's abandonment of his chances on the motion. Upon being informed by letter dated January 27, 1958, by the Deputy Clerk of Court that his motion to dismiss could no longer be acted

upon as it was received by the lower court only on January 21, 1958, he should have made inquiries about what happened with the third party complaint filed against him and to which no answer by him had as yet been filed. In that case, he should have obtained knowledge of the order of default and could have timely asked for its reopening. Having failed to do this, Mason is guilty of inaction and he must not be heard to complain that his rights have been violated.

Consequently, the lower court did not commit a mistake in dismissing Mason's cross-claim contained in his answer whereby Dimayuga was cross-defendant. It is worthy to note that said cross-claim was filed after the appellant was declared in default. As correctly pointed out by the lower court, to allow the cross-claim to remain would be tantamount to setting aside the order of default because then, the cross-claimant, who had been previously declared in default, would re-obtain a standing in court as party litigant.

With respect to the striking out from the records of Mason's motion for leave to file third party complaint. We have to accept the factual finding of the lower court that there was no proof of service of notice as required in section 6, Rule 26 of the Rules of Court. It has been held that without proof of service thereof, a motion is nothing but a scrap of paper which the clerk of court should not receive for filing (*Manahil vs. Revilla*, 42 Phil., 81; *Roman Catholic Bishop of Lipa vs. Municipality of Unisa*, 44 Phil., 866; and *Director of Lands vs. Sanz*; 45 Phil., 117). This ruling justifies the action taken by the lower court.

In view of the foregoing, the orders appealed from are hereby affirmed. Let this case be remanded to the court of origin for further proceedings. Costs against appellant Mason.

Bengzon, C. J., Labrador, Concepcion, Barrera Paredes, Dizon and Makalintal, JJ., concur.

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