

NUGUID & NUGUID, PLAINTIFF AND APPELLANT, VS. VENANCIO CARIÑO, DEFENDANT AND APPELLEE.*G. R. No. L-12379. July 31, 1958*

Ponente: FELIX, J.

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This is an appeal filed by the Nuguid brothers from the order of the Court of First Instance of Manila in Civil Case No. 18337, denying their motion for reconsideration dated November 29, 1954, of the order of the Court of November 4, 1953, reviving its previous decision rendered in this case, on the ground that said motion was not filed in accordance with law. The facts of the case are as follows:

On May 19, 1952, two Nuguid brothers, both practicing civil engineers, entered into a contract with Venancio Cariño whereby the latter undertook to supply the former with the necessary labor for the carpentry, masonry, tinsmithing, plumbing, electrical installation and painting jobs in the construction of a two-story house for a certain Celedonio de la Paz at Colorado St., Manila. For this undertaking, Cariño was to receive the sum of P4,600, payable in 5 installments. The records do not show when the work started but it does appear that sometime in November, 1952, the construction work was disrupted. On December 9, 1952, the Nuguid brothers instituted Civil Case No. 18337 in the Court of First Instance of Manila, entitled Nuguid & Nuguid vs. Venancio Cariño, for specific performance and damages, alleging that on November 20, 1952, defendant abandoned the construction project and failed to provide the labor necessary for the completion thereof as agreed upon in the contract between them; that plaintiffs had to take over and supervise the construction in order to finish it on or before December 4, 1952; that because of defendant's alleged abandonment of the work, plaintiffs failed to finish the same on time despite their efforts, for which reason, they were paying liquidated damages to the owner of the house in the amount of P30 for every day of delay. It was thus prayed that defendant be required to comply with the obligation imposed upon him by the contract and/or defendant be ordered to pay plaintiffs the sum of P989.50 representing the expenses incurred by plaintiffs for the payment of labor necessary to complete the construction work; for their professional fee for having supervised the construction at the rate of P50 a day from November 20, 1952, until the final completion thereof; for the total amount of liquidated damages that they would pay to the owner of the house at the rate of P30 a day from December 4, 1952, until the work was finally terminated; for attorney's fees and such other relief as may be just and equitable in the premises.

Defendant timely filed his answer denying the allegation that he abandoned the construction work, contending in turn that his laborers were always on the construction site but plaintiffs provided them no materials to work on; that such failure of plaintiffs to furnish the materials caused the delay in the completion of the construction. As counterclaim, defendant charged that plaintiffs were still under obligation to them in the sum of P811.05, although he admitted having already received the amount of P3,687. 95. He also charged, a special defense, that plaintiffs had no legal capacity to sue because the complaint was in the name of Nuguid & Nuguid which did not appear to be either a natural or juridical person. In praying for the dismissal of the complaint, defendant asked that plaintiffs be ordered to pay the amount of P811.05 representing the unpaid wages of laborers; for attorney's fees and costs.

The case was duly set for hearing and in view of plaintiffs' failure to appear, the Court, upon motion of defendant, declared them in default and proceeded to receive defendant's evidence to support the latter's counterclaim. And in a decision dated June 17, 1953, the Court dismissed the complaint and ordered plaintiffs to pay to defendant the sum of P811.05, with legal interest from the date of the filing of the counterclaim until the amount due was fully satisfied, plus attorney's fees in the sum of P200 and the costs of the suit.

Upon receipt of the decision, plaintiffs filed a motion for relief under Rule 38 on the ground of accident, which was granted by the Court and its previous decision was consequently set aside. However, on November 4, 1954, the scheduled date of hearing, as plaintiffs once again failed to appear, the Court revived its decision of June 17, 1953, and ordered the same to be executory in 30 days. From this order, plaintiffs once more filed a motion for reconsideration dated November 29, 1954, alleging that the original lawyer handling that case withdrew therefrom without informing the plaintiffs of the date of the hearing; that it was only upon receipt of the order reviving the previous decision that plaintiffs learned of it and contracted the services of a new counsel; that said circumstances may be considered as excusable negligence and accident. It was, therefore, prayed that the order be reconsidered and plaintiffs be allowed to present their evidence.

It appears that when the aforementioned motion of November 29, 1954, was filed, no affidavit of merit was incorporated therein, although on the date set for the hearing of said motion, plaintiffs filed an affidavit of merit stating their valid defenses against defendant's contentions. On December 27, 1954, the lower Court issued an order denying said motion for the reason that it was not presented in accordance with the Rules of Court. Plaintiffs thus appealed to the Court of Appeals, but as the main question involved therein was purely of law, said Tribunal certified the case to us pursuant to Section 17-(6) of Republic Act 296.

Apparently, plaintiffs' motion seeking for a reconsideration of the order of the lower court reviving its previous Decision on the ground of excusable negligence or accident was one for relief under Rule 38 of the Rules of Court. Section 3 of said Rule 88 provides the following:

SEC. 3. When petition filed; contents and verification.—A petition provided for in either of the preceding sections of this rule must be verified, filed within sixty days after the petitioner learns of the judgment, order or other proceeding to be set aside, and not more than six months after such judgment or order was entered, or such proceeding was taken; and must be accompanied with affidavits showing the fraud, accident, mistake, or excusable negligence relied upon,' and the facts constituting the petitioner's good and substantial cause of action or defense, as the case may be, which he may prove of his petition be granted.

While plaintiffs do not deny that when their motion for reconsideration was filed there was no affidavit of merit attached thereto, they argue that the subsequent filing of such an affidavit on the date of the hearing of the motion, without defendant's objection and before the Court could pass upon the same, may be considered to have "accompanied" the motion for reconsideration and may, therefore, be treated as substantial compliance with the requirement of the law. The word "accompany" has been variably defined as "to cause to be attended by or as by a companion; to go along with; to consort with (Webster's New International Dictionary, Second edition, p. 16); and it has been judicially defined in cases involving varied facts, one of which is—a motion based on answer already deposited with the clerk of court is accompanied by copy of answer (Los Angeles County vs. Lewis, 179 Cal. 398, 177 p. 154, 155). In the light of the foregoing definitions and considering that the affidavit of merit was presented for incorporation before the Court could determine and pass upon the merit of the same, and presumably with the assent of defendant (since he failed to register his opposition thereto), the filing of said affidavit of merit may be considered for all legal intent and purposes, as having "accompanied" the motion for relief involved herein.

We find, however, that the aforesaid affidavit of merit falls short of the requirement of the law. Under our Rules of Court, an affidavit of merit must not only contain facts constituting the movant's good and substantial defenses

but must also state the nature and character of the fraud, accident, mistake or excusable negligence on which the motion for relief was based. An examination of the affidavit of merit filed by plaintiffs-appellants reveals that while it sets down plaintiffs' defenses against the claims of defendant, it does not specify or state the accident or negligence supporting their prayer for relief. It is true that the accident or excusable negligence is mentioned in the motion for reconsideration as the alleged withdrawal of their attorney without notifying them of the date of the hearing, yet We shall not forget that even if the affidavit of merit were in conformity with the provisions of the Rules of Court, the granting or denial of a motion for relief largely depends upon the discretion of the Court and under the circumstances of the case. We cannot declare that the lower Court abused its discretion in issuing the order denying the motion for reconsideration.

Wherefore, the order appealed from is hereby affirmed, with costs against appellants It is so ordered.
Paras, C. J., Bengzon, Padilla, Montemayor, Bautista Angelo, Concepcion, and Endencia, JJ. concur.

CONCURRING

REYES, A., J.:

I concur on the ground that the excuses alleged for plaintiffs' failure to appear at the hearing of November 4, 1954 are not supported by oath.

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