

MAGDALENA VDA. DE LOPEZ, AND LYDIA L. DE TOLENTINO, PLAINTIFFS AND APPELLEES VS. DANIEL CABAIES, DEFENDANT AND APPELLANT.

G.R. No. L-83. April 29, 1946

Ponente: JARANILLA, J.

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JARANILLA, J.:

This ejectment case originated in the Municipal Court of Manila where the defendant obtained a favorable judgment. Plaintiffs appealed to the Court of First Instance, and the case was set for trial de novo.

On August 7, 1945, defendant received notice that the case would be tried at 9 A.M. on August 10, 1945. As he and his counsel would not be able to attend the hearing, a motion for continuance was filed on August 8, 1945, the adverse party having been furnished a copy thereof before the same was filed. When August 10, 1945, came, the Court of First Instance of Manila called the case for hearing, and because the defendant and his attorney did not appear it was heard ex parte and was decided in favor of plaintiffs.

Defendant and appellant assigns five errors allegedly committed by the court a quo, the first of which reads:

"The trial court erred in proceeding with the hearing of the case on 10 August 1945, despite the motion for continuance filed by the defendant and appellant on 8 August 1945, and in denying the relief—motion for new trial—prayed for in defendant's amendment to his motion of 18 August 1945."

It is an indisputable fact that on August 8, 1945, or two days before the hearing of the case de novo on August 10, 1945, counsel for defendant and appellant submitted a motion praying that the hearing be postponed, as he had a criminal case which had been set for trial long before that date and his client, the appellant herein, who had been a patient at an army hospital, was too weak to attend the trial, as certified to by Second Lieutenant Lucio Contago, which certificate was made part of his motion. Although the adverse party was ratified of this motion, no objection appears to have been made previous to the trial, and the movant was not notified of the denial of his motion for continuance. The court a quo nevertheless proceeded with the trial as aforesaid and thereafter entered judgment against the defendant and appellant, ordering the latter to vacate the premises at 2515 Gapan Street, Manila, and to surrender the possession thereof to the plaintiffs and appellees, etc.

Upon consideration of the arguments of both sides, we are of the opinion that under section 2 of Rule 38 of the Rules of Court, which provides that "when a judgment or order is entered, or any other proceeding is taken, against a party in a Court of First Instance through fraud, accident, mistake, or excusable negligence, he may file a petition in such court praying that the judgment, order, or proceeding be set aside," the appellant herein is entitled to the relief prayed for, as his case may be considered as falling under "excusable negligence," first, because he had a case to attend to where the liberty of a person was at stake, which case had been set for hearing long before the one at bar, and second, because his client was too weak to appear in court on that day, as supported by the certificate of a competent person. Moreover the motion for continuance was submitted two days prior to the hearing of the case and in so doing he displayed that diligence or care required of an ordinarily prudent man under

the circumstances. We are therefore of the opinion that the judgment of the lower court should be set aside and that the appellant be given his day in court. This being our conclusion, the remaining errors assigned need not be discussed and passed upon.

Wherefore the case is ordered remanded to the court a quo for further proceedings. Without costs.

Moran, C.J., Paras, Feria, Pablo, and Briones, JJ., concur.

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