

MELECIO ARRANZ, PLAINTIFF AND APPELLANT, VS. MANILA SURETY & FIDELITY CO., INC., DEFENDANT AND APPELLEE.*G.R. No. L-12844. June 30, 1960*

Ponente: PADILLA, J.

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An action was brought in the Court of First Instance of Manila by the plaintiff to recover from the defendant the sum of P14,200 claimed to have been paid by him under no obligation to pay to the defendant; P2,000 for attorney's fees and P10,000 for moral and exemplary damages and costs: A motion to dismiss the complaint with costs for failure to state a cause of action was granted. A motion for reconsideration was denied. An appeal was taken by the plaintiff from the dismissal of his complaint and denial of his motion for reconsideration. This Court rendered judgment affirming the order of dismissal for the reason that there is no allegation in the complaint that the appellee as surety promised the principal that it would pay the loan or obligation contracted by him for his account and that the sum sought to be recovered by the appellant as premium was due the appellee and collectible from the appellant while the liability of the former as surety subsisted.[1] A motion for reconsideration of the judgment was denied. A motion to allow an amended complaint attached thereto was denied. A motion for reconsideration of the last mentioned denial was also denied for the reason that the order of dismissal, affirmed by this Court, has long become final. A second motion for reconsideration was likewise denied. An appeal by the plaintiff brought for the second time the case to this Court.

The appellant insists that he may amend his complaint before a responsive pleading is served and filed (section 1, Rule 17). Although the motion to dismiss was sustained by the trial court and affirmed by this Court, still the appellant contends that he may amend his complaint, because a motion to dismiss is not a responsive pleading. What is contemplated in section 1, Rule 17, is a substantial amendment to the complaint before any judicial action is taken thereon. An order of dismissal upon motion is an adjudication of the case on the merits. After the order of dismissal the party whose pleading was adjudged defective may amend his pleading. However, if he insists that his pleading is not defective and appeals from the order of dismissal which is sustained and upheld by an appellate court, he is no longer entitled to amend his pleading adjudged defective by both Courts.

The orders appealed from are affirmed, with costs against the appellant.

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

Concepcion, J., reserves his vote.

[1] Melecio Arranz vs. Manila Fidelity & Surety Co., Inc., 101 Phil., 27; 53 Off. Gaz., 7247.

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