

GREGORIO ENRIQUEZ, PLAINTIFF AND APPELLANT, VS. DONATO PEREZ, AS ADMINISTRATOR OF THE INTESTATE ESTATE OF THE DECEASED SPOUSES SANTIAGO RUSTE TAN DIU AND CECILIA COLUMBRES, DEFE...*G. R. No. L-5296. May 29, 1953*

Ponente: PARAS, C.J.

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Under date of November 19, 1948, the plaintiff Gregorio Enriquez instituted civil case No. 149 in the Court of First Instance of Zamboanga, for foreclosure of real estate mortgage, against the defendant Donato Perez, in his capacity as administrator of the intestate estate of the deceased spouses Santiago Ruste Tan Diu and Cecilia Columbres. The defendant filed a motion dated December 1, 1948, praying that the complaint be dismissed on the grounds that the plaintiff had no legal capacity to sue and that the cause of action was barred by the statute of limitations, it being contended that the assignment of the mortgage credit in favor of the plaintiff had not been registered, and that more than ten years had elapsed since the cause of action accrued on the last of the three mortgages sought to be foreclosed. On January 13, 1949, the Court of First Instance of Zamboanga issued an order dismissing the complaint for the reasons alleged in the defendant's motion to dismiss. The plaintiff filed a motion for reconsideration praying that the order of dismissal be modified by allowing the plaintiff to amend his complaint so as to cure the defects raised in the defendant's motion to dismiss. This motion for reconsideration was denied by the court in its order of February 2, 1949. No appeal was taken by the plaintiff either from the order of dismissal or from the order denying plaintiff's motion for reconsideration; but on September 19, 1949, the plaintiff instituted in the Court of First Instance of Zamboanga civil case No. 187 against the same defendant and also for foreclosure of real estate mortgage.

On October 4, 1949, the defendant filed a motion praying that the complaint in civil case No. 187 be dismissed, on the ground that plaintiff's cause of action is barred by a prior judgment, in civil case No. 149. On March 31, 1950, the court, after hearing, issued an order dismissing the complaint on the ground of *res judicata*, without special pronouncement as to costs. From this order the plaintiff has appealed.

The plaintiff and appellant admits that "The litigants in this second case are the same as those in case No. 149. The properties involved are likewise the same properties which were the subject matter in said case No. 149, and the prayer is substantially similar to the prayer and remedy asked in Civil Case No. 149." But, according to the appellant, the essential differences between the complaint in civil case No. 149 and civil case No. 187 are (1) while in civil case No. 149 there was no allegation that the deed of assignment of the mortgage credit in favor of the appellant had been registered, in the present case, No. 187, it is alleged that the assignment was presented for registration; (2) while in civil case No. 149 there was no averment that since September 27, 1932, the date of the execution of the last of the three mortgages sued upon, payment was made on the mortgage loans, in the present suit, No. 187, it is expressly alleged that payments on the loans were made on April 30, 1941, and October 14, 1941; (3) while in civil case No. 149 there was no allegation that the defendant admitted the existence of the

mortgage obligations, in the complaint in civil case No. 187 there is positive allegation that as late as May 27, 1948, and August 21, 1948, the defendant recognized the existence of said obligations.

It is therefore contended by the plaintiff and appellant that the order of dismissal in civil case No. 149 cannot have the effect of barring plaintiff's cause of action in the present case No. 187, since the cause of action in the latter case is different from that in civil case No. 149. More specifically, the appellant points out that in the earlier case the plaintiff was relying on the mortgages executed in 1927, 1928, and 1932, whereas in the present case the plaintiff is relying on the partial payments made in 1941 which gave rise to a new promise to pay. It appears, however, that the order of dismissal in civil case No. 149 became final by reason of the failure of the plaintiff to appeal, with the result that, if said mortgages had ceased to be effective, they could not be revived by a subsequent complaint alleging partial payment. This new allegation might have been the subject of amendment, but since the plaintiff did not choose to appeal civil case No. 149 in which the court did not allow him to amend his complaint so as to cure the defects pointed out in the defendant's motion to dismiss, the new allegation cannot properly be brought in as a part of the second complaint in civil case No. 187. Otherwise, allegations may be split or presented piecemeal in separate complaints. The same consideration may be said as regards the additional averment that the assignment of the mortgage credit in favor of the plaintiff had already been registered.

This brings us to the contention of the appellant that the order of dismissal in civil case No. 149 cannot have the effect of res judicata, because it was not a judgment or order on the merits, because one of the grounds of the motion to dismiss was plaintiff's lack of capacity to sue. It is, however, clear that, as the motion to dismiss was predicated not only on said ground but also on the statute of limitations, and the court sustained both grounds, the order of dismissal was one on the merits, patently falling under section 4, Rule 30, of the Rules of Court, which provides as follows: "Unless otherwise ordered by the court, any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, operates as an adjudication upon the merits."

Wherefore, the appealed order is affirmed, and it is so ordered with costs of this instance against the appellant.

Pablo, Bengzon, Tuason, Montemayor, Reyes, Jugo, Bautista Angelo and Labrador, JJ., concur.

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