

PACENCIA O. ITCHON, PLAINTIFF AND APPELLANT, VS. JUAN M. BALIGOD AND ISABEL S. SERRANO ALIAS ISABEL S. BALIGOD, DEFENDANTS AND APPELLEES.

G.R. No. L-20962. May 27, 1966

Ponente: MAKALINTAL, J.

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MAKALINTAL, J.:

This is an appeal by Pacencia O. Ichon from the order of the Court of First Instance of Cagayan dismissing her complaint against the spouses Juan M. Baligod and Isabel S. Serrano alias Isabel S. Baligod.

Plaintiff filed the complaint on September 29, 1961. On October 21, 1961 defendants filed their answer with a counterclaim for actual damages in the amount of P2,000 and moral damages of P10,000. On October 31, 1961 plaintiff filed a motion for a bill of particulars, asking the court to order defendants to specify the items constituting the actual damages mentioned in their counterclaim. On November 11, 1961 the court granted the motion and ordered defendants to specify with definiteness the nature and extent of the actual damages they had allegedly suffered. On July 12, 1962 plaintiff filed a motion to strike out defendants' counterclaim for actual damages for failure to comply with the order of November 11, 1961. Before this motion could be heard, the clerk of court, on July 19, 1962, issued a notice of hearing", setting the case for trial on the merits on August 14, and 15, 1962. On July 23, 1962 the trial court issued an order denying "in the meantime" plaintiff's motion on the ground that there was no proof that defendants had received a copy of its order of November 11, 1961, and that there was no showing that they had violated the same. On August 13, 1962 plaintiff's counsel sent a telegram to the Court asking for postponement of the hearing because issues had not been joined due to defendants' failure to file a bill of particulars. On the same day plaintiff filed a motion for reconsideration of the order of denial, and at the same time requested postponement of the trial of the case until the motion for reconsideration had been resolved. The next day the court dismissed the case on the ground that plaintiff's non-appearance at the trial on that day constituted lack of interest to prosecute. On August 25, 1962 the court issued an order to the effect that in view of the order of dismissal dated August 14, 1962 resolution on the motion for reconsideration dated August 13, 1962 was no longer necessary. On September 6, 1962 plaintiff moved for reconsideration of this order but the court denied the motion on September 22, 1962. So plaintiff appealed.

The questions raised in this appeal are: (1) whether the issues were already joined when the case was calendared for trial; and (2) whether the lower court properly dismissed the case on the ground of plaintiff's lack of interest to prosecute.

Section 5, Rule 20, Revised Rules of Court, provides that upon the submission of the last pleading in a particular case, it shall be the duty of the clerk of court to place such case in the pre-trial calendar.[1]

Since appellees' answer contains a counterclaim, it is not the last pleading that should be filed in order that issues may be considered joined. For a counterclaim is equivalent to a complaint against the plaintiff (Pongos vs. Hidalgo Enterprises, Inc., et al., 84 Phil., 499; 47 Off. Gaz., 733) and itself calls for an answer. It is this answer

that should be deemed the last pleading necessary for joinder of issues.

Appellant had ten days from service within which to answer the counterclaim (section 7, Rule 10; now section 4, Rule 11). Failure to do so within said period would have constituted default with respect to the counterclaim (Section 6, Rule 35; now section 10, Rule 6). But before answering appellant filed a motion for bill of particulars, which was granted by the lower court.

After service of the bill of particulars (if one is submitted) the moving party shall have the same time to serve his responsive pleading, if any is permitted by the Rules, as that to which he was entitled at the time of serving his motion, but not less than five (5) days in any event (section 2, Rule 16; now section 1(b), Rule 12). If the order of the court to make a pleading more definite and certain or for a bill of particulars is not obeyed within ten days after notice thereof or within such other time as the court may fix, the court may order the striking out of the pleading to which the motion was directed or make such other order as it deems just; it may also, upon motion, set aside the order, or modify it in the interest of justice (section 1(c), *id.*).

Because as late as July 12, 1962 appellees had not yet filed a bill of particulars, appellant filed on that day a motion to strike out their claim for actual damages. The court, however, denied the motion on the ground that there was no showing that appellees had received a copy of its order of November 11, 1961. But the record shows that copies thereof were sent to the respective lawyers of the parties on November 16, 1961, as certified by the clerk of court (page 18, record on appeal). The court could have easily ascertained this fact from the record. Under Rule 16, section 3 (old Rules of Court) appellees had ten days from receipt of the order within which to comply therewith. This they failed to do. Appellant acted in accordance with the Rules in asking for the striking out of appellees' counterclaim for actual damages. If the court felt that appellees should no longer be required to obey its order of November 11, 1961, then it should have set the order aside, or at least modified it. But the court did neither. It simply denied the motion to strike out without touching the order to appellees to submit a bill of particulars. So this order still stands, although the period to comply with it has lapsed.

If the court had set aside its order of November 11, 1961, appellant should have filed her answer to the whole counterclaim; or if the court had stricken out the counterclaim for actual damages, appellant should have filed her answer to the counterclaim for moral damages alone. In neither case the filing of the answer would have signalled the joinder of issues.

The issues not having been joined, the case should not have been calendared for trial. Consequently appellant's failure to attend the same did not constitute lack of interest to prosecute.

Wherefore, the order of dismissal is set aside and the case remanded to the lower court for further proceedings, with costs against appellees.

Bengzon, C.J., Bautista Angelo, Conception, Reyes, J.B.L., Barrera, Dizon, Regala, Bengzon, J.P., Zaldivar and Sanchez, JJ., concur.

Order set aside, case remanded for further proceedings.

[1] The provision of Rule 31 of the Rules of Court (before revision) was as follows:

Section 1. When issue joined.—Upon the filing of the last pleading, the case shall be included in the trial calendar of the court.

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