

**PEOPLES REALTY BROKERAGE CORPORATION, PETITIONER, VS.
THE HON. JULIAN E. LUSTRE, NOW RETIRED JUDGE, COURT OF
FIRST INSTANCE, SEVENTH JUDICIAL DISTRICT, BRANCH XVII,
QUEZON CITY ...**

G.R. No. L-41495. October 20, 1978

Ponente: CONCEPCION, JR., J.

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CONCEPCION, JR., J.:

This is a petition for certiorari, prohibition and mandamus.

The case originated from the Court of First Instance of Quezon City, Branch XVII, on June 27, 1973 when private respondent Andres Torres Yap as plaintiff filed a complaint^[1] for breach of contract with damages against Jose C. Desiderio & Co., Inc. and the Peoples Realty Brokerage Corporation, docketed therein as Civil Case No. Q-17850.

In due time, the defendant Peoples Realty Brokerage Corporation filed its answer, and after the usual admissions and denials, interposed a cross-claim against its co-defendant.^[2]

After the issues had been joined, the case was set for pre-trial on March 12, 1974,^[3] which was, however, reset to March 26, 1974,^[4] by agreement of the parties.^[5] On the date agreed upon, the judge was on leave, hence, the pre-trial was again reset to May 30, 1974.^[6] The notice of the resetting of the pretrial to May 30, 1974, was written on the reverse side of the Minutes of the session held by the court on March 12, 1974 as follows: "Judge is on leave, Pre-trial is re-set to May 30, 1974 at 1:30 P.M.," which Mr. Amorsolo M. Medina, President and General Manager of petitioner signed below as follows: "A.M. Medina, for Peoples Realty & Atty. Ungson."^[7]

On the designated date, neither the defendant Peoples Realty Brokerage Corporation nor its counsel appeared. Hence, the court below, presided by respondent Judge Julian E. Lustre (now retired), issued upon motion of plaintiff, an Order declaring defendant Peoples Realty Brokerage Corporation as in default under Section 2, Rule 20 of the Rules of Court, ordering the plaintiff and the defendant Jose E. Desiderio & Co., Inc., to present their evidence before the Deputy Clerk of Court who was commissioned to receive the same.^[8] A copy of the Order as in default was sent by the court by registered mail to Atty. Ungson at NS-8 Sta. Mesa, Manila, on June 11, 1974.^[9]

On June 5, 1974, the plaintiff, thru counsel, presented his evidence before the Commission, and on July 15, 1974, the latter submitted his Report to the court.^[10] Thereafter, the plaintiff filed an ex-parte motion, dated August 8, 1974, for judgment against the defendant Peoples Realty Brokerage Corporation.^[11] The same, however, has not as yet been acted upon by the court a quo.

On August 21, 1974, defendant's counsel filed a motion to lift the Order of default alleging that he did not sign the notice of pre-trial on May 30, 1974, as he was hospitalized from March up to the later part of May, 1974; that he has not received a copy of the Order of default; and the motion was not filed for the purpose of delay.^[12] Plaintiff

opposed the motion and alleged that defendant had been duly notified of the pre-trial and had been given ample time to set aside the order of default but no action had been taken; and that the lifting of the order of default would only delay the proceedings, prejudicial to his interest.[13] After due hearing, the respondent Judge Julian E. Lustre, issued on September 18, 1974, an Order denying defendant's motion for having been filed "too late," i.e., three (3) months after the issuance of the Order of default on May 30, 1974, and granted Atty. Ungson's request to file a motion for reconsideration within fifteen (15) days from receipt thereof.[14]

Defendant's motion for reconsideration[15] as well as its second urgent motion for reconsideration[16] of the order denying the motion to lift the order of default were, likewise denied by respondent Judge Onofre A. Villaluz (vice Judge Lustre, who retired) per his Orders dated June 16, 1975[17] and July 25, 1975,[18] respectively.

Claiming that there is no appeal nor any plain, speedy and adequate remedy in the ordinary course of law available to it and believing that respondent Judges acted without or in excess of jurisdiction or with grave abuse of discretion, the defendant instituted the instant petition for (1) certiorari to set aside the Order of denying, dated May 30, 1974, the Order denying the motion to lift the order of default, dated September 18, 1974, the Orders denying the motion for reconsideration, dated June 16, 1975 and July 25, 1975, and all the ex-parte proceedings before the Commissioner; (2) prohibition to enjoin respondent Judge Onofre A. Villaluz from hearing the case, or deciding the same or executing the decision if already rendered; and (3) mandamus to order respondent Judge to set the case for trial on the merits and to give defendant an opportunity to confront the plaintiff and its co-defendant and their witnesses and to prove its defenses and its cross-claim.

In assailing the respondent court for having acted with grave abuse of discretion in declaring petitioner as in default for failure to appear at the pre-trial counsel for petitioner contends that he was not notified of the resetting of the pre-trial on May 30, 1974. He claims that although the notice of the resetting of the pre-trial was signed by Mr. A.M. Medina, President and General Manager of petitioner "for Peoples Realty & Atty. Ungson," the same is not binding upon him because he had never authorized Mr. Medina to receive or sign for him the notice of pre-trial or any notice, pleading or minutes in Civil Case No. Q-17850.[19] He also claims that the said notice was insufficient for purposes of pre-trial, and that the notice of pre-trial must be served separately upon the party and his counsel of record, which was not done in this case. Since he was not served with a separate notice of the pre-trial on May 30, 1974, the Order of respondent Judge Julian E. Lustre declaring the petitioner in default is null and void.[20]

On the other hand, private respondents maintain that Mr. Medina was negligent in not notifying Atty. Ungson and in not appearing at the pre-trial. Since it was through the negligence of petitioner's President and General Manager that petitioner was declared in default, it could not now be validly asserted that said petitioner was unlawfully declared in default.[21]

The question as to whether the notice of pre-trial should be served separately upon the party and his counsel of record was already passed upon by this Court in the case of *Lim vs. Ammas*[22] wherein it was held that the "x. x x notice of pre-trial must be served separately upon the party affected thereby and his counsel of record, stating therein the purpose, time and place of the pre-trial conference and requiring said party and his counsel to appear thereat. The service upon the party may be made directly to him or through his counsel who shall be required to serve notice upon the party."¹ This ruling was subsequently reiterated in the cases of *Pineda vs. Court of Appeals, et al.*[23] *Taroma vs. Hon. Marcelino Sayo, et al.*,[24] *Sagarino vs. Pelayo*,[25] and *Heirs of Fuentes, et al. vs. Hon. Antonio G. Macalingdog, et al.*[26] In the *Taroma* case, this Court, in affirming the ruling that notice of pre-trial must be served separately upon the party and his counsel of record held:

“For the guidance of the bench and bar, therefore, the Court in reaffirming the ruling that notice of pre-trial must be served separately upon the party and his counsel of record, restates that while service of such notice to party may be made directly to the party, it is best that trial courts uniformly serve such notice through or care of his counsel at counsel's address with the express imposition upon counsel of the obligation of notifying the party of the date, time and place of the pre-trial conference and assuring that the party either appear thereat or deliver to counsel a written authority to represent the party with power to compromise the case, with the warning that a party who fails to do so may be non-suited or declared in default.”

Pursuant, therefore, to the rulings laid down in the aforecited cases, the notice of the pre-trial on May 30, 1974, although signed by petitioner's President and General Manager for the said petitioner and its counsel of record, Atty. Ungson is neither adequate nor sufficient for purposes of pre-trial. Petitioner's counsel should have been served with a separate notice of the pre-trial held on May 30, 1974. Since he was not served with a separate notice of pre-trial, the order of respondent Judge declaring the petitioner in default as well as the ex-parte proceedings before the Commissioner were null and void.

In denying petitioner's motion to lift the order of default, respondent Judge Julian E. Lustre held that it was filed too late," i.e., almost three (3) months after the issuance of the order of default on May 30, 1974.[27] The delay, however, was due to the fact that petitioner's counsel did not receive a copy of the order of default. While it is true that a copy of the order of default was mailed to him, it was erroneously addressed at uNS-8 Sta. Mesa, Manila." instead of "NS-8 Sta. Mesa Market, Manila" the address given by him in the answer with cross-claim and appearing on the cover page of the record.[28] Hence, the same was returned to the Court of First Instance of Quezon City, Branch XVII as "UNCLAIMED" and/or "UNDELIVERABLE" mail, the address as being unknown by the letter carrier.[29] Although petitioner's counsel was not entirely without fault in indicating his address as "NS-8 Sta. Mesa, Manila" in the answer to the counterclaim[30] the same appears to be a typographical error and was not made to mislead the court. At any rate, the fact remains that petitioner's counsel did not receive a copy of the order of default. It was only on August 21, 1974, while he was in the sala of respondent Judge to check on another case, that he came to know of the order of default. Without unnecessary delay, he prepared and filed on the same day the motion to lift the order of default.[31] In this connection, We reiterate the principle that "(A) motion to set aside the order of default filed prior to the rendition of the judgment on the merits should be considered with liberality since it is presented promptly and without unnecessary delay and not much inconvenience may be caused either to the Court or to the adverse party there being as yet no judgment on the merits." [32] Considering the allegations of the complaint and the answer with cross-claim, We believe that it would be more in keeping with the concept of justice and fairness that the case be tried on the merits, allowing the parties to prove their respective allegations and without resorting to technicalities.

WHEREFORE, the petition is granted and the questioned orders dated May 30, 1974 declaring the petitioner in default, the order dated September 18, 1974 denying the petitioner's motion to lift the order of default, the orders dated June 16, 1975 and July 25, 1975 denying the petitioner's motion for reconsideration, are hereby annulled and set aside. With costs against the private respondents Andres Torresyap and Jose E. Desiderio and Company, Inc.

SO ORDERED.

Fernando (Actg. C.J., Chairman), Barredo, Antonio, Aquino, and Santos, JJ., concur.

[1] Annex "A" of Petition, p. 12. rollo.

[2] Annex "B" of Petition, p. 19. rollo.

- [3] Comment, p. 95. rollo.
- [4] Annex "C" of Answer: p. 46. rollo.
- [5] Annex "A" of Reply, p. 108. rollo.
- [6] Annex "B". Reply to Comments, p. 109. rollo.
- [7] Annex ""C-I" of Petition, p. 47. ratio.
- [8] Annex "D" of Petition, p. 48. rollo.
- [9] Annexes "E" and "G" of Petition, pp. 49. 51. rollo.
- [10] Annex "Q" of Petition, p. 73. ratio.
- [11] Annex "R" of Petition, p. 77. rollo.
- [12] Annex "H" of Petition, p. 52, rollo.
- [13] Annex "I" of Petition, p. 54. rollo.
- [14] Annex "J" of Petition, p. 55. rollo..
- [15] Annex "K" of Petition, p. 56. rollo.
- [16] Annex "M" of Petition, p. 65. rollo.
- [17] Annex "L" of Petition, p. 64. rollo.
- [18] Annex "N" of Petition, p. 70. rollo.
- [19] p. 3. rollo.
- [20] pp. 105-106, rollo.
- [21] pp. 86-87. 97-98. rollo.
- [22] G.R. No. L.-39094. April 18. 1975. 63 SCRA 408.
- [23] G.R. No. L-33583. Sept. 30. 1975. 67 SCRA 228.
- [24] G.R. No. L-37296. Oct. 30. 1975. 67 SCRA 508.
- [25] (G.R. No. L-27927. June 20. 1977. 77 SCRA 402.
- [26] (G.R. No. L-45445. June 16, 1978.
- [27] Annex "J". p. 55, rollo.
- [28] p. 4, rollo.
- [29] Annex "G", p. 51, rollo.
- [30] Annex "A" of Comment, p. 89. rollo.

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