

JOSE LEE DY PIAO, PLAINTIFF AND APPELLEE, VS. PAZ TY SIN TEI, ALIAS GUE KUY, DEFENDANT AND APPELLANT.*G.R. No. 10549. February 28, 1958*

Ponente: REYES, J.B.L., J.

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Jose Lee Dy Piao, claiming to be the only child of the late Dy Lac, by the latter's first marriage, filed Civil Case No. 25736 in the Court of First Instance of Manila on March 19, 1955, to compel defendant Paz Ty Sin Tei to deliver or reconvey certain properties allegedly belonging to his late father Dy Lac, but unlawfully donated by the latter on 1938 to defendant Paz Ty while the latter maintained extra-marital relations with the deceased. Plaintiff further averred that the donations were based on illegal consideration and were, besides inofficious, being in excess of the free part of Dy Lac's estate; but that Paz Ty, who is the executrix named in Dy Lac will, refused to bring said properties into the estate. On April 11, 1955, defendant pleaded by way of answer that she had been married to Dy Lac in 1942, and denied any impairment of plaintiff's legitime as a result of the questioned donations ; and counterclaimed for damages.

Up to the filing of the answer to defendant's .counterclaim, plaintiff had been represented by Attorney Ignacio Lugtu. However, on June 7, 1955, Attorneys Felipe S. Abeleda and Felipe T. Ang entered an appearance for plaintiff "in collaboration with Attorney Ignacio Lugtu".

On October 6, 1955, the court set the case for hearing on November 18, 1955, and the clerk of court served notice of said hearing on Attorneys Abeleda and Ang for plaintiff. When the date of the trial came, neither plaintiff nor any of his counsel appeared; and upon defendant's motion, the lower court dismissed the case "with prejudice."

On December 1, 1955, plaintiff, through Attorney Felipe S. Abeleda, filed a motion for reconsideration, claiming that Attorney Ignacio Lugtu was and had always been the principal counsel of record for plaintiff, the undersigned counsel having entered his appearance in the case only in collaboration with him; that Abeleda, a member of Congress, was in Occidental Mindoro from September 1 to November 23, 1955 in connection with the campaign for the elections of November 8, 1955, and came to know of the notice of the hearing of the case only on November 26, 1955, when he returned to Manila and was informed by his assistant that said notice was received; that while counsel for defendant had always served copies of previous pleadings on plaintiff's principal counsel Attorney Ignacio Lugtu, he did not serve copy of his motion to set the case for hearing on said counsel, and the clerk of court likewise failed to serve notice of the hearing on said lawyer; that plaintiff failed to appear at the hearing because of illness at the time, as shown by medical certificate attached to the records of another case pending in the same court; and that unless plaintiff is given ample opportunity to prove his allegations, his interests in Special Proceedings No. 5541 would be jeopardized. This motion for reconsideration was, on December 15, 1955, denied by the court, first, because it was not in due form, and second, because service of notice upon one of the attorneys of record in a case is sufficient and binding upon the party represented.

On December 23, 1955, Attorney Ignacio Lugtu, in behalf of plaintiff, asked for leave to file a second motion for

reconsideration, which was granted; and on January 7, 1955, said counsel filed a second motion for reconsideration, specifically charging defendant's counsel with having procured the hearing of November 18, 1955 by fraud, stealth or strategy calling attention to the fact that all notices prior to that of the hearing of November 18, 1955 had been served on the principal counsel of Ignacio Lugtu, and not on the collaborating attorneys. In spite of vigorous opposition on the part of defendant, the lower court, on January 19, 1956, amended its previous order of November 18, 1955 making the dismissal of the case "without prejudice". Having failed to obtain reconsideration of this last order, defendant appealed to this Court.

Appellant contends that since both motions were substantially identical, and because the fraud averred in the second motion must have existed already when the first motion was filed, the second did not interrupt the period for appealing; and as said period had already elapsed when the court entered its order amending that of November 18, 1955 (dismissing the action with prejudice), said order had become final, and hence, that the amendatory order of January 19, 1956, was void as issued without jurisdiction.

After mature consideration of the peculiar circumstances obtaining in the present case, we have reached the conclusion that the action of the court below should be sustained.

Defendant appellant's position that the two motions for reconsideration are identical is not warranted, for the first motion for reconsideration of December 1, 1955, merely alleged excusable negligence, while that of December 23, 1955, relied upon fraud or malice on the part of appellant's counsel. This charge necessarily injected a new fact, not theretofore averred or presented in the first motion for the court's consideration, and one that caused a substantial difference between the two petitions, to wit: that the failure to notify the principal counsel of the motion to set the case for trial was intentional and calculated to take advantage of the absence of collaborating counsel upon whom the motion to set was served. Consequently, the second motion for reconsideration being on a materially different ground than the first, suspended the period for appeal and the court retained jurisdiction to consider and decide it.

It is a recognized rule that in matters of fraud, the cause of action arises not upon the commission of the deception, but upon its discovery by the injured party, and this principle applies under the peculiar circumstances of the case. While it may be true that whatever deceit existed must have been practiced upon appellee before the issuance of the order of November 18, 1955, there is nothing on record to positively show that such fraud had been discovered on the day the first motion to reconsider was filed, either by appellee or attorney Abeleda who filed the same. Furthermore, a charge of fraud is one not to be lightly made; and we are not inclined to penalize appellee, by a final bar against his causes of action, simply because his counsel did not immediately and recklessly jump into conclusions and make a charge of fraud, but exercised proper restraint and refrained from doing so until he felt reasonably certain of its existence.

Considering that the merits of the case have not been in any way inquired into; and that a dismissal with prejudice would, under the facts of record in the present case operate to bar appellee's claim through mere technicality, we do not believe that the action of the court, in converting such dismissal into one without prejudice, exceeded the bounds of judicial discretion.

Wherefore, in the interest of equity and justice, the order appealed from is affirmed, with costs against appellant.

So ordered.

Paras, C.J., Bengzon, Padilla, Montemayor, Reyes A., Bautista Angelo, Labrador, Concepcion, Endencia, and Felix, JJ., concur.

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