

AUGUSTO CAPUZ, PETITIONER, VS. THE COURT OF APPEALS AND ERNESTO BANEZ, RESPONDENTS.

G.R. No. 112795. June 27, 1994

Ponente: QUIASON, J.

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QUIASON, J.:

This is a petition for review on certiorari under Rule 45 of the Revised Rules of Court to reverse and set aside the decision of the Court of Appeals in CA-G.R. SP No. 30030, which affirmed the judgment by default of the Regional Trial Court, Branch 130, Kalookan City in Civil Case No. C-15501.

We grant the petition.

I

On July 15, 1992, private respondent filed a complaint for a sum of money against petitioner with the Regional Trial Court, Branch 130, Kalookan City (Civil Case No. C-15501).

On September 5, petitioner was served with summons.

After petitioner failed to file any answer, private respondent filed on September 25, an Ex Parte Motion to Declare Defendant in Default.

On October 23, the trial court issued an order declaring petitioner in default and authorizing private respondent to present his evidence ex parte.

On October 28, private respondent presented his evidence ex parte.

On November 6, the trial court rendered a decision, disposing as follows:

"WHEREFORE, judgment is hereby rendered in favor of the plaintiff ERNESTO BANEZ against the defendant AUGUSTO CAPUZ ordering the defendant to pay the following:

1. The principal amount of P90,000.00 plus 12% interest per annum from June 13, 1992, the date of the written demand, until fully paid;
2. P10,000.00 as attorney's fees;
3. P1,000.00 as litigation expenses and the costs" (Rollo, p. 11).

On November 13, petitioner received a copy of the Order dated October 23, 1992 and the Decision dated November 6, 1992.

On November 23, petitioner filed a verified motion to lift the order of default and to set aside the decision.

In said motion, petitioner averred that:

"1. Defendant's failure to file his responsive pleading is due to fraud, mistake, accident and/or excusable neglect, and that when defendant received a copy of the summons and the complaint on September 5, 1992, defendant wasted no time in seeing the plaintiff and confronted him about his receipt (payment of the subject obligation), plaintiff assured the defendant that he (plaintiff) will instruct his lawyer to withdraw the complaint, and not to worry anymore. Defendant took the word of his 'compadre' the plaintiff. Hence, defendant did not file his answer to the complaint" (Rollo, p. 11).

On December 7, the trial court issued an order, denying petitioner's verified urgent motion, the pertinent portion of which reads:

"The filing of the motion to lift order of default did not stop the running of the period of appeal, for his only right at the moment is to receive notice of further proceedings regardless of whether the order of default is set aside or not. On the other hand, defendant could have appealed the Decision before the expiration of the period to appeal, for he is granted that right by the Rules. Since he failed to make a timely appeal, the decision rendered in this case has become (sic) final" (Rollo, p. 12).

On December 23, petitioner filed an urgent motion asking for the reconsideration of the Order dated December 7, 1992, claiming: (1) that the said order was prematurely issued; (2) that the trial court erred in holding that the decision had become final; and (3) that the said order was contrary to law and jurisprudence.

On January 6, 1993, the trial court issued an order, denying petitioner's motion for reconsideration.

Petitioner filed a petition for certiorari under Rule 65 of the Revised Rules of Court with the Court of Appeals.

On November 18, the Court of Appeals dismissed the petition for lack of merit, holding: (1) that petitioner's motion to lift the order of default and set aside the judgment was improper because there was already a judgment by default rendered when it was filed; (2) that having discovered the order of default after the rendition of the judgment, the remedy of petitioner was either to appeal the decision or file a motion for new trial under Rule 37; and (3) that the said motion could not be considered as a motion for new trial under Rule 37 because it was not accompanied by an affidavit of merit.

II

In the instant petition, petitioner argues that the motion to lift the order of default and to set aside the decision could be treated as a motion for new trial under Rule 37 and that a separate affidavit of merit need not be submitted considering that the said motion was verified.

We agree that the verified motion of petitioner could be considered as a motion for new trial. The grounds alleged by petitioner in his motion are the same as the grounds for a motion for new trial under Rule 37, which are: (1) that petitioner's failure to file his answer was due to fraud, mistake, accident or excusable negligence; and (2) that he has a meritorious defense. Petitioner explained that upon receiving the summons, he immediately saw private respondent and confronted him with the receipt evidencing his payment. Thereupon, private respondent assured him that he would instruct his lawyer to withdraw the complaint. The prior payment of the loan sought to be collected by private respondent is a good defense to the complaint to collect the same loan again.

The only reason why respondent court did not consider the motion of petitioner as a motion for new trial was because the said motion did not include an affidavit of merit.

The allegations contained in an affidavit of merit required to be attached to a motion to lift an order of default or for a new trial need not be embodied in a separate document but may be incorporated in the petition itself. As held in *Tanhu v. Ramolete*, 66 SCRA 425 (1975):

"Stated otherwise, when a motion to lift an order of default contains the reasons for the failure to answer as well as the facts constituting the prospective defense of the defendant and it is sworn to by said defendant, neither a formal verification nor a separate affidavit of merit is necessary."

Speaking for the Court in *Circle Financial Corporation v. Court of Appeals*, 196 SCRA 166 (1991), Chief Justice Andres R. Narvasa opined that the affidavit of merit may either be drawn up as a separate document and appended to the motion for new trial or the facts which should otherwise be set out in said separate document may, with equal effect, be alleged in the verified motion itself.

Respondent court erred when it held that petitioner should have appealed from the decision, instead of filing the motion to lift the order of default, because he still had two days left within which to appeal when he filed the said motion. Said court must have in mind paragraph 3 of Section 2, Rule 41 of the Revised Rules of Court, which provides that: "a party who has been declared in default may likewise appeal from the judgment rendered against him as contrary to the evidence or to the law, even if no petition for relief to set aside the order of default has been presented by him in accordance with Rule 38."

Petitioner properly availed of the remedy provided for in Section 1, Rule 65 of the Revised Rules of Court because the appeal under Section 2, Rule 41 was not, under the circumstances, a "plain, speedy and adequate remedy in the ordinary course of law." In an appeal under Section 2, Rule 41, the party in default can only question the decision in the light of the evidence on record. In other words, he cannot adduce his own evidence, like the receipt to prove payment by petitioner herein of his obligation to private respondent.

WHEREFORE, the petition is GRANTED. The challenged decision of the Court of Appeals is REVERSED and the judgment dated November 6, 1992 of the Regional Trial Court, Branch 130, Kalookan City is SET ASIDE. Let this case be remanded to the court of origin for further proceedings. No pronouncements as to costs.

SO ORDERED.

Cruz, (Chairman), Davide, Jr., Bellosillo, and Kapunan, JJ., concur.

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