

LUPO MERCADO, PLAINTIFF AND APPELLEE, VS. ANANIAS VICENCIO, DEFENDANT AND APPELLANT.

G.R. No. 11550. March 14, 1917

Ponente: TRENT, J.

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TRENT, J.:

This is an appeal from a judgment of the Court of First Instance in favor of the plaintiff for the sum of P348, together with interest and costs.

It is now urged that the trial court erred (1) in overruling the defendant's demurrer; (2) in declaring the defendant in default for a failure to answer the complaint within the time prescribed by the rules of the court; and (3) in rendering judgment against the defendant for the sum of P348.

The plaintiff alleged that he leased to the defendant on the 20th of December, 1914, a casco for P4 a day; that the defendant used the casco from that date until January 22, 1915; that the defendant paid P60 for the use of the casco; that due to the negligence of the defendant the casco, which had been abandoned on the rocks near the shore in Manila, was badly damaged; that it required twenty days in which to repair the casco at a cost of P200; and that the use of the casco during the twenty days was worth P80. The defendant demurred to the complaint upon the ground that it was vague, uncertain, and unintelligible. The demurrer was overruled and, according to the bill of exceptions, the court notified the defendant of the order overruling the demurrer on September 18, 1915, and the defendant noted his exception in the record on the same day. The defendant having failed to answer the complaint, judgment by default was entered against him on motion of the plaintiff on October 12, 1915. Final judgment was rendered for the amount above indicated, after hearing and considering the plaintiff's proof, on November 19, 1915, and exception taken on the same day. It is not now contended that the testimony does not support the findings of fact upon which the judgment rests.

The first assignment of error is entirely without merit, because the complaint clearly alleges in a legal, logical form a cause of action. The only question to be determined is whether or not the defendant can now insist that the notice served upon him by the court that his demurrer had been overruled was not a compliance with the rules of the court in view of the fact that the defendant accepted such notice by noting his exception thereto. In *Duran vs. Arboleda* (20 Phil. Rep., 253), the demurrer to the complaint was overruled by an oral order of the court delivered in the presence of both parties and their lawyers. The order gave the defendant five days within which to answer. On the 6th day, the answer not having been filed, the plaintiff presented a motion to have the defendant declared in default and for permission to prove the allegations of his complaint. Within a few minutes after such motion was made, the defendant came into court and presented her answer. The court refused to receive the answer upon the ground that it had not been filed within the five days. Thereupon the defendant was declared in default and judgment was entered in favor of the plaintiff upon the merits. On appeal the defendant contended that the plaintiff gave her no notice in writing of the order overruling her demurrer. This contention was sustained, the court saying:

"The court below having overruled the demurrer and having given the defendant the regular time in which to answer, as prescribed by the rules, the defendant had a right to expect that the proceedings were to be conducted according to the rules of the court as laid down. The defendant had a right to rely upon the express provisions of Rule 9 and to expect that she would be served by the plaintiff himself with a written notice of the entry of the order. She had a right to wait before moving further until the expiration of five days from the time when such notice was given. The plaintiff never gave the defendant any notice whatever of the entry of said order, relying upon the fact that the defendant was in court at the time the demurrer was overruled and that she received thereby sufficient notice of such order and that the five days began to run from that time. The defendant had a right to rely upon the rules of court and to expect that she would be given notice as required thereby. No negligence or fault can be imputed to her in so doing."

In the case just cited the defendant did not act upon the oral order of the court overruling her demurrer and giving her five days within which to answer the complaint. She had a right, as this court stated, to expect that the plaintiff would give her a written notice of the order of the court in accordance with Rule 9. She was not required to take any action in the premises until this written notice was given. She could have, of course, accepted the oral order delivered in her presence and acted thereon.

In the case under consideration the defendant accepted the notice given him by the court of the order overruling his demurrer by noting his exception on the same day that he received the notice. He could have declined to accept this notice by taking no action on it and required the plaintiff himself to have given him the written notice provided for in Rule 9, but when he accepted the court's notice by noting his exception, he waived his rights under Rule 9 and cannot now say that he was not notified in accordance with law.

For the foregoing reasons the judgment appealed from is affirmed, with costs against the appellant. So ordered.

Torres, Carson, and Araullo, JJ., concur.

MORELAND, J., concurring:

I agree on the ground (1) that an appeal from a judgment by default does not raise any question concerning the regularity of the proceedings upon which the defendant was declared in default; and (2) that the appellant has not properly shown the existence of the facts relative to the default upon which he relies.

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