

GISBURNE SUPPLY CO., PLAINTIFF AND APPELLANT, VS. VICENTE QUIOGUE, DEFENDANT AND APPELLEE.

G.R. No. 12765. September 26, 1917

Ponente: MALCOLM, J.

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MALCOLM, J.:

The plaintiff and appellant moves in this court for a new trial upon the grounds of accident and surprise and newly discovered evidence. The motion is based upon section 497 of the Code of Civil Procedure. Counsel for defendant were notified, and filed a memorandum in opposition.

The record discloses a complaint filed by the Gisburne Supply Company, a corporation organized under the laws of the State of Missouri, against Vicente Quiogue of the city of Manila for the sum of P450 for goods, wares, and merchandise sold and delivered to defendant by plaintiff. Judgment was rendered below absolving the defendant of the complaint. Plaintiff excepted and moved for a new trial. Motion denied. Appeal to the Supreme Court with a renewal of the motion for a new trial with affidavits attached.

Under the law (section 497 of the Code of Civil Procedure, as amended) we are to determine whether or not new and material evidence has been discovered by the plaintiff, which could not have been discovered before the trial in the court below, by the exercise of due diligence, and which is of such a character as probably to change the result.

Statements of counsel and the affidavits disclosed as tending to substantiate the affirmative of this question:

"(1) Plaintiff entered into a stipulation with the defendant to the effect that about the middle of October, 1914, defendant received a draft from plaintiff; but the affidavits disclose that the usual banking custom was not followed and that the defendant had no notice of the draft until December 28, 1914, so that the finding of the trial court that plaintiff was negligent in not forwarding a duplicate bill of lading until February, 1915, based upon the assumption that defendant received the draft in October, 1914, would appear to be untenable.

"(2) The original order taken by plaintiff's salesman was introduced in evidence; defendant testified and the trial court found that it was a conditional sale; the affidavit of the salesman now filed seems to show the contract to have been an absolute and unconditional sale.

"(3) The defendant offered in evidence a copy of a letter said to have been sent by defendant to plaintiff, in which defendant advised plaintiff of his failure to receive a bill of lading, which letter was admitted without objection; but the affidavit of the President of the plaintiff company sets out that no letter of any kind was received by plaintiff from defendant prior to the return of the draft on February 5, 1915."

These alleged facts together lead one to believe that the defendant misled the plaintiff and that because of the distance of the offices of the plaintiff company from the seat of the trial, counsel used all possible diligence in protecting the company's interests. Plaintiff's fault, if any, was in not asking for a continuance or in not moving to set aside the judgment. Nevertheless, under our statute and the authorities, the rule is that where one party to an action is misled by the other, justice demands that a new trial should be granted. (*Pinkham & McDonough vs.*

McFarland & Elrod [1855], 5 Cal., 137.) Moreover the motion for a new trial presented in this court gives grounds additional to those on which the motion was based in the lower court. (Fleming & Co. vs. Lorch "Nuestra Señora del Carmen" [1906], 7 Phil., 200.) Ordinary prudence, apparently, could not have guarded against accident or surprise on the facts suggested in this case.

The motion for a new trial is granted. Let the usual order issue.

Arellano, C. J., Johnson, Carson, Araullo, and Street, JJ., concur.

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