

RAFAEL REYES, PLAINTIFF AND APPELLEE, VS. LEONARDO OSORIO, DEFENDANT AND APPELLANT.*G.R. No. 13725. December 12, 1918*

Ponente: AVANCEÑA, J.

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In this case the plaintiff claims from the defendant the payment of the sums of P7,779.76, P1,225.04 and P1,500, which make the total of P10,504.80. The defendant, on the other hand, demands from the plaintiff, as a counterclaim, the sum of five thousand six hundred dollars (\$5,600). At the trial on October 29, 1917, counsel for both parties appeared and, after hearing the evidence of the plaintiff, the counsel for the defendant asked the court to grant him a fix time within which to present the evidence for the defense on the ground that the defendant, who was a witness, had not yet arrived. The counsel for the defendant also asked the court that, at all events, the right to bring a separate action for the recovery of the sum mentioned in the defendant's counterclaim be reserved to him. The court denied these requests and, after the trial of case, rendered its decision, on the 30th of the said month, absolving the plaintiff from the counterclaim and sentencing the defendant to pay to the plaintiff the sums of P7,779.76 with interest at the rate of 9 per cent per annum beginning January 25, 1916, until the full payment of P1,225.04, and of P1,500, together with the costs. From this decision the defendant appealed, and in this instance assigns the following errors:

- "1. The court erred in pronouncing judgment with the case in the condition it was on the day of trial.
- "2. The court erred in overruling the motion of the defendant praying for the reservation of a separate action for the sum mentioned in his counterclaim.
- "3. The court erred in absolving the plaintiff from the counterclaim or cross complaint.
- "4. The court erred in sentencing the defendant to pay plaintiff the sums he demanded."

These assignments of error do not merit any consideration, unless, under the supposition that the defendant may have satisfactorily explained his non-appearance on the day of the trial of the case. However the defendant has neither submitted, nor tried to submit, any explanation of his non-appearance.

Furthermore, after reviewing the evidence, we have found that it sufficiently justifies the decision of the court.

In regard to the motion by which the right shall be reserved to the defendant to present his counterclaim in a separate action against the plaintiff, it ought to be observed that, according to the allegations in the briefs of the parties, this counterclaim necessarily has a bearing on the complaint and, in accordance with section 97 of the Code of Civil Procedure, must be set up in this same action, on pain of defendant losing his right of action. Wherefore, the reservation by which the defendant would be able to present his counterclaim in a separate action against the plaintiff is tantamount to depriving the plaintiff of defense against the counterclaim, a defense which this section 97 grants him in the event that this counterclaim is not set up in said action. The court cannot arbitrarily deprive the plaintiff of this right, as would have done had the motion of the defendant been granted.

Consequently, the court did not err in overruling the said motion.

From another view point, considering the appellant as plaintiff in connection with his counterclaim asking for the dismissal of this counterclaim without prejudice to the right of presenting, it as a principal action at some later time, the court did not err in overruling this motion. Section 127 of the Code of Civil Procedure allows the dismissal of an action at the request of the plaintiff provided a counterclaim may not have been presented. As a counterclaim always takes for granted a complaint, it appears that, for the same reason the dismissal of a counterclaim, with a reservation by which it may be presented again by means of another action, ought not to be permitted. Courts can, in their discretion, deny the setting aside of any case whatsoever when the defendant has already prepared for the trial in such a way that to allow the setting aside of a case without a hearing in conformity with law would be unjust. Such is the circumstance in the present case, for the plaintiff appeared on the day fixed, not only by his complaint but also by the counterclaim of the defendant, presented his evidence, and submitted the case for decision. Under such conditions it would have been unjust to the plaintiff not to take action on the counterclaim of the defendant.

The judgment appealed from is hereby affirmed with the costs against the appellant. So ordered.

Torres, Johnson, Araullo, Street, and Malcolm, JJ., concur.

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