

ONG PENG, PLAINTIFF AND APPELLEE, VS. JOSE CUSTODIO, DEFENDANT AND APPELLANT.*G.R. No. 14911. March 25, 1961*

Ponente: LABRADOR, J.

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Appeal against various orders of the Court of First Instance of Iloilo, especially against that declaring defendant in default.

The present suit was instituted by Ong Peng against Jose Custodio to recover the sum of P2,527.30, with interest, representing the value of goods and materials obtained by defendant from plaintiff, plus the amount of P500 as attorney's fees. The complaint was filed on April 15, 1958, and on April 30 defendants moved to dismiss the complaint on the ground that plaintiff's cause of action had already prescribed. Plaintiff answered defendant's motion and attached to his answer an amended complaint, which set forth the promissory note supporting the claim. No answer to the amended, complaint was presented and no objection to its admission was also interposed. On May 21, 1958, the court admitted the amended complaint on the ground that no objection thereto had been filed, and on May 28, it denied the motion to dismiss. Copy of the order of the court admitting the amended complaint was furnished attorney for the defendant by ordinary mail on May 31, 1958, and copy of the order denying the motion to dismiss was sent by registered mail and received by the defendant on June 16, 1958.

On June 27, 1958, as the defendant had not filed an answer to the amended complaint, which had already been admitted in an order dated May 21, 1958, plaintiff moved that the defendant be declared in default. On June 28 the court granted the motion, declaring defendant in default, and set the case for hearing on July 17, for the reception of the plaintiff's evidence. Prior to this hearing, that is, on July 5, 1958, defendant presented a motion to set aside the order of default and to allow him to file his answer. This was set for hearing on July 12, 1958. Objection to this motion was filed by the plaintiff. On the date of the hearing the court denied the motion to lift the order of default.

On July 17, 1958, after presentation of plaintiff's evidence, the court entered judgment ordering defendant to pay plaintiff the sum of P2,527.30, with legal interest and costs. Upon receipt of this judgment the defendant filed a motion for reconsideration under oath, alleging that defendant has a strong and valid defense, that the promissory note is false and spurious, and that the defendant is an intelligent and respectable member of the community. Attached to the motion is an affidavit of the defendant stating that he has a good defense and that if only allowed to present his evidence he would prove that the said document is forged. Objection to this motion was presented by the plaintiff, and attached to the objection is the affidavit of Ong Peng stating that the promissory note was delivered to him by his clerk Ah Chiao. Another affidavit by Marcos Gotera is also attached to the objection, stating that he was present at the time that defendant Jose Custodio signed the promissory note in the presence of Ong Peng and Wong Tap, another Chinese clerk. The court denied the petition and after the denial of another motion for reconsideration the present appeal was presented.

In his brief the defendant-appellant argues that defendant never came under the jurisdiction of the court for the purposes of the amended complaint because the same was not served upon him with summons and in accordance with Section 10, Rule 27, of the Rules of Court, invoicing the case of *Atkins, Kroll and Co. vs. Domingo*, 44 Phil., 680. We have examined this case and we find that the ruling contained therein is not applicable to the case at bar. In that case summons under the original complaint was properly served the defendant. Before defendant appeared another amended complaint was served by registered mail. Of course we held that "the service of the amended complaint upon his sixteen-year old son by the attorney for the plaintiff was not sufficient to give the court jurisdiction over the defendant as to any new matter alleged in the amended complaint." In the case at bar, the amended complaint contained no new matter; it only sets forth the promissory note upon which the cause of action is based. In the case at bar also the defendant had already appeared when the amended complaint was served—defendant had, in fact, presented a motion to dismiss. We rule that after the defendant has appeared by virtue of a summons, as in this case, and presented a motion to dismiss, he may be served with the amended complaint, without need of another summons, and in the same form and manner ordinary motion or papers are served, thus:

"If he (defendant) had not yet appeared, a new summons must be served upon him as regards the amended complaint, otherwise the court would have no power to try the new causes of action alleged therein, unless he had lodged an answer thereto. Simply sending a copy of the amended complaint to the defendant by registered mail is not equivalent to service of summons in such case. However, if the defendant had already appeared in response to the first summons, so that he was already in court when the amended complaint was filed, then ordinary service of that pleading upon him, personally or by mail, would be sufficient, and no new summons need be served upon him. (*I Moran*, 1957 ed., p. 116, citing the case *Atkins vs. Domingo*, 44 Phil., 680.) (Italics supplied.)

We note that the defendant never claimed that he did not receive the amended complaint in the ordinary course of mail and his only objection thereto was the fact that no summons was served upon him with regard thereto. The opposition to the motion to dismiss and the amended complaint were served attorney for the defendant on May 12, 1958 by registered mail. Said counsel was also furnished copy of the court's order admitting the amended complaint on May 31, 1958. Assuming that the defendant received the copy of the amended complaint five days after May 12, or on May 17, and a copy of the order of the court about June 6, the court's order declaring him in default on June 28, is justifiable, for the reason that the time for filing an answer to the amended complaint commenced from the date of service of such amended complaint (*Villegas vs. Roldan*, 76 Phil., 349.)

The second point raised by appellant in his brief is the validity of the action of the lower court in allowing plaintiff to amend his original complaint even after a motion to dismiss has been filed. Appellant argues that Section 1 of Rule 17, giving plaintiff the right to amend his complaint once as a matter of course at any time before a responsive pleading is filed, does not apply where a motion to dismiss is filed by the adverse party on which the court should conduct a hearing before allowing the amendment. This claim merits no consideration. Under Section 3, Rule 8 of the Rules of Court, the court is not obliged to immediately hold a hearing on the motion to dismiss; it is granted the discretion to defer the hearing and determination thereof until the trial if the ground alleged therein does not appear to be indubitable. (*Nico vs. Blanco*, 81 Phil., 213) On the other hand, the right of a plaintiff under Section 1 of Rule 17 to amend his pleading once as a matter of course before a responsive pleading (which motion to dismiss is not one) is served, has been held to be one which the court should always grant, otherwise mandamus will lie against it. (*Breslin, et al., vs. Luzon Stevedoring Co., et al.*, 84 Phil. 618; 47 Off. Gaz. [37] 1170.) Besides, the amendment was merely one of form; it did not change the cause of action, but only set forth the promissory note on which the action was based.

We find that the points being raised on this appeal are supposed failures to follow formal proceedings, not

substantial requirements of procedure. Upon examination of the motion to set aside the order of default, we find it to be lacking in the following substantial requirements: it does not contain an affidavit of merits, the motion to set aside the default order is not under oath and contains only a promise or an assurance, not an affidavit of merits, that defendant has a good defense. The court was, therefore, fully justified in denying the motion to set aside the order of default.

We next come to the denial of the motion to set aside the judgment and grant relief under Rule 38 of the Rules of Court. The motion, it is true, contains an affidavit of merits, but this affidavit is merely a denial of the supposed authenticity of defendant's signature to the promissory note which is transcribed in the amended complaint. And in counter-affidavits plaintiff has presented witnesses declaring that defendant's signature to the promissory note is authentic. We believe that this is a last-minute attempt to defend a losing case. If the defendant really had any valid defense, this should have been brought at the first opportunity, that is, by the first motion to set aside the order of default. Beside, we doubt if the same issue raised in the original motion to set aside the order of default, may again be raised in a petition for relief under Rule 38 of the Rules of Court. The general rule is that once a matter in issue has been decided by the court, it may no longer be brought again in the form of another objection, and in the guise of a motion under another provision of the rules. But even laying this objection aside, we find that the court did not abuse its discretion in refusing to grant a reconsideration of the order of default and to set aside the consequent judgment ordering the defendant to pay the sum demanded in the complaint.

Wherefore, the appeal is hereby dismissed, with costs against defendant-appellant.

Bengzon, Acting C. J., Padilla, Bautista Angelo, Concepcion, Reyes, J. B. L., Barrera, Paredes and Dizon, JJ., concur.

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