

ASIAN SURETY & INSURANCE COMPANY, INC., PLAINTIFF AND APPELLEE, VS. ONG TING, ET AL., DEFENDANTS, RICARDO RELUCIO, DEFENDANT AND APPELLANT.

G.R. No. 22079, May 27, 1966

Ponente: REGALA, J.

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REGALA, J.:

Ricardo Relucio appeals from an order of the Court of First Instance of Manila denying him relief from a judgment by default.

It appears that in an action for the collection of sums of money brought by the plaintiff Asian Surety & Insurance Company against one Ong Ting and Ricardo Relucio, summons were served on the said defendants but that neither filed an answer, for which reason both were declared in default. Judgment was thus rendered on March 6, 1963, holding defendants jointly and severally liable to the plaintiff for the sum of P3,000 plus interest at 12 per cent a year from November 2, 1962; the sum of P9,000 plus 12 per cent annual interest from November 15, 1961 and the sum of P300 for attorney's fees.

The first amount (P3,000) represents what the plaintiff paid to one Gloria Yap Ting Wah as surety for defendant Ong Ting. The second amount of P9,000 represents the amount paid to the Equitable Banking Corporation by the plaintiff as accommodation co-maker of a promissory note executed by defendants Ong Ting and Relucio and one Ong Chin. The court found that in consideration of the issuance of surety bonds, defendants, together with Ong Chin, signed indemnity agreements, promising to indemnify the plaintiff for whatever amount it might be required to pay on its bonds.

On July 17, 1963, defendant Relucio filed a motion to lift the order of default and to set aside the judgment of the court on the ground that his failure to answer the complaint was due to "accident, mistake and/or excusable negligence" and that he had a valid, just and meritorious defense to make. The court denied the motion for lack of merit.

Only the defendant Relucio has appealed.

Appellant first asserts that it was a mistake for the lower court to dismiss for lack of merit his motion to lift the order of default and to set aside the judgment against him because his failure to answer the complaint, as explained in the lower court, was due to "accident, mistake and/or excusable negligence." In the affidavit of merit executed by Avelina Manapat in support of appellant's motion, the following appears:

"1. That Ricardo Relucio is one of the defendants in the above-entitled case (Civil Case No. 51483, entitled 'Asian Surety & Insurance Co., Inc. vs. Ong Ting et al.');

"2. That sometime in September 24, 1962 a sheriff of Caloocan City served to me the summons and complaint in the above-mentioned case which I first refused because Ricardo Relucio to whom said summons is addressed is in the province, but ultimately I accepted the said summons and copy of the complaint because the

Sheriff insisted that he will just leave the summons to me if I will not accept and the same will be as good as served;

"3. That because said Ricardo Relucio is in the province and that I know that he is only a guarantor of Mr. Ong Ting, the other defendant, what I did is I delivered the said summons and complaint to Mr. Ong Ting in their house at Caloocan and when we talked, Mr. Ong Ting told me that I can leave with him the copy of the summons and the complaint and that he will settle it amicably with the Asian Surety and there is nothing to worry anymore about the case;

"4. That I did not know that Ricardo Relucio is required by law to make and file an answer to the complaint that I received;

"5. That believing in good faith that after I talked to Mr. Ong Ting the case is already settled and closed, I forgot all about it and because of which I failed to inform Ricardo Relucio about it when he arrived from the province;

"6. That sometime on June 13, 1962 another Sheriff came to the Universal Foundry Shop and served upon Ricardo Relucio a writ of execution and then levied the properties of the Universal Foundry Shop;

"7. That it was only during the service of the writ of execution that I remembered about the summons and the complaint that I received and delivered to Mr. Ong Ting in 1962;

"8. That it was only the first time that Ricardo Relucio found out that there was a case filed against him because I was not able to tell him about the summons and the complaint that I received on September 24, 1962."

The above explanation deserves scant consideration. The plaintiff-appellee claims, and it is not disputed, that Avelina Manapat is the wife of Ricardo Relucio, the defendant guarantor. We see no reason for an intelligent person like Avelina Manapat to have left the summons and complaint intended for her husband with Ong Ting, when the latter as principal defendant in the case had also his own copy. It is not denied that Avelina Manapat is a literate person, a business woman who owns the Universal Foundry Shop. Indeed, contrary to what she states in paragraph 4 of her affidavit, she must have understood the summons. The summons states that Ricardo Relucio is "required to file with the office of the Clerk of Court of First Instance, Manila, Third Floor, Room 303, City Hall, Manila, within 15 days after the service of this summons upon you, exclusive of the day of such service, your answer to the complaint herewith of the plaintiff, a copy of which is served upon you; * * *." In paragraph 5 of her affidavit, it is stated that Avelina talked to Mr. Ong Ting about the case, which again shows that she really read the summons herself and understood what it means. As a responsible person, what Avelina should have done was to immediately communicate with her husband who was allegedly in the province then. There is no showing that her husband could not have been reached either by wire or letter on time for him to file his answer or to ask for an extension in the period prescribed therefor. Under the circumstances, Avelina Manapat's failure to inform her husband about the summons, especially the alleged fact that she even forgot to tell it to him upon his arrival from the province, and the consequent failure of Relucio to file his answer constitute negligence which is not, however, excusable under the law.

In a similar case, *Manzanilla vs. Jaramilla*, 84 Phil-809-811, this Tribunal decided against the party in default stating:

"Defendant has no valid reason to complain against the denial of his motion of February 5, 1956, for the lifting of the order of default. The motion admits that the summons was received at his residence in Manila on January 10 of that year. He, therefore had until January 25 to file his answer or to ask for an additional period for that purpose. Granting that he was in the province of Isabela at that time, no showing is made that he could not have been communicated within time for him to do either of those things or that anything at all was done or

attempted to be done by the mic who accepted the summons on his behalf to apprise him thereof. Neither does the motion show that he has a meritorious defense. In short, the motion does not show that defendant's failure to answer the , complaint on time was legally excusable or that anything; would be gained by having the order of default set aside. In the circumstances, we do not think the lower court abused its discretion in denying the motion. (Italics supplied)

The rule is established that in cases of this kind "the moving; party has the burden of showing diligence, and unless it is shown affirmatively the court will not ordinarily exercise its discretion in his favor." The defendant in this case having- utterly failed to so show his diligence, the lower court did not commit error in denying his motion.

The appellant also argues that he has a valid defense to make. In fact he executed an affidavit to this effect, but since it is clear from the above authorities that said appellant has lost his standing in court, it becomes unnecessary to pass upon the substantial aspect of the litigation.

Wherefore, the appealed order is hereby affirmed with costs against the appellant.

Bengzon, C.J., Bautista Angelo, Concepcion, Reyes, J.B.L., Barrera, Dizon, Makalintal, Zaldivar and Sanchez, JJ., concur.

Order affirmed.

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