

R. A. MCGRATH, PLAINTIFF AND APPELLEE, VS.S. V. DEL ROSARIO AND BENITA QUIOGUE DE V. DEL ROSARIO, DEFENDANTS AND APPELLANTS.

G. R. No. 25442. September 03, 1926

Ponente: OSTRAND, J.

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OSTRAND, J.:

This is an action for the foreclosure of a mortgage on real property for the sum of P15,000. The complaint was filed on April 22, 1925, and the sheriff's return shows that summons was served on the defendants on the 24th of the same month. They failed to appear, and on May 26, 1925, were declared in default. Two weeks later said defendants through their attorney filed the following unverified motion:

"Now come, Salvador V. del Rosario and Benita Quiogue de V. del Rosario, the defendants of the action above named, thru the undersigned attorney, and to this Honorable Court respectfully begs, that its order on the 26th day of May, 1925, declaring the aforesaid defendants, in default, be put aside, and the said case be again, reinstated.

"This petition is based upon the fact that said attorney did not receive the complaint of the case above mentioned from the messenger of the defendants, as the latter entrusted the said complaint to the said messenger for delivery to the undersigned attorney; nor have the said attorney any notice of the said complaint until after order of this Honorable Court, declaring said defendants in default was received. However, upon posterior investigation, the defendants above named found out that said complaint was carried by the said messenger with him in his escapade."

The motion was denied and on June 20, 1925, the defendants without leave of court filed another motion in exactly the same terms as the foregoing, but this time verified by oath. This motion was also denied. No affidavit of merit accompanied either of the motions and no exceptions appear to have been taken from the orders denying them.

On October 20, 1925, judgment was rendered by default ordering the foreclosure of the mortgage. Upon appeal to this court the defendants make only one assignment of error, namely, that "The court erred in not putting aside its order of May 26, 1925, declaring herein defendants-appellants in default, after having shown that their failure to file an answer was due to an accident, thus unjustly depriving them of their day in court, in violation of section 148 of the Code of Civil Procedure."

Without going into other features of the case, it is sufficient to say that the defendants' failure to show by affidavit of merit that they had a just and valid defense, is fatal to their contention. This point was fully discussed in the case of Coombs vs. Santos (24 Phil., 446), in which the court said: "There is, however, a serious drawback to granting the relief asked. The motion asking that the default judgment be set aside is accompanied by no affidavit of merits. Although the Code does not specifically require such an affidavit of merits, the reasonableness and necessity for it is apparent. If the defendant has no real defense to the action or intends to enter only a technical

plea, there would be no justice in permitting the case to be reopened and subject plaintiff to further delay and expense for the mere purpose of rendering a judgment in the regular manner, It is but right, therefore, to require the defendant to show that if he be allowed to answer he will be able to produce evidence which may affect the claims of the plaintiff.

"The universality of the rule is attested by the remarks in 23 Cyc, 951, 955, and 962, supported by a host of authorities. Black on Judgments, sec. 347, thus states the general rule:

" 'Where an application is made to open a judgment, under the statutes for that purpose, it must be accompanied by an affidavit setting forth a good defense on the merits, and showing that, the default occurred through mistake, surprise, or other statutory ground, and stating the facts constituting such mistake, surprise, etc., and also showing due diligence. And-independently of such statutes, it has always been the practice of our courts, from the very earliest times, on an application to open or set aside a judgment, to require some sort of showing, by affidavit or otherwise, that the judgment is unjust as it stands and prejudicial to the party complaining and that he has a meritorious defense. It may therefore be regarded as a universal requirement.'

"A mere statement that defendant has a valid defense is a conclusion of law (Roberts vs. Corby, 86 111., 182) ; or is not sufficient (Palmer vs. Rogers, 70 Iowa, 381; 30 N. W., 645; Jackson vs. Stiles, 3 Caines [N. Y.], 93; Mayer vs. Mayer, 27 Ore., 133; 39 Pac, 1002; Foster vs. Martin, 20 Tex., 119). The only exceptions to the rule are cases where the granting of the motion is not discretionary but is demandable as of right, as where there was no jurisdiction over the defendant or of the subject-matter of the action, where a judgment was taken by default before defendant's time to answer had expired, where it was entered by mistake, or was obtained by fraud, and other similar cases. (23 Cyc, 956.) It does not appear that any such exceptions favor the present case.

"The opinion of this court in the case of Wahl vs. Donaldson, Sims & Co. (2 Phil., 301), sets forth the rule with some particularity. But in view of the fact that the opinion in its entirety was not approved by a majority of the court, we have taken this opportunity to state the rule at length, and compliance with it in the future will be required." (See also Daipan vs. Sigabu, 25 Phil., 184 and Mapua vs. Mendoza, 45 Phil., 424.)

The appeal is entirely without merit and has evidently been taken for the sole purpose of securing delay.

The judgment appealed from is therefore affirmed with double costs against the appellants. So ordered.

Avanceña, C. J., Street, Villamor, Johns, Romualdez, and Villa-Real, JJ., concur.

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