

M. W. STAIGHT, PLAINTIFF AND APPELLANT, VS. A. D. HASKELL, THE MAGDALENA COCONUT CO., INC., AND A. S. HEYWARD, DEFENDANTS AND APPELLEES.*G. R. No. 25920. November 17, 1926*

Ponente: JOHNS, J.

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November 23, 1922, the defendant Haskell executed a real mortgage to and in favor of the plaintiff for the sum of P20,000 on a tract of land situate in the municipality of Magdalena, Province of Laguna, P15,000 of which was paid to him by the plaintiff at the time of the execution of the mortgage, in which it was provided that the remaining P5,000 was to be paid as soon as possible. The mortgage provided that the money should be repaid within one year from the date of its execution, with interest on P15,000 from date at the rate of 12 per cent per annum, and with like interest on the remaining P5,000 from the date of its payment to the defendant. It further provided that in case a suit or action was brought to enforce collection, that the defendant should pay the further sum of 10 per cent as attorney's fees upon the amount then due and owing.

April 28, 1923, the defendant Haskell executed to the plaintiff a second mortgage on the same property for P12,200, the receipt of which was acknowledged and which, by the terms of the mortgage, was made due and payable November 23, 1923, with like interest thereon from date and with a similar provision as to attorney's fees.

After the execution of the two mortgages, the defendant Haskell sold and conveyed the real property therein described to the defendant, the Magdalena Coconut Company, Inc., and in and by the terms and provisions of the conveyance, and as one of its considerations, the Coconut Company assumed and agreed to pay the whole amount of the debt evidenced by the two mortgages. After such conveyance was made to it, the Coconut Company executed a third mortgage to the defendant Heyward upon the tract of land now in question, together with other property, to secure the payment of the sum of P36,600. All three mortgages and the debt from the defendant Haskell to the Coconut Company were each duly registered with the register of deeds for the Province of Laguna in the chronological order of their execution. The interest upon the two mortgages in favor of the plaintiff was paid up to and including April 30, 1924. Thereafter, no other payments have been made of either principal or interest on either of such mortgages.

February 19, 1925, plaintiff filed a complaint in which he prayed for a foreclosure of one of the mortgages, and on July 14, 1925, he filed an amended complaint in which he prayed for a decree for the foreclosure of both of his mortgages, and against the defendants Haskell and the Magdalena Coconut Company for the sum of P20,000, with interest thereon at the rate of 12 per cent per annum from December 1, 1922, and the further sum of P12,200, with like interest thereon from April 28, 1923, together with the further sum of 10 per cent of the amount found due and owing upon such mortgages as attorney's fees, and that the two mortgages be declared a prior and superior lien upon the property therein described, and that it be sold to satisfy the amount of the debt found due

and owing to the plaintiff, and that in case of a deficiency, that the plaintiff have judgment over and against the defendants Haskell and the Magdalena Coconut Company for the amount of such deficiency, together with costs,

By way of answer to the amended complaint, the Coconut Company and Heyward made a general denial of all of the material allegations of the complaint, but later the Coconut Company filed an amended answer in which it admitted that it had assumed and agreed to pay the amount of the two mortgages executed by the defendant Haskell to and in favor of the plaintiff, and as a cross-complaint it alleged that the mortgage contracts were usurious, and for such reason ought not to be enforced.

For answer the defendant Haskell made a general and specific denial, and as a special defense, alleged that after the execution of the mortgages by him to the plaintiff, he, the said Haskell, with the knowledge and consent of the plaintiff, sold the property therein described to the defendant Coconut Company, which undertook and agreed to pay the amount of the mortgage indebtedness, and that it was stipulated, and agreed between Haskell and the plaintiff that he, Haskell, was then and there relieved and discharged of all liability arising from or growing out of the mortgages. That the plaintiff has breached the contracts, and that the defendant Haskell has suffered damages in the amount of P10,000. As a cross-complaint, he also alleges that the original mortgage contracts were usurious.

To each of such answers, the plaintiff filed a reply under oath.

Upon such issues, the lower court released the defendant Haskell from all liability under the mortgages, and rendered judgment in favor of the plaintiff and against the defendant the Magdalena Coconut Company for the amount of plaintiff's claim, with interest at 12 per cent per annum from May 1, 1924, and the further sum of P1,000 as attorney's fees, and gave the company six months within which to pay the amount of the judgment, and ordering that in the event it was not paid within that time, that the property should then be sold at public auction to satisfy the judgment.

To the rendition of that judgment, plaintiff duly excepted, and on appeal, contends that the lower court erred:

"1. When it found the defendant had consented in writing to the assumption by the Magdalena Coconut Co., Inc., one of the defendants, of the mortgage obligations and that such assumption constituted a substitution of debtors, thus relieving the defendant Haskell of his obligations under such mortgages.

"2. When it reduced the attorney's fees stipulated in the contracts sued upon from 10 per cent of the amount found due thereon to the sum of P1,000.

"3. When it absolved the defendant A. D. Haskell from the complaint.

"4. When it failed to find and declare that the two mortgages of the plaintiff sued upon herein are superior to and have preference over the mortgage executed by the defendant, the Magdalena Coconut Co., Inc., in favor of the other defendant, A. S. Heyward.

"5. In granting the defendants a longer period than three months within which to pay the judgment rendered against them.

"6. In overruling and denying plaintiff's motion for a new trial."

JOHNS, J.;

Although it is true that in the conveyance from Haskell to the Magdalena Coconut Company, Inc., and as one of the considerations therefor, the Coconut Company assumed and agreed to pay the amount of the two mortgages which Haskell executed to the plaintiff, and in legal effect agreed to release him from all liability, there is no

evidence that the plaintiff ever released or intended to release Haskell from the payment of his debts. The fact that the plaintiff received and accepted interest on the mortgages from the Coconut Company, and that it paid such interest, standing alone and within itself, is no evidence which shows or tends to show any release from plaintiff to Haskell. In the making of such payment, the Coconut Company did nothing more than to carry out the contract which it made with the defendant Haskell and to the amount of such payment. Haskell's liability to the plaintiff was evidenced by a written contract duly signed, witnessed and acknowledged before a notary public in which he promised and agreed to pay the plaintiff the amount specified in the mortgages, and there is no evidence, either oral or written, that plaintiff ever released or that he ever intended to release Haskell from the force and effect of his written contracts. The payment of the interest to the plaintiff by the Coconut Company inured to the benefit of Haskell, and operated as a release pro tanto of his liability to the plaintiff. Nothing more can be legally claimed for it.

To release a person from a valid, written contract duly witnessed and acknowledged, the evidence must be clear and convincing of the purpose and intent to release. Upon that point, there is not only a failure of proof, but there is no evidence whatever, either oral or written.

The mortgage expressly provides for the payment of an additional sum of 10 per cent as attorney's fees in the event of suit or action to enforce collection.

In this case, answers were filed by the defendants, and the case was litigated in the lower court, and the plaintiff was forced to appeal to this court, to obtain the relief to which he was legally entitled. Upon that state of facts, we are clearly of the opinion that 10 per cent of the amount found to be due and owing is a reasonable attorney's fee to be allowed the plaintiff. The lower court also allowed the defendant Coconut Company six months within which to pay the judgment before execution could be issued to enforce it. The record shows that no payment of any kind has been made to the plaintiff, except the interest on one mortgage to April, 1924, about two years and a half ago.

The judgment of the lower court is modified and reversed, and one will be entered here in favor of the plaintiff and against the defendants Haskell and the Magdalena Coconut Company, Inc., that they are jointly and severally liable for the full amount of plaintiff's claim as prayed for in his complaint, with interest thereon at the rate of 12 per cent per annum, together with 10 per cent of that amount as attorney's fees. That after the rendition of such final judgment, the defendants' stay of execution thereof will be limited to the period of four months from that date. In the event that the judgment is not then satisfied, an execution may issue upon such judgment, and the property sold and the proceeds of the sale applied to the satisfaction thereof, and that plaintiff may then have judgment over and against the defendants Haskell and the Magdalena Coconut Co., Inc., jointly and severally for any deficiency which may thereafter remain. The appellant also to have and recover costs againsts Haskell on this appeal. So ordered.

Avanceña, C. J., Johnson, Street, Ostrand, Romualdez, and Villa-Real, JJ., concur.

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