

EMILIO GONZALEZ LA O, PLAINTIFF AND APPELLEE, VS. THE YEK TONG LIN FIRE & MARINE INSURANCE CO., LTD., DEFENDANT AND APPELLANT.

G.R. No. 33131. December 13, 1930

Ponente: VILLAMOR, J.

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VILLAMOR, J.:

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This is an action to recover of the defendant the Yek Tong Lin Fire & Marine Insurance Co., Ltd., the amount of two insurance policies totalling P100,000 upon leaf tobacco belonging to the plaintiff, which was damaged by the fire that destroyed the building on Soler Street No. 188, where said tobacco was stored, on January 11, 1928.

The defendant filed a general and specific denial of each and every allegation of the complaint, set up three special defenses, and prayed to be absolved from the complaint with costs against the plaintiff.

After the case was tried, the court below rendered judgment as follows:

"In this case and in Nos. 33458, 33868, and 33480 of this court, which, by agreement of the interested parties, were jointly tried, the plaintiff demands P290,000 from the defendant assurance companies, alleging that to be the amount of the insurance on his leaf tobacco which was damaged by the fire that destroyed the warehouse at No. 188 Soler Street, Manila, where it was stored, on January 11, 1928, the plaintiff's claim against the herein defendant, the Yek Tong Lin Fire & Marine Insurance Co. being for P100,000, and against the defendants in the three other cases mentioned above, for P190,000.

"After the plaintiff had presented his evidence, the defendant companies in cases Nos. 33458, 33868, and 33480, offered to compromise with him by paying eighty-five per cent of his claim against them. In view of the fact that said defendants had in their answer raised the question of warranties A and G of the plaintiff's policies, providing that the building used for the effects insured would not be occupied by any other lessee, nor would be used for the deposit of other goods, without the consent of said defendants, and inasmuch as the latter alleged in their answer that the owner of the burnt building had leased the warehouse to several persons for the storage of sundry articles, the plaintiff had to accept the proposed compromise, and in consequence thereof, the three cases aforesaid were dismissed.

"The present case followed the usual course of procedure because the plaintiff refused to accept the compromise which, in the same terms as those made by the defendants in the three cases mentioned, was proposed to him by the defendant the Yek Tong Lin Fire & Marine Insurance Company, the plaintiff contending that said defendant did not, nor could, raise the question of warranties A and G heretofore mentioned for the simple reason that it was the defendant itself, as owner, who had leased the building which later was destroyed by fire, to another person after having already ceded a portion of it to said plaintiff.

"The only question to be determined, having been raised in the defendant's answer—both parties agreeing that the plaintiff insured his leaf tobacco with the defendant assurance company, and that said goods were damaged by the fire which destroyed the warehouse where they were stored, on January 11, 1928—is whether said goods were worth what the plaintiff claims, that is, about equal to the amount for which they were insured in the four above-mentioned assurance companies, including the defendant in this case.

"The plaintiff has conclusively shown by the Official Register Book (Exhibit I) and the Official Guide (Exhibit J), furnished by the Bureau of Internal Revenue, and kept under the supervision thereof in the usual form, in accordance with articles 10, 34 to 38 of the Regulations of the same promulgated under No. 17, by the Secretary of Finance; the Stock Book for recording the quantity of tobacco, Exhibit K, kept by the plaintiff and presented as part of the testimony of witnesses Claveria, Bonete, and Leoncio Jose; the testimony of Estanislao Lopez, Inspector of Internal Revenue, and the latter's report (Exhibit N), submitted to the Collector of Internal Revenue in pursuance of article 33 of the aforementioned Regulations; the tobacco invoices of stock damaged by the fire, Exhibits L and L-1 to L-20; and by the testimony of Clemente Uson who went over the plaintiff's books as auditor and public accountant, and also prepared Exhibits T and U, attached to the record, that the plaintiff had in the warehouse at No. 188 Soler at the time of the fire, not less, but rather more, than 6,200 bales of leaf tobacco worth over P300,000, which is of course more than the sum total of all the insurances taken out with the defendant herein and the defendants in the three aforementioned cases Nos. 33458, 33868, and 33480.

"The reason why the entry showing that 258 bales of tobacco had been removed from the warehouse, appearing in the Official Register Book, Exhibit I, was not posted in the Stock Book, Exhibit K, has been satisfactorily explained by the plaintiff's witnesses, who stated that it was due to the fact that there was no time to post it in the Stock Book, because the fire took place and the plaintiff told them not to touch, and to make no further entries in the books. Witness White, the defendant company's adjuster, who carefully examined the plaintiff's books not only immediately after the fire, but also during the hearing of this case, seems not to have found any irregularity therein; at least he said nothing on the point when he took the witness stand. On the contrary, in his report Exhibit TJU sent to the defendant herein in his capacity as adjuster, appointed by the latter, and in Exhibits WW and XX, admitted by the Yek Tong Lin Ins. Co., Ltd., he admitted that the leaf tobacco belonging to the plaintiff in the warehouse when the fire took place exceeded, in quantity and value, the amount of the insurance.

"The defendant did not present any evidence to rebut the plaintiff's evidence, but only presented witness Rowlands, whose testimony or opinion as to the probable number of bales of tobacco in the warehouse at the date of the fire does not deserve serious consideration, not only because of the plaintiff's evidence, but because his opinion or estimate is based solely upon photographs of the place taken after the fire.

"In view of the foregoing, the court hereby sentences the defendant the Yek Tong Lin Fire and Marine Insurance Company, Ltd., to pay the plaintiff Emilio Gonzalez La O, the amount of one hundred thousand pesos (P100,000), for which it had accepted the insurance on the leaf tobacco belonging to said plaintiff, damaged by fire which destroyed the warehouse at No. 188 Soler Street, where it was stored, on January 11, 1928, and legal interest upon said amount from June 27, 1928, when the complaint was filed in this case, plus the costs.

"So ordered.

"Manila, P. I., this 24th day of December, 1929.

"Anacleto Diaz

"Judge"

The defendant duly appealed from this judgment, alleging that the trial court erred in making reference to the

settlement arrived at by the plaintiff and other insurance companies, and in declaring that the only question involved in the case is whether or not the tobacco damaged by the fire is worth at least P290,000.

There is no merit in these assignments of error. Since the settlement between the plaintiff and the other defendant companies was reached after the plaintiff had presented his evidence, and as those three cases were tried jointly with the instant case, there is no valid reason why the trial court should not refer to it in deciding this case. Furthermore, the court's holding here assigned as error, granting there were other incidental matters to be decided by the court, does not in itself constitute a reversible error.

In the third assignment of error, the defendant contends that the plaintiff cannot recover under the policy as he has failed to prove that the Bank of the Philippine Islands, to whom the policy was made payable, no longer has any rights and interests in it. It should be noted that the defendant did not in its answer allege defect of parties plaintiff, and, besides, it does not appear that the plaintiff ceded to the bank all his rights or interests in the insurance, the note attached to the policies merely stating: "There shall be paid to the Bank of the Philippine Islands an indemnity for any loss caused by fire, according to the interest appearing in its favor." And the fact that the plaintiff himself presented in evidence the policies mortgaged to the Bank of the Philippine Islands gives rise to the presumption that the debt thus secured has been paid, in accordance with article 1191' of the Civil Code.

Corpus Juris, volume 26, pages 483 et seq., states:

"Insured, being the person with whom the contract was made, is primarily the proper person to bring suit thereon. * * * Subject to some exceptions, insured may thus sue, although the policy is taken wholly or in part for the benefit of another person named or unnamed, and although it is expressly made payable to another as his interest may appear or otherwise. * * * Although a policy issued to a mortgagor is taken out for the benefit of the mortgagee and is made payable to him, yet the mortgagor may sue thereon in his own name, especially where the mortgagee's interest is less than the full amount recoverable under the policy, * * *."

And in volume 33, page 82, of the same work, we read the following:

"Insured may be regarded as the real party in interest, although he has assigned the policy for the purpose of collection, or has assigned as collateral security any judgment he may obtain."

It is also contended that the trial court erred in not declaring that inasmuch as the plaintiff failed to notify the defendant corporation in writing, of other insurance policies obtained by him, he has violated article 3 of the conditions of the policies in question, thereby rendering these policies null and void. Article 3 of the conditions of the policies in question prescribes:

"ART. 3. Any insurance in force upon all or part of the things insured must be declared in writing by the insured and he should cause the company to insert or mention it in the policy, and without such requisite said policy will be regarded as null and void, and the assured deprived of all rights of indemnity in case of loss."

The following clause has been inserted with a typewriter in the policies: "Subject to clauses G and A and other insurances with a special short period attached to this policy." And attached to said policies issued by the defendant there is a sheet of "Other insurances" with the amount and the assurance companies in blank, which, according to the appellee, constitutes a notification that there were other insurances existing at the time.

In the case of *Benedict vs. Ocean Insurance Co.* (31 N. Y., 391-393), the construction of the clause, "privilege for \$4,500 additional insurance," was discussed. One of the printed clauses of the policy reads as follows:

"If said assured, or his assigns, shall hereafter make any other insurance upon the same property, and shall not, with all reasonable diligence, give notice to this corporation, and have the same indorsed on this instrument, or otherwise acknowledged by them, in writing, this policy shall cease and be of no further effect."

The Supreme Court of New York held that the words "Privilege for \$4,500 additional insurance" made it unnecessary for the assured to inform the insurer of any other policy up to that amount.

In the case cited the same goods insured by the defendant company were reinsured to the amount of P4,500 in accordance with the clause "privilege for \$4,500 additional insurance;" but in the instant case it may be said that the tobacco insured in the other companies was different from that insured with the defendant, since the number of bales of tobacco in the warehouse greatly exceeded that insured with the defendant and the other companies put together. And according to the doctrine enunciated in 26 Corpus Juris, 188, "to be insurance of the sort prohibited the prior policy must have been insurance upon the same subject matter, and upon the same interest therein."

Furthermore, the appellant cannot invoke the violation of article 3 of the conditions of the insurance policies for the first time on appeal, having failed to do so in its answer; besides, as the appellee correctly contends in his brief, Guillermo Cu Unjieng, who was then president and majority shareholder of the appellant company, the Yek Tong Lin Fire & Marine Insurance Co., knew that there were other insurances, at least from the attempt to raise the insurance premium on the warehouse and the appellee's tobacco deposited therein to 1 per centum, and it was later reduced upon petition of the appellant itself and other assurance companies to 0.75 per centum presented to the association of assurance companies in the year 1927, and notwithstanding this, said appellant did not rescind the insurance policies in question, but demanded and collected from the appellee the increased premium.

That the defendant had knowledge of the existence of other policies obtained by the plaintiff from other insurance companies, is specifically shown by the defendant's answer wherein it alleges, by way of special defense, the fact that there exist other policies issued by the companies mentioned therein. If, with the knowledge of the existence of other insurances which the defendant deemed violations of/ the contract, it has preferred to continue the policy, its action amounts to a waiver of the annulment of the contract, in accordance with the following doctrine in 19 Cyc, 791, 792:

"FAILURE TO ASSERT FORFEITURE—IN GENERAL.—

While the weight of authority is that a policy conditioned to become void upon a breach of a warranty is void ipso facto upon such a breach without formal proceedings on the part of the insurer, yet it is true that such conditions are inserted for the benefit of the insurer and may be waived, and that the insurer may elect to continue the policy despite the breach. If it does the policy is revived and restored. Its failure to assert a forfeiture therefore is at least evidence tending to show a waiver thereof. Many authorities go further, however, and hold that the failure to assert a forfeiture after knowledge of a ground thereof will amount of itself to a waiver. * * *

The fifth and sixth assignments of error refer to the quantity of tobacco in the Soler warehouse at the time of the fire, which, according to the appellant, did not exceed 4,930 bales. As may be seen, these assignments of error by the appellant involved purely questions of fact, and it is for this court to decide whether the findings of the trial court are supported by the evidence. The judgment appealed from sets forth clearly the evidence presented to the court in order to determine the quantity of tobacco in the warehouse at the time of the fire. We have studied the evidence aforesaid, and are fully convinced that the court's findings are well supported by the same. Inasmuch as it has not, in our opinion, been shown that the trial judge overlooked any fact, which, if duly considered would have changed the result of the case, we do not feel justified in altering or modifying his findings.

Finally, the appellant contends that the trial court erred in arriving at the damages that plaintiff may recover under the policies in question by the cost price of the tobacco damaged by the fire, instead of computing the same on the market price of the said tobacco at the time of the fire; and in declaring that the tobacco damaged was worth more than P300,000. This error is not well taken, for it is clear that the cost price is competent evidence tending to show the value of the article in question. And it was so held the case of Glaser vs. Home Ins. Co. (47 Misc. Rep., 89; 93

N. Y. Supp., 524; Abbott's Proof of Facts, 3d ed., p. 874), where it was declared that the cost of the goods destroyed by fire is some evidence of value, in an action against the insurance company. Exhibits L .to Lr-20, which are invoices for tobacco purchased by the appellee, and the testimony of the public accountant Cleraente Uson, who went over them and the rest of the appellee's books after the fire, taken in connection with reports T and Z, adduced as part of his testimony, show that the cost price of each bale of tobacco belonging to the appellee, damaged by the fire, was P51.8544, which, multiplied by 6,264, the number of bales, yields a total of over P320,000.

The adjusters of the appellant, White & Page, in ascertaining the market price of the plaintiffs tobacco deposited in the burnt warehouses taking the information furnished by the Tabacalera and by M. Pujalte, S. en C, as a basis, thus conclude their report: "We therefore are obliged to the conclusion that the value of the tobacco destroyed was not less than P290,000." And, indeed, said adjusters, in behalf of the appellant, appraised the appellee's tobacco assured and damaged by the fire at P303,052.32, collecting from the proceeds of the sale of the tobacco saved from the fire P3,000, the appellant's share in proportion to the insurance of P100,000 belonging to it, and P190,000 belonging to the other assurance companies, and considered the appellee himself as his own assurer in the amount of P13,052.32 which was the difference between the total value of the tobacco damaged and the total amount of the insurance, P290,000, for which reason the appellee received P129.21, as his proportionate share of the tobacco saved, as shown by Exhibits UU, WW, and XX.

Hence the last assignment of error is without merit.

Wherefore, the judgment appealed from is in accordance with law, and must be, as it is hereby, affirmed, with costs against the appellant. So ordered.

Johnson, Street, Malcolm, Ostrand, Johns, Romualdez and Villa-Real, JJ., concur.

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