

BONIFACIO PIMENTEL, PLAINTIFF AND APPELLEE, VS. EUGENIO GUTIERREZ, DEFENDANT AND APPELLANT.

G.R. No. 3377. August 24, 1909

Ponente: JOHNSON, J.

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JOHNSON, J.:

On the 27th day of February, 1905, plaintiff commenced an action in the Court of First Instance of the Province of Romblon against the defendant, for the purpose of recovering a judgment for the sum of P3,000, with interest at 10 per cent per annum from the 20th day of March, 1901.

The basis of the plaintiff's claim was a contract which he alleged was executed and delivered by the defendants upon the 20th day of March, 1901, for the sum of 3,000 pesos at 10 per cent per annum.

On the 23d day of August, 1905, Eugenio Gutierrez, for himself and as representative of the defendants, Leon Montana and Feliciano Moreno, filed an amended answer, admitting a part of the allegations of the plaintiff and denying others. The defendant admitted the execution and delivery of the original contract for 3,000 pesos and alleged that a part of said amount had been paid, and further alleged that upon the 1st day of December, 1904, he and the plaintiff had entered into a new contract, by virtue of the terms of which they, the defendants, were to pay the balance of said contract by paying P30 per month until the full amount of said contract should be paid, and alleging further that the plaintiff in the new contract of the said 1st day of December (1904) had agreed to forego the collection of the interest agreed upon in the original contract, the defendant admitted that there was still due the plaintiff on said original contract the sum of P2,636.44, and prayed that the said action might be dismissed with costs against the plaintiff.

On the 30th day of August, 1905, the plaintiff replied to the amended answer of the defendant, in which he denied certain of the allegations of the answer and admitted others. The plaintiff denied that he had executed and delivered or had consented to the execution and delivery of the said contract of the 1st day of December, 1904, by which he had agreed to accept P30 per month until the full amount was paid, but admitted that he had agreed to suspend the interest and also admitted that the defendant had paid in money and effects the sum of P785.36; that this amount of P785.36 had been applied to the payment of the interest on said original contract.

On the 1st day of December, 1905, the defendant presented a motion asking that the said amended complaint be struck from the files, for the reason that it was not a proper reply to the answer of the defendant, which motion the court denied,

On the 1st day of December, 1905, the defendant presented a demurrer to the said amended complaint, upon the ground that the complaint did not allege the period within which defendants were to pay the sum of the original contract of 3,000 pesos, which demurrer was also denied by the court.

On the 23d day of February, 1906, the defendant asked that the deposition of one Eduardo Montiel, who was then a prisoner in Bilibid, be taken, which motion was denied.

After hearing the evidence adduced during the trial of the cause, the lower court rendered a judgment in favor of the plaintiff and against the defendant Eugenio Gutierrez, for the sum of P3,366.38. The lower court found that the defendant had paid the sum of P747.03, at different times, which was applied upon the payment of interest. From this judgment of the lower court the defendant appealed, and made the following assignments of error:

"I.

"The court below erred in overruling the motion of the defendants of September 1, 1905, requesting that the reply of the plaintiff filed on the 29th of August, 1905, amending his original complaint of the 27th of February, 1905, be stricken from the record.

"II.

"The court below erred in overruling the motion of September 1, 1905, requesting the dismissal of the complaint on the ground that the facts therein stated are not sufficient to constitute a cause of action.

III.

"The court below erred in overruling the motion of the defendants of February 23, 1906, requesting that the testimony of Eduardo Montiel, who is confined in Bilibid Prison and therefore absent from the Province of Romblon, be taken by deposition, as they consider said witness an important one.

"IV.

"The court below erred in sentencing the defendant Eugenio Gutierrez alone to pay the total amount of the debt, and dismissing the case, on account of lack of evidence, with respect to the other defendants, Feliciano Moreno and Leon Montana.

"V.

"The court below erred in holding in its judgment that if the plaintiff signed the document offered in evidence by the defendant Gutierrez (Exhibit D of the defendants) in order to prove that the plaintiff had agreed to accept monthly payments of P30 until the debt was paid in full, he did so in ignorance of the contents of the instrument.

"VI.

"The court below erred in holding in its judgment that such a stipulation as the one contained in the said document, Exhibit D of the defendants, to accept monthly payments of P30, is invalid for the reason that no obligating motive for said stipulation exists; in view of which, the court below erred in failing to consider it as a renewal of the contract.

"VII.

"The court below erred in holding that interest on the loan ceased only on the 1st of January, 1905, instead of on the 1st of December, 1904.

"VIII.

"The court below erred in admitting as evidence the document which appears as Exhibit B, first sheet, offered by the plaintiff in order to establish the fact that the latter received from the defendant Gutierrez only P747.03 on account of interest.

"IX.

"The court below erred in holding that the sum of P685.85 contained in the first receipt, Exhibit B of the

defendants of April 8, 1904, is included in the sum of P747.03 contained in the second receipt, Exhibit A of the defendants of December 6, 1904.

"X.

"The court below erred in considering that the earnings which appear in the account-book, Exhibit 2 of the court, and which were entered subsequently to the 8th day of April, 1904, are fictitious and false.

"XI.

"The court below erred in holding that on the 20th of March, 1901, the plaintiff loaned to the defendant Gutierrez 3,000 pesos, Philippine currency, as indicated by the sign P.

"XII.

"The court below erred in holding that the plaintiff is entitled to recover the same amount or sum in Philippine currency which he loaned in 1901 in Mexican currency, without establishing the legal ratio of exchange between the two currencies."

With reference to the first assignment of error, to wit, that the lower court committed an error, in admitting the reply of the plaintiff, we are of the opinion, and so hold, that the lower court committed no error, for the reason that the defendant in his amended answer had alleged certain new matter, to wit, payments and a new contract, which the plaintiff, by virtue of section 104 of the Code of Procedure in Civil Actions, had a right to answer by a replication. It is true that section 104 gives the plaintiff the right to reply to new matter or special defenses set up in the defendant's answer, by an amendment to his complaint, but it is not necessary. If the plaintiff does not reply to new matter set up in the complaint, under the provisions of section 104, he is deemed to have denied them without a replication, and would be permitted to present proof denying the new matter in the answer without a replication. In the present case, however, the plaintiff preferred to file an amended complaint or replication. No error was committed in permitting him so to do.

With reference to the second assignment of error, to wit, that the court committed an error in not sustaining the demurrer of the defendant to the amended complaint or reply of the plaintiff, we are of the opinion, and so hold, that the court committed no error in overruling the demurrer, if what the defendant presented could be considered a demurrer. The reply was sufficient in form and substance.

With reference to the third assignment of error, to wit, that the court committed an error in denying the application of the defendant to be permitted to take the deposition of one Eduardo Montiel, it appears that the application to take the said deposition was made on the 23d day of February, 1906. From the record, it appears that the trial of the cause was set for the 23d day of February, 1906. It will also be noted from an examination of the record that all of the pleadings had been filed in the cause and the case was ready for trial on the 16th day of February, 1905. More than a year had elapsed, therefore, after the cause was at issue, before the time set for trial. The record does not disclose on what date the court had fixed the day of the trial. It must have been, however, naturally some time before the said 23d day of February.

The defendant had had, therefore, all of the time between the 16th day of February, 1905, and the 23d day of February, 1906, within which to have obtained the deposition of the said Montiel, had he really desired it; and moreover, under the provisions of section 361 of the Code of Procedure in Civil Actions, the defendant might have taken the deposition of the witness without the intervention of the court. Said section 361 provides the method for taking depositions of witnesses, when the same is permitted under section 355. It appears that the defendant, therefore, had not used due diligence in preparing himself for the trial of the cause, and furthermore the affidavit presented by the defendant does not attempt to show that the facts which he expected to prove by the

witness Montiel could not have been proven by some other accessible witness. The defendant should have taken advantage of the provisions of section 361 prior to the time fixed for the trial of the cause, or have shown to the court that he had used due diligence in an effort to secure the presence of the said Montiel, and that he could not safely proceed to the trial of the cause without the presence of said witness or his deposition. It would appear that the effort of the defendant was simply to delay the trial of the cause. In our opinion, the court, under the circumstances, committed no error in refusing to delay the trial of the cause for the reasons stated by the defendant.

With reference to the fourth assignment of error, to wit, that the court committed an error in rendering a judgment against the defendant Eugenio Gutierrez alone, for the full amount of the debt, dismissing the case as to the other defendants, Leon Montana and Feliciano Moreno, the defendant contends that under the contracts the defendants were only liable for their proportionate share of the obligation, citing articles 1137 and 1138 of the Civil Code. It is true that under said articles of the Civil Code, where two or more persons are obligated in the same contract, and where there is nothing in the contract to the contrary, the parties are liable pro rata upon said contract; in other words, by virtue of the provisions of the Civil Code, where two or more persons sign a contract, in order that each shall be responsible for the full amount of the obligation, express words to that effect must be used. If two persons sign a contract under the provisions of the Civil Code, and no words are used to make each liable for the full amount, each is only liable for a proportionate amount of the contract. In the present case the contract was written in the following words:

"We, Feliciano Moreno, Eugenio Gutierrez, and Leon Montaña, hereby acknowledge to have this day received from Bonifacio Pimentel the sum of three thousand pesos in silver coin, as a loan, which sum of money we three will use in business transactions, it having been agreed with the lender that said money will earn a premium or interest at the rate of 10 per cent per annum, that is to say we promise to pay three hundred pesos at the end of each year, and said amount will commence to bear interest from that date; likewise we agree that in case of an unexpected event our property is to serve as collateral.

"In witness to the truth, we, together with the lender, sign this formal agreement in duplicate.

"Romblon, March 20, 1901.

(Signed) "FELICIANO MORENO.

"LEON GUTIERREZ

"LEON MONTAÑA.

"BONIFACIO PIMENTEL."

From a reading of the contract in question, it will be seen that it is una obligacion mancomunada y no solidaria and that the three debtors are not liable separately for the payment of the full amount. They are each only liable for an aliquot part of the original obligation. (See articles 1137 and 1138, Civil Code.) The lower court therefore committed an error in rendering a judgment for the full amount against one of the, said codebtors.

It appears from an examination of the record that Eugenio Gutierrez had assumed all responsibility in relation to the contract. Not only by his answer does this fact appear, but by the alleged contract (Exhibit D) of December 1, 1904. He there assumes to make a contract for himself and for the other defendants. Under this contract and the pleadings filed in this cause, the defendant Gutierrez tried to assume all obligation in respect to the said original contract. The record shows that Leon Montaña had died (the record does not show the date) prior to the 1st of December, 1904. There is nothing to show that the said Gutierrez represented the estate of the said Montaña in this litigation. The personal representatives of the said Leon Montaña were not made parties to this action. Therefore no judgment can be rendered which would affect their rights or interests in any way. Inasmuch, however, as the said Gutierrez represented himself and the other defendant, Feliciano Moreno, Feliciano Moreno

being thus represented in litigation, and the contract being one creating a joint liability, a judgment may properly be rendered against each of them, Gutierrez and Moreno. In view of the fact that the contract was a joint obligation and not a several one, the lower court committed an error in dismissing the action as to the said Moreno. The lower court should have rendered a judgment against each of the said defendants Moreno and Gutierrez for an aliquot part of the original contract.

With reference to the fifth assignment of error, we are of the opinion, and so hold, that the plaintiff did not execute and deliver the alleged contract, by which he was to receive P30 per month until the said obligation was fully liquidated. We do find, however, that the plaintiff agreed to forego the payment of the interest upon said contract until the same was paid.

With reference to the sixth assignment of error, having found that the lower court committed no error in declaring that the plaintiff did not execute and deliver the contract of December 1, 1904, makes it unnecessary for us to discuss this assignment of error.

With reference to the seventh assignment of error, to wit, that the lower court committed an error in holding that the contract did not draw interest after the 1st day of January, 1905, instead of the 1st day of December, 1904, we are of the opinion that the court committed an error in this respect, for the reason that, by virtue of the indorsement signed by the plaintiff, made upon the original contract (Exhibit A), it was thereby agreed that the interest upon said contract should cease upon the said 1st day of December, 1904.

With reference to the eight assignment of error, to wit, that the lower court committed an error in holding that the defendant paid to the plaintiff the sum of P747.03 to be applied upon the interest, it will be noted that upon the first page of Exhibit B there appears to be a credit of P717.41, while upon the second page of Exhibit B a credit seems to have been given on the 6th day of December, 1904, of P747.03. The defendant himself testified that the credit on the first page of Exhibit B, of P686.85, was included in the credit of P747.03. There is no question, it would seem, therefore, about the payment made by the defendant to the plaintiff of this sum of P747.03. The only question between the two parties with reference to this sum is whether it was a part payment of the principal or a payment on the interest due. The plaintiff claims that it was a payment of the interest due; the defendant denies this fact. There is no proof that the defendant, at the time he made the payment, indicated to what it should be applied. It is a rule well established that when a debtor makes payment to his creditor, in a case where the creditor holds two or more accounts against him, the creditor may apply the payment to whichever of the indebtednesses he pleases, in the absence of an express statement on the part of the debtor that the payment should be applied to one or another of the different claims. There being no proof, therefore, of request on the part of the defendant that the sum should be applied upon the payment of the principal, the plaintiff had a right to apply it to the payment of the interest then due. The lower court committed no error, therefore, in view of the proof, in applying this payment to the liquidation of the interest due. (See arts. 1172, 1173, 1174, Civil Code.)

With reference to the ninth assignment of error, the defendant himself testified (p. 22-a of the record) that the sum of P686.85, mentioned in Exhibit B, was included in the sum of P747.03. Therefore the finding of the court was in accordance with the proof adduced during the trial of the cause.

With reference to the tenth assignment of error, the record does not disclose that the book which was marked "Exhibit No. 2" was ever presented in evidence as proof. It is true that certain questions were asked with reference to the same. Granting that the parties intended to offer it as evidence, and that it was actually admitted as proof, while it contains some items which can scarcely be explained, yet the last page of it discloses the fact that the plaintiff's claim was proven beyond question, or at least by a preponderance of proof, to wit, that the defendant

had paid only the sum of P747.03, and the sum of P38.35. We are of the opinion, and so hold, that the statement of the lower court with reference to this exhibit in no way affects or vitiates his conclusions.

With reference to the eleventh assignment of error, we are of the opinion, and so hold, that the lower court committed no error in indicating the kind of money in which the judgment was rendered by the sign for pesos. This court has held, in the case of *Dougherty vs. Evangelista* (7 Phil. Rep., 37), that in the absence of explanation or proof to the contrary the word "peso" in the judgment of the court must be understood to be "peso" in the established currency of this country at the time when the judgment was rendered. (See also *Gaspar vs. Molina*, 5 Phil. Rep., 197).

With reference to the twelfth assignment of error, the lower court found that there was due from the defendant to the plaintiff a certain number of "pesos" without indicating whether they were Mexican or Filipino pesos. The original contract expressly stated "Mexican pesos." There was no evidence adduced during the trial which in any way indicated that there was any difference between the value of Mexican pesos and Filipino pesos, and unless the proof showed that there was a difference, under the decision of this court in the case of *Dougherty vs. Evangelista*, supra, we will assume that the word "peso" used in the judgment of the lower court means the peso constituting the currency of this country. The defendant in the court below not having attempted to show that there was a difference, and not having called the attention of the court below to the fact that there was a difference, we will consider that there was no difference and that the judgment of the lower court will not therefore be set aside for the reasons contended for by the appellant.

Our conclusions upon all of the facts of the record are as follows:

First. That the plaintiff loaned to the defendant, upon the 20th day of March, 1901, the sum of P3,000, at 10 per cent per annum.

Second. That upon the 1st day of December, 1904, the plaintiff agreed to relieve the defendant from the necessity of paying interest upon the said sum thereafter. (See Exhibit C.)

Third. That the defendant had paid to the plaintiff the sums of P747.03 and P38.35, to be applied on the payment of the interest of said note, or a total of P785.38.

Fourth. That under the terms of the contract the defendants were each liable to pay an aliquot part of the said original contract.

Fifth. That the estate of Leon Montana not being represented in this action, no judgment can be rendered against him or his personal representative.

The contract was executed and delivered on the 20th day of March, 1901, and drew interest at the rate of 10 per cent until the 1st day of December, 1904. The defendants had paid to the plaintiff the sum of P785.38. This amount was applied to the payment of the interest by the plaintiff. The interest due upon the 1st day of December, 1904, was P1,109.16. Deducting the amount paid (P785.38) from the amount of interest due (P1,109.16) left a balance of interest unpaid on the 1st day of December, 1904, of P323.78. The total amount due on said contract, then, on the 1st day of December, 1904, was the amount of the original contract (P3,000) plus the interest unpaid (P323.78), making a total of P3,323.78. This action was commenced on the 27th day of February, 1905. The plaintiff is entitled, therefore, to draw interest from the date of the judicial demand (the 27th of February, 1905).

The judgment of the lower court is hereby modified, and it is hereby directed that a judgment be entered against the defendants, Eugenio Gutierrez and Feliciano Moreno, each respectively, for a one-third part of the sum of P3,323.78, with interest from the 27th day of February, 1905, with costs, Leon Montaña nor his representatives

not being made a party in this action, no judgment can be rendered against him. So ordered.

Arellano, C. J., Torres and Moreland, JJ., concur.

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