

FLORBNCIO TERNATE, PLAINTIFF AND APPELLEE, VS. MARIA ANIVERSARIO, DEFENDANT AND APPELLANT.*G. R. No. 3576. August 03, 1907*

Ponente: WILLARD, J.

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The plaintiff and the defendant, on the 14th day of October, 1902, entered into a contract of partnership for the purpose of engaging in the coast wise trade with the steamship Nuestra Senora de Gracia, of which they were the sole owners. The partnership continued until the 15th day of October, 1905, when it was dissolved by mutual consent, the plaintiff, selling to the defendant his interest in the vessel, which then was one half thereof. The parties not being able to settle the affairs of the partnership amicably, the plaintiff brought this action to recover a balance which he claimed to be due to him from the defendant.

The profits of the business had been divided up to the 1st day of July, 1905; so that, with the exception hereinafter stated, the only matters to be liquidated related to the business from the 1st of July, 1905, to the dissolution.

It appears from the evidence that for that period the expenses were 11,044 pesos and 8 centavos, and that the receipts during the same time were 6,509 pesos and 46 centavos; so that the losses during this period were 4,534 pesos and 62 centavos. By the terms of the partnership agreement, the parties were to share the losses in proportion to the amount of the various investments, so that this loss should be equally divided between the two. The articles of partnership made the plaintiff the manager thereof. He received and paid out all the money, and the debts of the company, which are represented by this loss of 4,534 pesos and 62 centavos, he had paid before the commencement of the action. The defendant is therefore bound to pay to him one-half of that sum, and the decision of the court below in reference to this item must be affirmed.

The plaintiff also claimed, and the court below so held, that he was entitled to recover the sum of 148 pesos, for money advanced to the defendant in cash and for money paid for the saying of certain masses. The plaintiff introduced some evidence to support this claim and the defendant introduced no evidence at all upon the subject. The judgment of the court below on this item must, therefore, be affirmed.

The articles of partnership provided as follows:

"(h) In consideration of his personal services, the manager shall be entitled to receive 2 per cent of the profits.

"(i) All profits or earnings accruing, after deducting the general and special expenses, and the 2 per cent referred to in the foregoing clause, shall be distributed among the partners in proportion to their respective capital, and they shall be equally liable for all losses and damages sustained by the partnership.

"(j) Balance sheets for the co-partnership shall be made out semi-annually."

The plaintiff claimed, and the court below held, that he was entitled to recover, by virtue of this provision in the articles, 2 per cent upon the profits which he, as manager, had paid to the defendant during the life of the partnership, and the court found that he had paid such profits to the amount of 57,879 pesos and 49 centavos, and

that he was entitled to recover from the defendant 2 per cent of this amount, or 1,157 pesos and 59 centavos. It may be noted in passing that the court committed an error of fact in determining the amount of profits which the plaintiff had paid to the defendant during the life of the partnership. In this sum of 57,879 pesos and 49 centavos is included the sum of 16,245 pesos and 12 centavos, her share of the profits of the business between the 11th day of November, 1901, and the 20th day of June, 1902. This was before the partnership was organized and, of course, the plaintiff is not entitled to any commission upon these profits. There is also included in this amount of 57,879 pesos and 49 centavos, the sum of 11,760 pesos and 15 centavos, her share of the profits from July 1, 1902, to December 31, 1902. The partnership not having been organized until the 14th day of October, 1902, the plaintiff would not be entitled to any commission upon that part of the 11,760 pesos and 15 centavos which was the profit for the time elapsing between the 1st of July and the 14th of October. There was no evidence in the case to show what proportion of this sum should be considered as the profits of the business from July 1 to October 14, and what part should be considered as the profits from the period from October 14 to December 31. The entire amount should, therefore, be rejected. The actual amount of profits which the plaintiff paid to the defendant from January 1, 1903, to July 1, 1905, was 29,869 pesos and 22 centavos, and the 2 per cent should have been figured upon that sum, if the plaintiff were entitled to recover anything.

But we think that in no event is the plaintiff entitled to anything upon his claim. As has been seen, the articles of partnership provided that this 2 per cent, with other expenses, should be taken from the receipts before any division of the profits was made, and that there should be an adjustment of the business every six months. This latter provision of the contract was observed and there was such an adjustment upon the 31st of December, 1902. A statement of the account was then made out by the plaintiff himself, who, either by himself or by his bookkeeper, kept the accounts and managed the entire business. That statement of account was agreed to in writing, both by the plaintiff and by the defendant, and there is no item found therein relating to this 2 per cent. In other words, the plaintiff did not charge the business with the 2 per cent commission to which he was entitled, did not enter that up as an expense of the business, and paid to the plaintiff her share of the profits without deducting therefrom this amount.

The same thing happened on the 30th day of March, 1903; the 30th day of June, 1903; the 30th day of September, 1903; the 31st day of December, 1903; the 31st day of March, 1904; the 30th day of June, 1904; and the 30th day of September, 1904. The settlements for the 31st day of December, 1904, the 31st day of March, 1905, and the 30th day of June, 1905, are not signed by the parties, but they were entered in detail in the books of the company. The amount of the profits due to each one of the partners is stated in these accounts, and the plaintiff at the trial testified that he had paid to the defendant her proportion thereof. As to the period between July 1, 1905, and the dissolution of the partnership in October of that year, there were no profits, as we have seen.

The question to be determined is whether, under these circumstances, the plaintiff, by failing to deduct the commission to which he was entitled, renounced the same, and therefore can not now recover it from the defendant. In those settlements which were signed by the parties there is found the clause "errors and omissions excepted." The plaintiff was a witness at the trial. He did not then state that he had omitted to deduct this commission through any error or omission on his part; he did not give any reason why he had not deducted it and, in fact, not one word was said by him during his testimony in relation to the matter, and the same is true of all the other evidence in the case. He was thoroughly advised as to all the facts in the case. He, of course, knew that he was entitled to this 2 per cent of the profits. He knew that by the terms of the partnership articles it was his duty to deduct it before a division of the profits was made. Having voluntarily, and with full knowledge of all these facts, made repeated statements in writing to the defendant as to the true condition of the business; having signed these statements himself, and having procured her signature thereto also, we do not think that he can now say that these statements were not correct, without giving some explanation of the reason why the deduction was not made at

the time these several balances were struck. What was said by this court in the case of Lucia et al. vs. Perez (6 Phil. Rep., 219, 222) is applicable to this case. The court there said:

"From the foregoing testimony we find: First, that the defendant duly rendered to the plaintiff his accounts as manager of the hotel; second, that the amount which is the subject of this action appeared in the accounts thus rendered by him as a loss charged to the business; and, third, that the plaintiff, with full knowledge of these facts, approved and accepted this charge when she approved and accepted the accounts of the management of the business as rendered by the defendant. In view of such approval, the plaintiff is estopped from making a claim for the amount in controversy."

The defendant, the appellant in this court, insists that this action can not be maintained because there was no settlement of the accounts made by the parties before the action was brought. As we have said, the parties were unable to agree upon the amount due. It was therefore impossible to settle the accounts, and this action was brought for the purpose of obtaining such settlement and liquidation in court

The heavy losses suffered by the partnership during the last three months of its existence are due to the fact that the steamer was driven on shore by a heavy typhoon and very seriously damaged. The defendant, in her brief in this court, claims that the plaintiff, who was the manager of the business, was responsible for this loss because after the second typhoon signal had been hoisted in Manila he ordered the boat to leave this port upon her journey. No claim of this kind was made in the answer and no counter-claim was ever set up in the pleadings. The evidence introduced in support of this contention and the argument made thereon in this court can not therefore be considered.

The court below found that the plaintiff was entitled to recover of the defendant the sum of 3,572 pesos and 90 centavos, with interest thereon from the 28th day of November, 1905. This amount was made up of 2,267 pesos and 31 centavos, one-half of the losses suffered by the partnership between July 1, 1905, and October 15, 1905, the sum of 1,157 pesos and 59 centavos, 2 per cent of the profits received by the defendant, and the sum of 148 pesos, money advanced by the plaintiff. We hold that the recovery for the first and third items was proper, but that the plaintiff is not entitled to recover anything for the second item.

The judgment of the court below is modified so as to make the recovery of the plaintiff 2,415 pesos and 31 centavos, instead of 3,572 pesos and 90 centavos.

The case is remanded to the court below with directions to that court to enter judgment in favor of the plaintiff, and against the defendant, for 2,415 pesos and 31 centavos, with interest thereon from the 8th day of November, 1905, and the costs of that court. No costs will be allowed to either party in this court. So ordered.

Arellano, C. J., Torres, Johnson, and Tracey, JJ., concur.

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