

ELVIRA FRESSELL, PLAINTIFF AND APPELLEE, VS. MAROIANA AGUSTIN, DEFENDANT AND APPELLANT.*G.R. No. 3708. September 12, 1907*

Ponente: WILLARD, J.

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The plaintiff brought this action in the court of a justice of the peace of the city of Manila to recover the possession of a tract of land described in the complaint therein, and damages for its detention. Judgment was rendered in that court in favor of the plaintiff and the defendant appealed to the Court of First Instance. In that court, the plaintiff having given notice that she would rely upon the complaint which she had filed in the court of the justice of the peace, the defendant demurred to the complaint. The plaintiff gave notice in writing that the demurrer would be brought on for hearing on the 29th day of September, which notice was served by mailing a copy thereof to the defendant in Manila. On the 29th of September the court below overruled the demurrer, saying in its order that it did so after hearing both parties by their respective counsel. On the 6th day of October, the defendant, upon affidavits, moved the court to set aside the order overruling the demurrer and direct a new hearing thereon. This motion was never decided by the court below so far as the record before us shows.

The defendant excepted to the order overruling the demurrer and assigns that order as error in her brief in this court. She claims that she was not duly notified of the hearing upon the demurrer and consequently it was error for the court to overrule it without giving her an opportunity to argue it. The order of the court below states that the defendant appeared by her counsel. While she in her affidavit states that she did not appear, yet she never procured from the court a ruling upon her motion to set aside the order overruling the demurrer. We can not therefore say that the statement made by the judge in his order to the effect that she did appear is overcome by her affidavit, upon which the court never made any ruling to the effect that she did not appear.

The defendant not having answered within the time required by the rules after the demurrer was overruled, on motion of the plaintiff judgment of default was entered against her on the 13th day of October, 1906. She was notified of this judgment on the 15th day of October, and on the 16th she made a motion to have the judgment by default set aside on the ground that she had received no notice of the order overruling the demurrer. This motion was denied. We think that the court erred in making this order. It appears that the defendant did not receive the notice of the order overruling the demurrer, which the clerk sent her by mail.

This error was not cured by the fact that the court allowed the defendant to introduce evidence. She was deprived of the right to cross-examine the witnesses of the plaintiff.

The judgment of the court below is reversed, and the case remanded to the court below with instructions to allow the defendant to answer within such time as may be fixed by the court, and for further proceedings in accordance with the law. 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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