

HERRANZ & GARRIZ, PLAINTIFFS AND APPELLEES, VS. ROMAN BARBUDO, DEFENDANT AND APPELLANT.*G.R. No. 3753. November 11, 1908*

Ponente: TRACEY, J.

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This is an appeal from a judgment of the Court of First Instance of Sorsogon in favor of the plaintiffs in the sum of 1,800 Mexican pesos, or its equivalent at the rate of 1.30. The plaintiffs constituted a partnership, conducting a business as successors of the firm of Mendezona & Co. in Manila, Sorsogon, and Casiguran, and brought this suit to recover a balance appearing on their books against the defendant. He was in their employment as a warehouse keeper at Sorsogon, and when in the month of September, 1898, the outbreak of the revolution in the province forced the plaintiffs, who were Spaniards, to fly, they left their local business in his charge, from the 23d of September until the 21st of November, when he was relieved of his care of everything except the warehouse by their new representative, one Pedro Lopez. His engagement is shown in several letters from the plaintiff Garriz. In the first of these, dated September 23, Garriz writes: "Care well for my interests, and besides paying you well, I will never forget your good behavior." The second, dated September 27, is headed: "Instructions for Don Roman Barbudo, representative in Sorsogon and Bacon," and relates to details of the business, among other things directing him to notify the representative of the house in Casiguran, Don Teodoro de Castro, when in need of abaca for the press. The third, undated, concludes with the words: "Do well, and in addition to your wages I will give you a good gratuity (gratificacion)" On November 21, Garriz wrote notifying him of the appointment of Don Pedro Lopez as representative, to whom he should account for the branch at Sorsogon and Bacon, retaining, however, his position as warehouseman under the orders of Lopez in Sorsogon and of the local manager Don Victor Eco in Bacon. That letter ends: "I remain satisfied with your management during our absence and if, as I hope, we finish the present year without illfortune, I will pay you, in addition to your salary, a good gratuity as compensation for your good services."

The books of the partnership show that at the end of the year the accounts were balanced and in the account of the defendant was the entry "To Roman Barbudo as salary from the 1st of May to the 31st of December, at the rate of 40 pesos a month, 320 pesos." In another account, headed "profit and loss" the entry "To Roman Barbudo, gratuity in October, November, and December, 150 pesos;" and in the current account of the house at Sorsogon an entry showing the payment to Roman Barbudo for wages of servants and cook, 12 pesos; messengers and feed, 15 pesos; things for the house, 4.70 pesos, and disbursements for the house during December, 40 pesos. These accounts appear to have been all closed on the 31st of December, 1898.

On the 30th of October, 1901, the defendant, desiring to buy some real property from another employee of the house named Sanchez, obtained 1,900 pesos from the firm, giving them the following acknowledgment:

"I have received from Messrs. M. a y Cia. the sum of one thousand nine hundred pesos in cash, which was paid to Don Juan Sanchez for hemp land which I bought and which sum I promise to pay with the products of my lands at current prices, and with the profits which may belong to me.

"In witness whereof I sign the present receipt in Sorsogon the thirtieth day of October of one thousand nine hundred and one.

"ROMAN BARBUDO.

"\$1,900."

He continued in the employment of the plaintiffs as warehouseman at Sorsogon until June, 1902, when he left their employment, and on the 6th of July, 1902, wrote Pedro Lopez a letter in which he said:

"The object of this letter is no other but to inform you that, since the 24th of June, last, I have been compelled to leave the warehouse, as I was very much dissatisfied. While I complied punctually with my duties, I was criticised for matters which had nothing to do with the business. Of this I complained, and justly. I think that if you were here, I would not have had such trouble. It was all due to the unfair demands on the part of one Mr. Puentes, who asked me to secure some carpenters, but as I was so busy, as you know, I was unable to furnish them. This man has been talking about me and in order to avoid further trouble, I decided to leave, without prejudice to going back to the warehouse when one of you comes here, and I await your action. I am willing, and further, I appreciate the favors for which I am indebted to you, this provided you want to take me back.

"I expect that you will communicate with Messrs. Garriz & Herranz in regard to this matter."

The oral testimony is conflicting. The plaintiff Garriz testifies that he was personally present when the receipt of October 30, 1901, was given, and that the defendant then made no mention of his claim for salary or gratuity, whereas the defendant testifies that he conducted the transaction with Mr. Garriz's cousin, Luciano Andea, and that he had asked for the money on account of the sum the firm owed him. It is not disputed that at various times after leaving their service he did make such a demand. It also appears that, while in charge at Sorsogon, he was subordinate in that general locality to the representative at Casiguran. He claimed that his engagement as representative was oral, the plaintiff, Garriz, saying to him: "As Julian Gerona has refused to accept charge, I will give you the same salary which I offered to him, 500 pesos a month."

In his answer he admitted the allegation of the complaint that since the year 1901 he had owed the plaintiffs the sum of 1,900 pesos, which he had received from them and had not paid, but set up a counterclaim for his salary as their representative from the 23d of September to the 21st of November, 1898, of 350 Mexican pesos a month, amounting to 700 pesos, and further for the money expended by him for the wages of the cook and other items during that period.

In several particulars this claim of the defendant appears inconsistent with the established facts.

- If the oral engagement which he claims had been made for a definite salary, the indefinite promises in the letters of Garriz would not have been written.
- If that promise had been to pay him 500 pesos a month, he would not have interposed a counterclaim at the rate of 350 pesos a month.

This inconsistency he endeavors to explain by saying that he had received in fact 300 pesos which, dividing between the two months, he deducted from the stipulated sum. This explanation is not consistent with the entries in the books either in regard to his salary, which was 40 pesos a month, until a later period, when it was increased to 75 pesos a month, or with the gratuity in fact paid him of 150 pesos. His theory does not square with his figures.

- If his disbursements while in charge at Sorsogon had remained unsettled, the entries of credits therefor would not have appeared in the firm books.

- It he were at the time pressing the claims against the firm for his salary and gratuity, he should not have signed the promise of October 30, 1901, to repay them the money which he then borrowed from them.

- Nor, in that case, would he have been likely in his letter of July 6, 1902, to Pedro Lopez, stating his reasons for leaving his employment, have omitted to mention the large amount claimed to be due him standing unpaid as one cause of his displeasure, nor would he in that event have then expressed satisfaction with the treatment he had received.

- According to the defendant's testimony, his salary was in payment for all his services, both as warehouseman and representative, and the gratuity was also general in its terms, so that it is not possible to separate them, referring the salary to one capacity and the gratuity to the other. Nor has the defendant in his presentation of his case sought to do so. Moreover, the very term "gratuity"(gratificacion) differs from the words "salary" or "compensation," in leaving the amount thereof, within the limits of reason, to the arbitrament of the giver. In this instance the gratuity had not been refused, but had been fixed, allowed, and credited by the employer at 150 pesos.

- The books of the plaintiff, introduced at the instance of the defendant, show a settlement of his accounts for disbursements, salary, and gratuity on December 31, 1898, and in their details support the testimony of the plaintiffs.

Not without reason, the defendant contends that the care of the local business of a Spanish house in the provinces during the two first months of the revolution of 1898 was a delicate one, justifying a substantial reward, which he considers himself especially entitled to by virtue of the rank of lieutenant which, apparently in the interest of the firm, he obtained and held in the revolutionary forces, nor does the gratuity of 150 pesos, with a salary of 40 pesos a month, appear to be a munificent return on the part of the plaintiffs for the special services which the defendant may have rendered. It must be borne in mind, however, that he was thereafter continued in the employment of the plaintiffs in his old capacity as warehouseman at a salary nearly doubled in amount, and that, while in charge, he was not their chief representative in the province. By way of explanation, one of the plaintiffs has sworn that when the property was turned over by the defendant some articles and some cash remained unaccounted for, but this we are unable to consider adequate for the reason that, assuming it to be true, it is not in harmony with the expressions of satisfaction in the letters of the plaintiffs or with a certificate of good conduct which, on the 12th of June, 1903, Pedro Lopez gave to the defendant in the name of Mendezona & Co. Nevertheless, for the reasons above given, we think that the balance of the oral testimony and all of the written testimony is in favor of the plaintiffs, and that the judgment in their favor should be affirmed on the merits.

Counsel for the defendant has presented an elaborate argument to the effect that plaintiffs must be taken to be in default for want of a reply to the counterclaim, citing in its support many American authorities. Under the practice as prescribed by the codes in many of the American States, this would be correct, but it is not so under our Code of Civil Procedure. By section 94 thereof, the defendant is allowed to plead any new matter constituting a defense or counterclaim. By section 104, the plaintiff is permitted to reply to any new claim or special defense set up in the defendant's answer by an amendment to his complaint. It provides, however, "if the plaintiff does not amend his complaint, as provided in this section, he shall be deemed to have controverted every material statement of the answer." This clause gives to the silence of the plaintiff the effect of a pleading specially putting in issue the allegations of the answer, no reply to which can, therefore, be required.

The judgment of the court below is affirmed, with the costs of this instance. So ordered.

Arellano, C. J., Johnson and Willard, JJ., concur.

Mapa and Carson, JJ., dissent.

DISSENTING**TORRES, J.,**

Taking into consideration the conclusions and merits of the case, and the matter set forth by the trial judge in the judgment appealed from, it is my opinion that, as a matter of justice, the right of the defendant, Roman Barbudo, to receive the sum of P700 as salary, P450 as gratuity (after deducting P150 already received by him), and P240 as compensation paid by him to two watchmen whom he had employed, should be acknowledged.

The three amounts above stated aggregate P1,390, and should be set off against the sum of P1,800, to the payment of which Roman Barbudo has been sentenced under the judgment appealed from, and he should only be required to pay the difference, to wit, P410; therefore, it is proper, in my opinion to hold that the greater portion of the sum demanded in the complaint being reduced by the P1,390 to which the defendant is entitled, he is only responsible for the difference, and in consequence thereof the said defendant should only be sentenced to pay 410 pesos, Mexican currency, reduced to Philippine currency at the exchange of 1.30 Mexican peso for each Philippine peso, without any special ruling as to costs.

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