

JOSEFA MARCELO, PLAINTIFF AND APPELLANT, VS. FELICIANO (ALIAS FELIX BERMUDEZ) AND BENITO ALCANTARA, DEFENDANTS AND APPELLEES.

G.R. No. 43547. September 13, 1938

Ponente: DIAZ, J.

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DIAZ, J.:

Plaintiff appealed from the order of the Court of First Instance of Pangasinan of February 15, 1935 dismissing her complaint on her failure to amend the same within the prescribed period after defendant's demurrer to said complaint, based on the ground that the facts alleged in the latter did not constitute a cause of action, was sustained by order of January 7, 1935 of said court.

Said order of January 7, 1935 literally reads as follows:

"At the hearing on the demurrer on November 10, 1934, the attorney for the defendant asked leave to file an amended demurrer, which was done on November 19, of last year.

"In the opinion of the court the demurrer is well taken. Plaintiff, according to her own allegations in her complaint, has not acquired any title or right over the property subject of the complaint. For this reason she has no cause of action against defendants. In accordance with said allegations, the parcels of land described in the complaint are registered in the name of the defendant Feliciano (alias Felix Bermudez).

"If it is true that this owner, who is her husband, has executed deeds by means of deceit on the part of his codefendant because said husband is without mental capacity, the proper action would be the appointment of a guardian for said incapacitated person and the filing of a complaint in the name or on behalf of the ward for the purpose of annulling the alleged fraudulent deed. It is so ordered."

As stated in her exception and motion for new trial of January 30, 1935, plaintiff was notified of the aforesaid order on January 17, 1935. However, up to the time of taking her appeal and even to this moment, plaintiff has not filed nor has she asked for leave to file an amended complaint. The practice established by rule 14 of the Rules of Courts of First Instance is that when a demurrer to a complaint or answer is sustained, the party who may have filed either of said pleadings is bound to amend the same within five days following notice from the clerk of the court of the order sustaining the demurrer, except when the court grants further extension in accordance with section 101 of Act No. 190. As no period different from that prescribed in the rule above-cited has been fixed in the order in question, the amendment should have been made within five days and since this was not done it is apparent that the order appealed from, of the lower court, is in accordance with law and that the appeal is without basis.

Moreover, it can not be said that plaintiff had thirty days to ask for new trial from the order of January 7, 1935 under the provisions of section 145 of Act No. 190 and that when she filed her motion to that end on the 13th day after being notified of said order, she did so within the aforesaid legal period, because rule 14 above-mentioned, and not the section invoked, is applicable to her case. This is so because, disregarding the fact that she has not

alleged the same an reason in support of her appeal inasmuch as she merely avers that she was not ordered to amend her complaint, there is nothing in the order in question showing that she was forbidden to amend her pleading and because her failure to do so within the prescribed period of five days can not but imply waiver on her part. Had she wished to do so, plaintiff could have amended her complaint within five days from January 18, 1935 because the order sustaining the demurrer to her complaint did not prohibit her from so doing either expressly or impliedly. In allowing that period to elapse without taking any action, she necessarily made it understood that she chose not to file any amendment. Under such circumstances it is not permissible for her, under the law, to ask for new trial for the reason alleged by her, to wit: "On the ground that said order is contrary to law."

In view of all the foregoing and finding the order appealed from in accordance with law, the same is hereby affirmed with the costs of this instance against plaintiff and appellant. So ordered.

Avanceña, C. J., Villa-Real, Abad Santos, Imperial, Laurel, and Concepcion, JJ., concur.

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