

**TOMAS SUNICO, LIQUIDATOR OF A MERCANTILE ASSOCIATION,
KNOWN AS CHUIDIAN, BUENAVENTURA & CO., IN LIQUIDATION,
PLAINTIFF AND APPELLANT, VS. JOSE VILLAPANDO ET AL.,
DEFENDANTS AND ...**

G.R. No. 5083. October 25, 1909

Ponente: CARSON, J.

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CARSON, J.:

This is an appeal from an order of the Court of First Instance of Batangas, dismissing the complaint in this action on the ground, first, that plaintiff failed to appear at the time set for the trial and, second, that he had failed for an unreasonable length of time to prosecute his action.

When the action, which was brought to foreclose a mortgage, was called on the 21st of July, 1908, it was found that as to one of the defendants, service of summons had not been obtained; and it was suggested at the hearing that this defendant was dead and that no legal representative had been appointed for his estate.

The trial judge thereupon directed plaintiff to elect whether he would proceed against the defendant upon whom summons had been duly served, and who was then present in court, or amend his pleadings so as to bring in a duly appointed legal representative of the estate of the deceased; and plaintiff having elected the latter course, the case was continued on his motion, and a formal order entered, wherein the hearing was continued until "the first day of the October term," and the plaintiff formally directed to amend his pleadings, and to bring in as defendant the legal representative of the defendant whose death had been suggested.

The case was set down in the October calendar for the 13th day of that month, and notice of that fact mailed to the parties and their counsel; and, when called on that day, the defendant who had originally been served with notice, appeared in open court, announced himself ready for trial, and prayed the court to dismiss the action because of the absence of plaintiff and his counsel, and because the record disclosed that plaintiff had neglected to prosecute his action by amending the pleadings and bringing, in the legal representative of the estate of the defendant whose death had been suggested at the July term.

Upon this motion the trial judge dismissed the complaint, in the exercise of the discretion conferred upon him in section 127 of the Code of Civil Procedure, which is as follows:

"An action may be dismissed, with costs to the defendant, in the following cases:

"2. By the court, when the plaintiff fails to appear at the time of trial, and the defendant appears and asks for the dismissal;

"3. By the court, when the plaintiff fails, for an unreasonable length of time, to prosecute his action.

"In either of these three cases a dismissal of the action shall not be a bar to another action for the same cause."

Thereafter a motion for a continuance was filed by counsel for the plaintiff, and later a motion for reinstatement of the action upon the calendar, both of which were denied, whereupon this appeal was duly perfected.

The facts above set out leave no room for doubt that in dismissing the complaint on the motion of the defendant, the trial court did no more than the above-cited provisions of the Code of Civil Procedure expressly authorized him to do, and no excuse or explanation being forthcoming at the time when the case was set for trial, of the absence of plaintiff and his counsel, and of the failure of plaintiff to prosecute his action by amending his pleadings in accordance with the previous order of the court and the facts developed in the record, the order of dismissal was properly entered. Hence the only question for consideration is whether the trial judge erred in the exercise of his discretion in refusing to reinstate the case upon the calendar in the light of the explanations and excuses submitted together with the motions for reinstatement and continuance.

Counsel for plaintiff stated that their absence from the hearing set for the 13th of October was due to the fact that notice that the case was set for that day on the October calendar did not reach them until the evening of the 12th of October (when it was delivered through the mails at their office in Manila), so that thereafter it was physically impossible for them to reach the Court of First Instance in Batangas in time for the hearing; and they attempted to excuse their failure to amend the pleadings so as to bring in the legal representative of the deceased defendant, by stating that it had been impracticable to secure the necessary data upon which to base an application for the appointment of a representative of the estate of the deceased.

We agree with the trial judge that these explanations and excuses are unsatisfactory; and certainly they are not sufficient to sustain a finding that the trial court committed reversible error in declining to accept them as a ground upon which to rest an order reinstating the action upon the register.

Where an alleged aggrieved party prays for the setting aside of a final judgment lawfully entered against him, on the ground of accident or surprise, it must appear that there was "accident or surprise which ordinary prudence could not have guarded against, and by reason of which the party applying has probably been impaired in his rights." (Subsec. 1 of sec. 145, Code of Civil Procedure.) Clearly the exercise of the most ordinary prudence by the plaintiff in this action would have guarded against the alleged surprise of which his counsel now complain. As will be seen from the facts hereinbefore set out, a hearing upon the action was expressly set for the first day of the October term in a formal order, entered on the 21st day of July, 1908, and it is admitted that plaintiff and counsel were duly notified thereof upon the day of its issue. It was their duty, therefore, in the absence of notice of a change of the date of the hearing, to appear on the first day of the October term and take such action as may have been proper or necessary in the furtherance of their demand. This they failed to do, and had the action been dismissed then and there, they would have had no cause to complain. Nor have they any just cause of complaint in the fact that the hearing was continued on the October calendar until a later day, upon which, in their continued absence, it was dismissed; the effect of the continuance being merely to give them an unasked for opportunity to repair their negligence or oversight in failing to appear on the day originally set for the hearing.

It is true, as appears from their affidavits, that counsel did not receive notice at their offices in Manila of the continuance of the day of the hearing, from the first day of the October term until the 13th day October, in time to make it possible for them after receiving this notice to make the journey to Batangas before the 13th of October, but the case having been set by order of the court for the first day of the term they were not entitled, as of right, to written notice of a continuance of the hearing to a later day of the same term; and the fact that notice was forwarded to them does not give them a just cause of complaint even if it failed to reach them in time to make it possible for them to be present on the new date set for the hearing; for, as has been said, the failure to serve such notice altogether could not have resulted in their surprise or mistake as to the day to which the hearing was continued, had they been present on the day originally set therefor. In view of the uncertainty which sometimes

attends the holding of terms of the provincial Courts of First Instance, and the difficulties and inconveniences which burden communication and travel in these Islands, we might be disposed to take a more lenient view of the failure of plaintiff and his counsel to appear on the first day of the term, if it were shown that in good faith they had intended to appear at the October term, and prosecute their action, and through inadvertence or misunderstanding, had mistaken the day set for the trial; but the fact that, when the case was called for trial after the term had begun, the pleadings had not been perfected so as to make it practicable for them to go forward with the trial, and the further fact that when notice of the date finally set for hearing came to their hands, they merely mailed a motion for a continuance until the succeeding term, without assigning any sufficient reason therefor, and took no further steps until they learned that the complaint had been dismissed, convince us that having neglected and failed to perfect their pleadings in compliance with the order of the court, it was not their intention to appear to prosecute the action at the October term, and that they recklessly relied upon the generosity of their adversary and the liberality of the court to relieve them from the danger of dismissal of their action to which such conduct exposed them.

We think also that the trial judge properly declined to accept the statement of counsel that it had been impracticable to secure the appointment of a legal representative of the estate of the deceased defendant before the date set for the hearing of the case at the October term. As he well says, the time allowed for that purpose, from the 21st of July to the 13th of October, was amply sufficient for that purpose, in the absence of very exceptional circumstances, and there is nothing in the record or in the affidavits accompanying the motion for reinstatement which indicates that such exceptional circumstances existed in this case.

The order of dismissal appealed from should be and is hereby affirmed, with the costs of this instance against the appellant. So ordered.

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

[1] The following causes, involving the same subject matter, were considered and decided at the same time with the same result: No 5082, Sunico vs. Guerra et.; No. 5084, Sunico vs. De Villa and De Villa.

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