

NINFA F. CUA, PETITIONER, VS. JUDGE EULALIO D. ROSETE, COURT OF FIRST INSTANCE OF MISAMIS ORIENTAL, BRANCH V; BANK OF THE PHILIPPINE ISLANDS, CAGAYAN DE ORO BRANCH; ISMAELA ALVA...

G.R. No. 55337. October 28, 1983

Ponente: AQUINO, J.

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AQUINO, J.:

This is an appeal under Republic Act No. 5440 from the lower court's order, dismissing Ninfa F. Cua's complaint because of her nonappearance at the hearing, a failure which she attributes to her counsel's alleged mis-understanding of the date thereof.

On April 25, 1979, Ninfa Cua filed in the Court of First Instance of Misamis Oriental Civil Case No. 6512 to annul the extrajudicial foreclosure of the mortgage on her Lot No. 1051-C covered by OCT No. 0-166 located at Lapasan, Cagayan de Oro City with an area of 989 square meters valued at P40,320.

The mortgage had been executed in her behalf by Ismaela B. Alvaro, her attorney-in-fact (lessee of the lot), in favor of the Bank of the Philippine Islands, to secure a loan of P120,000.

Cua had sued in 1977 the spouses Ismaela B. Alvaro and Felipe Alvaro in Civil Case No. 5538 (p. 70, Rollo). Its pendency was annotated by means of a notice of lis pendens on the back of OCT-166. The bank's new title is TCT No. 29323 (supposed to be Annex 6 of the bank's comment but Annex 6 is OCT No. 0-166 and not TCT No. T-29323.) Presumably, the notice of lis pendens is also annotated on TCT No. T-29323).

After the issues had been joined in Civil Case No. 6512 and the pre-trial was held on October 31, 1979, the case was set for hearing on February 8, 1980. Apparently, no trial was held on that date. The case was again set for trial on July 29, 1980 but "for lack of material time" the hearing was transferred to "September 5, 1980 at 9:00 o'clock in the morning". A copy of this order was received by Monica Jardin, the wife of Galdino B. Jardin, counsel of plaintiff Cua (p. 131, Rollo).

Cua's counsel alleges in paragraph 9 of the instant petition that the real reason why no hearing was held on July 29, 1980 was because of the absence of Augusto Maderazo, counsel for the Alvaro spouses, and not because of "lack of material time".

On September 5, 1980, Cua and her counsel did not appear. The lower court dismissed the complaint and defendants' counterclaims (p. 47, Rollo). Cua and her counsel thought that the hearing was scheduled on September 8, 1980 and not September 5.

The version of Cua's counsel is that he was in the office of the clerk of court at about eleven o'clock of September 5, 1980 to file Civil Case No. 7341. On that occasion, the court interpreter informed him that Civil Case No. 6512 was dismissed for nonappearance of Cua and her counsel. At about two o'clock in the afternoon of that same day,

he talked with the Pre-siding Judge to explain his nonappearance. He thought that the case was scheduled on September 8, 1980 as he had indicated in his diary book (p. 57, Rollo). Cua's counsel received on September 5, 1980 a copy of the order of dismissal.

Cua's counsel alleged that a certain stenographer named Edilberto S. Salceda was the one who took down the notes of the hearing on July 29, 1980 which he and the two opposing lawyers signed. But, contrary to the usual practice, the stenographic notes of Salceda and the minutes of the hearing on that date were not attached to the record of the case. Salceda and the deputy clerk of court could not explain why the minutes of the hearing were not in the record. They are now attached to the lower court's record on page 57-A.

Cua filed a motion for reconsideration of the order of dismissal. It was denied by respondent Judge Eulalio Rosete in his order of October 7, 1980 on the grounds that the bases of the motion "are deliberate falsehoods" and that Cua's counsel filed at three o'clock in the afternoon of September 5, 1980 an "urgent motion for transfer of hearing" accompanied by a medical certificate as to Cua's "pretended illness" so that plaintiff and her counsel could have an excuse for not coming to court in the morning of September 5, 1980.

Judge Rosete concluded his dismissal order with the observation that Cua had admitted the execution of the special power of attorney to accommodate the Alvaro spouses and, therefore, she "has no meritorious cause of action and there is no point in granting the motion for reconsideration. It would be an exercise in futility to reinstate the complaint only to dismiss it again because it lacks a meritorious cause of action." (pp. 62-63, Rollo.)

On the other hand, the version of the bank is that a copy of the court order transferring the trial to September 5, 1980 was actually received by Jardin's wife (Annexes 7 and 8 of Comment). So, there was no reason for him to insist that the trial was scheduled on September 8, 1980. And at three o'clock in the afternoon of the same day, September 5, 1980, he filed a motion for transfer of the September 8 hearing because of Cua's illness (Annex 10 of Comment). That was a "diversionary strategy" according to the bank's counsel inconsistent with the allegation of Cua's counsel that he learned of the dismissal at eleven o'clock and with his conference with the Presiding Judge at two o'clock.

The bank's counsel attached to his comment a copy of the stenographic notes and the minutes of the hearing for July 29, 1980 (p. 57-A, Record), and the affidavit of the deputy clerk of court to refute Cua's allegations that the case was set for September 8, 1980.

We hold that in the interest of justice Mrs. Cua should not be prejudiced by her counsel's failure to appear at the hearing of September 5, 1980. Such failure was sufficiently explained by her counsel. Moreover, Judge Rosete had shown in his order of October 7, 1980 that he had prejudged the case.

Civil Case No. 6512, Cua vs. Bank of the P. I., should be consolidated with the related case of Civil Case No. 5538, "Ninfa F. Cua vs. Ismaela B. Alvaro, et al.," which is now pending before Branch 17 of the Regional Trial Court of Misamis Oriental, presided by Hon. Judge Cesar Ybañez.

WHEREFORE, Judge Rosete's order of dismissal dated September 5, 1980 in Civil Case No. 6512 is reversed and set aside. That case should be consolidated with Civil Case No. 5538 and transferred to Judge Ybañez. No costs.

SO ORDERED.

Makasiar, (Chairman), Concepcion, Jr., Guerrero, Abad Santos, and Escolin, JJ., concur.
De Castro, J., on sick leave.

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