

## **ZENITH INSURANCE CORPORATION, PETITIONER, VS. HON. FIDEL P. PURISIMA, PRESIDING JUDGE OF BRANCH VIII, CFI, MANILA AND PERLA COMPANIA DE SEGUROS, RESPONDENTS.**

*G.R. No. 57535. May 24, 1982*

Ponente: MELENCIO-HERRERA, J.

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### **MELENCIO-HERRERA, J.:**

A Petition for Review on Certiorari of a default judgment rendered by the Court of First Instance of Manila, Branch VIII, in an action for damages arising from a vehicular accident entitled "Perla Cia. de Seguros, Inc. vs. Manalang, Garcia and Zenith Insurance Corp.", docketed therein as Civil Case No. 120920. In that Decision, said defendants were ordered to pay respondent Perla Cia. de Seguros, jointly and severally, the sum of P35,000.00 with 12% interest per annum from January 17, 1979, plus the additional sum of P2,000.00 as attorney's fees.

The records show that petitioner, as defendant below, filed its Answer with counterclaim. But, for its failure to appear at the scheduled pre-trial on January 16, 1981, petitioner corporation (then the defendant) was declared as in default and Perla Cia. de Seguros, as plaintiff, was authorized to adduce evidence ex-parte. Petitioner alleges that it did not receive any copy of said Order of default.

The lower Court Order setting the case for pre-trial on January 16, 1981 indicated that "the parties and their counsel (were) notified in open Court."[1]

However, in its "Motion for Reconsideration and to Set Aside Order of Default" filed by petitioner on May 14, 1981, or after its receipt of the judgment by default, as well as in its present Petition, petitioner insists that it received no notice of the pre-trial set for January 16, 1981 as "borne by the records of this case,"[2] and that petitioner's counsel was sick with influenza from January 15 to January 18, 1981 and advised to rest for a week, as shown by a verified medical certificate.[3]

Thus, petitioner's submission is that respondent Judge acted without or in excess of jurisdiction or with grave abuse of discretion in declaring petitioner as in default for non-appearance at the January 16, 1981 pre-trial and in rendering the default judgment.

An examination of the expediente below fails to reveal any notification to parties or counsel of the pre-trial set for January 16, 1981[4] unlike the trial Court's other Orders, such as, the notification for the pre-trial on November 17, 1980[5], for December 18, 1980[6], and for the presentation of evidence on February 4, 1980.[7]

"Due notice" not having been clearly established, we are constrained to hold that the trial Court committed grave abuse of discretion in considering petitioner as in default and in denying its "Motion for Reconsideration and to Set Aside Order of Default" filed on May 18, 1981. Consequently, the validity of the Order of default and all the proceedings that transpired subsequent thereto cannot be sustained.[8]

Additionally, default judgments are frowned upon.

"x x x We maintain fealty to the principle that courts should be liberal in setting aside orders of default for default judgment is frowned upon, and unless it clearly appears that the reopening of the case is intended for delay, it is best that the trial Courts give both parties every chance to fight their case fairly and in the open, with out resort to technicality." [9]

The defenses that petitioner wanted to interpose if the default judgment had been lifted are listed in the Affidavit of Merit of its Senior Vice President as follows:

"a) That there was no documentary evidence purporting to show that the vehicle of defendant Roman Garcia was insured with defendant Zenith Insurance Corporation;

"b) That assuming without admitting that the said vehicle of defendant Roman Garcia was insured with defendant Zenith Insurance Corporation, the action against it had already prescribed, it appearing that it was filed more than one year after the occurrence of the vehicular accident pursuant to the provisions of the New Insurance Code;

"c) That assuming again, without admitting, that the said vehicle of defendant Roman Garcia was insured with Zenith Insurance Corporation, its liability is subject to the terms and conditions of the insurance policy;

"d) That there is no record on file that this particular vehicular accident was reported to our company." [10]

To afford petitioner its day in Court, it should be allowed to present evidence to substantiate those defenses.

And although appeal was technically available to petitioner, Certiorari lies when such appeal does not prove to be a speedy and adequate remedy. [11] Certiorari is a more speedy and efficacious remedy to have the judgment by default set aside as a nullity where a party has been illegally declared in default. [12]

Note should also be taken of the fact that the trial Court had already ordered the issuance of a Writ of Execution in its Order of September 17, 1981, [13] except that respondent Judge, in his Order of November 12, 1981, held in abeyance resolution of petitioner's Motion to Quash said Writ pending the resolution by this Court of this Petition. [14] Clearly, even if appeal were available to petitioner, it is no longer speedy and adequate. [15]

WHEREFORE, granting Certiorari, the default Order and default Judgment rendered by respondent Judge in Civil Case No. 120920 are hereby set aside and he is hereby directed to re-set the case for pre-trial and trial and to render judgment accordingly.

No costs.

### **SO ORDERED.**

Teehankee, (Chairman), Makasiar, Plana, Vasquez, Relova, and Gutierrez, Jr., JJ., concur.

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[1] p. 51, CFI Records.

[2] parag. 7, Petition.

[3] p. 62, CFI Records.

[4] p. 51, CFI Expediente.

[5] Acknowledged at the back of p. 48, *ibid*.

[6] Signatures appear at the back of p. 49, *ibid*.

- [7] Acknowledgments at the back of p. 52, *ibid*.
- [8] *Samson vs. Court of Appeals*, 105 SCRA 781, 782 (1981).
- [9] *Pineda vs. Court of Appeals*, 67 SCRA 229 (1975).
- [10] Annex "B", Motion, p. 63, CFI Rollo.
- [11] *Dimayacyac vs. Court of Appeals*, 93 SCRA 265 (1979).
- [12] *Omico Mining & Industrial Corp. vs. Vallejos*, 63 SCRA 286 (1975).
- [13] p. 104, CFI REcords.
- [14] p. 109-110, *ibid*.
- [15] *Matute vs. Court of Appeals*, 26 SCRA 772 (1969).

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