

MARCELO SUSARA, PLAINTIFF AND APPELLANT, VS. MARIANO MARTINEZ, DEFENDANT AND APPELLEE.*G.R. No. 6080. October 18, 1910*

Ponente: TORRES, J.

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On October 28, 1909, Marcelo Susara filed a written complaint in the Court of First Instance of this city, against Mariano Martinez, the administrator of the intestate estate of the late Francisco Martinez, who, during his lifetime, was declared incapable of the management of his property, for which reason Attorney Vicente Ilustre was appointed guardian on March 30, 1906. Upon the death of the said Francisco Martinez, on January 21, 1909, the guardian Ilustre ceased to act and the said Mariano Martinez was appointed by the court as administrator of the intestate estate left by the said Francisco Martinez. It was alleged in the complaint that, on the said date of March 30, 1906, Ilustre, in his capacity of guardian of the latter, made with the plaintiff a contract of loan and of acknowledgment of a debt in favor of the plaintiff for the sum of P4,125, secured by the property situated at Nos, 93, 95, and 97 Calle Sevilla, Manila, owned by the said Martinez; that the said contract was embodied in a public instrument executed for the purpose, a copy of which, marked with the letter A, was exhibited with the complaint and made an integral part thereof; that the said contract was approved by the court on April 3 of the year before mentioned, and that the plaintiff continued to be the legitimate owner of the aforesaid credit and security; that, in accordance with the instrument above referred to, the said sum of P4,125 was to be refunded to the plaintiff within a term of three years, from the 30th of March, 1906, which term had expired on March 30, 1909. The complaint further recited that, in accordance with the instrument before mentioned, the debtor Martinez, or his representative, was obliged to pay to the plaintiff annually P367.50 as interest on his debt; but that neither the debtor nor his representative had, up to the date of the complaint, refunded the said amount and had only paid the plaintiff P244 as interest for the last year, wherefore, it was alleged, that the said Martinez then owed, as interest, P123.50, which, together with the principal to be repaid, amounted to the sum of P4,248.50; and that, by such failure to pay the principal and interest, loss and damage was sustained by the plaintiff to the amount of P246. The latter therefore asked that judgment be rendered in his favor to compel the defendant to pay him the total sum of P4,494.50, together with legal interest thereon from the date of the filing of the complaint until the amount due should be fully paid, and that, in case of insolvency, the sale at public auction of the property mentioned be decreed, and that the net proceeds obtained therefrom be applied to the payment of the judgment.

The instrument, Exhibit A, shows that Vicente Ilustre, the guardian of Francisco Martinez y Garcia, party of the first part, and Marcelo Susara, party of the second part, made the following statements: The former stated that his ward Martinez y Garcia was the owner of a house and lot situated on Calle Sevilla, Binondo, and designated by the numbers 93, 95, and 97, and that, in his capacity of guardian and with the approval of the court, he mortgaged the said property by a special preferred mortgage in favor of the other contracting party for the sum of P4,125, under the following conditions: Susara was to deliver to him, as in fact he did, the sum of P2,000, for the purposes of the contract; that Marcelo Susara held a credit against Francisco Martinez of P2,125, verbally acknowledged by the latter and previously affirmed by a partial payment on account, as recorded at the foot of the original

instrument of the date of July 8, 1903, and subscribed by the debtor, Martinez y Garcia, which document was made a part of the said instrument Exhibit A. The said credit of P2,125 also constituted an encumbrance on the property described, which amount, together with the P2,000 before mentioned, formed the total sum of the mortgage. The said P2,000 was to earn 12 per cent interest per annum and the remainder, P2,125, 6 per cent only, and the term of the mortgage was to be two years, extendible for another year, at the will of the said party of the first part. The creditor, Marcelo Susara, stated that he accepted the contract in all its parts, and the instrument was signed by both contracting parties on the 30th of March, in the presence of two witnesses, and its contents were ratified on the same date before a notary public. At the end of the instrument appears a note of approval, signed by Judge A. S. Crossfield, under date of April 3, 1906, and bearing the stamp of the court.

Following the said instrument and attached thereto, is a copy of a promissory note, dated July 8, subscribed by Francisco Martinez, made payable on the 23d of October of that year to the order of Marcelo Susara, for the sum of P2,600, value thereof being acknowledged as received from the said Susara in jewelry set with diamonds, a solitaire ring, and a pair of diamond earrings mounted in gold. Under the signature of the debtor there is a note which reads: "Paid on account a credit of P600." This note is also signed by Martinez.

The defendant in his answer to the foregoing complaint denied paragraphs 8, 9, and 10 thereof and each and all of their parts. These paragraphs refer to the allegations of the plaintiff to the effect that the debtor was obliged to pay an annual interest of P367.50; that the former only received P244 as interest; that the debtor owes him, the plaintiff, for principal and interest, the sum of P4,248.50 and that the failure to pay the same caused the latter loss and damages to the amount of P246. As a special defense, the defendant alleged that the question involved was a claim against the estate of a deceased person, for the settlement of which the court had appointed commissioners in accordance with the law. He therefore asked that the complaint be dismissed, with the costs against the plaintiff.

The case having come to trial, with oral evidence introduced on the part of the plaintiff, the court, on March 7 of the present year, rendered judgment by dismissing the complaint, without special finding as to costs. Counsel for the plaintiff filed an exception to the judgment and asked for a new trial, on the ground that the findings were contrary to the evidence and the law. This motion was overruled by the court, exception was taken by the plaintiff, the necessary bill of exceptions was filed on March 31 of the current year, and, in view of the opposition to the approval thereof, entered by counsel for the defendant upon the ground that it was not presented in due time - a fact admitted by the plaintiff the court, holding that the question as to whether the appeal was improperly admitted was one within the competency of the Supreme Court to decide on motion to dismiss, approved the said bill of exceptions and ordered that it be forwarded to the clerk of this court.

The action prosecuted by Marcelo Susara in the complaint herein above mentioned is unquestionably a mortgage action and has for its object the collection of a credit secured by real property, under the provisions of section 254 and following of the Code of Civil Procedure, judging from the nature of the petition made by the plaintiff in his complaint, for he prays that, in case of insolvency in the amount claimed, the property alleged as mortgaged be ordered sold at public auction and the net proceeds of the sale applied to the payment of the judgment sought.

The court, after due consideration of the arguments presented by both sides, dismissed the complaint, on the ground that the instrument purporting to be a mortgage of the property situated at Nos. 93, 95, and 97, Calle Sevilla, district of Binondo, given as security for the fulfillment of an obligation stipulated therein, does not appear to be registered in the registry of property, wherefore no mortgage credit legally exists in this case, nor does any action based thereon lie with the creditor, but the latter should have presented his claim to the commissioners of appraisal in accordance with the provisions of section 636 and following, of the aforementioned code.

The indispensable requisite of the registration of a mortgage instrument in the registry of property, is expressly prescribed by the Civil Code in article 1875 thereof, the first paragraph of which reads:

"Besides the requisites mentioned in article 1857, it is indispensable, in order that the mortgage may be validly constituted, that the instrument by which it is created be entered in the registry of property."

The instrument of debt, Exhibit A, which created the mortgage upon the aforesaid property in favor of the plaintiff, does not appear to be registered in the registry of property, as stated in the judgment appealed from; wherefore it can not be concluded that the said mortgage was validly constituted in accordance with law so as to enable the creditor, by virtue of the said document, to prosecute an action upon a mortgage, a right of action which could not be derived therefrom because of the failure to register the instrument in the registry of property.

The other kind of security referred, to in section 708 of the Code of Civil Procedure, can not support the prosecution of the action mentioned, because such security can not be held to be a mortgage, and if there is no mortgage it would be impossible to prosecute the action. The proper action may be of a different kind, but it can not be that mortgage action expressly provided by law for the collection of credits secured by a mortgage on real estate.

With respect to the incidental issue raised in first instance, relative to the alleged improper admission of the appeal by the approval of the bill of exceptions, since that incidental issue was not raised in this second instance by means of the necessary previous motion, before proceeding further with the appeal, in order that that question might be duly and opportunely decided by this court, it is not possible to pass upon it now, in view of the statements made in the appellee's brief, and at the same time decide the principal issue, on account of the present status of the case in this instance where it is no longer permissible either to raise or to argue such a question, owing to the omission or waiver of the party interested.

For the foregoing reasons, it is proper, in our opinion, to affirm and we do hereby affirm the judgment appealed from, with the costs against the appellant. So ordered.

Arellano, C. J., Johnson, Moreland, and Trent, JJ., concur.

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