

JOSE DURAN, PLAINTIFF AND APPELLEE, VS. MARIA ARBOLEDA, DEFENDANT AND APPELLANT.

G.R. No. 6751. September 16, 1911

Ponente: MORELAND, J.

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MORELAND, J.:

A demurrer to a complaint was overruled by an oral order of the court delivered in the presence of both parties and their lawyers after the conclusion of the arguments upon the hearing: of said demurrer. In that order the court gave the defendant five days within which to answer. On the sixth day, the answer not having been filed, the plaintiff presented a motion to have the defendant declared in default and for permission to prove the allegations of his complaint. Within a few minutes after such motion was made defendant came into court and presented her answer. The court refused to receive it upon the ground that it was not filed within the five days granted upon the overruling of her demurrer. Thereupon the court entered an order declaring her in default and later received the proofs of the plaintiff and entered judgment accordingly.

From that judgment and from the order denying defendant leave to answer and defend, the defendant appealed to this court, alleging two errors. First, that the plaintiff gave her no notice of his motion to declare her in default and for permission to prove the allegations of his complaint. Second, that the court should have received her answer, filed on the sixth day, for the reason that her time to answer had not yet expired under the rules of the court.

We are satisfied that defendant's first allegation of error can not be sustained. Section 101 of the Code of Civil Procedure provides in part:

"If the demurrer is overruled, the court shall proceed, if no answer is filed, to render such judgment as the law and the facts duly pleaded warrant. But after the overruling of a demurrer to a complaint, the defendant may answer within a time to be fixed by general rules of court; and after the overruling of a demurrer to an answer the plaintiff may amend his complaint, if necessary, to meet new facts or counterclaims set forth in the answer."

We are of the opinion that a defendant, whose demurrer to the complaint has been overruled, and who fails to answer within the time prescribed by the rules of court, is, not entitled to notice of a motion to declare him in default or of a motion requesting permission to the plaintiff to prove his case. When defendant has failed to file his answer within the time prescribed, he is already in default by operation of law and the plaintiff may proceed to prove his case without further notice to him.

As to the second assignment of error, we are of the opinion that it is well taken. Rule 9 of the Court of First Instance provides:

"When a demurrer to a complaint is overruled the defendant shall answer within five days after service on him of written notice of the order, which notice the plaintiff shall give."

The court below having overruled the demurrer and having given the defendant the regular time in which to

answer, as prescribed by the rules, the defendant had a right to expect that the proceedings were to be conducted according to the rules of the court as laid down. The defendant had a right to rely upon the express provisions of Rule 9 and to expect that she would be served by the plaintiff himself with a written notice of the entry of the order. She had a right to wait before moving further until the expiration of five days from the time when such notice was given. The plaintiff never gave the defendant any notice whatever of the entry of said order, relying upon the fact that the defendant was in court at the time the demurrer was overruled and that she received thereby sufficient notice of such order and that the five days began to run from that time. The defendant had a right to rely upon the rules of court and to expect that she would be given notice as required thereby. No negligence or fault can be imputed to her in so doing.

The judgment of the court below is reversed and the cause remanded, with instructions that the defendant's answer be received and that the cause proceed to trial in due form. So ordered.

Torres, Mapa, and Johnson, JJ., concur.

Carson, J, concurs in the result.

ON MOTION FOR REHEARING

DECEMBER 15, 1911.

MORELAND, J.:

Little need be said upon this application for a rehearing and re-argument in this case. The opinion reversing the judgment contains a full statement of the law applicable to the situation.

In that decision we said in part:

"The defendant had a right to rely upon the express provisions of Rule 9 and to expect that she would be served by the plaintiff, himself with a written notice of the entry of the order. She had a right to wait before moving further until the expiration of five days from the time when such notice was given. The plaintiff never gave the defendant any notice whatever of the entry of said order, relying upon the fact that the defendant was in court at the time the demurrer was overruled and that she received thereby sufficient notice of such order and that the five days began to run from that time. The defendant had a right to rely upon the rules of court and to expect that she would be given notice as required thereby."

In referring to the necessity of serving written notice upon the defendant we did not mean the defendant personally but rather her attorney of record. Notice of the various proceedings during the course of a trial or of an appeal, or both, is properly given by the attorney of record of one party to the attorney of record of the other. Notification of the parties personally is not necessary when they have attorneys of record.

It was admitted in the cause when it was before us on appeal that no notice had been given to the defendant by the plaintiff of the order overruling the demurrer to the complaint as required by Rule 9; and that the only notice which the defendant received of such order was that given by the verbal rendition of the decision of the court at the time the demurrer was overruled. This being so, it is clear that, if such notice be held sufficient, as requested by the plaintiff, there is a complete abrogation of Rule 9. This cannot be permitted. The rules of the court are made to be followed. Every litigant has a right to rely upon them. To penalize that reliance by a destruction of the rule would be to perpetrate a grave injustice.

The motion for a rehearing is denied.

Mapa, Johnson, and Carson, JJ., concur.

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