

SYDNEY COOMBS, PLAINTIFF AND APPELLEE, VS. LOPE K. SANTOS, DEFENDANT AND APPELLANT.*G.R. No. 7644. March 24, 1913*

Ponente: TRENT, J.

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The property in question was seized on March 31, 1911, by the defendant Lope K. Santos as sheriff of the Province of Rizal, acting by virtue of an execution issued at the instance of Kuenzle & Streiff in a case wherein the latter was the plaintiff and George Cruickshank was the defendant. The plaintiff, who was in possession of the property at the time of the seizure, demanded its return from the sheriff. Upon the sheriff's refusal to comply with this demand the plaintiff instituted this action in the Court of First Instance of the city of Manila to recover possession of the property seized and for damages caused by reason of the seizure. The first complaint was against Lope K. Santos alone and a summons was served upon him on the 10th day of April. The amended complaint added the firm of Kuenzle & Streiff as defendant. This amended complaint was served upon the manager of the defendant Kuenzle & Streiff on the 24th day of April, and upon the defendant Santos on the 25th day of April. Both defendants entered their appearance through their attorneys, on the 4th day of May, and not having answered within the time provided, Lope K. Santos was, by a judgment of the court, declared to be in default on the 23d of May, and the case was heard on the 25th of May, at which time the defendant Kuenzle & Streiff was declared to be in default. After stating the facts as found, the trial court said:

"Let judgment be entered in favor of the plaintiff, Sydney Coombs, and against the defendants Lope K. Santos, sheriff of the Province of Rizal, and Kuenzle & Streiff, for the delivery and possession of the following described property: A temporary building of mixed materials; 1 piano; 49 bamboo chairs; 26 bar tables; 100 rattan chairs; 1 piano stool; 1 refrigerator; 1 front bar; 1 back bar; 1 cork extractor; 1 set of mirrors; one 50 c. p. electric light globe; seven 16 c. p. electric light globes; six 100 c. p. electric light globes; two 400 c. p. electric light globes; five 50 c. p. electric light globes; one 32 c. p. electric light globe; and for damages for the detention thereof in the sum of P200 per month during the time it was detained, and for the costs of the cause."

From this judgment Lope K. Santos alone appealed and now insists that the trial court erred (1) in overruling his motion asking for the annulment of the order wherein he was declared to be in default; and (2) in taking jurisdiction of the cause, the same being for the recovery of real property. No other questions have been raised by the appellant.

With reference to the first alleged error, it appears, as before stated, that the amended complaint was served upon the appellant on the 25th day of April, 1911, and that he entered his appearance on the 4th of May. On the 23d day of May, the appellant not having answered or demurred, a default judgment was entered against him. Subsequently thereto, and on the following day, he filed a motion, which was sworn to, asking that the judgment by default be set aside. This motion was denied and exception noted. The reasons given by counsel for the appellant in the motion to set aside the default judgment were as follows:

"It is the docket clerk of the office who has in his care the papers in cases pending, and whose duty it is to

notify counsel of the dates when the time expires for answering or presenting any other pleadings to the courts. Said docket clerk has been absent from this office since May 6 without notifying anyone and without leaving any memorandum of hearings or motions pending, and returned only yesterday. Counsel who are now in this office received no notification of the time having elapsed for presenting an answer or demurrer until they were served by the court with notice of the order of default against said defendant, Lope K. Santos."

Counsel for appellee insist that the first alleged error is not well founded because (1) the motion does not show that the default occurred through mistake, inadvertence, surprise, or excusable neglect; (2) it was not shown that the trial court abused its discretion in refusing to set aside the default judgment; and (3) the application to open the default does not contain nor was accompanied by an affidavit showing a meritorious defense. The first and second propositions will be considered together.

Section 113 of the Code of Civil Procedure reads:

"Upon such terms as may be just the court may relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect: Provided, That application therefor be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken."

The default was entered" nineteen days after the appellant had entered his appearance. Motion to open default was made before the trial of the case on the merits. No one contends that if the default had been set aside it would have delayed the trial of the cause or inconvenienced the appellee in any manner. Counsel who entered their appearance for the appellant now swear that they have in their office an employee called the docket clerk, who has in his possession the papers in pending cases, and whose duty it is to notify counsel of the days within which pleadings must be filed. This docket clerk absented himself on May 6, two days after appearance was entered, and did not return until the 23d, the very day that the default was taken. The clerk did not notify counsel of the expiration of the time within which they should file their answer. Do these facts bring them within the provisions of section 113, *supra*?

A default judgment does not pretend to be based upon the merits of the controversy. Its existence is justified on the ground that it is the one final expedient to induce the defendant to join issue upon the allegations tendered by the plaintiff, and to do so without unnecessary delay. A judgment by default may amount to a positive and considerable injustice to the defendant? and the possibility of such serious consequences necessitates a careful examination of the grounds upon which the defendant asks that it be set aside.

In *Watson vs. R. R. Co.* (41 Cal., 17, 20), the court said:

"Applications of this character are addressed to the discretion—the legal discretion—of the court in which the default has occurred, and should be disposed of by it as substantial justice may seem to require. Each case must be determined upon its own peculiar facts, for perhaps no two cases will be found to present the same circumstances for consideration. As a general rule, however, in cases where, as here, the application is made so immediately after default entered as that no considerable delay to the plaintiff is to be occasioned by permitting a defense on the merits, the court ought to incline to relieve. The exercise of the mere discretion of the court ought to tend in a reasonable degree, at least, to bring about a judgment on the very merits of the case; and when the circumstances are such as to lead the court to hesitate upon the motion to open the default, it is better, as a general rule, that the doubt should be resolved in favor of the application."

It might be added that if plaintiff relies upon his judgment obtained by default and directs the attention of the court to no real injury which would result to his interests by the reopening of the case, his objection to such action assumes, to say the least, the appearance of a technicality, which, in this liberal age, is not looked upon with favor. An examination of the authorities shows that where application to set aside a default judgment is made

immediately following its entry, it will receive much greater consideration than where a delay of months or even weeks has occurred.

But it is urged that the granting of the motion to set aside a default rests in the discretion of the court; that such discretion cannot be controlled in the absence of a showing of an abuse thereof; and that this showing has not been made in the case at bar.

It must be remembered that the only discretion conferred upon officers is a legal discretion, and when anything is left to any officer to be done according to his discretion the law intends it to be done with a sound discretion and according to law; and if a given case falls within both the letter and spirit of section 113, *supra*, a denial of the relief sought will amount to an abuse of such discretion.

"Inadvertence" is defined to be, among other things, an oversight; an involuntary accident; the effect of inattention. And "mistake" is defined to be air error in action; a blunder. The conduct of counsel in the case at bar in depending upon their docket clerk to call their attention to the time within which they must file their answer rises no higher than the plane of inadvertence. They have brought this case, in so far as the two propositions under consideration are concerned, within both the letter and the spirit of the remedy.

There is, however, a serious drawback to granting the relief asked. The motion asking that the default judgment be set aside is accompanied by no affidavit of merits. Although the Code does not specifically require such an affidavit of merits, the reasonableness and necessity for it is apparent. If the defendant has no real defense to the action or intends to enter only a technical plea, there would be no justice in permitting the case to be reopened and subject plaintiff to further delay and expense for the mere purpose of rendering a judgment in the regular manner. It is but right, therefore, to require the defendant to show that if he be allowed to answer he will be able to produce evidence which may affect the claims of the plaintiff.

The universality of the rule is attested by the remarks in 23 Cyc, 951, 955, and 962, supported by a host of authorities. Black on Judgments, § 347, thus states the general rule:

"Where an application is made to open a judgment, under the statutes for that purpose, it must be accompanied by an affidavit setting forth a good defense on the merits, and showing that the default occurred through mistake, surprise, or other statutory ground, and stating the facts constituting such mistake, surprise, etc., and also showing due diligence. And independently of such statutes, it has always been the practice of our courts, from the very earliest times, on an application to open or set aside a judgment, to require some sort of showing, by affidavit or otherwise, that the judgment is unjust as it stands and prejudicial to the party complaining and that he has a meritorious defense. It may therefore be regarded as a universal requirement."

A mere statement that defendant has a valid defense is a conclusion of law (*Roberts vs. Corby*, 86 111., 182); or is not sufficient (*Palmer vs. Rogers*, 70 la., 381, 30 N. W. 645; *Jackson vs. Stiles*, 3 Caines (N. Y.), 93; *Mayer vs. Mayer*, 27 Ore., 133, 39 Pac, 1002; *Foster vs. Martin*, 20 Tex., 119). The only exceptions to the rule are cases where the granting of the motion is not discretionary but is demandable as of right, as where there was no jurisdiction over the defendant or of the subject matter of the action, where a judgment was taken by default before defendant's time to answer had expired, where it was entered by mistake, or was obtained by fraud, and other similar cases. (23 Cyc, 956.) It does not appear that any such exceptions favor the present case.

The opinion of this court in the case of *Wahl vs. Donaldson, Sims & Co.* (2 Phil. Rep., 301), sets forth the rule with some particularity. But in view of the fact that the opinion in its entirety was not approved by a majority of the court, we have taken this opportunity to state the rule at length, and compliance with it in the future will be required.

The rule being now clearly set forth, and it having been decided to consider conditionally the motion of counsel to

set aside the judgment by default, it is ordered that the record be returned to the court whence it came with instructions to allow the appellant to file an affidavit of merits. When this is done the court will proceed to determine whether the judgment by default should be set aside, and after this determination, the case will go forward to final conclusion. No costs will be allowed either party in this instance.

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

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