

DOMINADOR GOMEZ, PLAINTIFF AND APPELLANT, VS. REMEDIOS SALCEDO, DEFENDANT AND APPELLEE.

G.R. No. 7821. December 31, 1913

Ponente: TRENT, J.

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TRENT, J.:

This is an appeal from a judgment sustaining a demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action.

The complaint alleges that the defendant leased a house and lot on November 8, 1910, to one Crary for a period of two years at a monthly rental of P200, said lease being evidenced by a public document and no stipulation being contained therein that the lessee should not sublet the property, Crary sublet a portion of the property during the same month to the plaintiff for a term of two years at a monthly rental of P140, it not being stated whether this lease was evidenced by a writing or not. In February, 1911, the defendant agreed with the plaintiff to subrogate the latter in all the rights and obligations of the original lessee under the lease, at the same time agreeing to a reduction in the rent to P110 per month. The complaint further alleges that the plaintiff has asked the defendant many times to evidence the subrogation of the original lessee in a public document, but that the defendant has always refused to do so with the statement that plaintiff could remain in possession of the property under the conditions of the lease as long as he desired. As a result of a final judgment in the month of December, 1911, in an action of ejectment instituted by the defendant against the present plaintiff the defendant notified the plaintiff that from January 1, 1912, he would be required to pay a monthly rental of P300 for that part of the house occupied by him.

There is no indication in the complaint of how the rights of Crary had been disposed of or that he had any knowledge or information concerning the transaction between the plaintiff and the defendant.

The first question which arises is whether, by the contract between Gomez and Salcedo, the former acquired Crary's leasehold rights to the entire property or whether the contract related merely to that portion of the property occupied by Gomez. The complaint is not artistically drawn, and in view of the disposition we propose to make of this case, we shall not attempt to hazard a construction of it which might possibly be contrary to the pleader's intention. For, whether the subrogation of the plaintiff in the rights of Crary related merely to that part of the property the plaintiff had previously occupied as sublessee or whether such subrogation was intended to completely eliminate Crary as a tenant of the property, the contract evidencing such subrogation necessarily pertains to the leasing for a longer period than one year of real property or an interest therein, and, as such, comes within the statute of frauds. (Sec. 335, C. C. P.) The absolute necessity of holding that this contract between the plaintiff and the defendant comes within the statute of frauds is not alone based upon the law above cited, although that alone is sufficiently clear, it seems to us.

Section 335 reads as follows: "In the following cases an agreement hereafter made shall be unenforceable by action unless the same, or some note or memorandum thereof, be in writing, and subscribed by the party charged,

or by his agent; evidence, therefore, of the agreement cannot be received without the writing, or secondary evidence of its contents: * * *

"5. An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein, and such agreement, if made by the agent of the party sought to be charged, is invalid unless the authority of the agent be in writing and subscribed by the party sought to be charged."

Even on the assumption that the complaint only sets forth a contract of subrogation in the rights of Crary as to the portion of the house occupied by Gomez, it seems clear that Gomez acquired a leasehold interest in the real property in question, unless it be argued that a portion of a property cannot be leased to the exclusion of the remainder. So that if he did acquire a leasehold interest in any part of the property, it falls directly within the italicized words of the above quoted section of the code. When we consider the possible, not to say the probable, consequences from holding that a subtenant or other third person may be subrogated in the rights of the tenant whose contract was and of necessity was required to be in writing, without such contract of subrogation being also in writing, there appears to be no ground upon which to base an assertion that such subrogation need not be reduced to writing. The very avenue for fraud which the purpose of the statute is to close would be open to a dishonest lessee by allowing him to subrogate a third person in Ms own right, could he prove and enforce such a contract without the necessity of reducing it to writing. For these reasons we say that whether the real property acquired by the plaintiff in the contract of subrogation constituted the entire holding of the defendant or only that portion of it which the plaintiff had theretofore occupied as subtenant, is of no importance. In either view of the case the contract is within the statute of frauds.

The next assignment of error relates to the fact that there is no allegation in the complaint that the contract of subrogation therein set forth is in writing or that there exists some note or memorandum thereof signed by the defendant. Is such an allegation necessary?

In *Price vs. Weaver* (13 Gray, Mass., 272), it was said:

"The statute of frauds has not altered the rules of pleading, in law or equity. A declaration on a promise which, though oral only, was valid by the common law, may be declared on in the same manner, since the statute, as it might have been before. The writing is matter of proof, and not of allegation."

The principle enunciated in this case is still recognized by the great weight of authority.

This court has held in a number of cases, among which are *Conlu vs. Araneta* (15 Phil. Rep., 387), and *Gallemit vs. Tabiliran* (20 Phil. Rep., 241), that the statute of frauds does not make an oral contract within its terms illegal, but merely voidable at the election of the party sought to be charged, and such election must, of course, be manifested in some affirmative way. While there is no question but that the better practice is to allege that the contract is in writing it is not necessary to the statement of the prima facie cause of action.

Can the defense of the statute be raised by demurrer? We think that there should be a presumption in favor of the execution of the writing evidencing the contract, in the absence of allegations in the complaint expressly showing that it was an oral agreement. Paragraph 17 of section 334 of the Code of Civil Procedure establishes the presumption that the ordinary course of business has been followed; and as stated in *Printup vs. Johnson* (19 Ga., 73):

"If the agreement was such a one that it was required to be in writing by the statute of frauds, then it is to be presumed, until the contrary be shown, that the agreement was in writing; for it is, in general, to be presumed until something to the contrary be shown, that no man does what the law forbids, or what the law declares shall be invalid."

A late case from the same jurisdiction contains the following further remarks on this subject: "Where the statute, in derogation of the common law, requires certain contracts to be executed in a prescribed manner in order to be binding upon parties, the law will not presume, in the absence of proof, that either party has violated the statute." (*Draper, Moore & Co. vs. Macon Dry Goods Co.*, 103 Ga., 661.)

The rule that the contract is presumed to be in writing when so required by the statute of frauds and not specifically alleged to be in writing by the pleading is supported by many other well-considered cases. (*Gale vs. Harp*, 64 Ark., 462; *Lupean vs. Brainard*, 46 N. Y. S., 1044; *Gladyden vs. Ellison*, 68 S. W., 715, Tex. Civ. App., 1902; *Barnsdall vs. Waltmayer*, 142 P., 415; *Bradford Inv. Co. vs. Joost*, 117 Cal., 204; *Walker vs. Edmundson*, 111 Ga., 454; *Laybourn vs. Zinns*, 92 Minn., 208; *Speyer vs. Desjardins*, 144 111., 641, 36 A. S. R., 473.) The rule is otherwise in Indiana, but this is due to a statutory enactment. (*Horner vs. McConnell*, 158 Ind., 280.)

As a result of this presumption a pleading which merely fails to show that a contract relied upon is in writing is not susceptible to a demurrer based upon the statute of frauds, for the reason that a demurrer does not even dispute the facts alleged in the pleading to which it is directed, but admits them, together with the legitimate inferences flowing therefrom. That the defense of the statute cannot be raised by demurrer in the face of this presumption of the enforceability of the contract is also a doctrine which receives general assent. (*Evans vs. Southern R. Co.*, 133 Ala., 482; *Anderson vs. Hilton & D. Lumber Co.*, 121 Ga., 688; *Fowler vs. Fowler*, 204 Ill., 82; *Phillips vs. Hardenburg*, 181 Mo., 463; *Alexander vs. Cleland*, 13 N. M., 524 (1906), 86 P., 425; *Matthews vs. Matthews*, 154 N. Y., 288; *Hennings vs. Doss*, 125 N. C., 400; *Tyson vs. Jackson Bros.*, 41 Tex. Civ. App., 128.)

Where, however, the pleading shows on its face that the contract relied upon is oral and that it comes within the statute of frauds, the objection of the party sought to be charged may as well be taken by demurrer as by objection to the reception of evidence tending to prove its existence. When such a party proposes to thus offer the defense of the statute, it would prolong the action and subject both litigants to needless expense and waste of time to allow the case to proceed to trial. It would be a mere empty formality which would produce no better or different results than a decision on the demurrer, as in neither case could the contract be enforced. That the defense may be raised by demurrer when the pleading shows on its face that the contract relied upon is oral, is the approved doctrine as is evidenced by the following authorities: *Thompson vs. New South Coal Co.* (135 Ala., 630; 62 L. R. A., 551; 93 A. S. R., 49); *Ahrend vs. Odiorne* (118 Mass., 261; 19 Am. Rep., 449); *Seamans vs. Barentsen* (180 N. Y., 333; 105 A. S. R., 759); *International Harvester Co. of America vs. Campbell* (43 Tex. Civ. App., 421). An exception to this rule is where part performance is relied upon to take the contract out of the statute. (*Dicken vs. McKinlay*, 163 111., 318; 54 A. S. R., 471.)

In the present case we find nothing in the complaint which indicates whether the contract relied upon is written or oral, although as stated above it is within the statute of frauds. In accordance with the above remarks relative to the manner of pleading the statute as a defense, it is clear that the demurrer to the complaint should have been overruled. The complaint states a cause of action and the case must proceed to trial.

The judgment of the lower court sustaining the demurrer to the complaint is reversed, and the case remanded for further proceedings in accordance with this opinion. Without costs.

Torres and Carson, JJ., concur.

Johnson, J., concurs in the result.

Arellano, C. J., dissents.

DISSENTING

MORELAND, J.,

This case, as decided, presents, in my judgment, so many unusual features, from a legal point of view, that I feel compelled to dissent.

The case comes here by appeal from an order sustaining a demurrer and from the judgment entered thereon dismissing the complaint with costs. The material portions of the complaint are as follows:

"That the defendant, on or about the month of November, 1910, as the owner and proprietor of a house, No. 877 Calle Azcarraga, at the corner of Alix, in the district of Sampaloc, leased the same to L. M. Crary for a period of two years from said date at a monthly rent of P200, which said lease was manifested in a document duly executed and acknowledged before a notary public; that said lease contained no prohibition against subletting.

"That the said tenant, L. M. Crary, in the exercise of his rights under said lease, in the said month of November, 1910, sublet part of the said house to this plaintiff, namely, all of the upper part of said house with its hall, exit, and appurtenances and rights with entry from Calle Azcarraga; that said subletting was for the period of two years from the date of said lease to Crary at a monthly rental of P140 Philippine currency, with free water and sewerage service and with the provision that the installation of electric lights should be at the expense of the said sublessee.

"That on or about the month of February, 1911, the defendant, as owner and proprietor of the said house occupied by the plaintiff, covenanted and agreed with the plaintiff to subrogate him in all the rights and obligations of the said lessor, L. M. Crary, to such an extent that in the future the plaintiff should pay to the defendant the monthly rental, which from said date forward should be reduced to P110 monthly; that the execution of said agreement was duly entered upon, the plaintiff paying to the defendant directly the sum of P110 from that date forward and thereby separating himself completely from his sublessor, L. M. Crary, the plaintiff thereupon becoming' and thereafter being the tenant of the defendant under the same conditions as said L. M. Crary.

"That the defendant since the said agreement of subrogation has repeatedly been requested by the plaintiff to execute in writing before a notary public the said contract of subrogation, and the defendant has each time answered that the plaintiff should not worry because he could occupy the house as long as he desired.

"That by virtue of a judgment of a justice's court rendered in the present month terminating an action for the recovery of possession and rents due in which the present plaintiff was defendant and the present defendant plaintiff, the said defendant in this action notified the plaintiff, Dominador Gomez, that from the month of January, 1912, he must pay a monthly rental of P300 for that part of the house occupied by him, which requirement was in contravention of the continued promises made by the defendant to the plaintiff, and especially in violation of the contract of subrogation between the parties relative to all the rights and obligations of L. M. Crary in favor of the plaintiff, Dominador Gomez.

"Wherefore the plaintiff demands judgment in his favor:

"(a) Ordering the defendant to execute in writing before a notary public the contract of lease covenanted and agreed with the plaintiff, said lease to continue as long as this plaintiff desires."

The first feature of this case which attracts attention is what I regard as a misconception on the part of the plaintiff of what actually occurred between the parties when they made the contract set forth in the complaint. The plaintiff alleges that he made an agreement with the defendant in which he, by the aid of the defendant, "subrogated" himself to the rights of Crary in a part of the premises which, to plaintiff's knowledge, had already been leased to

Crary by the defendant for a period of two years, which period had only just begun to run. It is clear that, under the allegations of the complaint, Crary's rights in the premises were not affected by that agreement. No arrangement between a landlord and a sublessee can prejudice or in any way interfere with the rights of a lessee. Nor could the agreement between plaintiff and defendant disturb the relations between Crary and Gomez created by the contract of sublease. Crary's rights in the premises could not be taken away from him by Gomez or by the landlord or by both. It required some act of his to deprive him of his rights as lessee. None of the elements of subrogation exist. Subrogation is either legal or conventional. The facts set forth do not establish either. The agreement in question did not affect the rights of Crary in the premises. What actually occurred, from defendant's standpoint, was that the defendant sought to lease to the plaintiff a portion of a house the whole of which had already been leased to another person. In other words, it was a second lease of the same premises. From plaintiff's point of view, he, by the contract with defendant, sought to dissolve the ties which, by his sublease, bound him to Crary. That agreement between the plaintiff and defendant took no rights away from Crary and gave none to Gomez. It did not destroy the relation of landlord and tenant existing between Salcedo and Crary; and, when the agreement was completed, the parties, so far as Crary was concerned, were just what they were before. There is no allegation that Crary consented to the arrangement. On the contrary, the complaint and particularly the arguments of counsel on this appeal tend to demonstrate that Crary has maintained and is maintaining the rights which his lease with Salcedo gave him in the premises in question. Specific performance of a contract which appears to be in violation of the rights of third persons will not be decreed.

The second interesting feature is that the complaint sets out as the basis of plaintiff's rights one contract and asks for the specific performance of another and altogether different contract, if it can be called a contract at all.

It will be observed from the allegations of the complaint that the real contract or lease between the parties provided that the defendant thereby, in November, 1910, leased to the plaintiff, for the period of two years, the upper part of a house which, in the same month and but a short time previously, the defendant had leased to one L. M. Crary for the same period. That is to say, Crary's lease, as well as the lease made between the parties hereto, was for a period of two years from the 8th of November, 1910. This is the lease or "contract of subrogation," set out so fully in plaintiff's complaint, to which he continually refers in his pleading, which, in reality, is the sole basis of his action, and is the only contract as to which there is any consideration. But it is clear from the terms of this "contract of subrogation" that the lease-thereby created would continue no longer than November, 1912. This action was commenced on the 29th of December, 1911, the demurrer was filed on the 13th of January, 1912, the decision was rendered on that day, an appeal taken and the bill of exceptions certified on the 17th of February, 1912, and the case was submitted to this court in the month of January, 1913. Therefore, when the case was submitted to this court, the "contract of subrogation" had expired by virtue of its terms and, from the allegations of the complaint, had been fully and specifically performed. It needs no argument to demonstrate that specific performance cannot be decreed of a contract which has already expired by its own limitations or which has already been performed. This must have been clear to plaintiff and to his counsel. They knew that an action to perform specifically that contract or to require the execution of a document which would be evidence of that contract would be useless and futile. The plaintiff, accordingly, seems to have abandoned the original contract of lease and to base his action upon another and different contract, if it may be so called. The basis of this alleged lease is a conversation which was had between the parties with reference to the "contract of subrogation." The plaintiff alleges that he requested the defendant several times to execute a written instrument embodying the parol contract which they had made relative to the rental of the upper part of the house in question or, as he terms it, the "contract of subrogation." In reply to these repeated requests, the plaintiff alleges that the defendant said to him: "Do not worry, you may occupy the house as long as you desire." It is upon this answer that this action seems to be based; and the plaintiff is here asking not the specific performance of his "contract of subrogation" but the

specific performance of an answer which the defendant gave in a conversation in relation to said "contract of subrogation." This would seem to be necessarily the case as the plaintiff is asking for the execution of a written lease granting to him the premises "as long as the plaintiff desires," whereas the term in the "contract of subrogation," or original lease, was two years.

It is clear that this answer of the defendant to plaintiff's queries cannot be considered a lease. It lacks many of the essential elements of a lease, among them being a consideration. An action of specific performance will not lie in a relation so indefinite and imperfect.

The third feature of the action, which requires notice, is that it seeks to compel the execution of a written instrument embodying a verbal contract, which contract, according to respectable authority, could not itself be specifically performed, whether verbal or in writing. So far as the maintenance of this action is concerned the alleged contract has, according to the authorities referred to, three fatal defects: (1) Its terms are indefinite and uncertain; (2) it lacks mutuality; (3) the contract is determinate at the will of one of the parties. According to its terms, it is to continue only so long as plaintiff wills. It is a well settled rule of law in many jurisdictions that the court will not compel the specific performance of a contract in favor of one of the parties thereto where the same contract could not be specifically enforced by the other. It seems also to be the law in those jurisdictions that the specific performance of a lease will not be decreed where the term for which the lease is to run is indefinite and uncertain. The same courts hold that specific performance will not be decreed where one of the parties may terminate the contract at will or upon notice. In the case of *Nelson vs. Kelly* (91 Ala., 569), it was held that "an agreement that one may erect and occupy as long as he desires an office on the land of another is too indefinite to be enforced." In the case of *Rutland Marble Co. vs. Ripley* (10 Wall., 339), the court said: "Another reason why specific performance should not be decreed in this case, is found in the want of mutuality. Such performance by Ripley could not be decreed or enforced at the suit of the Marble Company, for the contract expressly stipulates that he may relinquish the business and abandon the contract at any time on giving one year's notice. And it is a general principle that when—from personal incapacity, the nature of the contract, or any other cause—a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former. (Fry, Spec. Perf., sec. 286.)"

In the case of the *Southern Express Co. vs. Railroad Company* (99 U. S., 191), specific performance of a contract was denied by the court upon the ground that "the contract stipulates that after the first year it shall cease upon the payment of the \$20,000 and interest. This might be made immediately upon the rendition of the decree. The action of the court would thus become a nullity." It is broadly stated in that case that "a court of equity never interferes where the power of revocation exists." (Fry, Spec. Perf., 64.) In the case of *Solomon vs. Wilmington Sewerage Co.* (55 S. E., 300), the action was brought to restrain the defendant from disconnecting plaintiffs' residences from the main sewer pipe of the defendant company and for the specific performance of a contract on the part of the defendant company in which it had agreed to furnish the plaintiffs sewerage connection as long as they desired. In that case the court said: "The uncertainty in this contract is in respect to its duration. How long shall the plaintiffs enjoy the right to use the sewer pipe of the defendant company?

They say: As long as they please, even to the life of the company, by paying the annual dues."

Considering this question the court said: "Again, how would it be possible for a court of equity to supervise and enforce the performance of its decree during so long a period?" And after discussing the case, reached this conclusion: "In this view of the case, we simply hold that, by reason of its uncertainty in respect to time, specific performance will not be decreed."

Speaking of another objection to specific performance, the court said: "In regard to the second objection urged by defendant, we find the rule laid down by courts of equity to be that a contract which is not mutual—that is, in which both parties are not and cannot be bound by the decree—will not be specifically enforced. * * * (Ten Eyck vs. Manning, 52 N. J. Eq., 47; Beard vs. Linthicum, 1 Md. Ch., 345; Duval vs. Myers, 2 Md. Ch., 401; Woodruff vs. Woodruff, 44 N. J. Eq., 349.)"

In the case of Shields vs. Trammel] (19 Ark., 51), the court said that "what is meant by mutuality of remedy is that the contract must be of such a nature that performance on both sides can be judicially secured. (Kolachny vs. Galbreath, 26 Okla., 772.)"

It is clear from the complaint in this case that the action suffers from all of the defects pointed out in the foregoing decisions. According to the law as laid down therein, courts will not decree the specific performance of a contract when one of the parties may at his will terminate it and thus render null the decree of the court. The decree might become operative one moment and the revocation of the contract and, in consequence, the nullification of the decree might occur the next, the continuation of said contract and all rights thereunder being wholly subject to the will of the plaintiff.

I express no opinion about the soundness of the propositions laid down in the cases above cited. I simply call attention to them as having a strong bearing on this case and as presenting questions seriously important in this case to which the decision does not even refer. In the same way I desire to call attention, without expressing a definite opinion in relation thereto, to the following point:

The fourth interesting feature is that the parties and the decision of the court entirely overlook the provisions of the Civil Code and the decisions of this court (article 1128 of the Civil Code; Eleizegui vs. Manila Lawn Tennis Club, 2 Phil. Rep., 309; Levy Hermanos vs. Paterno, 18 Phil. Rep., 353; Seoane vs. Franco, 24 Phil. Rep., 309) which declare that where the time for the performance of an obligation has been left to the will of one of the parties, the obligation is not enforceable until the court has, in an appropriate action, fixed the date on which the obligation is due. From these decisions may it be deduced that, until this court has fixed the term during which the alleged lease must run, specific performance thereof cannot be had because, as a matter of law, no one can say prior to that time what the term of the lease is? It is not a sufficient reply to this question to say that the term of the lease may be fixed in the present action. The action is not properly brought for that purpose, the facts are not stated in the complaint in a way to warrant such relief, nor does the plaintiff, and especially the defendant, ask for such a remedy. That matter was not brought to the attention of the lower court and has not been presented or argued in this. May it be said, therefore, that specific performance can be decreed in this action at this time? Or will it be impossible until the term for which the lease is to run has been fixed by competent authority?

If these questions are answered in the affirmative, the discussion relative to the application of the statute of frauds, as it appears in the decision, is premature. Until the term of the lease is fixed and known, it cannot be said whether the lease will fall within the statute of frauds or not, because if the lease is for a year or less, the statute of frauds does not apply. If, therefore, the court should hold, in an action by Salcedo to fix the term of the lease, that the lease was for one month (Civil Code, art. 1581), it is clear that the statute of frauds would be eliminated from consideration.

As a necessary conclusion, the decision of the court does not contain facts sufficient to sustain its conclusions of law and the application of the law to such facts as there are, is wrong.

For these reasons I dissent. I cannot believe that the facts stated in the complaint warrant a court in granting the relief prayed for. The judgment should be affirmed.

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