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SECOND DIVISION

[G.R. No. L-45270. February 28, 1979]

**LUIS T. PEGGY, RESTITUTA TUDTUD, and LUZVIMINDA T. PEGGY,** *petitioners, vs.* **HON. LAURO L. TAPUCAR, as the Presiding Judge of the Court of First Instance of Agusan del Norte and Butuan City, Branch I, CITY SHERIFF OF BUTUAN CITY, PROVINCIAL SHERIFF OF CEBU, and PURITA TORRALBA PEGGY,** *respondents.*

SYLLABUS

1. **REMEDIAL LAW; CIVIL PROCEDURE; PRE-TRIAL; MANDATORY AND NOTICE MUST BE SENT TO COUNSEL AND PARTY.** — Pre-trial is mandatory and the parties, as well as their counsel, who are required to appear thereat, must be notified of the same. The defendants in this case were not deemed to have been properly notified of the pre-trial conference where the notices of the pre-trial were sent to their counsel and not upon them, so that the order declaring them in default for non-appearance at the pre-trial conference is null and void.

2. **ID.; ID.; PLEADINGS; "LAST PLEADING," CONSTRUED.** — Under the rules of pleading and practice, the answer ordinarily is the last pleading, but when the defendant's answer contains a counterclaim, plaintiff's answer to it is the last pleading. When the defendant's answer has a cross claim, the answer of the cross-defendant to it is the last pleading. Where the plaintiff's answer to a counterclaim contains a counterclaim against the opposing party or a cross-claim against a co-defendant, the answer of the co-defendant to the cross-claim is the last pleading. And where the plaintiff files a reply alleging facts in denial or avoidance of new matter by way of defense in the answer, such reply constitutes the last pleading.

3. **ID.; ID.; ID.; PRE-TRIAL; NOTICE REQUIREMENT; NOT SATISFIED IF ISSUED BEFORE THE LAST PLEADING WAS FILED.** — Separate notices to the parties of the holding of a pre-trial conference cannot be considered to have fully satisfied the requirement of the law where said notices of pre-trial

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conference were issued before the last pleading has been filed, since the calling of the pre-trial conference was premature. And the fact that the defendants have filed with the court special powers of attorney in favor of their respective attorneys cannot cure the jurisdictional defect where the same were filed before the filing of the last pleading and no valid notice of pre-trial conference has been sent to the defendants.

4. **ID.; ID.; DEFAULT ORDER; SHOULD BE SET ASIDE IF A MOTION FOR POSTPONEMENT WAS DULY FILED.**— The respondent judge abused his discretion in declaring defendants in default in view of the urgent motion for the postponement of the pre-trial conference filed by one of the defendants' counsel upon the ground that said defendant was gravely ill and could not attend the pre-trial conference. The respondent judge applied the rules of procedure strictly and failed to take into serious consideration the admonition of the Court that the "rules shall be liberally construed in order to promote their object and to assist the parties in obtaining just, speedy, and inexpensive determination of every action and proceedings." The Supreme Court disapproves of default judgment and cautions courts to be more circumspect before declaring a defendant in default. Where no substantial right of plaintiff could have been affected and the reasons advanced by the defendants for their failure to appear at the pre-trial conference are creditable and reasonable, the respondent judge should grant the postponement prayed for or set aside his order declaring defendants in default.

**APPEARANCES OF COUNSEL**

*Fil C. Veloso and George P. Bragat* for petitioners.
*Felimon L. Fernandez* for respondents.

## D E C I S I O N

**CONCEPCION JR., *J.*:**

Petition for *certiorari* to annul and set aside the order of the respondent judge declaring the petitioners in default in Civil Case No. 1712 of the Court of First Instance of Agusan del Norte, as well as all the proceedings made subsequent thereto,

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with a prayer for the issuance of a writ of preliminary injunction to restrain the respondents from enforcing the writ of execution issued therein.

The petitioners are the defendants in said Civil Case No. 1712, an action for separation of property, dissolution of conjugal partnership, reconveyance of properties, etc., initiated by the private respondent Purita Peggy, the estranged spouse of the petitioner Luis T. Peggy, on December 9, 1974.[1]

Instead of filing a responsive pleading the defendants filed a motion to dismiss the complaint on January 16,1 975 upon the grounds that: (1) the venue is improperly laid; (2) the action is barred by prior judgment or that the same has prescribed; (3) the plaintiff is estopped from the prosecuting the case; (4) the claims or demands set forth in the complaint have already been waived, abandoned or otherwise extinguished; and (5) no earnest efforts towards a compromise or amicable settlement has been made prior to the filing of the complaint.[2]

On January 31, 1975, the plaintiff, Purita T. Peggy, filed an amended complaint[3] and her opposition to the motion to dismiss the complaint.

The respondent court denied the motion to dismiss on July 7, 1975 and set the pre-trial conference on August 8, 1975.[5] Pursuant thereto, a notice of pre-trial conference was sent to the parties and their respective attorneys on July 8, 1975.[6]

On August 8, 1975, the respondent court issued an order which reads, as follows:

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[1] *Rollo*, p. 41.

[2] *Id.*, p. 55.

[3] *Id.*, p. 94.

[4] *Id.*, p. 108.

[5] *Id.*, p. 117.

[6] *Id.*, p. 120.

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"ORDER

"APPEARANCES: plaintiff Purita Torralba Peggy and her counsel, Atty. Romeo Gonzaga; defendant Luis T. Peggy thru a special power of attorney in favor of Atty. George P. Bragat, who also appeared as counsel; defendants Restituta Tudtud and Luzviminda T. Peggy with special powers of attorney in favor of Atty. Fil C. Veloso who also appeared as their counsel.

"The defendants thru counsel manifested that at their initiative they caused xerox copies to be made of plaintiff's amended complaint and that it was not necessary for the plaintiff to furnish them a copy thereof. The defendants asked that they be given fifteen days to file their amended answers.

"The plaintiff thru counsel manifested that she had six witnesses, some of whom are residing in Cebu City.

"WHEREFORE, it is hereby ordered:

"1. That the pre-trial conference is reset on 15 October 1975 at 4 p.m. and the trial shall proceed on 16 and 17 October 1975 at 9 a.m. to 12 noon and 3 to 5 p.m., it being understood that NO POSTPONEMENT WILL BE GRANTED:

"2. That the parties and counsels comply with paragraph 4 of the notice of pre-trial conference, copy of which were furnished the respective counsel: and

"3. That within fifteen days from today the defendants file their amended answers furnishing the plaintiff a copy thereof.

"Let the special powers of attorney be attached to the record."[7]

In due time the defendants filed their respective answer to the amended complaint.[8] The plaintiff likewise filed her answer to the counterclaim interposed by Luis T. Peggy.[9]

On October 13, 1975, counsel for the defendant Luis T. Peggy filed an urgent *ex-parte* motion for the postponement of the pre-trial set for October 15, 1975 upon the ground that he was

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[7] *Id.*, p. 122.

[8] *Id.*, pp. 124, 129, 134.

[9] *Id.*, p. 146.

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taken ill and could not be present on said date.[10] So, the respondent court re-set the pre-trial conference to December 17, 1975, and trial of the case on December 18 and 19, 1975. The court decreed that the counsels should serve notice of the pre-trial conference upon the parties represented by them in accordance with the case of *Lim, et al. vs. Animas, et al.*, 63 SCRA 408.[11]

On November 19 and 20, 1975, counsels for the defendants received telegrams from the clerk of the respondent court advising them that all hearings scheduled for the months of November and December, 1975 were cancelled for the reason the presiding judge, Hon. Vicente B. Echaves, Jr., has been transferred to another judicial district.[12] Then, on March 1, 1976, the court, now presided by the respondent Judge Lauro L. Tapucar caused a notice to be sent that the pre-trial conference on the case has been set for March 29, 1976. Only the attorneys for the parties however were notified thereof.[13]

On March 22, 1976, counsel for the plaintiff, Purita T. Peggy, filed a motion for the postponement of the pre-trial set for March 29, 1976 upon the ground that he had previous commitments on that day which cannot be deferred.[14] Accordingly, the pre-trial conference was re-set to May 10, 1976, with a warning that no postponement will be granted.[15] But, on May 9, 1976, the plaintiff Purita T. Peggy sent a telegram to the respondent court that her counsel was bed-ridden and physically incapable of attending the pre-trial conference set for May 10, 1976.[16] The postponement of the pre-trial conference was similarly prayed for by the defendants in their motion dated May 6, 1976.[17]

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[10] *Id.*, 147.

[11] *Id.*, p. 149.

[12] *Id.*, p. 415.

[13] *Id.*, p. 150.

[14] *Id.*, p. 151.

[15] *Id.*, p. 152.

[16] *Id.*, p. 14.

[17] *Id.*, p. 182.

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As a result, the pre-trial conference was re-set for July 12, 1976.[18]

On July 6, 1976, counsel for the defendants Restituta Tudtud and Luzviminda T. Peggy sent a telegram to the clerk of the court inquiring whether or not their case will be heard on July 12, 1976, as scheduled, since he had been reliably informed that the presiding judge of the court was in Tagaytay City attending the DAP conference for CFI judges.[19] The clerk of the court replied that there is no advice when the judge will be back.[20] On July 9, 1976, counsel for the defendant Luis T. Peggy filed an urgent motion for the postponement of the pre-trial conference set for July 12, 1976 upon the ground that his client Luis T. Peggy was gravely ill and cannot attend the pre-trial conference as he had hoped to.[21] A telegram was sent to the trial court informing the clerk of court of the mailing of said motion.[22] he defendants Restituta Tudtud and Luzviminda T. Peggy sent a confirmatory telegram and interposed no objection to the postponement of the pre-trial conference.[23] On July 12, 1976, case was heard, as previously set, with only the plaintiff and her counsel in attendance. Upon motion of counsel for the plaintiff, the defendants were declared in default and the case was set for hearing on July 23, 1976 for the reception of the plaintiff's evidence.[24]

Upon learning that the respondent court had issued an order declaring them in default, the defendants filed a motion to set aside the order of default and the proceedings made subsequent thereto for the reason that the aforesaid order of default was

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[18] *Id.*, p. 184.

[19] *Id.*, p. 188.

[20] *Id.*, p. 189.

[21] *Id.*, p. 190.

[22] *Id.*, p. 192.

[23] *Id.*, p. 193.

[24] *Id.*, p. 194.

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illegally and prematurely issued.[25] The court, however, denied said motion for lack of merit.[26]

On December 2, 1976, the respondent court rendered judgment in said Civil Case No. 1712 in favor of the plaintiff and against the defendants, ordering, among others, the dissolution of the conjugal partnership and the separation of the properties of Luis T. Peggy and Purita Torralba Peggy and awarding to plaintiff half of the conjugal properties; condemning the defendants Luis T. Peggy and Restituta Tudtud to pay the plaintiff the amount of ₱100,000.00 as nominal, exemplary, and moral damages and ₱10,000.00 as attorney's fees; and to pay the costs.[27] Two days thereafter, or on December 4, 1976, the plaintiff filed a motion for the immediate execution of the judgment.[28]

On December 13, 1976, the defendants filed an omnibus motion for the reconsideration of the order denying their motion to set aside order of default, as well as of the decision rendered on December 2, 1976, and their opposition to the motion for the immediate execution of the said decision of December 2, 1976,[29] but the motion was denied on December 15, 1976.[30] On that same day, an order was issued granting the motion for the immediate execution of the judgment rendered on December 2, 1976 and directing the issuance of a writ of execution.[31] Pursuant thereto, a writ of execution was issued on December 16, 1976.[32] Whereupon, the defendants filed the instant recourse. As prayed for, a temporary restraining order was issued by the Court restraining the respondents from enforcing the writ of execution issued.[33]

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[25] *Id.*, p. 246.

[26] *Id.*, p. 260.

[27] *Id.*, p. 267.

[28] *Id.*, p. 308.

[29] *Id.*, p. 316.

[30] *Id.*, p. 430.

[31] *Id.*, p. 431.

[32] *Id.*, p. 433.

[33] *Id.*, p. 442.

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The defendants contend that the order declaring them in default for failure to attend and be present at the scheduled pre-trial conference on July 12, 1976 is illegal for the reason that they were not served with the notice of the said pre-trial conference, and premature, in view of the unresolved motion for the postponement filed by them.

The plaintiff, upon the other hand, maintains that the order declaring the defendants in default was properly issued in view of the defendants' non-appearance at the pre-trial scheduled on July 12, 1976, despite notice, and while the petitioners may not have been summoned separately, personal notice to them is not necessary in view of the special powers of attorney executed by them in favor of the respective attorneys who have been duly notified of the said pre-trial conference.

We find merit in the petition. Section 1, Rule 20 of the Revised Rules of Court provides:

"Section 1. *Pre-trial mandatory.* — In any action, after the last pleading has been filed, the court shall direct the parties and their attorneys to appear before it for a conference to consider:

"(a) the possibility of an amicable settlement or of a submission to arbitration;

"(b) the simplification of the issues;

"(c) the necessity or desirability of amendments to the pleadings;

"(d) the possibility of obtaining stipulations or admissions of fact and of documents to avoid unnecessary proof;

"(e) the limitation of the number of witnesses;

"(f) the advisability of a preliminary reference of issues to a commissioner;

"(g) such other matters as may aid in the prompt disposition of the action."

As will be seen, pre-trial is mandatory and the Court has uniformly ruled that the parties, as well as their counsel, who are required to appear thereat, must be notified of the same.[34]

[34] *Peoples Realty Brokerage Corporation vs. Hon. Julian E. Lustre, etc., et al.*, G.R. No. L-41495, Oct. 20, 1978 and cases cited.

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The records of this case, however, show that the defendants were not properly notified of the pre-trial conference since the notices of pre-trial were sent to their counsel and not upon them so that the order declaring them in default for non-appearance at the pre-trial conference is null and void. The only instance wherein the parties were notified separately of the holding of a pre-trial conference was on July 8, 1975. This notice, however, cannot be considered to have fully satisfied the requirements of the law because the said notice of pre-trial conference was issued before the last pleading has been filed. Construing the term "last pleading," the Court, in a case,[35] said:

"Under the rules of pleading and practice, the answer ordinarily is the last pleading, but when the defendant's answer contains a counterclaim, plaintiff's answer to it is the last pleading. When the defendant's answer has a cross claim, the answer of the cross-defendant to it is the last pleading. Where the plaintiff's answer to a counterclaim contains a counterclaim against the opposing party or a cross-claim against a co-defendant, the answer of the co-defendant to the cross-claims is the last pleading. And where the plaintiff files a reply alleging facts in denial or avoidance of new matter by way of defense in the answer, such reply constitutes the last pleading. (Francisco, *The Revised Rules of Court*, Vol. II, p. 2-3)"

Following this rule, the "last pleading" is the answer of the plaintiff to the counterclaim of the defendant Luis T. Peggy, filed on September 16, 1975.[36] Obviously, the calling of a pre-trial conference on August 8, 1975 was premature. The fact that the defendants have filed with the court special powers of attorney in favor of the respective attorneys cannot cure the jurisdictional defect since the same were filed before the filing of the last pleading and no valid notice of pre-trial conference had been sent to the defendants.

At any rate, the respondent judge abused his discretion in declaring the defendants in default in view of the urgent motion

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[35] *Pioneer Insurance & Surety Corp. vs. Hontañosas*, L-35951, August 31, 1977; 78 SCRA 447.

[36] *Rollo*, p. 8, par. XI of the Petition; also p. 146.

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for the postponement of the pre-trial conference filed by counsel for the defendant Luis T. Peggy on July 9, 1976 upon the ground that the defendant Luis T. Peggy was gravely ill and could not attend the pre-trial conference set for July 12, 1976 as he had expected to do. The respondent judge applied the rules of procedure strictly and failed to take into serious consideration the admonition of the Court that the "rules shall be liberally construed in order to promote their object and to assist the parties in obtaining just, speedy, and inexpensive determination of every action and proceedings.[37] In a recent decision,[38] this Court reiterated its disapproval of default judgments and cautioned the courts to be more circumspect before declaring a defendant in default. Since no substantial right of the plaintiff therein could have been affected and the reasons advanced by the defendants for their failure to appear at the pre-trial conference are creditable and reasonable, the respondent judge should have granted the postponement prayed for or set aside his order declaring defendants in default.

**WHEREFORE**, the petition is granted and the order of the respondent judge, dated July 21, 1976, declaring the petitioners in default, as well as all proceedings made subsequently thereto are hereby annulled and set aside and the temporary restraining order heretofore issued is made permanent. Let this case be remanded to the lower court for further proceedings. Without costs.

**SO ORDERED.**

*Fernando (Chairman), Santos,* and *Abad Santos, JJ.*, concur.

*Barredo, J.*, I concur. Although I feel that petitioners were duly notified because of the powers of attorney they gave their counsel, as in fact, they asked for postponement, I held that the motion for postponement was well-grounded and should have been granted.

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[37] Section 7. Rule 1. Revised Rules of Court.

[38] *Corsino, et al., vs. Hon. A. Savella, et al.*, L-38367, November 24, 1978 and cases cited.

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*Antonio, J.*, concurs in the result.

*Aquino, J.*, took no part.

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**SECOND DIVISION**

[G.R. No. L-45633. February 28, 1979]

**ELIZABETH PAPILOTA, for herself and as guardian of the minors: MARILOU, MARIJEAN, CERES, LUISITO, CRISPULO, JR., and DENNIS all surnamed PAPILOTA, SPOUSES HERMINIAS CALMERIN and ESTRELLA SUAGA, NICOLAS BRETAÑA, WARLITO PAPILOTA and ELISA DIROY, THE HON. MIDPANTAO L. ADIL, The Deputy Provincial Sheriff of Iloilo, RODOLFO S. BESA**, *petitioners, vs.* **COURT OF APPEALS, SAN MIGUEL CORPORATION and ROMEO C. ZARRIS**, *respondents.*

**SYLLABUS**

1. **REMEDIAL LAW; CIVIL PROCEDURE; COURT OF APPEALS; HAS JURISDICTION TO ENTERTAIN PETITION FOR *CERTIORARI* AND *MANDAMUS*.** — Where the Supreme Court dismissed a petition for review on *certiorari* of a decision of the Court of Appeals granting a petition for *certiorari* and *mandamus*, the clear implication of the dismissal is the recognition of the existence of jurisdiction of the latter to entertain said petition for *certiorari* and *mandamus*.

2. **ID.; ID.; SUPREME COURT; DENIAL OF PETITION FOR REVIEW, EFFECT.** — Where the Supreme Court denied for "lack of merit" an appeal by way of petition for review from the decision