RIO GRANDE IRRIGATION & COLONIZATION CO. V. GILDERSLEEVE, 1897-NMSC-002, 9 N.M. 12, 48 P. 309 (S. Ct. 1897)

RIO GRANDE IRRIGATION & COLONIZATION COMPANY, Plaintiff in Error,
vs.
CHARLES H. GILDERSLEEVE, Defendant in Error

No. 643

SUPREME COURT OF NEW MEXICO

1897-NMSC-002, 9 N.M. 12, 48 P. 309

March 01, 1897

Error, from a judgment for plaintiff by default, to the Second Judicial District Court, Bernalillo County.

The facts are stated in the opinion of the court.

COUNSEL

F. W. Clancy for plaintiff in error.

The appearance of a defendant, once regularly entered, can not be withdrawn without leave of court. U. S. v. Curry, 6 How. 111; see, also, Michew v. McCoy, 3 W. & Sarg. 501; Dana v. Adams, 13 Ill. 692, 693; Creighton v. Kerr, 20 Wall. 13.

The record does not show that the defendant below ever attempted to withdraw its appearance. 20 Am. and Eng. Ency. Law, 475, and cases cited; Fisher v. Cockerell, 5 Pet. 254; Sargeant v. State Bank, 12 How. 384, 385; Bronson v. Schulten, 104 U.S. 412, 413; England v. Gebhardt, 112 Id. 505; Vanderkarr v. State, 51 Ind. 95; Kirby v. Wood, 16 Me. 82, 83; Storer v. White, 7 Mass. 448; Pierce v. Adams, 8 Mass. 383; Sharp v. Danguy, 33 Cal. 12, 13; Nichols v. Bridgeport, 27 Conn. 465, 466; Newman v. State, 14 Wis. 430, 431. See, also, Bowen v. State, 9 N. E. Rep. 379; Applegate v. White, 79 Ind. 413; Indianapolis v. Kollman, Id. 508, 509.

No presumption can be invoked to aid the record in this case. Hudson v. Breeding, 7 Ark. 445; Cole v. Allen, 51 Ind. 122; Galpin v. Page, 18 Wall. 366, 367.

The record does not show the entry of any default. Davidson v. Murphy, 13 Conn. 217, 219; Wales v. Smith, Id. 217, note; O'Connell v. Hotchkiss, 44 Id. 53, 54; 10 Went. Pl. 429-439.

Warren, Fergusson & Gillett for defendant in error.

JUDGES

Bantz, J. Smith, C. J., and Laughlin, J., concur.

AUTHOR: BANTZ

OPINION

*{*13}* **{1}** The defendant below was only served with process, and on the third day of August, 1894, entered its appearance by attorney. On the fifteenth of September the attorney, in writing, withdrew appearance of the defendant, and on the same day judgment was taken for failure to appear. On October 5th execution was issued, and on October 26th return was made of nulla bona. On November 15th defendant filed its motion to vacate the judgment. This motion was not argued and submitted until September 6th of the following year (1895), when it was overruled. Three days afterwards another motion to vacate was filed with an affidavit of merit. This motion was likewise overruled, and the cause is brought here on writ of error.

{2} Section 4, chapter 66, Acts 1891, entitles the plaintiff to a judgment if the defendant fails to appear, and it may be rendered at any place in the district. There was no occasion for the judgment to recite that the defendant had been called. The absence of an order granting leave to withdraw the appearance of the defendant was not a matter of which defendant could complain. The court, in granting the judgment, ratified the act of withdrawal. It is not pretended that any *{*14}* collusion was practiced between the plaintiff and the defendant's attorney, nor that the attorney, either in entering or withdrawing defendant's appearance, acted without authority or by mistake. It is urged that the withdrawal has not been preserved properly in the record brought to this court, and our attention is called to its recital in the record proper, where it is claimed to have been improperly copied by the clerk in preparing the transcript. But the written withdrawal was also preserved by the bill of exceptions.

{3} The affidavit of merit does not charge that the resolutions of the board of directors of defendant company authorizing and afterwards recognizing the creation of the debt were fraudulently or collusively procured, but it is charged that the corporation received no benefit from the note, which was really for the benefit of the indorser now suing upon it. An affidavit of merit would not alone be sufficient to entitle a defaulting party to have a judgment against it set aside, and much less entitle it to a reversal of the district court for refusing to set the judgment aside. Trial courts have a liberal discretion over such matters, which an appellate court has not. This judgment was rendered September 15, 1894; yet the affidavit of merit was not filed till September 9, 1895, after a motion to vacate the judgment had been overruled. The affidavit of merit filed in support of the second motion to vacate sets out that affiant had been employed as attorney by certain of the stockholders of defendant company in another suit, and communicated to them the fact of this judgment, "some weeks after the judgment had been obtained," "in the

month of October, 1894," and that he was employed as attorney for the company on the seventh of November, 1894. Rule 29 provides that no motion to set aside judgments rendered in vacation shall be entertained unless filed, and a copy thereof served on the opposite party, within ten days after the entry of such judgment. It will not be necessary to determine whether the court below could have *{*15}* set aside the judgment on an application filed after the ten days had expired if a diligent effort and a showing of merit had been made, but there was such an apparent lack of diligence in this case that we think the trial court properly refused to set the judgment aside. There is no error in the record, and the judgment must be affirmed.