GREAT AMERICAN INSURANCE COMPANY NEW YORK v. JOSE SUAREZ

146 So. 644 (1932) | Cited 0 times | Supreme Court of Florida | November 17, 1932

ON MOTION FOR REHEARING.

Per Curiam. -- Because this case has been several times reversed by this Court and has resulted favorably to defendant in error on several trials had afterwards (See Great American Ins. Co. of N.Y. vs. Suarez, 92 Fla. 24, 109 Sou. Rep. 299; Great American Ins. of N.Y. vs. Suarez, 96 Fla. 865, 119 Sou. Rep. 388, 120 Sou. Rep. 320), we have decided to grant a rehearing on the merits before the Court en banc, so that we may be fully advised among other things, as to whether there is any evidence in the record from which we could allow a remittitur in the amount of recovery, in lieu of a reversal for new trial, if any right to recovery be sustained on re-hearing as justified by the evidence.

But before the re-hearing is had we deem it imperative to discuss and dispose of those questions which have been suggested by the petition for re-hering relating to the transcript of the record before us and our previous decision thereon.

The motion for new trial was, within the time allowed, filed July 22, 1930, and it was entertained by the Judge who denied the motion August 16, 1930.The motion and the order denying the motion for new trial and the exception thereto appear in the record proper and also in the bill of exceptions.

A writ of error was issued August 21, 1930, by the Clerk of the Circuit Court acting as Clerk of this Court for that purpose. Upon the issuance of the writ of error the cause was transferred to the jurisdiction of this Court; and even without a supersedeas the Circuit Court had no authority to strike the motion for new trial on October 23, 1930, since the motion for a new trial and the order thereon were a part of the cause that had been transferred to this Court upon the issuance of the writ of error by the clerk of the Circuit Court, August 21, 1930. Besides this, the motion for new trial and the order thereon and the exception taken to the order, were incorporated as a part of the bill of exceptions which was authenticated by the Judge, October 23, 1930. The motion for new trial, not the order denying the motion, was stricken by the Circuit Judge, October 23, 1930. Even if, instead of striking the motion for new trial, which motion, with the order denying it and the exception taken to such order, were then in the jurisdiction of this Court, the Circuit Judge has required the motion to strike the motion for new trial, the objections thereto and the order thereon, with the exception thereto, to be incorporated in a duly authenticated bill of exceptions, and included in the transcript sent here under the writ of error, the effect, if any, which such matters so authenticated by the Judge would have upon the motion for new trial that had been entertained and denied by the Circuit Judge, August 16, 1930, would be for this Court to consider if duly presented.

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But the matters relative to striking the motion for new trial are adversary proceedings in pais, had two months after the motion for new trial was denied; and such matters in pais are not so authenticated that they may be considered by this Court. It is now too late to authenticate a bill of exceptions covering the motion to strike, the objections thereto, and the order thereon with the exceptions thereto, because when, upon adversary proceedings on October 23rd, the order was made striking the motion for new trial, no bill of exceptions was then authenticated covering such matter under Sections 4609 (2904), 4614 (2906) Compiled General Laws; and no further time was allowed by special order in which to do so under Rule 97.

The opinion and judgment of this Court are correct on the record as it then existed in the Circuit Court. Brown v. State, 29 Fla. 494, 11 Sou. Rep. 181. A motion to amend the bill of exceptions to include therein matters not properly authenticated to become a part of the record at the time the judgment here was rendered, will not avail the movant, because when the order striking the motion for new trial was made, the proceedings, being adversary and in pais, should have been but were not incorporated and authenticated in a bill of exceptions; and no further time was allowed by special order for preparing and presenting for authentication a bill of exceptions containing such adversary proceedings in pais which were had on October 23, 1930. The only order extending the time for presenting a bill of exceptions was incorporated in the order made August 16, 1930, denying the motion for new trial. Even if that order extending the time for presenting a bill of exceptions is sufficient to cover the order made October 23, 1930, striking the motion for new trial, the Court had no authority to strike the motion for new trial after the writ was issued August 21, 1930. If this Court can consider for any purpose, the motion to strike the motion for new trial, such motion to strike is a matter in pais which has not been by the Judge ordered to be included in a bill of exceptions for consideration by this Court; and it is now too late to do so. Neither Sections 4609 (2904), 4616 (2906), Compiled General Laws, nor Rule 97, relating to bills of exceptions was complied with when the motion to strike the motion for new trial was granted. Rule 97 requires the order extending the time for preparing a bill of exceptions to be "entered in the minutes" of the Court.

In the Brown case, supra, the mandate had been transmitted to the lower court. In this case the mandate has not been sent down, but the judgment here is correct on the record as it then stood in the Circuit Court; and as the matters sought to be made a part of the bill of exceptions cannot now be properly authenticated in a bill of exceptions for consideration by this Court, an order permitting the Circuit Judge to amend the bill of exceptions so as to include such matters would be futile. Section 4614, Compiled General Laws, does not avail in this case.

The motion to amend the record is denied. A rehearing is granted on the record as heretofore considered, the case to be assigned for argument before the Court en banc at an early date.

BUFORD, C. J. AND WHITFIELD, TERRELL AND BROWN, J. J., concur.