

FOR PUBLICATION

**IN THE SUPREME COURT OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

FRANCISCA F. SANTOS,
Appellant

v.

RICARDO S. SANTOS,
Appellee.

OPINION

Cite as: *Santos v. Santos*, 2001 MP 12
Appeal No. 2000-020
FCD-DI Civil Action No. 99-0458

Counsel for Appellant:

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None¹

¹Appellee neither filed a brief with the Court nor appeared at oral argument.

BEFORE: MIGUEL S. DEMAPAN, Chief Justice, ALEXANDRO C. CASTRO, Associate Justice, and JOHN A. MANGLONA, Associate Justice.

CASTRO, Associate Justice:

¶1 Francisca F. Santos (“Francisca”) appeals the lower court’s decision that her husband, Ricardo S. Santos (“Ricardo”), was not properly served with an additional summons to provide notice of the trial date thus resulting in a denial for a hearing on her Complaint for Divorce. Francisca seeks review of the court’s May 16, 2000 written order, the June 5, 2000 oral decision made in open court, and the August 18, 2000 written decision which was issued after this appeal was filed.

¶2 [1,2] We have jurisdiction pursuant to N.M.I. Const. art. IV, § 3 and 1 CMC §3102(a). The lower court’s order was certified for appeal by the trial judge in the August 18, 2000 written decision. *Santos v. Santos*, FCD DI Civil Action No. 99-0458 (N.M.I. Super. Ct. Aug. 17, 2000) (Written Decision After Oral Ruling).² For the reasons set forth below, we **REVERSE** the lower court’s denial of a hearing and **REMAND** the case to allow Francisca to present the merits of her complaint for divorce.

ISSUE PRESENTED AND STANDARD OF REVIEW

¶3 Whether the lower court erred by deciding Francisca was required to serve Ricardo with an additional summons after serving a summons and complaint to notify him of the trial date in accordance with the Commonwealth Rules of Civil Procedure and if, by not serving an additional summons, whether Francisca is entitled to a determination on the merits of her complaint for divorce.

²The lower court recognized that the order was not a final appealable order but nevertheless certified the procedural issue in light of the importance of the claims to be adjudicated and the likelihood that it will recur. “All further proceedings in this matter shall be stayed pending the resolution of any appeal to the CNMI Supreme Court or upon service to Ricardo of notice of the trial in this divorce action.” *Santos v. Santos*, FCD DI Civil Action No. 99-0458 (N.M.I. Super. Ct. Aug. 17, 2000) (Written Decision After Oral Ruling).

¶4 [3] We review this procedural issue of law under the *de novo* standard. *Ada v. K. Sadhwani's Inc.*, 3 N.M.I. 303, 307 (1992).

FACTUAL AND PROCEDURAL BACKGROUND

¶5 On November 18, 1999, Francisca filed a complaint for divorce against Ricardo pursuant to 8 CMC § 1331(b)³ and (h).⁴ On December 15, 1999, a copy of the complaint, along with a summons, was delivered to Ricardo at his residence. A proof of service was filed on December 16, 1999. Francisca indicated in her complaint that a property declaration would be filed separately. On March 1, 2000, two and a half months after the service of the complaint and summons, Francisca filed a property declaration. On March 7, 2000, Francisca served a copy of the property declaration on Ricardo, and filed the proof of service on March 8, 2000.

¶7 Ricardo did not file an answer, nor in any way signify his intention to dispute any of the claims. On March 14, 2000, the Clerk entered Ricardo's default.

¶8 On May 15, 2000, the matter was set for hearing. Francisca appeared with counsel but the trial court did not proceed with the complaint. On May 16, 2000, the trial court issued its Order and continued the matter until June 5, 2000, stating in its Order that the reason for the continuance was that Ricardo "did not appear as service was not perfected." *Santos v. Santos*, FCD DI Civil Action No. 99-0458 (N.M.I. Super. Ct. May 16, 2000) (Order).

¶9 On May 25, 2000, Francisca filed a Memorandum Re Service asking the trial court to reconsider

³ 8 CMC §1331(b) states: "The guilt of either party toward the other of such cruel treatment, neglect or personal indignities, whether or not amounting to physical cruelty, as to render the life of the other burdensome and intolerable and their further living together unsupportable."

⁴ 8 CMC § 1331(h) states: "The separation of the parties for two consecutive years without cohabitation, whether or not by mutual consent."

the finding and allow her to proceed. On June 5, 2000, the trial court refused to permit Francisca to proceed until she served Ricardo with notice of the hearing. On August 18, 2000, the Written Decision After Oral Ruling ordered that the case be taken off calendar until the CNMI Supreme Court resolves the issue of service. Francisca timely appeals.

ANALYSIS

¶10 [4] Under 7 CMC § 1205, the issuance, service and return of process shall be as prescribed in the rules of practice or procedure adopted by the court. The court has adopted the Commonwealth Rules of Civil Procedure which govern procedure in all suits of a civil nature. Com. R. Civ. P. 1. Family law cases are civil in nature and are governed by the civil rules. *In re Adoption of Magofna*, 1 N.M.I. 449 (1990).

¶11 At issue is whether there was proper service under Rule 4 of the Rules of Civil Procedure. Under Com. R. Civ. P. 4, a summons and complaint are to be served on a defendant within 120 days after the filing of the complaint. See Com. R. Civ. P. 4(c) and (m).⁵ The summons and complaint were filed on November 18, 1999 and were personally served on Ricardo on December 15, 1999, well within the 120-day time frame under Com. R. Civ.P.4.

¶12 [5] Francisca maintains that Ricardo was properly served with a summons and complaint and by not answering the summons and complaint, he was not entitled to additional service. The purpose of a summons is to command a person to appear or otherwise plead to the complaint filed. *Taimanao v. Superior Court*, 4 N.M.I. 94, 99 (1994). See Com. R. Civ. P. 4. The summons in this case met the requirements of proper form, signature, seal and issuance under the Com. R. Civ. P. 4. Ricardo failed to

⁵Failure to effect proper service of process gives the court the authority, upon motion or on its own initiative after notice to the plaintiff, to dismiss the action without prejudice or direct that service be effected within a specified time. See Com. R. Civ. P. 4(m).

file an answer within the 120 days allowed by the summons, thus rendering Ricardo a defaulting party. Under Com. R. Civ. P. 5, a plaintiff is not required to serve a defaulting party for failure to appear, except that pleadings asserting new or additional claims for relief against them shall be served in the same manner as Rule 4. Com. R. Civ. P. 5.

¶13 The lower court disagreed with Francisca, finding fault with the separate filing of the property declaration, in that the property declaration was not accompanied by an additional summons and therefore it did not provide sufficient notice to Ricardo. Specifically, the court found that under Com. R. Civ. P. 4(c)⁶ Francisca was required to serve the property declaration with the original summons in December of 1999 or should have included another summons with the property declaration. Order at 4-5.

¶14 [6,7] The complaint and summons served on Ricardo are sufficient to put Ricardo on notice of the lawsuit. An additional summons to accompany the property declaration is unnecessary. Under the general rule of pleadings, what is required in a complaint and summons includes a statement of jurisdiction, a short and plain statement of the claim, and a demand for judgment. Com. R. Civ. P. 8, *See In re Magofna*, 1 N.M.I. at 454. Pursuant to Com. R. Civ. P. 8(d), averments in a pleading to which a responsive pleading is required are admitted when not denied. Sufficiency of process and sufficiency of service are waived unless properly included in a responsive pleading which is timely filed. Com. R. Civ. P. 12(h). Ricardo has not filed a responsive pleading thus waiving his defenses.

¶15 Since Ricardo was already in default, Francisca was not required to serve additional pleadings including the Order Setting Trial. Francisca followed the rules set out in the Commonwealth Rules of Civil Procedure which does not explicitly require additional notice requirements. When the language of a court

⁶A summons shall be served together with a copy of the complaint. The plaintiff is responsible for service of a summons and complaint within the time allowed under subdivision (m) and shall furnish the person with the necessary copies of the summons and complaint. Com. R. Civ. P. 4 (c).

rule is clear, the Court will not construe it contrary to its plain meaning. *See Mafnas v. Commonwealth*, 1 N.M.I. 400, 403-404 (1990). If additional notice requirements are to be imposed, it should be adopted by amendment to the existing rule.

¶16 Additionally, the lower court found the property declaration was insufficient to give Ricardo notice that his failure to respond would result in an adverse judgment regarding his property. The property declaration was served on March 7, 2000, and Francisca moved for an entry of default on March 14, 2000. The lower court held that since the clerk of court made an entry of default only seven days after Ricardo was served with the property declaration, the entry of default is void under Com. R. Civ. P. Rule 55(a).⁷

¶17 Commonwealth Rules Civ. P. 55(a)(2) provides that only “[i]f the party against whom judgment by default is sought has appeared in the action, the party shall be served with written notice.” Com. R. Civ. P. 55 (b)(2). Since Ricardo did not appear, he was not entitled to notice of Francisca’s application for entry of default or for default judgment. The application of Rule 55 depends upon whether the defendant has appeared in the action. If the defendant has not appeared, then upon the plaintiff’s application, the clerk of court may enter a default without requiring service of the application upon defendant. Com. R. Civ. P. 55(b)(1). Upon application, and again without notice to the defendant, the clerk may enter a default judgment if the damages are for “a sum which can by computation be made certain.” Com. R. Civ. P. 55(b)(1). When it is necessary to take an account or to make an investigation into any other matter, such as the case at hand, the court “may conduct hearings or order such references as it deems necessary and proper.” Com. R. Civ. P. 55 (b)(2). The court may then conduct a hearing without requiring notice to a

⁷When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party’s default. Com. R. Civ. P. 55(a).

defendant who has failed to previously appear in the action. Com. R. Civ. P. 55 (b)(2), *see also Brown v. Lange*, 21 P.3d 822 (2001).

¶18 Ricardo could move the lower court for a relief from default pursuant to Com. R. Civ. P. 55(c). Under Com. R. Civ. P. 55, “[f]or good cause shown the court may set aside an entry of default and, if a judgment by default has been enter[ed] may likewise set it aside in accordance with [Com. R. Civ. P.] 60(b).” Com. R. Civ. P. 55(c).⁸

¶19 The lower court did not comport with the Rules of Civil Procedure by requiring Francisca to serve Ricardo, a defaulting party, with notice of the hearing. The lower court emphasized that the reasons for requiring notice to Ricardo were: it is a default divorce, defendant is in the Commonwealth, and it involves children and marital property. Excerpts of Record 22 (Transcript of Trial Proceedings, June 5, 2000). Ricardo’s interests must be balanced against the interests of Francisca, who has a right to a timely determination of her complaint for divorce.

CONCLUSION

¶20 For the foregoing reasons, we hold that Francisca is entitled to be heard on her complaint for divorce. We **REVERSE** the lower court’s denial of a hearing and **REMAND** the case to allow Francisca to prove the merits of her complaint.

DATED this 13th day of July 2001.

⁸The different treatment of default entry and judgment by Rule 55(c) frees a court from considering a motion to set aside a default entry from the restraint of Rule 60(b) and entrusts determination to the discretion of the court. As a practical matter, however, when considering a motion to set aside a default entry, the parallels between granting relief from a default entry and a default judgment encourage utilizing the list of grounds for relief provided in Rule 60(b), including considering whether a defendant has a meritorious defense. These Rule 60(b) grounds are liberally interpreted when used on a motion for relief from an entry of default. *Roberto v. De Leon Guerrero*, 4 N.M.I. 297, *see also Hawaii Carpenters’ Trust Funds*, 794 F.2d at 513.

/s/ Miguel S. Demapan
MIGUEL S. DEMAPAN, Chief Justice

/s/ Alexandro C. Castro
ALEXANDRO C. CASTRO, Associate Justice

/s/ John A. Manglona
JOHN A. MANGLONA, Associate Justice