THOMAS JOHN SON, Appellant, e. MATTAR

BROTHERS, by and through HALIM MATTAR,

Appellee.

hIOTION TO DISMISS AN APPEAL FROM TH E CIRCUIT COURT OF TH E FOURTH J UDICIAL CIRCUIT hlARYLAND COU NTY.

Argued April 20, 1970. Decided June 11, 1970.

1. Upon the failure of movent to appear on his motion to dismiss an appeal,

should the appellant insist that the motion be heard on its merits and not be ” dismissed for failure of mox'ing party to appear, rather than permit argi-

meit by appellant only, for the sake of fairness to all, the Sutireme Court will restore the motion to its calendar so that hoth sides may be heartl.

The appellant's complaint for a proper accounting was dismissed by the trial court. He appealed from the judpnaent. During the pendency of the appeal, appellee moved to dismiss. At the call of the calendar on the mo- tioi, appellee failed to answer or appear. The Supreme Court thereupon dismissed the motion by default. The appellant, however, thereafter urged the Court to con- sider the appeal on the merits and allow him to argue the motion. The application of appellant was granted. However, at the time the Court was considering its deci- sion on the merits of the motion, it *i eco usr d era d* its posi- tion and *redo cbeted* the motion for a rguinent, so that both p arties would be assured an opportunity to lie heard.

*fGelllti yto ii K. A!e ii fvill‹•* for appellant. No appe ar-

ance for appellee.

VIII. JUSTICE SI hI PSOh\* delivered the opin ion of the Con rt.

During the February Term, z 969, of t he fourth J u- dicial Circa it Con rt, Maryland County, an action enti tied “Bill in equity for correct accounting” was filed by ap pel-

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lee. The bill alleged that on April , I 9\*7. Thomas Johnson gave to Mattar Brothers, by and through Haliin Mattar, a limited power of attorney, authorizing the lat- ter to receive his salary checks for the months of June through December, I 9\*7. to the value of **$2IO.OO.**

The gravamen of the complaint consists of a charge by

petitioner in the court below to the effect that, after hav- ing received cash and goods to the value of $I iO.oo, he returned to his post of duty in an area remote I rom Harper and thereat remained for a few additional months. Whereupon, being in further need of cash and supplies, he returned to Mattar Brothers at Harper to receive the additional $ioo.oo that remained at the store. However, to his great surprise he was informed that his account had been exhausted in that, .instead of $8$ as he alleged, he had already received $i 8$, thereby exhausting the ac- count.

He proceeded to the Stipendiary Magistrate for Harper

City and charged Halim Mattar with forgery. This case was, however, dismissed by the Magistrate. It was after this dismissal that the present proceedings were com- menced for the purpose of ascertaining a true statement of account between the parties. Count seven of the bill at the lower court stated that the suit for a correct account- ing, then filed, was “an ancillary” to a basic suit sounding in damages which petitioner would bring against respon- dent in the Law Division of that court to recover damages for the inconvenience that he sustained by reason o1 the I raudulent, prejudicial and mischievous acts of the re- spondent. Further complaining, he continued: “and for the suit of damages he herein gives notice to respondent as required by law.”

To this bill in equity as filed, respondent filed an an- swer in which it said that no action existed known as a bill in equity for correct accounting, but, instead, should have been labeled a bill in equity for proper accounting. Ad- ditionally, it was contended that petitioner should have

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been nonsuited for having chosen the wrong Iorin of the future action intended, the f acts recounted by the peti- tioner indicating the basis of a suit under the Penal Law for defrauding and cheating.

Thirdly, in Iurther answering, the respondent in the lower court held th at a bill in equity for correct accou nt- ing will not lie in the absence of a basic suit having been filed. The respondent contended that the intention to file a basic suit in and of itself is insufficient to serve as a basis for the maintenance of a bill in equity for proper (correct) accounting. Respondent insists that the suit must already have been commenced prior to the institu- tion of the ancillary action.

The reply of appellant, then petitioner, at the lower court, held that the averment of an intention to file a basi c suit at law f ulfills the legal requirement by giving notice thereof in the ancillary suit.

The tri a1 judge after entei taining argument of counsel, proceeded to hand down a ruling, in which he dismissed the entire proceedings. Exceptions were taken to this ruling and an appeal taken to tllis Court. Upon the call of the case for hearing of a motion filed by appellee for dismissal of the suit, no one appeared for a ppellee- movent, whereupon, by invocation of our Civil Procedure Law, L. iq63- 6J, ch. III, § iooh, providing for def a ult

on motion, the motion was dismissed for Iailure of movent

to appear.

Immed iately following the Court’s determination that the motion be dismissed by default, appellant, a coun- sellor I rom one of the leeward counties who had been here at the capital for a protracted period of time to attend upon this Court, importuned the Court to consider the case, since he was desirous of returning to Harper City at the earliest possible time. In a moment of comp assion the Court granted the request of counsel and permitted hits, as ap pellant, to argue and submit his case.

At the time of our deliberation thereon, we observed

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that we were at the threshold of committing a grave in- justice in an endeavor to give assistance to homesick counsel. We were about to determine a case without af- fording appellee an opportunity to be present to be heard. This would have been wrong.

I n the circumstance, to insure transparent justice, we are ordering the redocketing of the appeal so that both parties may be afforded an opportunity to present argu- ment to the Court. Costs to abide final determination of the case. And it is hereby so ordered.

*Ar gume nt resc he dul ed.*