

**SPOUSES PURITA M. BISMONTE AND GELACIO M. BISMONTE,
PETITIONERS, VS. HON. VIVENCIO GREGORIO ATUTUBO III, IN HIS
CAPACITY AS PRESIDING JUDGE OF THE REGIONAL TRIAL COURT,
BRANCH 3...**

Ponente: LOPEZ, J.

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LOPEZ, J.:

Whether the public respondent committed grave abuse of discretion in declaring the Spouses Gelacio and Purita Bismonte non-suited is the main issue in this Petition for Certiorari.[1]

The facts are of record.

Spouses Gelacio and Purita Bismonte filed a case for Quieting of Title, Recovery of Possession and Damages[2] against Teresita Pili, Mary Charity Pili, Luciano Pili, Jr., and Luciano Pili IV.[3] On September 14, 2012, Acting Presiding Judge Jose Sarcilla, referred the case for mediation.[4] Three days after, the Clerk of Court directed the parties to file their respective pre-trial briefs. The court also set the case for preliminary conference on November 7, 2012. After all the documentary exhibits of both parties were submitted and marked, the case was set for pre-trial on June 13, 2013. Sps. Bismonte and their counsel, however, failed to attend the pre-trial; thus, in an Order dated June 13, 2013, they were declared non-suited.[5]

On August 1, 2013, the Sps. Bismonte moved for reconsideration of the June 13, 2013 Order, explaining that their counsel failed to attend the pre-trial because she appeared at the hearing of another case.[6] In an Order[7] dated September 3, 2013, the RTC denied the motion for reconsideration for lack of merit. It ruled that the Order dated June 13, 2013 had already attained finality because the motion for reconsideration was filed out of time. Thus, the court dismissed the case in so far as the Sps. Bismonte are concerned, to wit:

The Court is well aware of the fact that procedural rules are not immutable components of a low gate before which lawyers and litigants are unreasonably required to stoop considering that litigation is not a game of technicalities, courts are exhorted, time and again, to afford every litigant the amplest opportunity for the proper and just determination of his case free from constraints of technicalities. As a perusal of the record would, however, readily reveal, plaintiffs have additionally failed to file their pre-trial brief up to this late date, despite their November 2, 2012 receipt of the Court's September 17, 2012 notice directing them to do so. Under the last paragraph of Section 6 of Rule 19 (sic), "failure to file the pre-trial brief shall have the same effect as failure to appear at the pre-trial."

WHEREFORE, premises considered, plaintiffs' motion for reconsideration of the June 13, 2013 Order is DENIED for lack of merit.

Set the continuation of the pre-trial of the case as to the third-party complaint on October 14, 2013 x x x.

SO ORDERED.

Aggrieved, the Sps. Bismonte impute grave abuse of discretion on the part of the public respondent in setting the

case for pre-trial without first referring it for mediation and in declaring them non-suited.

Prefatorily, We note that the Second Revised Guidelines for the Implementation of Mediation Proceedings,[8] considers mediation a part of pre-trial.[9] The Rules of Court[10] provides that the parties shall file with the court their respective pre-trial briefs which shall contain, among other things, a statement of their willingness to enter into amicable settlement or alternative modes of dispute resolution. Here, the Sps. Bismonte belatedly question the setting of the case for pre-trial without first referring the case for mediation. The spouses objected to the court processes only when they were declared non-suited. They did not file their pre-trial brief despite notice from the court. If indeed the spouses were sincere in their desire to settle, they should have complied with the filing of a pre-trial brief indicating their willingness to enter into amicable settlement. For their failure, the spouses violated the Order of the court warranting dismissal of the case.

On the main issue, We find the petition bereft of merit.

It is an established rule of procedure that appeal and certiorari are mutually exclusive and not alternative or successive remedies.[11] Under Rule 41 of the Rules of Court, an appeal may be taken from a judgment or final order that completely disposes of the case, or of a particular matter declared by the Revised Rules of Court to be appealable. A special civil action for certiorari under Rule 65, on the other hand, generally lies only when there is no appeal nor any other plain, speedy or adequate remedy available.

Section 5, Rule 18 of the Rules of Court provides that the order of dismissal based on failure to appear at pre-trial is with prejudice, unless the order itself states otherwise. In the assailed Order dated September 3, 2013, the trial court did not specify that the dismissal is without prejudice; hence, it must be with prejudice. The Order should be considered as adjudication on the merits, and the proper recourse to assail it is by appeal under Rule 41. The present certiorari chosen by the Sps. Bismonte is a wrong mode of judicial review. Settled is the rule that certiorari cannot be allowed when a party to a case fails to appeal a judgment despite the availability of that remedy, certiorari not being a substitute for lost appeal.[12]

Corollarily, even assuming that a petition for certiorari is the correct remedy, the petition will still be dismissed because the June 13, 2013 Order declaring Sps. Bismonte non-suited already became final and executory. Records reveal that Sps. Bismonte received the assailed order on June 20, 2013 and had 15 days[13] or until July 5, 2013 within which to file a motion for reconsideration.[14] However, Sps. Bismonte moved for reconsideration only on August 1, 2013 or 27 days late. Settled is the rule that once the judgment has become final and executory, it may no longer be modified in any respect, even if the modification is meant to correct what is perceived to be an erroneous conclusion of fact or law, and regardless of whether the modification is attempted to be made by the court rendering it or by the highest court of the land.[15]

In any case, the declaration that the spouses are non-suited is proper. The Rules of Court[16] makes it the duty of the parties and their counsel to appear at the pre-trial. The non-appearance of a party may be excused only if a valid cause is shown or if a representative appears in his behalf. In this case, both the parties and their counsel failed to attend the pre-trial. The counsel's claim that she had another hearing scheduled at Branch 30 of the Regional Trial Court of San Jose is not a reasonable ground for non-appearance. Also, neither the spouses nor their counsel appeared when the case was called for hearing on the Motion for Reconsideration. While a representative of the spouses appeared and informed the court that the Sps. Bismonte were engaging a new lawyer, no motion for substitution of counsel has been filed. Considering their apparent complacency, if not delinquency, in the conduct of their litigation, dismissal of the complaint is proper.

FOR THESE REASONS, the petition is DISMISSED.

SO ORDERED.

Reyes, J.C., JR., (Chairperson) and Inting, S.B., JJ., concur.

[1] Rollo, pp. 5-31.

[2] Docketed as Civil Case No. P-2600

[3] Rollo, p. 8.

[4] Id. at 48-49. Pursuant to Rule 18, Section 6(a) of the Rules of Court and the Second Revised Guidelines for the Implementation of Mediation Proceedings approved by the Supreme Court on October 1, 2001.

[5] Id. at 61, Order of the Regional Trial Court dated September 3, 2013.

[6] Ibid.

[7] Id. at 61-62.

[8] Otherwise known as A.M. No. 01-10-5-SC-PHILJA (October 16, 2001).

[9] Cecilia Gadrinab Senarlo v. Judge Maximo G.W. Paderanga, A.M. No. RTJ-06-2025, April 5, 2010.

[10] Rule 18, Sec. 6. Pre-trial brief. The parties shall file with the court and serve on the adverse party, in such manner as shall ensure their receipt thereof at least three (3) days before the date of the pre-trial, their respective pre-trial briefs which shall include, among others:

(a) A statement of their willingness to enter into amicable settlement or alternative modes of dispute resolution, indicating the desired terms thereof;

(b) x x x.

[11] Banco Filipino Savings and Mortgage Bank v. Court of Appeals, G.R. No. 132703 June 23, 2000, citing Bernardo v. Court of Appeals, 275 SCRA 423.

[12] Republic v. Court of Appeals, 322 SCRA 81 (2000).

[13] Section 1, Rule 37 in relation to Section 2, Rule 40 of the Rules of Court provide:

Rule 37, Section 1. Grounds of and period for filing motion for new trial or reconsideration. - Within the period for taking an appeal, the aggrieved party may move the trial court to set aside the judgment or final order and grant a new trial xxx:

xxx

Within the same period, the aggrieved party may also move for reconsideration upon the grounds that the damages awarded are excessive, that the evidence is insufficient to justify the decision or final order, or that the decision or final order is contrary to law.

Rule 40, Section 2. When to appeal. - An appeal may be taken within fifteen (15) days after notice to the appellant of the judgment or final order appealed from. When a record o appeal is required, the appellant shall file a notice of appeal and a record on appeal within thirty (30) days after notice of the judgment or final order.

The period of appeal shall be interrupted by a timely motion for new trial or reconsideration. No motion for extension of time to file a motion for new trial or reconsideration shall be allowed.

[14] Rollo, p. 62.

[15] Egypt Air Local Employees Association Ntuai-Transphil-Tupas v. NLRC, G.R. No. 98933. March 1, 1993.

[16] Rule 18, Sec. 4. Appearance of parties. - It shall be the duty of the parties and their counsel to appear at the pre-trial. The non-appearance of a party may be excused only if a valid cause is shown therefor or if a representative shall appear in his behalf fully authorized in writing to enter into an amicable settlement, to submit to alternative modes of dispute resolution, and to enter into stipulations or admissions of facts and of documents.

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