

**TOMAS TY TION AND CABMEN YU, PLAINTIFFS AND APPELLANTS,
VS. MARSMAN & COMPANY, INC. AND ALPHA INSURANCE & SURETY JCOMPANY, INC., DEFENDANTS AND APPELLEES.**

G. R. No. L-17229. July 31, 1962

Ponente: CONCEPCION, J.

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CONCEPCION, J.:

Appeal from an order granting a motion to dismiss the complaint.

On January 7, 1958, Marsman & Co., Inc., hereafter referred to as the Corporation, instituted in the Court of First Instance of Davao Civil Case No. 2543 thereof, against Tomas Ty Tion and the Glory Trading, a business establishment owned and operated by Ty Tion in the City of Davao, for the recovery of P5,540 said to represent the balance of the price of 800 sacks of flour sold by the Corporation to said defendants. Soon thereafter, or on January 9, 1958, the Corporation filed in said case a motion for a writ of preliminary attachment, upon the ground that Ty Tion and the Glory Trading had "removed or disposed of their property" or were "about to do so with the intent to defraud" said Corporation. Acting upon this motion, the court issued, on January 10, 1958, the writ prayed for, upon the posting of a bond in the sum of P5,540, subscribed by the Corporation, as principal, and the Alpha Insurance & Surety Co., Inc., as surety, to guaranty the payment to Ty Tion and the Glory Trading of any damages they may suffer should it appear that the Corporation was not entitled to the attachment. It is claimed that, in consequence thereof, the Glory Trading and all its stocks and merchandise were attached by the Provincial Sheriff of Davao, thereby "resulting in the forced closure of said establishment"; that, on January 15, 1958, upon the arrival of Ty Tion in Davao, he posted a P5,540 counterbond, to secure the lifting of the process aforementioned; that the Corporation objected thereto upon the ground that said sum did not include the attorney's fees, expenses of litigation and costs of the suit, for which, it was averred, there should be posted an additional bond for P1,500; and that the same was forthwith given by Ty Tion, and the attachment, accordingly, lifted on January 20, 1958.

In due course, Ty Tion and the Glory Trading filed their answer, with a counterclaim for damages allegedly sustained by them on account of said attachment, which they claimed to be wrongful. Subsequently, Ty Tion moved to withdraw this counterclaim, for the purpose of filing a separate civil action to recover the damages involved therein. The motion having been granted, the present action (Civil Case No. 2588) was, on March 7, 1958, commenced in the same court, by the spouses Ty Tion and Carmen Yu, against the Corporation and the aforementioned surety company, for the recovery of said damages. After the filing of their respective answers, these defendants moved for a preliminary hearing, upon the ground that the complaint herein states no cause of action and that plaintiffs' alleged cause of action arose out of, and is necessarily connected with, the transaction or occurrence that is the subject matter of said Civil Case No. 2543 and should have been set up as a counter-claim therein. After hearing both parties, the lower court upheld this view and, accordingly, dismissed the case. Hence, this appeal by Ty Tion and his wife.

They maintain that the order of dismissal appealed from is erroneous, it being based upon Section 20 of Rule 59 of the Rules of Court, which is claimed to be inapplicable to this case. Said provision reads:

"If the judgment on the action be in favor of the defendant, he may recover, upon the bond given by the plaintiff, damages resulting from the attachment. Such damages may be awarded only upon application and after proper hearing, and shall be included in the final judgment. The application must be filed before the trial or, in the discretion of the court, before entry of the final judgment, with due notice to the plaintiff and his surety or sureties, setting forth the facts showing his right to damages and the amount thereof. Damages sustained during the pendency of an appeal may be claimed by the defendant, if the judgment of the appellate court be favorable to him, by filing an application therewith, with notice to the plaintiff and his surety or sureties, and the appellate court may allow the application to be heard and decided by the trial court".

It is urged by appellants that this provision applies only when the plaintiff, who obtained a writ of preliminary attachment, has been found to have no cause of action, for which reason judgment thereon is rendered "in favor of the defendant", and that it has no application when, having a cause of action—as the Corporation had in Case No. 2543, for Ty Tion admitted therein his indebtedness for P5,540—said plaintiff secures the writ wrongfully and illegally, by alleging falsely that the defendant had disposed or was about to dispose of his properties for the purpose of defrauding his creditors, which, appellants maintain, is what the Corporation has done in Civil Case No. 2543.

Regardless of the provisions of said Section 20 of Rule 59, appellants' pretense is untenable. Considering that the damages involved in the present case were allegedly sustained by appellants in consequence of the writ of preliminary attachment issued in said Case No. 2543, it is obvious that their alleged cause of action therefor arose out of the proceedings in that case, and must be litigated therein. Indeed, the writ was issued therein upon allegations which are branded by appellants herein as maliciously false, and, as a consequence, the truth of said allegations, and the liability, if any, for damages caused thereby, must be determined in that case. In short, the cause of action of plaintiffs herein must be set up in said Civil Case No. 2543, not only because it is in the nature of a compulsory counterclaim (Section 6, Rule 10, Rules of Court), but, also, in order to avoid multiplicity of actions (*Del Rosario vs. Nava*, 95 Phil., 637; 50 Off. Gaz., 4189; *Estioco vs. Hanada*, L-11079, May 21, 1958; *Nueva-España vs. Montelibano*, 58 Phil., 807, 810- 811; *Tan-Syco vs. Javier*, 21 Phil., 82; *Raymundo vs. Carpio*, 33 Phil., 395; *Santos vs. Moir*, 36 Phil., 350).

Wherefore, without prejudice to the right of plaintiffs herein to revive or reinstate their counterclaim in said Civil Case No. 2543, the order appealed from is hereby affirmed, with the costs of this instance against plaintiff-appellants. It is so ordered.

Bengzon, C. J., Padilla, Bautista Angelo, Labrador, Barrera, Paredes, Dizon, Regala and Makalintal, JJ., concur.

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