

RAY N. VISITACION, ROY N. VISITACION, AND JUDILEEN V. MONTILLA, PETITIONERS-APPELLANTS, VS. SONIC FINANCE CORP., JOSES T. TAN, AND ILDEFONSO VILLANUEVA, JR., RESPONDENTS-APPELLEES.

Ponente: QUIJANO-PADILLA, J.

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QUIJANO-PADILLA, J.:

This is an appeal on the Order[1] dated August 17, 2011 and Order[2] dated March 14, 2012 (“assailed Orders”) of the Regional Trial Court , Branch 44, Bacolod City in Civil Case No. 08-13302 for Declaratory Relief, Annulment of Extrajudicial Foreclosure Proceedings, Damages and Preliminary Injunction with prayer for a Temporary Restraining Order (TRO) for 72 hours. The August 17, 2011 assailed Order declared petitioners-appellants non-suited for their failure to appear in the pre-trial conference that caused the dismissal of their case. The March 14, 2012 Order, meanwhile, denied petitioners-appellants' Motion for Reconsideration.

On January 17, 2008, petitioners-appellants secured a loan from Sonic Finance Corp. (Sonic) in the amount of One Million Four Hundred Ten Thousand Pesos (P1,410,000.00) and executed a real estate mortgage[3] in the latter's favor on the following property:

“A parcel of land (Lot 18, Block 50, Psd-06-00425, being a portion of the cons. subd. survey of Lot 1072-C-3-B-2 and Lot 1630, Bacolod Cad.), situated in Bacolod City, containing an area of Eight Hundred Forty Nine (849) square meters, more or less, and covered by Transfer Certificate Title No. T-316814 issued in the name of Judith N. Visitacion.”[4]

Petitioners-appellants defaulted in the payment of their loan obligation that prompted Sonic to file a Petition for Extrajudicial Foreclosure of Real Estate Mortgage.[5] Acting on the petition for extrajudicial foreclosure, Clerk of Court VI and Ex-Officio Sheriff Ildefonso Villanueva, Jr. issued a Notice of Extrajudicial Sale[6] setting the public auction of the above-described property on November 10, 2008.

Because of the pending public auction, petitioners-appellants filed a Petition[7] dated November 6, 2008 for declaratory relief, annulment of extrajudicial foreclosure proceedings, damages and preliminary injunction with prayer for a 72-hour TRO before the trial court.

Petitioners-appellants alleged in their petition that paragraphs 6 and 7 of the Real Mortgage contract, which pertain to the waiver of redemption right by the mortgagor, are void as it would amount to a pactum commissorium. They claimed that the mortgage contract is a contract of adhesion, so it must be construed against Sonic who prepared the contract. Likewise, petitioners-appellants argued that the foreclosure proceedings should be annulled and the public auction should be stopped considering the invalidity of the provision on waiver of redemption. Finally, they averred that the foreclosure proceeding did not comply with the provisions of Act No. 3135 (“An Act to Regulate the Sale of Property under Special Powers Inserted in or Annexed to Real Estate Mortgages”) because there was no posting of notices of the sale and no publication of the same in a newspaper of general circulation in the province where the property is located.

Accordingly, petitioners-appellants prayed in their Petition for an issuance of a TRO considering the scheduled public auction sale of the foreclosed property. They also prayed for the trial court to declare as null and void the provisions in the mortgage contract on the waiver of redemption and the foreclosure proceedings. Then, they asked to be paid moral and exemplary damages, attorney's fees and cost of the suit.

Sonic, et al. as respondents-appellees averred in their Answer with Counterclaim[8] that the foreclosure proceedings properly complied with the provisions of Act No. 3135. They contended that the action for declaratory relief was infirmed for its failure to notify the Office of the Solicitor General. They also averred that petitioners-appellants had no cause of action against Sonic considering that they failed to pay their loan obligation, thus the extrajudicial foreclosure of their property ensued. Then, Sonic argued that the prayer for the issuance of a TRO has been rendered moot considering that the public auction already took place.

Respondents-appellees, thus, as counterclaim alleged that they suffered moral and exemplary damages. They also prayed for attorney's fees.

The case was referred to the Philippine Mediation Center, but mediation failed.

Consequently, while the case was pending for Judicial Dispute Resolution (JDR), petitioners-appellants filed a Manifestation with Proposal[9], which stated that petitioners-appellants are sincere to settle their obligation with Sonic and revealed that petitioners-appellants already had a potential buyer of the property who could pay-off their loan obligation. They then requested Sonic to extend the redemption period in order to accommodate the request of the buyer to pay the first half of the purchase price then later on the second half.

On December 7, 2009, the trial court received from Sonic a Motion to Dismiss Petitioner's Petition.[10] Sonic alleged that on November 16, 2009, petitioners-appellants fully paid their account with Sonic as evidenced by Official Receipt No. 8549.[11] Thus, a certificate of redemption was issued to petitioners-appellants and the owner's duplicate copy of the certificate of title of the mortgaged property was turned over to them and now in their possession.

Subsequently, petitioners-appellants filed a Motion to Require Respondent Sonic Finance Corp. to Return/Reimburse the following: 1) The amount of P129,907.50 illegally charged and collected as "accounts receivable"; and 2) The amount of P230,000.00 illegally charged and collected as attorney's fees ("Motion to Require Reimbursement").[12] Petitioners-appellants stated in the said Motion that when they paid the redemption price on November 16, 2009, they were surprised that aside from the redemption price, they were required to pay by Sonic an amount of P129,907.50 representing "accounts receivable" and an amount of P230,000.00 as "attorney's fees". Petitioners-appellants then alleged that they just paid the said amounts because if they would not be able to redeem the property the prospective buyer would back out. They also alleged that Sonic only issued a receipt for the amount of P1,738,482.53 and did not include the amount representing the "accounts receivable". As for the attorney's fees, they alleged that Sonic told them to secure the same from Atty. Edmundo Tan, Sonic's counsel, because the amount will be paid to him. Thus, petitioners-appellants argued that the amounts were illegally imposed and prayed for a reimbursement.

Petitioners-appellants, likewise, filed a Vehement Opposition (Re: Motion to Dismiss)[13] and argued therein that the trial court must resolve whether the mortgage contract was null and void and the propriety of their Motion to Require Reimbursement of the amounts paid as "accounts receivables" and "attorney's fees".

Respondents-appellees, on their part, filed a Comment on the petitioners-appellants' Vehement Opposition and an Opposition to the Motion to Require Reimbursement.[14] They argued that the obligation was already extinguished considering that petitioners-appellants already exercised their redemption right and the issue posed

by their Petition is already moot. As regards the amounts being asked to be reimbursed, they averred that the amount representing the “accounts receivable” pertains to expenses of the foreclosure proceedings and litigation expenses plus interests thereon. Then, as regards the attorney's fees, they argued that the amount paid was only P200,000.00 and this amount was voluntarily offered by Joann N. Visitacion, sister of herein petitioners-appellants, and Atty. Tan issued a receipt therefor.

Thereafter, petitioners-appellants filed a Reply to Comment[15], and respondents-appellees filed a Rejoinder[16] that reiterated their respective positions and arguments.

In an Order[17] dated July 5, 2010, the trial court denied respondents-appellees' Motion to Dismiss and set the case for pre-trial.

During the scheduled pre-trial on November 3, 2010, petitioners-appellants and their counsel Atty. Silverio Sorbito IV failed to appear. And, on motion of respondents-appellees' counsel, the trial court declared the petitioners-appellants non-suited and dismissed their case. A corresponding Order[18] dated November 3, 2010 was then issued by the trial court.

Petitioners-appellants, subsequently, filed a Manifestation of Sincere Apologies and Motion for Reconsideration.[19] They averred that they were just late during the pre-trial, and the order dismissing their case was decreed prior to their arrival in court. Respondents-appellees filed their Opposition[20] thereto.

The trial court in its Order[21] dated May 2, 2011, granted petitioners-appellants' motion for reconsideration and reinstated the case. It also admonished the petitioners-appellants that a repetition of their absence in the pre-trial shall cause the dismissal of their case with prejudice. Hence, the case was again set for pre-trial.

However, petitioners-appellants and their counsel again failed to attend the pre-trial. Hence, the trial court issued the August 17, 2011 assailed Order, which declared petitioners-appellants non-suited and dismissed their case, to wit:

“xxx. Records show that the petitioners were duly notified of today's pre-trial conference.

In view thereof and considering that petitioners were duly notified of today's pre-trial conference, the petitioners are hereby declared non-suited. Accordingly, the case against the respondents-defendants is hereby DISMISSED.

xxxx

SO ORDERED.”[22]

On September 9, 2011, through a new counsel, petitioners-appellants moved for the reconsideration of the August 17, 2011 assailed Order with prayer to set-aside the “non-suit” Order.[23] They explained that they did not know that the pre-trial was scheduled on August 17, 2011, and attached an Affidavit of Merit[24] executed by Ray N. Visitacion, one of the petitioners-appellants. In such Affidavit of Merit, Mr. Visitacion stated that there was a communication hitch between them and their previous counsel Atty. Sorbito. He claimed that he was unaware of the re-setting of the pre-trial conference as he was not informed by Atty. Sorbito. They, thus prayed for the liberal application of the Rules.

Respondent-appellees filed their Opposition[25] arguing that the Motion for Reconsideration must be denied considering the alleged communication hitch was unbelievable.

On March 14, 2012, the trial court issued its second assailed Order denying petitioners-appellants' Motion for Reconsideration. The trial court noted that the absence of petitioners-appellants and the dismissal of their case

was not the first time, so they should have been more cautious and attentive to court notices and hearings. The dispositive portion of the assailed Order reads:

“WHEREFORE, premises considered, the instant Motion for Reconsideration is Denied for lack of merit.

SO ORDERED.”[26]

Hence, this appeal, alleging that the court a quo committed the following grave errors:

I. “When it rigidly observed procedural technicalities in declaring appellants non-suited and dismissed the case;

II. When it ruled that the appellants' motion for reconsideration dated 09 September 2011 is a second motion for reconsideration;

III. When it did not act and rule on appellants' Motion to Require Sonic Finance Corp. to Return/Reimburse the Following: The amount of P129,907.50 Illegally Charged and Collected as “Account Receivable”; and the amount of P230,000.00 Illegally Charged and Collected as “Attorney's Fees”. [27]

Petitioners-appellants argue that the trial court rigidly applied the rules of procedure despite the fact that petitioners-appellants' failure to appear during the pre-trial was due to their previous counsel's carelessness of not informing them of the schedule thereof. They also intimated that the trial court erred in treating their motion for reconsideration as a second motion for reconsideration, considering the fact that their motion for reconsideration was directed to the second order of dismissal and not to the first one. They, likewise, argue that the trial court erred in not acting and ruling on their motion to require reimbursement and maintained that the sums collected from them by Sonic representing account receivable and attorney's fees are invalid and unjustified.

On the part of respondents-appellees, they first noted the formal defects of the appellant's brief as to the insufficiency of the subject index, non-appending of the order appealed from, and the absence of any “statement of facts” and “statement of the case”. They also contend that the dismissal of petitioners-appellants' case was correct and the trial court did not err in applying the rules of procedure because petitioners-appellants are not entitled to a liberal application of the rules. As regards the relief for reimbursement sought by petitioners-appellants, respondents-appellees argue that the same has no basis.

We resolve to deny the appeal.

Preliminarily, We correct petitioners-appellants' incorrect notion that the trial court treated their motion for reconsideration as a second motion for reconsideration, hence the same was denied.

A perusal of the trial court's March 14, 2012 assailed Order reveals that the trial court sided with petitioners-appellants that their motion for reconsideration was not a second motion for reconsideration. But the trial court, although ruling for petitioners-appellants on this issue, concluded that the case would still be dismissed because petitioners-appellants were absent in the pre-trial for the second time, after they were given consideration on their first absence. The trial court held, to wit:

“It bears stressing, moreover, that the instant motion is not the second motion for reconsideration which is not allowed by the Rules. Let it be emphasized that the instant motion is directed to the Order of this Court dated August 17, 2011 declaring plaintiffs as non-suited and not of the first Order that dismissed this case on November 3, 2010 which was reconsidered by this Court on May 2, 2011. The instant motion seeks reconsideration of the Order of the dismissal dated August 17, 2011 and declaring the plaintiffs non-suited for the second time for the very same reason as in the Order of November 3, 2010 – their failure to appear during the pre-trial conference. Sad to say, the instant Motion for Reconsideration can no longer be granted by the Court.”[28]

Clearly, there is no error that could be assigned to the trial court on this issue. The trial court did not consider petitioners-appellants' motion for reconsideration as a second motion for reconsideration.

Anent the main issue, that is, the dismissal of the case due to petitioners-appellants failure to appear during pre-trial, We resolve against petitioners-appellants.

Section 5, Rule 18 of the Rules of Court clearly provides that the plaintiff's failure to appear in the pre-trial shall be cause for dismissal of his action, and such dismissal shall be with prejudice, unless otherwise ordered by the court, thus:

“SEC. 5. Effect of failure to appear. – The failure of the plaintiff to appear when so required pursuant to the next preceding section shall be cause for dismissal of the action. The dismissal shall be with prejudice, unless otherwise ordered by the court. A similar failure on the part of the defendant shall be cause to allow the plaintiff to present his evidence ex parte and the court to render judgment on the basis thereof.”

Given the foregoing provision, the trial court indeed had a valid basis in dismissing petitioners-appellants' case. Petitioners-appellants sought for a reconsideration of the dismissal alleging that their failure to appear in the pre-trial was due to the carelessness of their counsel who failed to inform them of its schedule. They also averred the liberal application of the rules to serve substantial justice.

On this note, We stress the ruling in *Bank of the Philippine Islands v. Dando*[29] which cited the reasons that may justify suspension of strict adherence to procedural rules, these are: (a) matters of life, liberty, honor or property; (b) the existence of special or compelling circumstances; (c) the merits of the case; (d) a cause not entirely attributable to the fault or negligence of the party favored by the suspension of the rules; (e) a lack of any showing that the review sought is merely frivolous and dilatory; and (f) the fact that the other party will not be unjustly prejudiced thereby.

A perusal of the records and the antecedents of this case reveals the absence of the foregoing justifications. We find no compelling circumstance to relax the rules. We note that the petitioners-appellants' Petition dated November 8, 2006 mainly questions the validity of the provision on the mortgage contract with Sonic regarding the waiver of redemption right, and seeks for the restoration of petitioners-appellants' redemption right. And, We underscore the fact that petitioners-appellants already exercised their redemption right, they themselves admitted that they were able to redeem the property foreclosed by Sonic, and the owner's duplicate of the certificate of title covering the said property is already with them. Clearly, the cause of action presented by the Petition is now moot considering the extinguishment of both parties' obligations under the mortgage contract.

The presence of petitioners-appellants in the pre-trial is not one that could be easily brushed aside, the effect of which clearly gives a warning to every litigant to be serious in the pre-trial stage of the case.

In *Durban Apartments Corporation v. Pioneer Insurance and Surety Corporation*,[30] the Supreme Court stressed the nature and importance of a pre-trial, to wit:

“Everyone knows that a pre-trial in civil actions is mandatory, and has been so since January 1, 1964. Yet to this day its place in the scheme of things is not fully appreciated, and it receives but perfunctory treatment in many courts. Some courts consider it a mere technicality, serving no useful purpose save perhaps, occasionally to furnish ground for non-suiting the plaintiff, or declaring a defendant in default, or, wistfully, to bring about a compromise. The pre-trial is not thus put to full use. Hence, it has failed in the main to accomplish the chief objective for it: the simplification, abbreviation and expedition of the trial, if not indeed its dispensation. This is a great pity, because the objective is attainable, and with not much difficulty, if the device were more intelligently and extensively handled.

x x x x

Consistently with the mandatory character of the pre-trial, the Rules oblige not only the lawyers but the parties as well to appear for this purpose before the Court, and when a party "fails to appear at a pre-trial conference, (he) may be non-suited or considered as in default." The obligation "to appear" denotes not simply the personal appearance, or the mere physical presentation by a party of one's self, but connotes as importantly, preparedness to go into the different subjects assigned by law to a pre-trial. xxxx."

Again, petitioners-appellants seek the relaxation of the rules on the ground that their previous counsel was careless in not informing them of the scheduled pre-trial. What petitioners-appellants argue, in sum, is that their absence was attributable to the fault or negligence of their counsel.

Nothing is more settled than the rule that the negligence and mistakes of counsel are binding on the client.[31] The rationale for the rule is that a counsel, once retained, holds the implied authority to do all acts necessary or, at least, incidental to the prosecution and management of the suit in behalf of his client, such that any act or omission by counsel within the scope of the authority is regarded, in the eyes of the law, as the act or omission of the client himself.[32] Otherwise, there would never be an end to a suit, so long as counsel could allege its own fault or negligence to support the client's case and obtain remedies and reliefs already lost by the operation of law.[33]

The same applies in the case at bar, the negligence of petitioners-appellants' counsel binds them. Their counsel's alleged negligence was simple, not gross. There was only a slight want of care. Thus, this negligence binds petitioners-appellants. In addition, worth noting is the fact that the dismissal of petitioners-appellants' case due to their absence in the pre-trial was not the first time. Hence, they should have been more prudent in updating themselves of their own case.

Our very own Supreme Court has consistently ruled that parties, though represented by counsels, should also take initiative "of making the proper inquiries from its counsel and the ... court as to the status of its case"and of extending to him the "necessary assistance." [34] The Highest Court noted that the "litigant bears the responsibility to monitor the status of his case, for no prudent party leaves the fate of his case entirely in the hands of his lawyer. It is the client's duty to be in contact with his lawyer from time to time in order to be informed of the progress and developments of his case." [35]

Finally, as regards the contention of petitioners-appellants that their Motion to Require Reimbursement was not acted upon by the trial court, We find the same unmeritorious.

To recall, petitioners-appellants filed this Motion to Require Reimbursement because they were made to pay certain sums for "accounts receivable" and "attorney's fees" after they exercised their redemption right. Petitioners-appellants alleged that these sums paid had no basis, hence must be reimbursed to them.

However, We do not lose sight of the fact that seeking reimbursement of the sums of P129,907.50, representing "accounts receivable", and P230,000.00 as "attorney's fees" constitute a new cause of action which is not covered by petitioners-appellants' Petition dated November 8, 2006. As already mentioned, the said Petition mainly prays for the grant of petitioners-appellants' redemption right, which was previously denied by the mortgage contract they signed. Hence, when petitioners-appellants' already exercised their redemption right, their cause of action in their Petition had been extinguished.

Consequently, petitioners-appellants' allegation that they overpaid Sonic is a separate and distinct cause of action from that of the first which sought for the reinstatement of their redemption right. Seeking for reimbursement of what has been paid is in the nature of a collection of sum of money suit, it is a new cause of action which arose from a different act or omission allegedly committed by Sonic. Petitioners-appellants' prayer in the Motion, that is reimbursement of what has been paid, is different and distinct from the reliefs they prayed for in their Petition,

that is the declaration of the mortgage contract as void and the reinstatement of their redemption right.

Verily, petitioners-appellants' new cause of action should have been filed before the trial court through a complaint and not through a mere motion. The filing through a complaint is necessary not only for the court to assess the necessary filing fees but also to allow petitioners-appellants to present evidence of their claims and respondents-appellees to present their counter-evidence. Filing a mere motion for a new cause of action is a procedural shortcut which undermines the Rules of Court.

Petitioners-appellants' action for reimbursement must, thus, be tried in a different proceeding, and this Court cannot use the same as basis to reinstate petitioners-appellants' dismissed Petition.

WHEREFORE, the instant appeal is DENIED. The dismissal of petitioners-appellants' Petition dated November 8, 2006, through the Orders dated August 17, 2011 and March 14, 2012 of the Regional Trial Court, Branch 44, Bacolod City in Civil Case No. 08-13302, is hereby AFFIRMED.

SO ORDERED.

Delos Santos, J., Chairperson, and Azcarraga-Jacob, J., concur.

[1] Records, p. 197.

[2] Records, pp. 238-240.

[3] Records, pp. 13-15.

[4] See Petition, records, p. 2.

[5] Records, pp. 17-18.

[6] Records, p. 18.

[7] Records, pp. 1-12.

[8] Records, pp. 33-38.

[9] Records, pp. 76-77.

[10] Records, pp. 90-91.

[11] Records, p. 93.

[12] Records, pp. 97-106.

[13] Records, pp. 123-125.

[14] Records, pp. 128-132.

[15] Records, pp. 145-152.

[16] Records, pp. 153-155.

[17] Records, pp. 156-158.

[18] Records, p. 174.

[19] Records, pp. 175-178.

- [20] Records, pp. 180-182.
- [21] Records, pp. 185-186.
- [22] Records, p. 197.
- [23] Records, pp. 205-208.
- [24] Records, pp. 209-210.
- [25] Records, pp. 213-216.
- [26] Records, p. 240.
- [27] Rollo, p. 36.
- [28] Records, p. 240. Underscoring and emphasis supplied.
- [29] G.R. No. 177456, September 4, 2009, citing *Sanchez v. Court of Appeals*, 452 Phil. 665, 674 (2003).
- [30] *Durban Apartments Corporation v. Pioneer Insurance and Surety Corporation*, G.R. No. 179419, January 12, 2011, citing *Development Bank of the Phils. v. CA*, 251 Phil. 390, 392-395 (1989).
- [31] *Lagua v. Court of Appeals*, G.R. No. 173390, June 27, 2012.
- [32] *Bejarasco, Jr. v. People*, G.R. No. 159781, February 2, 2011.
- [33] *Lagua v. Court of Appeals*, Supra note __
- [34] *Air Phils. Corp. v. International Business Aviation Services Phils. Inc.*, G.R. No. 151963, September 9, 2004.
- [35] *Bejarasco, Jr. v. People of the Philippines*, Supra, note _

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