MANUEL DELA CRUZ, PLAINTIFF-APPELLEE, VS. ENGR. EDUARDO PAULE, ENGR. ALEXANDER COLOMA AND NATIONAL IRRIGATION ADMINISTRATION (NIA MUÑOZ, NUEVA ECIJA), DEFENDANTS-APPELLANTS.

Ponente: DIMARANAN-VIDAL, J.

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DIMARANAN-VIDAL, J.:

This is an Appeal lodged by defendant-appellant Engr. Eduardo Paule (herein after Appellant PAULE) and the third party defendant Zenaida M. Mendoza (hereinafter Appellant MENDOZA) from the Decision[1] of the Regional Trial Court, Third Judicial Region, Branch 37, of Baloc, Nueva Ecija, in Civil Case No. 168-SD (2000) AF for Collection of Sum of Money with Damages with Prayer for TRO & Preliminary Injunction, ruling in favor of the Plaintiff-Appellee MANUEL DELA CRUZ (hereinafter Appellee) against Appellant PAULE.

THE FACTS

As synthesized by the Court a quo:

> Defendant Paule is the owner of a single proprietorship business registered under the name and style of "E.M. Paule Construction and Trading (EMPCT) with principal office located at Veterans Village, Quezon City.
>
> On May 24, 1999, defendant Paule executed a special power of attorney in favor of Zenaida Mendoza under which he empowered the latter to participate in the prequalification and bidding in the project being bidded by NIA as well as to represent him in all business transactions related thereto.
>
> On August 9, 1999, defendant paule executed another SPA in favor of the same Mendoza additionally giving her the power and authorizing her to collect and receive payments from NIA.
>
> EMPCT, acting through Mendoza, participated in the public bidding conducted by NIA on September 29, 1999 on its project known as National Irrigation Administration-Casecnan Multi-Purpose Irrigation and Power Project (NIA-CMIPP) and which consisted of several packages.
>
> EMPCT won and was awarded Packages A-10 and B-11 of Schedule A thereof. On November 16, 1999, Mendoza received the Notice of Award, dated November 16, 1999 signed by defendant Coloma as NIA's Acting Project Manager of NIA CMIPP, for and in behalf of EMPCT.
>
> The project involved canalization works and construction of road system and of drainage box culverts for the contract price of P5,613,591.69.
>
> Plaintiff was told by his "compadre" Carlito Navarro that Mendoza was looking for heavy equipment to be used for implementing a NIA contract won by her principal. He met Mendoza at Bayuga, Muñoz, Nueva Ecija, where she was holding office in an apartment with a signboard that read EM Paule Construction and Trading.
>
> Plaintiff was convinced to deal with Mendoza after he was shown a copy of the Notice of Award of the project to EMPCT. After meeting with the defendant Paule whom he saw at EMPCT office several times, plaintiff

> agreed to sign contracts on December 2 and 20, 1999 for the furnishing of equipment at the project site of the Package A-10 located at San Andres, Llanera, Nueva Ecija.
>
> As of March 13, 2000, lease rentals for plaintiff's equipment added up to P640,300.00 (Exh. E). It went up to a total of P726,000.00 (Exh. H) because work was extended up to March 30, 2000.
>
> Mendoza had issued to Plaintiff her personal checks. x x x All these checks were dishonored upon presentation.
>
> The SPA (Exh. "B-1") executed by defendant Paule empowered her agent, Mendoza with the following:
>
> - To represent E. M. PAULE CONSTRUCTION & TRADING of which I am the General Manager in all my business transactions with National Irrigation Authority, Muñoz, Nueva Ecija.
>
> - To participate in the bidding, to secure bid bonds and other documents pre-requisite in the bidding of Casicnan Multi-Purpose Irrigation and Power Plant (CMIPPL 04-99), National Irrigation Authority, Muñoz, Nueva Ecija.
>
> - To receive and collect payment in check in behalf of E. M. PAULE CONSTRUCTION & TRADING.
>
> - To do and perform such acts and things that may be necessary and/or required to make the herein authority effective.
>
> On April 27, 2000, defendant Paule revoked this special power of attorney.
>
> On account of the revocation of Mendoza's Special Power of Attorney, defendant NIA refused to make payments on her billings. She advised plaintiff to directly address his demand for payment from defendant. The plaintiff did by billing NIA for P640,300.00 but he was told NIA would only be paying to (sic) through contractor EMPCT. Meanwhile, plaintiff continued his hauling services. As of March 30, 2000, his collectibles went up to P726,000.00. In a letter, dated April 5, 2000 (Exhibit H) to Mendoza, plaintiff demanded from her and/or EMPCT the payment of said amount.
>
> Subsequently, Mendoza was again constituted attorney-in-fact of defendant Paule but the Special Power of Attorney given her was already unavailing because in the meantime defendant NIA had paid Atty. Rodolfo Adriano and thereafter had already refused to make further payments.[2]

On 30 June 2000, the Appellee filed a Complaint[3] for collection of sum of money with damages and with prayer for preliminary injunction. On 31 July 2000, the NIA for its part filed a Motion to Dismiss[4] and an Answer[5] on the ground of lack of cause of action due to the absence of privity of contract between the NIA and the Appellee.

On 8 August 2000, Appellant PAULE filed his Answer[6], praying for the dismissal of the complaint alleging that there was likewise no privity between him and Appellee.

On 8 August 2000, the Appellee moved[7] to amend his complaint, attaching thereto his Amended Complaint[8]. This was granted by the court a quo in an Order[9] dated 12 September 2000. On 11 September 2000, Appellant PAULE filed a Manifestation[10] stating that the amended complaint did not substantially change the cause of action of the case, and he is adopting his 8 August 2000 answer as his answer to the amended complaint. On 9 September 2000, Appellee filed a Reply[11] thereto.

On 25 September 2000, Appellant PAULE filed a Motion to File Third Party Complaint[12] against Appellant MENDOZA. Appellee in turn filed his Opposition[13] to the said Motion on 4 October 2000. Over said Opposition, the Motion was granted by the court a quo in its Order[14] dated 28 November 2000. On 15 April 2001, Appellant MENDOZA filed her Answer with "Cross-claim"[15] thereto.After several postponements due

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to the absence of the parties' counsels, the pre-trial of the case was reset on 25 November 2002[16]. However, on Motion[17] of Appellant COLOMA, the pre-trial was reset to 6 January 2003. Counsels for the Appellee and for Appellant PAULE were notified thereof in open court. On the next scheduled pre-trial hearing, only the Appellee's counsel appeared. Consequently, upon motion of the latter, the Appellants were declared in default[18]. The Appellee was then allowed to present his evidence ex-parte. On 6 March 2003, Appellant MENDOZA filed a Motion to Declare Third-Party Plaintiff Non-Suited[19] praying that she be allowed to present her evidence ex-parte on 17 March 2003.

After the ex-parte presentation of evidence for the Appellee, the court a quo rendered a Decision[20] dated 7 August 2003, the dispositive portion of which reads:

- Ordering defendant Paule to pay plaintiff the sum of P726,000.00 by way of actual damages of compensation for the services rendered by him;

- Ordering defendant Paule to pay plaintiff the sum of P500,000.00 by way of moral damages;

- Ordering defendant Paule to pay plaintiff the sum of P50,000.00 by way of reasonable attorney's fees;

- Ordering defendant Paule to pay the costs of suit; and

- Ordering defendant National Irrigation Administration (NIA) to withhold the balance still due from it to defendant Paule/E.M. Paule Construction and Trading under NIA-CMIPP Contract Package A-10 and to pay plaintiff therefrom to the extent of defendant Paule's liability herein adjudged.

THE ISSUES

Appellant PAULE interposed the instant appeal attributing upon the court a quo the following assigned errors:

- THE ORDER OF DEFAULT DUE TO NON APPEARANCE DESPITE THE LACK OF PROPER NOTICE TO DEFENDANT NIA AND THE WITHDRAWAL OF THE COUNSEL FOR THE THIRD PARTY DEFENDANT AND AGGRAVATED BY THE FACT THAT NO ORDER OF DEFAULT WAS SENT TO THE APPELLANT, HENCE, THE COURT PURPOSELY CURTAILED THEIR RIGHT TO SEEK RELIEF OF THE DEFAULT ORDER;

- THE MOTION TO PRESENT ADDITIONAL WITNESS AND THE SUBSEQUENT MOTION FOR NON-SUITED FILED BY THIRD PARTY DEFENDANT HERSELF, DESPITE THE FACT, THAT THE COURT HAS ADMITTED ALL THE EVIDENCE OF PLAINTIFF AND THE SUBSEQUENT PRESENTATION OF THIRD PARTY DEFENDANT AS WITNESS FOR THE PLAINTIFF, DESPITE THE OBVIOUS CONFLICT OF INTEREST, SINCE THE CAUSE OF ACTION OF THE PLAINTIFF IS TO COLLECT HIS UNPAID SERVICES FROM THE THIRD PARTY DEFENDANT;

- THE ERRONEOUS APPRECIATION THAT THERE EXISTS THE PRINCIPLE OF AGENCY AND THE UNCONSCIONABLY EXCESSIVE AWARD OF MORAL DAMAGES AND ATTORNEY'S FEES.[21]

The Third Party Defendant-Appellant MENDOZA for her part raised the following issues:

> I.
>
> WHETHER OR NOT THE RTC ERRED IN RENDERING HEREIN APPEALED DECISION WITHOUT AFFORDING ZENAIDA MENDOZA THE OPPORTUNITY TO PRESENT EVIDENCE ON HER CROSS-CLAIM AGAINST HIM.
>
> II.

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> WHETHER OF NOT THE RTC ERRED IN NEITHER DISMISSING NOR GRANTING ZENAIDA MENDOZA'S CROSS-CLAIM AGAINST ENGR. PAULE AND IN NOT DIRECTING THE NATIONAL IRRIGATION ADMINISTRATION TO PAY TO ZENAIDA MENDOZA THE UNPAID AMOUNT FOR THE COST OF THE PROJECT (P3,018,864.04 PLUS P500,000.00 FOR THE CHANGED AND OR ADDED ORDER) STILL TO BE PAID BY IT FOR THE COST OF THE PROJECT.
>
> III.
>
> WHETHER OR NOT THE RTC ERRED IN NOT ORDERING ENGR. PAULE TO RETURN TO ZENAIDA MENDOZA THE AMOUNT P839,450.88 REPRESENTING WHAT HE COLLECTED IN EXCESS FROM THE P1,043,834.31 PAYMENT MADE BY NIA ON JUNE 21, 2000.[22]

OUR RULING

The appeal is partly meritorious.

On the first assigned error, Appellant PAULE contends that there was no notice of the Order of default was sent to NIA. However, Appellant Paule, in his own capacity, was declared by the court a quo as in default for his failure to attend the pre-trial conference on 6 January 2003 of which he was duly notified. Section 5 of Rule 18 of the Revised Rules of Court states:

> Section 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 without prejudice, unless otherwise ordered by the court. A similar failure of the part of the defendant shall be a cause to allow the plaintiff to present his evidence ex-parte and the court to render judgment on the basis thereof.

Suffice it to say that whether or not the notice of default was received by the NIA is not the concern of Appellant PAULE as he is not representing NIA in the instant case. What is material is that Appellant PAULE did not appear during the pre-trial despite notice.

Appellant Paule likewise faults the trial court, in the first assigned error, that no order of default was sent to him. This is belied by the fact that the Return[23] of the service of the Order dated 6 January 2006 to Attorney SAMUEL ACORDA indicated that said order was received by said counsel. It is well settled that notice to counsel is notice to the party[24].

Anent the second assigned error, Appellant PAULE contests the presentation of the third party defendant as witness for the plaintiff. Section 20 of Rule 130 of the Revised Rules of Court provides:

> SECTION 20. Witnesses; their qualifications. — Except as provided in the next succeeding section, all persons who can perceive, and perceiving, can make known their perception to others, may be witnesses.
>
> Religious or political belief, interest in the outcome of the case, or conviction of a crime unless otherwise provided by law, shall not be a ground for disqualification.

It is clear, from the aforecited rule, that herein third party defendant i.e. Appellant MENDOZA is not disqualified from being a witness for the plaintiff. It is settled that it is entirely within each of the parties discretion, consonant with the theory of the case it or he seeks to advance and subject to such procedural strategy followed thereby, to present all available evidence at its or his disposal in the manner which may be deemed necessary and beneficial to prove its or his position, provided only that the same shall measure up to the quantum of evidence required by law.[25]

Thus, the first and second assigned errors are lacking in merit.

Anent the third assigned error, Appellant PAULE avers that it was a clear mistake on the part of the Court a quo when it ruled that the engagement by Appellant MENDOZA with Appellee in the latter's hauling services was in pursuance of the powers granted her by Appellant PAULE, thereby making Appellant PAULE liable to the Appellee for said services.

A perusal however, of the Special Power of Attorney[26] executed by Appellant PAULE in favor of Appellant MENDOZA readily show that the engagement of the hauling services of the Appellee is not within the scope of the powers granted to Appellant MENDOZA. Said SPA specifically limits the authority of MENDOZA (1) to represent E. M. Paule in its business transactions with the NIA, (2) to participate in the bidding of Casicnan Multi-Purpose Irrigation Canal, (3) to receive and collect payment in check in behalf of E. M. Paule and (4) to perform such acts and things that may be necessary and/or required to make said authority effective. Nothing in said enumeration of powers covers the engagement of plaintiff's services. It cannot even fall under the fourth enumerated power, which refer only to acts effectuating the three (3) other powers.

Apropos, the engagement of the hauling services of the Appellee being outside the scope of MENDOZA's authority, Appellant PAULE is not liable under the contract supra, entered into by MENDOZA. In such situation, Article 1910 of the New Civil Code applies, thus:

> Art. 1910. The principal must comply with all the obligations which the agent may have contracted within the scope of his authority.
>
> As for any obligation wherein the agent has exceeded his power, the principal is not bound except when he ratifies it expressly or tacitly. (Underscoring supplied)

In Manila Memorial Park Cemetery, Inc., vs. Linsagan[27], the Supreme Court emphatically held:

> To repeat, the acts of the agent beyond the scope of his authority do not bind the principal unless the latter ratifies the same.

Furthermore, the Appellee with whom the MENDOZA contracted, knew of the scope of her authority[28]. However, notwithstanding knowledge of the SPA in question, the Appellee proceeded to transact with her. In the Manila Memorial Park case supra, the Supreme Court emphasized, thus:

> It also bears emphasis that when the third person knows that the agent was acting beyond his power or authority, the principal cannot be held liable for the acts of the agent. If the said third person was aware of such limits of authority, he is to blame and is not entitled to recover damages from the agent, unless the latter undertook to secure the principal's ratification.

Anent the award of moral damages, the same should be deleted. Article 2220 of the Civil Code provides:

> Art. 2220. Willful injury to property may be a legal ground for awarding moral damages if the court should find that, under the circumstances, such damages are justly due. The same rule applies to breaches of contract where the defendant acted fraudulently or in bad faith.

A fortiori, with the finding that Appellant PAULE has valid reason in refusing to honor the contract supra, entered into by MENDOZA, the award of moral damages in favor of the Appellee has no leg to stand on. Otherwise put, no bad faith could thus be ascribed to Appellant PAULE, disentitling the Appellee to moral damages. As elucidated by the Supreme Court in Philippine National Bank vs. Pike[29], thus:

> Specifically, in culpa contractual or breach of contract, as here, moral damages are recoverable only if the defendant has acted fraudulently or in bad faith, or is found guilty of gross negligence amounting to bad faith, or in wanton disregard of his contractual obligations. Verily, the breach must be wanton, reckless, malicious, or in bad faith, oppressive or abusive.

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As to the award of attorney's fees, the same should likewise be deleted. Article 2208 of the New Civil Code provides:

> Art. 2208. In the absence of stipulation, attorney's fees and expenses of litigation, other than judicial costs, cannot be recovered, except:
>
> - When exemplary damages are awarded;
>
> - When the defendant's act or omission has compelled the plaintiff to litigate with third persons or to incur expenses to protect his interest;
>
> - In criminal cases of malicious prosecution against the plaintiff;
>
> - In case of a clearly unfounded civil action or proceeding against the plaintiff;
>
> - Where the defendant acted in gross and evident bad faith in refusing to satisfy the plaintiff's plainly valid, just and demandable claim;
>
> - In actions for legal support;
>
> - In actions for the recovery of wages of household helpers, laborers and skilled workers;
>
> - In actions for indemnity under workmen's compensation and employer's liability laws;
>
> - In a separate civil action to recover civil liability arising from a crime;
>
> - When at least double judicial costs are awarded;
>
> - In any other case where the court deems it just and equitable that attorney's fees and expenses of litigation should be recovered.
>
> In all cases, the attorney's fees and expenses of litigation must be reasonable.

None of the enumerated exceptions applies to the instant case. Besides, the policy of the law is to put no premium on the right to litigate[30].

Going now on the first issue raised by MENDOZA in her Appeal supra alleging that the court a quo erred in not ruling on her counterclaim (erroneously described as "cross-claim") on the Third Party Complaint, in Firestone Tire and Rubber Company of the Philippines v. Tempongko[31], the Supreme Court held that when leave to file the third-party complaint is properly granted as in the instant case, the Court renders in effect two judgments in the same case, one on the plaintiff's complaint and the other on the third-party complaint.

However, in the present case, the Court a quo failed to make any pronouncement on the counterclaim of Appellant MENDOZA against Appellant PAULE's third party complaint. Be that as it may, said counterclaim is solely based on the allegation of Appellant MENDOZA that the revocation of her SPA was whimsical. Granting arguendo that is was so, nonetheless that revocation of the SPA by defendant Paule is within the bounds of his discretion in accordance with Article 1920 of the New Civil Code which provides:

> Article 1920. The principal may revoke the agency at will, and compel the agent to return the document evidencing the agency. Such revocation may be express or implied.

Anent Appellant MENDOZA's second and third issues[32], these matters were not raised before the court a quo. What was raised before the court a quo was only the whimsical revocation of the SPA for which she only asked that Eduardo Paule be made to pay the actual damage arising from debts on purchases of material, cost of labor, rentals, etc. costing to P3 M and moral damages estimated at P1 M[33] and nothing else. Basic is the rule that

issues not raised below cannot be raised for the first time on appeal, to do so would be offensive to the basic rules of fair play and justice.[34]

The only issue left to discuss on the appeal of Appellant MENDOZA is the matter of her entitlement to moral damages. To be entitled to moral damages, it must be evident that the award is justly due the claimant. However the records is bereft of any showing which will entitle Appellant MENDOZA to moral damages. Besides, as stated earlier, she acted beyond the scope of her authority.

WHEREFORE, premises considered, the Appeal of Appellant EDUARDO M. PAULE is hereby GRANTED. Consequently, the Complaint of MANUEL DELA CRUZ is DISMISSED. Likewise, the Appeal of Appellant ZENAIDA MENDOZA is DISMISSED for lack of merit.

SO ORDERED.

Reyes, (Chairman) and Lampas-Peralta, JJ., concur.

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[*] Should be counterclaim. Rule 6, Section 6 of the Revised Rules of Court provides: A counterclaim is any claim which a defending party may have against an opposing party.

[1] Records, pp. 222-231

[2] Records, pp. 227-229

[3] Id. p. 1

[4] Id. p. 15

[5] Id. p. 25

[6] Id. p. 31

[7] Id. p. 34

[8] Id. p. 36

[9] Id. p. 55

[10] Id. p. 53

[11] Id p. 48

[12] Id. p. 59

[13] Id. p. 65

[14] Id. p. 74

[15] Id. pp. 83-87

[16] Id. pp. 156-157

[17] Id. p. 158

[18] Id. p. 160

[19] Id. p. 209

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[20] Supra

[21] Rollo, p. 19

[22] Id. p. 104

[23] Records, p. 160, dorsal portion.

[24] Salen vs. Dinglasan et al., G.R. No. 59082, June 28, 1991

[25] Metro Manila Transit Corp. vs. Court of Appeals, G.R. No. 104408. June 21, 1993

[26] Records, p. 8

[27] G.R. No. 151319, November 22, 2004.

[28] TSN, 21 February 2003, p. 204

[29] G.R. No. 157845, September 20, 2005

[30] Gomer et al., vs. Sps. Heruela et al., G.R. No. 145330, October 14, 2005.

[31] G.R. No. L-24399, March 28, 1969

[32] supra

[33] Records, p. 86

[34] Hermogenes vs. Osco Shipping Services, Inc., G.R. No. 141505, August 18, 2005

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