

PHILIPPINE NATIONAL BANK, PETITIONER, VS. NEPOMUCENO PRODUCTIONS, INC., FILM ADVERTISING MEDIA EXHIBITIONS, INC. (FAME), LUIS NEPOMUCENO, AMPARO NEPOMUCENO, AND JESUS NEPOMUCENO...

G.R. No. 139479. December 27, 2002

Ponente: AUSTRIA-MARTINEZ, J.

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AUSTRIA-MARTINEZ, J.:

Before us is a petition for review on certiorari of the decision of the Court of Appeals in CA-G.R. CV No. 47500[1] affirming the decision of the Regional Trial Court of Pasig City (Branch 155) in Civil Case No. 28809 which set aside the foreclosure proceedings and auction sale of respondent's properties and ordered petitioner to pay attorney's fees.

The relevant facts of the case are undisputed.

On November 28, 1973, petitioner Philippine National Bank (PNB) granted respondents a 4 Million Pesos (P4,000,000.00) credit line to finance the filming of the movie "Pacific Connection." [2] The loan was secured by mortgages on respondents' real and personal properties, to wit: (1) a 7,623 square meters parcel of land located in Malugay Street, Makati (referred to as the Malugay property); (2) a 3,000 square meters parcel of land located in North Forbes Park, Makati (referred to as the Forbes property); [3] and (3) several motion picture equipments. [4] The credit line was later increased to 6 Million Pesos (P6,000,000.00) on January 14, 1974, [5] and finally to 7.5 Million Pesos (P7,500,000.00) on September 8, 1974. [6]

Respondents defaulted in their obligation. Petitioner sought foreclosure of the mortgaged properties with the Sheriff's Office of Pasig, Rizal. Initially scheduled on August 12, 1976, the auction sale was re-scheduled several times without need of republication of the notice of sale, as stipulated in the Agreement to Postpone Sale, [7] until finally, the auction sale proceeded on December 20, 1976, with petitioner as the highest bidder in the amount of P10,432,776.97. [8]

Aggrieved, respondents filed Civil Case No. 28809 with the Regional Trial Court of Pasig (Branch 155), an action for annulment of foreclosure sale and damages with injunction. [9] Respondents contended that the foreclosure sale is null and void because: (1) the obligation is yet to mature as there were negotiations for an additional loan amount of P5,000,000.00; (2) lack of publication; (3) the purchase price was grossly inadequate and unconscionable; and (4) the foreclosure proceedings were initiated by petitioner in bad faith. [10]

In its Decision dated September 16, 1992, the court a quo ordered the annulment and setting aside of the foreclosure proceedings and auction sale held on December 20, 1976 on the ground that there was lack of publication of the notice of sale. [11] The court a quo also ordered petitioner to pay P100,000.00 as attorney's fees. [12]

Dissatisfied, petitioner elevated the case to the Court of Appeals.

During completion stage of the appeal, the appellate court issued a Resolution on January 31, 1996 dismissing petitioner's appeal with regard to the Forbes Park property as the same was already the subject of a Deed of Reconveyance executed by petitioner in favor of respondents on November 22, 1994, as well as a Compromise Agreement dated September 13, 1994 between the same parties.[13] Said Resolution having become final and executory on February 26, 1996, entry of judgment was made on March 27, 1996.[14] Hence, resolution of the appeal in the Court of Appeals pertained only to the Malugay property.

On December 11, 1998, the appellate court rendered the assailed Decision, which affirmed in toto the decision of the court a quo.[15]

Hence, herein petition for review under Rule 45 of the Rules of Court.

Petitioner maintains that:

"I

"THE COURT OF APPEALS ERRED IN DECLARING PNB'S FORECLOSURE SALE OF RESPONDENTS' PROPERTIES NULL AND VOID FOR LACK OF REPUBLICATION DESPITE THE PARTIES AGREEMENT TO WAIVE THE REPUBLICATION AND RESPOSTING OF SHERIFF'S SALE

"II

"THE COURT OF APPEALS ERRED IN NOT DECLARING THE RESPONDENTS IN ESTOPPEL TO ASSAIL THE VALIDITY OF THE FORECLOSURE SALE AFTER THEY INDUCED PNB TO EXECUTE THE AGREEMENT TO POSTPONE SALE WAIVING THE REPUBLICATION AND REPOSTING OF THE SHERIFF'S NOTICE OF SALE

"III

"THE COURT OF APPEALS ERRED IN SUSTAINING THAT RESPONDENTS ARE NOT THIRD PERSONS IN CONTEMPLATION OF THE LAW"[16]

The focal issue in this case is whether the parties to the mortgage can validly waive the posting and publication requirements mandated by Act No. 3135.

We answer in the negative.

Act. No. 3135, as amended, governing extrajudicial foreclosure of mortgages on real property is specific with regard to the posting and publication requirements of the notice of sale, to wit:

"Sec. 3. Notice shall be given by posting notices of the sale for not less than twenty days in at least three public places of the municipality or city where the property is situated, and if such property is worth more than four hundred pesos, such notice shall also be published once a week for at least three consecutive weeks in a newspaper of general circulation in the municipality or city."

On this score, it is well settled that what Act No. 3135 requires is: (1) the posting of notices of sale in three public places; and, (2) the publication of the same in a newspaper of general circulation.[17] Failure to publish the notice of sale constitutes a jurisdictional defect, which invalidates the sale.[18]

Petitioner, however, insists that the posting and publication requirements can be dispensed with since the parties agreed in writing that the auction sale may proceed without need of re-publication and re-posting of the notice of sale.[19]

We are not convinced. Petitioner and respondents have absolutely no right to waive the posting and publication requirements of Act No. 3135.

In *People v. Donato*,^[20] the Court expounded on what rights and privileges may be waived, viz.:

“x x x the doctrine of waiver extends to rights and privileges of any character, and, since the word 'waiver' covers every conceivable right, it is the general rule that a person may waive any matter which affects his property, and any alienable right or privilege of which he is the owner or which belongs to him or to which he is legally entitled, whether secured by contract, conferred with statute, or guaranteed by constitution, provided such rights and privileges rest in the individual, are intended for his sole benefit, do not infringe on the rights of others, and further provided the waiver of the right or privilege is not forbidden by law, and does not contravene public policy; and the principle is recognized that everyone has a right to waive, and agree to waive, the advantage of a law or role made solely for the benefit and protection of the individual in his private capacity, if it can be dispensed with and relinquished without infringing on any public right, and without detriment to the community at large x x x.

“Although the general rule is that any right or privilege conferred by statute or guaranteed by constitution may be waived, a waiver in derogation of a statutory right is not favored, and a waiver will be inoperative and void if it infringes on the rights of others, or would be against public policy or morals and the public interest may be waived.

“While it has been stated generally that all personal rights conferred by statute and guaranteed by constitution may be waived, it has also been said that constitutional provisions intended to protect property may be waived, and even some of the constitutional rights created to secure personal liberty are subjects of waiver.”^[21]

While it is established that rights may be waived, Article 6 of the Civil Code explicitly provides that such waiver is subject to the condition that it is not contrary to law, public order, public policy, morals, or good customs, or prejudicial to a third person with a right recognized by law.^[22]

The principal object of a notice of sale in a foreclosure of mortgage is not so much to notify the mortgagor as to inform the public generally of the nature and condition of the property to be sold, and of the time, place, and terms of the sale. Notices are given to secure bidders and prevent a sacrifice of the property.^[23] Clearly, the statutory requirements of posting and publication are mandated, not for the mortgagor's benefit, but for the public or third persons. In fact, personal notice to the mortgagor in extrajudicial foreclosure proceedings is not even necessary, unless stipulated.^[24] As such, it is imbued with public policy considerations and any waiver thereon would be inconsistent with the intent and letter of Act No. 3135.

Moreover, statutory provisions governing publication of notice of mortgage foreclosure sales must be strictly complied with and slight deviations therefrom will invalidate the notice and render the sale at the very least voidable.^[25]

"Where required by the statute or by the terms of the foreclosure decree, public notice of the place and time of the mortgage foreclosure sale must be given, a statute requiring it being held applicable to subsequent sales as well as to the first "advertised sale of the property. It has been held that failure to advertise a mortgage foreclosure sale in compliance with statutory requirements constitutes a jurisdictional defect invalidating the sale and that a substantial error or omission in a notice of sale will render the notice insufficient and vitiate the sale."^[26]

Thus, in the recent case of *Development Bank of the Philippines v. Aguirre*,^[27] the foreclosure sale held more than two (2) months after the published date of sale was considered void for lack of republication.^[28] Similarly, in the instant case, the lack of republication of the notice of the December 20, 1976 foreclosure sale renders it void.

The right of a bank to foreclose a mortgage upon the mortgagor's failure to pay his obligation must be exercised according to its clear mandate, and every requirement of the law must be complied with, lest the valid exercise of

the right would end.[29] The exercise of a right ends when the right disappears, and it disappears when it is abused especially to the prejudice of others.[30]

We also cannot accept petitioner's argument that respondents should be held in estoppel for inducing the former to re-schedule the sale without need of republication and reposting of the notice of sale.

Records show that respondents, indeed, requested for the postponement of the foreclosure sale.[31] That, however, is all that respondents sought. Nowhere in the records was it shown that respondents purposely sought re-scheduling of the sale without need of republication and reposting of the notice of sale. To request postponement of the sale is one thing; to request it without need of compliance with the statutory requirements is another. Respondents, therefore, did not commit any act that would have estopped them from questioning the validity of the foreclosure sale for non-compliance with Act No. 3135.

In addition, the "Agreement to Postpone Sale" signed by respondents was obviously prepared solely by petitioner.[32] A scrutiny of the agreement discloses that it is in a ready-made form and the only participation of respondents is to affix or "adhere" their signature thereto. It therefore partakes of the nature of a contract of adhesion, i.e., one in which one of the contracting parties imposes a ready-made form of contract which the other party may accept or reject, but cannot modify.[33] One party prepares the stipulation in the contract, while the other party merely affixes his signature or his "adhesion" thereto, giving no room for negotiation, and depriving the latter of the opportunity to bargain on equal footing.[34] As such, their terms are construed strictly against the party who drafted it.[35]

Finally, while we rule that the appellate court did not commit any error in affirming the decision of the court a quo, we find the award of P100,000.00 as attorney's fees to be excessive. Article 2208 of the Civil Code allows the award of such fees when its claimant is compelled to litigate with third persons or to incur expenses to protect its just and valid claim. In view of petitioner's foreclosure of the property without complying with the statutory requirements,[36] the award of attorney's fees of P25,000.00 is just, fair, and reasonable.

WHEREFORE, the Decision dated December 10, 1998 in CA-G.R. CV No. 47500 is hereby **AFFIRMED** with modification that the award of attorney's fees is reduced to P25,000.00.

No pronouncement as to costs.

SO ORDERED.

Bellosillo (Chairman), Mendoza, Quisumbing, and Callejo, Sr., JJ., concur.

[1] Entitled: "Nepomuceno Productions, Inc., et al. vs. Philippine National Bank," Rollo, p. 40.

[2] Original Records, pp. 734-736.

[3] Id., pp. 728-732.

[4] Id., pp. 739-747.

[5] Id., pp. 748-753.

[6] Ibid.

[7] CA rollo, pp. 372-375.

[8] Id., p. 376.

[9] Original Records, pp. 1-8.

[10] Id., pp. 4-5.

[11] Id., p. 887.

[12] Id., p. 888.

[13] CA rollo, p. 117.

[14] Id., p. 150.

[15] Id., p. 291.

[16] Id., pp. 24-25.

[17] Metropolitan Bank and Trust Company v. Wong, G.R. No. 120859, June 26, 2001; Valmonte v. Court of Appeals, 303 SCRA 278, 289 [1999]; Fortune Motors (Phils.) Inc. v. Metropolitan Bank and Trust Company, 265 SCRA 71, 81 [1996].

[18] Development Bank of the Philippines v. Aguirre, G.R. No. 144877, September 7, 2001.

[19] Rollo, p. 27.

[20] 198 SCRA 130, 154 [1991].

[21] Ibid., citing 92 C.J.S., 1066-1068

[22] Valenzuela Hardwood and Industrial Supply, Inc. v. Court of Appeals, 274 SCRA 642, 656 [1997].

[23] Olizon v. Court of Appeals, 236 SCRA 148, 156 [1994].

[24] Metropolitan Bank and Trust Company v. Wong, supra.; Philippine National Bank v. Rabat, 344 SCRA 706, 716 [2000] ; Concepcion v. Court of Appeals, 274 SCRA 614, 620 [1997]; Fortune Motors (Phils.) Inc. v. Metropolitan Bank and Trust Company, supra.

[25] Tambunting v. Court of Appeals, 167 SCRA 16, 23 (1988).

[26] Ibid.

[27] G.R. No. 144877. September 7, 2001.

[28] Citing Masantol Rural Bank, Inc. v. Court of Appeals, 204 SCRA 752 (1991).

[29] Metropolitan Bank and Trust Company v. Wong, supra.

[30] Ibid.

[31] TSN of April 18, 1988, pp. 20-21.

[32] CA rollo, pp. 372-275.

[33] Polotan, Sr. v. Court of Appeals, 296 SCRA 247, 255 [1998].

[34] Ibid.

[35] BPI Express Card Corp. v. Olalia, G.R. No. 131086, December 14, 2001.

[36] CA rollo, p. 322.

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