

MEDISERV, INC., HERNANDO B. DELIZO, M.D. AND MARISSA C. DELIZO, M.D., PETITIONERS, VS. CHINA BANKING CORPORATION, AND KELLY SALVADOR, RESPONDENTS.

G.R. No. 140755. April 17, 2001

Ponente: GONZAGA-REYES, J.

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GONZAGA-REYES, J.:

Petitioners assail the dismissal by respondent Court of Appeals[1] of their petition for certiorari, prohibition and mandamus in CA-G.R. SP No. 51378 entitled "Mediserv, Inc., Hernando Delizo and Marissa Delizo, Petitioners, versus Honorable Ramon P. Makasiar, as the Presiding Judge of the Regional Trial Court of Manila, Branch 35, China Banking Corporation, and Kelly Salvador, Respondents."

The antecedents as gathered by the Court of Appeals are as follows:

"On January 13, 1998, the private respondent China Banking Corporation filed a complaint for a sum of money to recover deficiency judgment in foreclosure proceedings against the petitioners herein, Mediserv, Incorporated, Hernando Delizo and Marissa Delizo, as well as Kelly Salvador, alleging that the defendants executed and delivered on October 5, 1995 in its favor three promissory notes covering an aggregate sum of P18 million, and secured by a real estate mortgage over a parcel of land covered by TCT-205824 of the Register of Deeds of the City of Manila; and that the defendants defaulted in their obligations to the plaintiff, and despite demands, failed and refused to pay the same, which by October 16, 1997, amounted to P23,008,623.97. The plaintiff, upon foreclosure of the mortgage, realized P17,617,960.00 only, thus leaving a deficiency of P5,390,663.97. Lydia Y. Yu, stating therein that she was the Assistant Vice President of China Banking Corporation, Greenhills Branch, signed the certification against forum shopping.

On April 15, 1998, the defendants Mediserv, Incorporated, Hernando Delizo and Marissa Delizo filed a Motion for Extension of Time to File Motion to Dismiss and/or Answer, praying that they be given an additional period of 15 days from April 16, 1998 or up to May 1, 1998, within which to file their "appropriate pleading or motion".

On April 17, 1998 the law firm of Guerrero, Alambra, Viernes and Margarejo withdrew its appearance as counsel for therein defendants. On April 24, 1998 the respondent judge granted the April 15, 1998 motion of the therein defendants.

On April 30, 1998, the defendants filed another motion for extension for an additional 15 days, from May 1, 1998 or up to May 16, 1998, within which to file their pleading or motion, averring that they were shopping for a new counsel, with the defendant Hernando Delizo himself signing the same. On May 7, 1998, His Honor granted the motion, with the warning this time that no further extension would be entertained. Despite such warning, on May 15, 1998, the defendants filed yet another motion for a last extension of time to file their motion to dismiss and/or Answer, seeking yet another ten days from May 16, 1998, or up to May 26, 1998 to do so, claiming anew that they were still looking for a new counsel, with the defendant Hernando Delizo once more signing the motion. This last motion for extension was denied by the respondent judge in his Order dated May 20, 1998, the respondent judge advertng to his Order dated May 7, 1998.

On May 26, 1998, or some 10 days from May 16, 1998, the last day granted by His Honor for the defendants to file their responsive pleading and/or motion to dismiss, the defendants filed a motion to dismiss the complaint on the ground of *litis pendentia*, lack of cause of action and payment of claim. In support thereof, the defendants alleged that they had earlier filed a case against the plaintiff on November 27, 1997 entitled "Mediserv, Inc., represented by its President, Hernando B. Delizo and Treasurer, Marissa Delizo v. China Banking Corporation, Landheights (Iloilo) Development Corp., Romeo A. Ignacio, Jr. in his capacity as Notary Public in the City of Manila and the Registrar of Deeds for the City of Manila." The case, docketed as Civil Case No. Q-97-68152, and pending with Branch 29 of the Regional Trial Court of Manila, was for Declaration of Nullity of Auction Sale and all incidents thereto, Specific Performance and Damages with prayer for a Temporary Restraining Order and/or writ of Preliminary Injunction. The defendants claimed that said case put in issue the rights of the parties relative to the mortgage agreement and the subject promissory notes, and likewise assailed the legality of the foreclosure proceedings and the auction sale of the real property covered by TCT-205824 of the Register of Deeds of the City of Manila. The pendency of Civil Case No. Q-97-68152, the defendants averred, warranted the outright dismissal of the case subject of the instant petition or Civil Case No. 98-86794, as the requisites of *litis pendentia* were attendant.

On June 4, 1998, the private respondents filed a Motion to Declare Defendants Mediserv, Incorporated, and Hernando Delizo and Marissa Delizo in default, and another Motion to Strike Out the Motion to Dismiss.

On June 16, 1998, the respondent judge issued an order denying the defendants' motion to dismiss, and declaring the defendants in default xxx.

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On July 14, 1998, Atty. Edward Margarejo filed his withdrawal of appearance as counsel for the defendants, a motion that was granted by the respondent judge in his order of July 15, 1998.

On August 20, 1998, the defendants filed an Omnibus Motion; (a) to lift the order of default; (b) to dismiss the complaint with prejudice for violation of the requirement of certification against forum-shopping; and (c) to cite Lydia Yu in contempt of Court. The motion was accompanied by an Affidavit of Merit of the defendant Hernando Delizo. To this motion, the plaintiff filed its Opposition dated August 28, 1998, and the defendants filed their Reply thereto on September 18, 1998.

On September 30, 1998, the respondent judge denied the defendants' motion to lift the order of default xxx.

xxx xxx xxx

On October 22, 1998, the defendants moved for reconsideration of the above-cited order, which was opposed by the plaintiff bank. On November 25, 1998, the defendants filed their Reply to the plaintiffs opposition.

On January 12, 1999, the respondent court denied the above-cited motion for reconsideration xxx."[2]

Before the Court of Appeals, petitioners (then defendants) assailed the trial court's refusal to dismiss the complaint on the ground of non-compliance with the requirements of a certification of forum-shopping, declaring the petitioners in default without first resolving this motion to dismiss which was filed ahead of respondent bank's motion to declare them in default, and not declaring respondent bank's motion to declare defendants in default as having been rendered moot and academic by reason of the filing of petitioners' motion to dismiss.

The Court of Appeals dismissed the petition for being "absolutely devoid of merit". It ruled that the Omnibus Motion to Lift Order of Default filed by defendant bank was "fatally flawed," as it was filed beyond the extended periods to file answer granted by the court, was not under oath, and was not accompanied by a proper affidavit of merit. The court also struck down petitioners' assertion that the respondent's complaint should have been dismissed for failure to comply with the requirements of certification against forum shopping.

Motion for reconsideration of the order of dismissal was denied.[3] Hence, this petition for review on certiorari which submits the following grounds in support thereof -

"A. THE COURT A QUO DECIDED A QUESTION OF SUBSTANCE EVIDENTLY NOT IN ACCORD WITH LAW AND WITH THE DECISIONS OF THIS HONORABLE COURT IN AVOIDING TO RULE ON THE GLARING AND OBVIOUSLY STARING ISSUE OF RESPONDENT BANK'S FAILURE TO COMPLY WITH THE ESSENTIAL REQUIREMENT OF A CERTIFICATION AGAINST FORUM-SHOPPING BY DECLARING INSTEAD, PETITIONERS IN DEFAULT.

B. THE COURT A QUO HAS EVIDENTLY DECIDED A QUESTION OF SUBSTANCE NOT IN ACCORD WITH LAW AND WITH THE DECISIONS OF THIS HONORABLE COURT AS WELL AS THE EXPRESS PROVISIONS OF THE RULES OF COURT IN NOT ORDERING THE DISMISSAL WITH PREJUDICE OF THE COMPLAINT FILED WITH THE TRIAL COURT FOR FAILURE TO COMPLY WITH THE REQUIREMENT OF A CERTIFICATION AGAINST FORUM-SHOPPING AS ESSENTIALLY REQUIRED UNDER SECTION 5 OF RULE 7 OF THE 1997 RULES OF CIVIL PROCEDURE."[4]

It is the essence of petitioner's claim that the complaint below should have been dismissed for failure to comply with the requirement of certification against forum shopping as the person (Lydia Yu) who signed the certification was not authorized to do so, and respondent bank cannot feign ignorance of another civil action, i.e. Civil Case No. 97-86152, entitled "Mediserv Inc. represented by its President, Hernando B. Delizo and treasurer, Marissa D. Delizo, Plaintiff, versus China Banking Corporation, Landheights (Iloilo) Development Corporation, Romeo Ignacio, Jr. in his capacity as Notary Public in the City of Manila and the Register of Deeds for the City of Manila, Defendants", wherein petitioners sought the declaration of nullity of auction sale and all incidents thereto, specific performance and damages against respondents allegedly for lack of violation of the terms of the mortgage constituted on the property subject of the auction sale, and the issues therein are similar to those at bench. By avoiding a definitive ruling on the issue as to whether or not respondent Bank violated the requirements of a certification of forum shopping, and instead declaring the petitioners in default, the court a quo "decided a question of substance" not in accord with law, the rules and jurisprudence. In connection with the second assignment of error, petitioners stress that their Motion to Dismiss was filed ahead of respondent bank's Motion to Declare Defendants in Default, and petitioners had accordingly not yet lost their standing in court when they filed their motion to dismiss. Finally, petitioners insist that the complaint against them must be dismissed for failure to comply with the essential requirement of a certification against forum shopping.

Respondent China Banking Corporation in its Comment stresses that petitioners were correctly declared in default as they filed their Motion to Dismiss after the expiration of the second extended period to file answer, whereupon plaintiff bank properly filed a Motion to Declare Defendants in Default and another Motion to Strike Out Motion to Dismiss. Two months after being declared in default, petitioners filed their "hodge-podge" Motion to Lift Order of Default, a Motion to Dismiss (the second one) the complaint with Prejudice for Violation of the Requirement of Certification against Forum Shopping, and a Motion to Cite Lydia Yu in Contempt of Court without first securing the restoration of his standing in court by first moving to set aside the order of default. Respondent points out that the Motion to Lift Order of Default is not only unverified or not under oath, but the affidavit of merit was also defective. Further, respondent bank insists that it has not violated the rule on forum shopping because it did not institute twin actions against petitioners: Civil Case No. 97-86152 was instituted by Mediserv Inc. whereas Civil Case No. 98-86794 was the only case instituted by respondent bank against petitioners.

Petitioners, in their Reply to Comment, state that while it is not disputed that they were declared in default, the issue is whether granting that they already lost personality in the case below, the trial court is mandated to dismiss the case *motu proprio* upon being apprised of a false certification in the certificate against forum shopping. In their

Memorandum, petitioners assert an affirmative answer to this issue.

Respondent's Memorandum reiterates the arguments earlier raised in their pleadings.

We find the instant petition unmeritorious.

There is no question that petitioners (then defendants) filed on May 26, 1998 their Motion to Dismiss the Complaint against them on the grounds of *litis pendentia*, lack of cause of action, and payment of claim. This motion was filed ten (10) days late, as the last day for filing answer/motion to dismiss was May 16, 1998 after two (2) extensions of fifteen (15) days each were granted by the court on motion of petitioners. In the meantime, or on June 4, 1998, private respondent (plaintiff) filed a Motion to Declare Defendants in Default and another Motion to Strike Out the Motion to Dismiss. The trial court denied the defendants' Motion to Dismiss and declared the defendants in default in its Order of June 16, 1998, Thus:

"Accordingly, the motion to dismiss filed by the defendants is denied; the motion of the plaintiff to declare them in default is granted; and defendants Mediserv, Inc., Hernando Delizo and Marissa Delizo are declared in default.

The plaintiff is authorized to adduce *ex parte* its evidence against the aforementioned defendants at the same time when it adduce its evidence against defendant Kelly Salvador, who filed his answer to the complaint.

SO ORDERED."[5]

It also appears that on August 20, 1998, petitioners filed their Omnibus Motion (a) to lift Order of Default; (b) to Dismiss the Complaint with Prejudice for Violation of the Requirement of Certification Against Forum Shopping; and (c) to cite Lydia Yu for contempt of Court. The Omnibus Motion which was approved by respondent bank, was denied by the court in its Order dated September 30, 1998.

The trial court was upheld by the Court of Appeals which described the Order dated September 30, 1998 as "juridically unassailable". We agree that the Omnibus Motion was fatally flawed although the Omnibus Motion insofar as it seeks the lifting of the order of default, may have been seasonably filed on August 20, 1998, or two (2) months after petitioners were already declared in default for failure to file answer/motion to dismiss within the extended period granted by the court to do so.[6] However, the said Omnibus Motion[7] was not under oath as required in Rule 9, Sec. 3 (b), and the Affidavit of Merit[8] is defective in that it failed to aver any fact which constitutes movant's good and substantial defense nor allege circumstances constituting defendants' mistake or excusable negligence as contemplated by the Rules. Petitioners have conspicuously failed to traverse these factual findings of the court on these defects, whether in its Petition, its Reply to Comment and Memorandum, and instead seek to focus their attack on respondent's complaint on the ground of alleged violation of the rule on forum shopping.

The Court of Appeals denounced the attempt as a desperate bid to muddle up the issues. It observed that:

"xxx as of June 16, 1998, petitioners were already declared in default, which, not having been set aside (in fact it was even ratified by the respondent judge in his order of January 12, 1999, after the petitioners had filed a motion for reconsideration after almost two (2) months from the issuance of the default order) resulted in the petitioners' loss of standing in court, and worked the forfeiture of their right to present their defense and control the proceedings, as well as the deprivation of any hope or expectation that their pleadings will be acted upon"

We agree with the appellate court that the trial court did not act with grave abuse of discretion amounting to want or excess of jurisdiction in issuing the impugned order dated September 30, 1998 which denied the Omnibus Motion in question.

A party declared in default is deprived of the right to take part in the trial and forfeits his rights as a party litigant except the right to receive notice of subsequent proceedings.[9] To obtain relief from an order of default, the said party may at any time after notice thereof and before judgment file a motion under oath to set aside order of default upon proper showing that his failure to answer was due to fraud, accident, mistake or excusable negligence and that he has a meritorious defense.[10]

If not accompanied by an affidavit of merit, the trial court has no authority to consider the same.[11] Petitioners failed to set aside the order of default and must suffer the consequences thereof.[12]

Petitioners' submission that their Motion to Dismiss, having been filed ahead of respondent bank's Motion to Declare Defendants in Default, must take precedence and should have been resolved first, does not impress us. Petitioners' period to file responsive pleading had expired, and was overtaken by respondent's motion to declare them in default, which was filed eight (8) days later (or on June 4, 1998). There is no rule or jurisprudence that mandates that both incidents cannot be resolved together. In fact, an order of default can be made only upon motion of the claiming party[13] and the motion herein was precisely based on the defendants' failure to file his responsive pleading/motion to dismiss on time. The second motion to dismiss contained in the August 20, 1998 Omnibus Motion and the Motion to Cite for Contempt cannot be entertained until the default order is lifted and the petitioners' standing as party litigant is restored.

Petitioners claim that respondent bank "slept on its rights" apparently because it did not immediately file its motion to declare petitioners in default. But they committed a more serious delay, fatal to their rights, by filing a motion to dismiss way beyond the forty five (45) days granted for them to do so, and without any satisfactory explanation under oath for their late action, despite the court's warning that no further extension would be granted after the earlier motions for extension were granted, nor any showing that they have a meritorious defense. The defective Omnibus Motion was correctly denied and the reliefs sought therein could not be granted as petitioners failed to purge themselves of the effects of a declaration of default.

WHEREFORE, the instant petition is DENIED for lack of merit.

SO ORDERED.

Melo, (Chairman), Vitug, Panganiban, and Sandoval-Gutierrez, JJ., concur.

[1] Penned by Associate Justice Renato C. Dacudao and concurred in by Associate Justices Ma. Alicia Austria-Martinez and Salvador J. Valdez, Jr.

[2] Rollo, pp. 53-57.

[3] Resolution dated November 16, 1999.

[4] Rollo, p. 30.

[5] Rollo, p. 24.

[6] Under Rule 9, Sec. 3, a motion to set aside an order of default may be filed at any time after notice thereof and before judgment.

[7] Annex "G".

[8] Rollo, p. 95.

[9] Rule 9, Sec. 3(a).

[10] par. 3(b).

[11] Phil. British Co., Inc. vs. de los Angeles, L-33720, March 10, 1975, 63 SCRA 50.

[12] In Santos vs. De la Fuente, 110 SCRA 215, it was held that where the defendant filed a motion to dismiss after her receipt of the default order, without moving to set aside such order, said motion to dismiss should be denied as she has lost her standing in court and is not entitled to further notice nor to participate in the trial unless she had filed a motion to lift the default order. (See also Fuentes vs. Leviste, 117 SCRA 958).

[13] Rule 9, Sec. 3.

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