BANK OF THE PHILIPPINE ISLANDS (FORMERLY FAR EAST BANK AND TRUST COMPANY), PETITIONER, VS. COURT OF APPEALS AND JIMMY T. GO, RESPONDENTS.

G.R. NO. 142731. June 08, 2006

Ponente: AZCUNA, J.

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AZCUNA, J.:

This is a petition for review on certiorari filed by Bank of the Philippine Islands of the decision and resolution of the Court of Appeals, which in turn partially denied a petition for certiorari questioning the temporary restraining order (TRO) and preliminary injunction issued by Judge Urbano C. Victorio, Sr. [1]

The facts as narrated in the Court of Appeals decision are as follows:

> Petitioner, Far East Bank and Trust Company, granted a total of eight (8) loans to Noah's Arc Merchandising (Noah's Ark, for brevity). Per Certificate of Registration issued by the Department of Trade and Industry (Rollo, p. 40), Noah's Ark is a single proprietorship owned by Mr. Albert T. Looyuko. The said loans were evidenced by identical Promissory Notes all signed by Albert T. Looyuko, private respondent Jimmy T. Go and one Wilson Go. Likewise, all loans were secured by real estate mortgage constituted over a parcel of land covered by Transfer Certificate of Title [No.] 160277 registered in the names of Mr. Looyuko and herein private respondent. Petitioner, claiming that Noah's Ark defaulted in its obligations, extrajudicially foreclosed the mortgage. The auction sale was set on 14 April 1998 but on 8 April 1998 private respondent filed a complaint for damages with prayer [for] issuance of TRO and/or writ of preliminary injunction seeking [to] enjoin the auction sale. [I]n the Order dated 14 April 1998 a temporary restraining order was issued and in the same order the application for Preliminary Injunction was set for hearing [i]n the afternoon of the same day (Rollo, p. 142).[2]

In an order[3] dated April 15, 1998, Judge Victorio extended the TRO for another 15 days, for a total of 20 days. The Court of Appeals decision continues thus:

> After hearing, the 7 May 1998 Order granted the application for preliminary injunction which shall take effect upon posting of a bond in the amount of Two Hundred Thousand Pesos (P200,000.00). The dispositive portion read:
> "WHEREFORE, it appearing that the acts complained of would be in violation of plaintiff's right and would work injustice to the plaintiff and so as not to render ineffectual whatever judgment may be issued in this case, the application [for] preliminary injunction is hereby granted and the defendants and all persons acting in their behalf are hereby ordered to cease, desist, and refrain from proceeding with the scheduled foreclosure and public auction sale of the mortgaged property covered by TCT No. 160277 until further orders from this Court.
>
> This Order shall be effective upon petitioner's filing of a bond in the amount of Two Hundred Thousand Pesos (P200,000.00) to answer for any and all damages that defendants may suffer by reason of the issuance of the writ of preliminary injunction.
>
> As prayed for, defendants are hereby directed to file their answer on or before May 14, 1998. Copy furnished

plaintiff.

SO ORDERED." (Rollo p. 175)

Private-respondent then filed a bond as required by the order. Petitioner moved for a reconsideration of the aforementioned order which motion was denied in the Order dated 30 July 1998 on the ground that the extrajudicial foreclosure was premature as to four (4) promissory notes. The dispositive portion read:

"WHEREFORE, premises considered, the motion for reconsideration is hereby denied and the other pending incident pertaining thereto are noted and this case be set for pre-trial.

LET THEREFORE, a notice of pre-trial be sent to the parties.

SO ORDERED." (Rollo, p. 219)[4]

After petitioner's motion for reconsideration was denied in an order dated July 30, 1998, petitioner filed a petition for certiorari with the Court of Appeals, praying that the orders dated May 7, 1998 and July 30, 1998, granting the writ of preliminary injunction and denying the motion for reconsideration, respectively, be annulled and set aside and the writ of preliminary injunction be dissolved. Furthermore, petitioner asked to be allowed to proceed with the auction sale of the property.

The Court of Appeals promulgated its decision dated August 26, 1999 which partially denied the petition for certiorari, stating as follows:

The issue in this case is: "Whether the trial court erred in the issuance of the Writ of Preliminary Injunction or not."

Petitioner averred that private respondent had not shown any right which should be protected by an injunction. Private respondent naturally claimed otherwise and asserted that since four (4) of the promissory notes have not yet matured there was no basis to foreclose the mortgage (Comment, p 15). He also claimed that his right to due process entitles him to legal demand prior to the filing of the foreclosure proceedings against the subject property (Comment, p. 16).

It has been held that an injunction may be issued in order to preserve the status quo. Thus, in Cagayan de Oro City Landless Residents Association, Inc., v. Court of Appeals (254 SCRA 220 [1996]) it was held:
As an extraordinary remedy, injunction is calculated to preserve the status quo of things and is generally availed of to prevent actual or threatened acts, until the merits of the case can be heard. x x x. (254 SCRA 228).

In the case at bar, there is a need to first settle the question of whether the demand made by petitioner was sufficient to render private respondent in default or not. In Rose Packing Co., Inc. v. Court of Appeals (167 SCRA 309 [1988]) it was held that the question of whether the debtor is in default should first be settled to determine if the foreclosure was proper. In the same case it was also held that said question should be resolved by the trial court, to wit:

While petitioner corporation does not deny, in fact, it admits its indebtedness to respondent bank (Brief for Petitioner, pp. 7-11), there were matters that needed the preservation of the status quo between the parties. The foreclosure sale was premature.

First was the question of whether or not petitioner corporation was already in default.

x x x

Petitioner corporation alleges that there had been no demand on the part of respondent bank previous to its filing a complaint against petitioner and Rene Knecht personally for collection on petitioner's indebtedness (Brief for Petitioner, p.13). For an obligation to become due there must generally be a demand. Default

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> generally begins from the moment the creditor demands the performance of the obligation. Without such demand, judicial or extrajudicial, the effects of default will not arise. (Namarco v. Federation of United Namarco Distributors, Inc. 49 SCRA 238 [1973]; Borje v. CFI of Misamis Occidental, 88 SCRA 576 [1979]. Whether petitioner corporation is already in default or not and whether demand had been properly made or not had to be determined in the lower court. (167 SCRA 317-318).

We now come to the matter of sufficiency of the bond filed by private respondent. Petitioner claims that the P200,000.00 bond is grossly insufficient. It argued, thus:

> By enjoining petitioner from conducting the auction sale of the mortgaged property, petitioner has already suffered damages in the amount of P715,077.78 representing filing and publication fees. Yet damages to be incurred by petitioner by reason of the injunction are not limited to filing and publication fees, granting that the case will drag on for more tha[n] a year, which is usually the case. The injunction would deprive petitioner FEBTC of its own income from the foreclosed property or from the proceeds of the foreclosure sale. Obviously it is easily more than P200,000.00 (Rollo, p. 31).

The Court agrees with petitioner that the amount of the bond is insufficient. In Valencia v. Court of Appeals, (263 SCRA 275 [1996]) the Supreme Court explained that the bond is for the protection against loss or damage by reason of the injunction, to wit:

> The said bond was supposed to answer only for damages which may be sustained by private respondents, against whom the mandatory injunction was issued, by reason of the issuance thereof, and not to answer for damages caused by the actuations of petitioner, which may or may not be related at all to the implementation of the mandatory injunction. The purpose of the injunction bond is to protect the defendant against loss or damage by reason of the injunction in case the court finally decides that the plaintiff was not entitled to it, and the bond is usually conditioned accordingly. Thus, the bondsmen are obligated to account to the defendant in the injunction suit for all damages, or costs and reasonable counsel's fees incurred or sustained by the latter in case it is determined that the injunction was wrongfully issued. (263 SCRA 288-289)

Private respondent's contention that considering the market value of the property, the bond is reasonable and proper (Rollo, p. 240) cannot be upheld considering that no proof of the value of the property was even presented to buttress this assertion.

However, the insufficiency of the amount of the bond prescribed by the trial court does not warrant the lifting of the writ of injunction. The Court notes that under Section 7, Rule 58 of the 1997 Rules of Civil Procedure the applicant, in case the bond is insufficient, may still file one sufficient in amount, to wit:

> Sec. 7. Service of copies of bond; effect of disapproval of same. - - x x x. If the applicant's bond is found to be insufficient in amount, or if the surety or sureties thereon fail to justify, and a bond sufficient in amount with sufficient sureties approved after justification is not filed forthwith, the injunction shall be dissolved. x x x.

The Court considers a bond of Five Million Pesos (P5,000,000.00) to be more appropriate in the present case.

WHEREFORE, considering the foregoing premises the petition for certiorari is DENIED; however, private respondent is ordered to file an injunctive bond in the amount of P5,000,000.00.

SO ORDERED.[5]

Petitioner filed a motion for reconsideration which was denied in a resolution dated April 3, 2000 by the Court of Appeals on the ground that all the matters raised in the motion for reconsideration had already been passed upon in the decision.[6]

Petitioner filed the instant petition for review on certiorari questioning the August 26, 1999 decision and the April

3, 2000 resolution. The following issues were raised by petitioner:

> 3.1 Whether the Honorable Court of Appeals can resolve the issue of the sufficiency of demand.
>
> 3.2 Whether private respondent Go is entitled to a temporary restraining order and a writ of preliminary injunction.
>
> 3.3 Whether the Complaint of private respondent Go has been rendered moot and academic.

For the purpose of clarity, the issues are restated thus:

> - Whether or not the private respondent was entitled to the TRO and writ of preliminary injunction.
>
> - Whether or not the TRO and writ of preliminary injunction were properly issued by Judge Victorio.

On the first issue, this Court finds that private respondent was not entitled to the TRO and the writ of preliminary injunction. Section 3 of Rule 58 of the Rules of Court provides the grounds for the issuance of a preliminary injunction, to wit:

> A preliminary injunction may be granted when it is established:
>
> (a) That the applicant is entitled to the relief demanded, and the whole or part of such relief consists in restraining the commission or continuance of the act or acts complained of, or in requiring the performance of an act or acts, either for a limited period or perpetually;
>
> (b) That the commission, continuance or non-performance of the act or acts complained of during the litigation would probably work injustice to the applicant; or
>
> (c) That a party, court, agency or person is doing, threatening, or is attempting to do, or is procuring or suffering to be done, some act or acts probably in violation of the rights of the applicant respecting the subject of the action or proceeding, and tending to render the judgment ineffectual.

As will be discussed below, private respondent is not entitled to the relief of injunction against the extrajudicial foreclosure and auction sale. Neither are the extrajudicial foreclosure and auction sale violative of private respondent's rights.

Private respondent claimed that demand was not made upon him, in spite of the fact that he co-signed the promissory notes. He also argues that only four of the eight promissory notes secured by the mortgage had become due. A reading of the promissory notes discloses that as co-signor, private respondent waived demand. Furthermore, the promissory notes contain an acceleration clause, to wit:

> Upon the happening of any of the following events, FAR EAST BANK AND TRUST COMPANY or the holder, may at its option, forthwith accelerate maturity and the unpaid balance of the principal, as well as interest and other charges which have accrued, shall become due and payable without demand or notice[:] (1) default in payment or performance of any obligation of any of the undersigned to FAR EAST BANK AND TRUST COMPANY or its affiliated companies;
>
> x x x
>
> I/We hereby waive any diligence, presentment, demand, protest or notice of non-payment o[r] dishonor with

> respect to this note or any extension thereof.[7] (Emphasis added)

The Civil Code in Article 1169[8] provides that one incurs in delay or is in default from the time the obligor demands the fulfillment of the obligation from the obligee. However, the law expressly provides that demand is not necessary under certain circumstances, and one of these circumstances is when the parties expressly waive demand. Hence, since the co-signors expressly waived demand in the promissory notes, demand was unnecessary for them to be in default.

Private respondent further argues that by withholding the lease payments Far East Bank and Trust Company (FEBTC) owed Noah's Ark for the space FEBTC was leasing from Noah's Ark and applying said amounts to the outstanding obligation of Noah's Ark, as expressed in a letter from FEBTC dated May 19, 1998,[9] FEBTC has waived default, novated the contract of loan as embodied in the promissory notes and is therefore estopped from foreclosing on the mortgaged property.

This Court disagrees. FEBTC's act of withholding the lease payments and applying them to the outstanding obligation of Noah's Ark is merely an acknowledgement of the legal compensation that occurred by operation of law between the parties. The Court has expounded on compensation and more specifically on legal compensation as follows:

> x x x compensation is a mode of extinguishing to the concurrent amount the obligations of persons who in their own right and as principals are reciprocally debtors and creditors of each other. Legal compensation takes place by operation of law when all the requisites are present, as opposed to conventional compensation which takes place when the parties agree to compensate their mutual obligations even in the absence of some requisites.[10]

The Civil Code enumerates the requisites of legal compensation, thus:

> Art. 1278. Compensation shall take place when two persons, in their own right, are creditors and debtors of each other.
>
> Art. 1279. In order that compensation may be proper, it is necessary:
>
> (1)
>
> That each one of the obligors be bound principally, and that he be at the same time a principal creditor of the other;
>
> (2)
>
> That both debts consist in a sum of money, or if the things due are consumable, they be of the same kind, and also of the same quality if the latter has been stated;
>
> (3)
>
> That the two debts be due;
>
> (4)
>
> That they be liquidated and demandable;

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(5)

That over neither of them there be any retention or controversy, commenced by third persons and communicated in due time to the debtor.

It is clear from the facts that FEBTC and Noah's Ark are both principal obligors and creditors of each other. Their debts to each other both consist in a sum of money. As discussed above, the eight promissory notes of Noah's Ark are all due; and the lease payments owed by FEBTC become due each month. Noah's Ark's debt is liquidated and demandable; and FEBTC's lease payments are liquidated and are demandable every month as they fall due. Lastly, there is no retention or controversy commenced by third persons over either of the debts.

Novation did not occur as private respondent argued. The Court has declared that a contract cannot be novated in the absence of a new contract executed between the parties.[11] The legal compensation, which was acknowledged by FEBTC in its May 19, 1998 letter, occurred by operation of law, as discussed above. As a consequence, it cannot be considered a new contract between the parties. Hence, the loan agreement, as embodied in the promissory notes and the real estate mortgage, subsists.

Since the compensation between the parties occurred by operation of law, FEBTC did not waive Noah's Ark's default.

As a result of the absence of novation or waiver of default, FEBTC is therefore not estopped from proceeding with the foreclosure.

Private respondent further argues in his memorandum that FEBTC was in bad faith when it initiated the foreclosure proceedings because Noah's Ark had been requesting for accounting and reconciliation of its account and the application of interest payment, and that there were on-going negotiations with FEBTC for the settlement and restructuring of the loan obligation. From the evidence on hand, it is clear that FEBTC was acting within its rights. Private respondent did not present any other agreement signed by the parties subsequent to the promissory notes and mortgage contract which can be considered as replacing, altering, or novating the contractual rights between the parties. Even if Noah's Ark was trying to seek an accounting and reconciliation of its account and even if it was trying to negotiate a restructuring of its loan obligation, it cannot deny the fact that it had already defaulted on the entire loan obligation. This gave FEBTC the right to exercise its contractual rights to foreclose on the security of the debt, which in this case was the real estate mortgage subject of this case. FEBTC was therefore just exercising its contractual rights when it initiated foreclosure proceedings and cannot be considered to have acted in bad faith.

With regard to the second issue, this Court finds that the TRO and the writ of preliminary injunction were improperly issued by Judge Victorio. First of all, on substantive grounds, as discussed above, private respondent was not entitled to the TRO and the writ of preliminary injunction.

Second, the issuance of the TRO was, on procedural grounds, irregular. Section 5, Rule 58 of the Rules of Civil Procedure provides:

Preliminary injunction not granted without notice; exception. - No preliminary injunction shall be granted without hearing and prior notice to the party or person sought to be enjoined. If it shall appear from facts shown by affidavits or by the verified application that great or irreparable injury would result to the applicant before the matter can be heard on notice, the court to which the application for preliminary injunction was made, may issue a temporary restraining order to be effective only for a period of twenty (20) days from notice to the party or person sought to be enjoined. Within the said twenty-day period, the court must order said party or person to show cause, at a specified time and place, why the injunction should not be granted, determine within the same period whether or not the preliminary injunction shall be granted, and accordingly issue the

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> corresponding order.

Judge Victorio, in an order dated April 14, 1998, issued a TRO for five days, then, in an order dated April 15, 1998, extended it for fifteen more days, totaling twenty days. However, in the first order, Judge Victorio excluded Saturdays and Sundays; and in the latter order he added legal holidays to the exclusions. As quoted above, a TRO is effective only for aperiod of twenty days from notice to the party sought to be enjoined. The rule does not specify that the counting of the twenty-day period is only limited to working days or that Saturdays, Sundays and legal holidays are excluded from the twenty-day period. The law simply states twenty days from notice. Section 1, Rule 22 of the Rules of Court is pertinent, to wit:

> How to compute time. - In computing any period of time prescribed or allowed by these Rules, or by order of the court, or by any applicable statute, the day of the act or event from which the designated period of time begins to run is to be excluded and the date of performance included. If the last day of the period, as thus computed, falls on a Saturday, a Sunday, or a legal holiday in the place where the court sits, the time shall not run until the next working day.

It is clear from the last sentence of this section that non-working days (Saturdays, Sundays and legal holidays) are excluded from the counting of the period only when the last day of the period falls on such days. The Rule does not provide for any other circumstance in which non-working days would affect the counting of a prescribed period. Hence, Judge Victorio exceeded the authority granted to lower courts, in Section 5, Rule 58 of the Rules of Court, when he excluded non-working days from the counting of the twenty-day period.

In sum, private respondent was not entitled to the TRO nor to the preliminary injunction, and the period granted in the TRO issued by Judge Victorio exceeded that prescribed in the Rules of Court.

WHEREFORE, the petition is GRANTED and the decision[12] and resolution[13] of the Court of Appeals dated August 26, 1999 and April 3, 2000, respectively, are PARTIALLY REVERSED and SET ASIDE, retaining only the portion which increases the amount of the injunctive bond to Five Million Pesos (P5,000,000). The writ of preliminary injunction issued by Judge Urbano C. Victorio, Sr., in an order[14] dated May 7, 1998 in Civil Case No. 98-88266, is hereby DISSOLVED. No costs.

SO ORDERED.

Puno, (Chairperson), Sandoval-Gutierrez, Corona, and Garcia, JJ., concur.

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[1] By virtue of a merger of the Bank of the Philippine Islands and Far East Bank and Trust Company the corporate life of the latter has terminated and the merged entity is now called Bank of the Philippine Islands; See, Manifestation and Urgent Motion for Extension of Time, dated April 25, 2000; CA Rollo, unnumbered.[2] Rollo, p. 39.[3] Records, p. 60.[4] Rollo, pp. 39-41.[5] Rollo, pp. 41-45.[6] Id. at 47.[7] Rollo, pp. 50-57.[8] ART. 1169. Those obliged to deliver or to do something incur in delay from the time the obligee judicially or extrajudicially demands from them the fulfillment of their obligation.

However, the demand by the creditor shall not be necessary in order that delay may exist:

(1) When the obligation or law expressly so declare; x x x.[9]NOAH'S ARK BUILDING
Escolta, Manila
Attention : MS. JULIET T. GO
Administrator

This is to inform you that in view of the non-payment of Noah's Ark Merchandising of its loan obligation with Far

East Bank and Trust Company, we have withheld the February 1998 to May 1998 rental payments to your office and have correspondingly applied said amount to the outstanding obligation of Noah's Ark Merchandising. We will continue to do so for the succeeding months until such time said loan is fully settled.

Please note that we have not been delinquent in our rental payments and should not be charged with penalties for non-remittance of the same. x x x [10] PNB MEDECOR v. Uy, 415 Phil. 348, 359 (2001).[11] Bert Osmeña & Associates Inc. v. CA, 205 Phil. 328 (1983); Tiu Siuco v. Habana, 45 Phil. 707 (1924).[12] Rollo, pp. 38-45.[13] Id. at 47.

[14] Records, pp. 113-115.

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