STRONGWORLD CONSTRUCTION CORPORATION, LEO CLETO A. GAMOLO, AND REYNOLD P. MOLO, PETITIONERS,VS. HON. N.C. PERELLO IN HER CAPACITY AS PRESIDING JUDGE OF BRANCH 276 OF THE REGIONA...

G.R. NO. 148026. July 27, 2006

Ponente: CHICO-NAZARIO, J.

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CHICO-NAZARIO, J.:

Before Us is a Petition for Review on Certiorari, seeking to set aside the Decision[1] and Resolution[2] of the Court of Appeals in CA-G.R. SP. No. 49462, dated 24 May 2000 and 2 April 2001, respectively.

The Antecedents

Petitioner Strongworld Construction Corporation (Strongworld) is a domestic corporation engaged in the business of construction. Petitioners Leo Cleto A. Gamolo (Gamolo) and Reynold P. Molo (Molo) are members of the Board of Directors of petitioner Strongworld. On 31 October 1997, petitioners filed a Complaint[3] for Sum of Money and Damages with the Regional Trial Court (RTC) of Muntinlupa City, Branch 276, presided over by the Hon. N. C. Perello, and docketed as Civil Case No. 97-222, against private respondents First People's Bank (formerly known as Rural Bank of San Teodoro), Bank of Commerce, Orlando O. Francisco (Francisco), and Editha Lizarda (Lizarda).

In their Complaint, petitioners alleged, inter alia, that: in 1996, Rizal Cement Company, Inc. delivered to petitioner Strongworld four (4) checks[4] as payment for the construction of housing units;[5] at the time of the issuance of the aforesaid checks, petitioner Strongworld maintained a single account with private respondent Bank of Commerce, San Pedro Branch,[6] with private respondents Francisco, former president of petitioner Strongworld, and its incumbent president, petitioner Gamolo as authorized signatories; the subject checks were not deposited to the account of petitioner Strongworld; instead, private respondents Francisco and Lizarda, conspiring and confederating between themselves and with the employees of private respondent First People's Bank, maliciously and fraudulently diverted the checks to their personal accounts, specifically First People's Bank Savings Account No. 51-03025-5, without the knowledge and consent of petitioners Gamolo and Molo, and without authority from the Board of Directors of petitioner Strongworld;[7] and that repeated demands against the private respondents were not heeded resulting in the damage and prejudice of petitioners.

The petitioners prayed for the following reliefs:

> WHEREFORE, it is respectfully prayed that judgment be rendered as follows:
>
> - Ordering the defendants to pay plaintiff Strongworld, jointly and severally, the amount of P5,085,615.22 constituting the value of plaintiff corporation's checks, and P3,000,000.00, constituting lost profits, interest and other expenses which resulted by reason of the illegal acts of defendants.
>
> - Ordering defendants to pay plaintiffs, jointly and severally, a) P3,000,000.00 by way of moral damages

> divided as follows: i) plaintiff Gamolo P1,500,000.00, ii) plaintiff Molo P750,000.00, and iii) plaintiff Strongworld P750,000.00; b) P100,000.00 exemplary damages; and c) P200,000.00 attorney's fees.
>
> Other reliefs just and equitable under the premises are likewise prayed for.[8]

On 2 December 1997, private respondent Bank of Commerce filed an Answer with Cross-Claim,[9] praying for the dismissal of the Complaint. Subsequent thereto, private respondent Lizarda filed an Answer with Counterclaim and Cross-Claim,[10] dated 12 December 1997. On 11 December 1997, private respondent First People's Bank filed a Motion to Dismiss[11] on the grounds that petitioners Gamolo and Molo had no legal capacity to sue, and that the Complaint stated no cause of action. On 9 January 1998, petitioners filed an Opposition to Motion to Dismiss.[12]

On 9 January 1998, the court a quo rendered an Order[13] dismissing the Complaint. We quote the pertinent portion hereunder:

> From the allegations of the COMPLAINT, it appears that money sought to be recovered belongs to the Corporation and who allegedly was damaged due to the unauthorized expenditure of this sum. Therefore, Plaintiff Leo Cleto A. Gamolo and Reynaldo P. Molo, although, admittedly are officers of the corporation appear to have instituted this action for and in behalf of the corporation, yet their authority to sue or defend the corporation has not been shown in this COMPLAINT. No Board Resolution for this purpose has been attached or recited in it. Thus this complaint is not prosecuted by the proper property in interest.[14]

On 30 January 1998, petitioners filed a Motion for Reconsideration[15] which was opposed by private respondent First People's Bank.[16]

On 30 March 1998, the trial court granted petitioners' Motion for Reconsideration, and consequently, ordered the case reinstated.[17] According to the court a quo, the board resolution authorizing petitioner Gamolo to prosecute the case in behalf of petitioner Strongworld was defective for not having been authenticated by the proper officer.[18] However, notwithstanding the defect in the resolution, the court a quo held that the intention of petitioner Strongworld to authorize Gamolo to prosecute the case against private respondents is clear.[19] On 30 April 1998, private respondent First People's Bank filed a Motion for Reconsideration[20] of the 30 March 1998 Order, praying for the dismissal of the Complaint. On 25 May 1998, petitioners belatedly filed an Opposition[21] thereto.

In the interim, on 7 May 1998, the court a quo issued an Order,[22] recalling its Order of 30 March 1998. The trial court declared that the case should remain dismissed on the ground that petitioners' Motion for Reconsideration of the Order dated 9 January 1998, dismissing the Complaint, was not served on private respondents Bank of Commerce, Francisco and Lizarda.[23] Moreover, the trial court opined that it was in error when it considered petitioners' Motion for Reconsideration, as no proof of service to private respondents was shown therein, and the same lacked a notice of hearing, which defects rendered the aforesaid Motion for Reconsideration, a mere scrap of paper.[24]

Subsequently, petitioners apparently filed a Motion for Reconsideration of the 7 May 1998 Order, a copy of which cannot be found on the records. On 29 May 1998, the court a quo rendered an Order,[25] denying the motion and finding no reason to reconsider its Order of 7 May 1998.

On 15 June 1998, petitioners filed a Motion for Clarification and/or Reconsideration and for Declaration of Default.[26] They sought, inter alia, for clarification of the Order dated 7 May 1998, positing that the dismissal should only pertain to private respondent First People's Bank. They also prayed that the 7 May 1998 Order be declared as superseded by the Order of 29 May 1998. In the alternative, they prayed that the 7 May 1998 Order be reconsidered and set aside, that the Complaint be reinstated, and that private respondents First People's Bank and

Francisco be declared in default.[27]

Resolving petitioners' Motion for Clarification, the trial court issued an Order[28] in open court, dated 17 July 1998, reiterating that the case should remain dismissed as petitioners' Motion for Reconsideration was defective, and hence, unbinding against the Order of 7 May 1998. Similarly, the trial court corrected the Order of 29 May 1998 to refer to the Order of 7 May 1998, which sustained the dismissal of the case.[29] The court a quo reasoned, thus:

> Even as the MOTION FOR RECONSIDERATION by the Plaintiff was not assailed by the other Defendant, but due to lack of notification, this Motion should not have been received by the Court at all, therefore [it] is a mere scrap of paper which requires no ruling.
>
> - A motion that does not contain a notice of hearing is a mere scrap of paper, it represents no question which merits the attention of the Court. (Goldloop Properties, Inc. vs. Court of Appeals, 212 SCRA 498).
>
> - Rule 15, Sec. 4. Hearing of motion- Except for motions which the Court may act upon without prejudicing the rights of the adverse party, every written motion shall be set for hearing by the applicant.
>
> - Every written motion required to be heard and the notice of the hearing thereof shall be served in such a manner to ensure its receipt by the other party at least three (3) days before the date of hearing unless the Court for good cause sets the hearing on shorter notice.
>
> - Sec. 5, Notice of hearing - The notice of hearing shall be addressed to all parties concerned, and shall specify the time and date of the hearing which must not be later than ten (10) days after the filing of the motion.
>
> - Sec. 6, Proof of service necessary - No written motion set for hearing shall be acted upon by the Court without proof of service thereof.
>
> - Any motion that does not contain proof of service of notice to the other party is not entitled to judicial cognizance. (Cui vs. Madayag, 245 SCRA 1).[30]

Aggrieved, petitioners filed a Petition for Certiorari with the Court of Appeals, assailing the Orders of the RTC dated 7 May 1998 and 17 July 1998. The Petition likewise sought to annul the Order of the RTC dated 9 January 1998, dismissing the Complaint, which was later revived by the Order of 7 May 1998.

The Ruling of the Court of Appeals

The Court of Appeals dismissed petitioners' Petition for Certiorari for utilizing the wrong recourse of certiorari, instead of an ordinary appeal. The appellate court said that the Complaint was finally dismissed on 17 July 1998. Thus, citing Denso (Phils.), Inc. v. Intermediate Appellate Court,[31] it held that the dismissal of the Complaint is a final order which disposed of the action, and the remedy of a party aggrieved of a final order or judgment is appeal under Section 1, Rule 41 of the 1997 Revised Rules of Civil Procedure, and not a special civil action of certiorari under Rule 65 thereof.[32]

In dismissing the Petition, the Court of Appeals, in part, declared:

> As earlier said, however Our Supreme Court has held that if a party essays a course by the wrong procedure, the only recourse of action open is to dismiss the case (Murillo vs. Rodolfo Consul, UDK 9748, 182 SCRA XI (sic)). The remedy of appeal being available to the petitioners, it cannot resort to Certiorari (Felizardo vs. Court of Appeals, 233 SCRA 220).
>
> It is settled that a special civil action for certiorari will not lie as a substitute for the last (sic) remedy of appeal (Dela Paz v. Panis, 245 SCRA 242) and we find no special nor compelling reasons why we should make out this case as an exception.[33]

Petitioners moved for Reconsideration[34] thereon, but the same was denied by the Court of Appeals in the assailed Order promulgated on 2 April 2001.

Assignment of Errors

Hence, petitioners come to us via the instant Petition for Review, submitting that the Court of Appeals erred, viz:

I.

> IN RULING THAT APPEAL IS THE PROPER REMEDY AND PETITION FOR CERTIORARI IS NOT AVAILABLE IN THE PRESENT CASE;
>
> II.
>
> IN NOT FINDING THAT APPEAL IS NOT THE REMEDY WITH RESPECT TO PETITIONER'S (sic) MOTION FOR CLARIFICATION;
>
> III.
>
> IN NOT FINDING THAT THE TRIAL COURT ABUSED ITS DISCRETION IN NOT REINSTATING THE COMPLAINTS (sic) AND IN FAILING TO CONSIDER THAT THE TRIAL COURT GRAVELY ERRED IN: 1) DISMISSING THE COMPLAINT ON THE GROUND THAT A BOARD RESOLUTION WAS NOT RECITED IN OR ATTACHED TO THE COMPLAINT; 2) IN DISMISSING THE COMPLAINT EVEN AGAINST THE RESPONDENTS WHO DID NOT FILE A MOTION TO DISMISS AND WHO DID NOT RAISE THE SAME GROUNDS RELIED UPON BY THE TRIAL COURT IN DISMISSING THE COMPLAINT; 3) IN REINSTATING ITS JANUARY 9, 1998 ORDER AND IN NOT RECALLING THE JANUARY 9, 1998.[35]

Issue

For our resolution is whether the appellate court was in error when it dismissed petitioners' Petition for Certiorari on the ground that appeal was the appropriate remedy under Rule 41 of the 1997 Revised Rules of Civil Procedure, and not a Petition for Certiorari, under Rule 65 thereof.

The Court's Ruling

At the outset, attention must be called to Section 1, Rule 41 of the 1997 Revised Rules of Civil Procedure, to wit:

> SECTION 1. Subject of appeal. - An appeal may be taken from a judgment or final order that completely disposes of the case, or of a particular matter therein when declared by these Rules to be appealable:
>
> No appeal may be taken from:
>
> (a) An order denying a motion for new trial or reconsideration;
>
> (b) An order denying a petition for relief or any similar motion seeking relief from judgment;
>
> (c) An interlocutory order;
>
> (d) An order disallowing or dismissing an appeal;
>
> (e) An order denying a motion to set aside a judgment by consent, confession or compromise on the ground of fraud, mistake or duress, or any other ground vitiating consent;
>
> (f) An order of execution;
>
> (g) A judgment or final order for or against one or more of several parties or in separate claims, counterclaims,

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> cross-claims and third-party complaints, while the main case is pending, unless the court allows an appeal therefrom; and
>
> (h) An order dismissing an action without prejudice;
>
> In all the above instances where the judgment or final order is not appealable, the aggrieved party may file an appropriate special civil action under Rule 65.

From the foregoing, it is evident that under Section 1(h), Rule 41, no appeal may be taken from an order dismissing an action without prejudice. In such a case, the 1997 Revised Rules of Civil Procedure states that the remedy available to the aggrieved party is to file an appropriate special civil action under Rule 65.

Jurisprudence has similarly underscored that with the advent of the 1997 Revised Rules of Civil Procedure, an order of dismissal without prejudice is no longer appealable, as expressly provided by Section 1(h), Rule 41 thereof. In Philippine Export and Foreign Loan Guarantee Corporation v. Philippine Infrastructures, Inc.,[36] this Court had the opportunity to resolve whether an order dismissing a petition without prejudice should be appealed by way of ordinary appeal, petition for review on certiorari or a petition for certiorari. The Court said that, indeed, prior to the 1997 Revised Rules of Civil Procedure, an order dismissing an action may be appealed by ordinary appeal.[37] Verily, Section 1, Rule 41 of the 1997 Revised Rules of Civil Procedure recites the instances when appeal may not be taken, specifically, in case of an order dismissing an action without prejudice, in which case, the remedy available to the aggrieved party is Rule 65.

Thus, the question is: was the Order of the RTC, dated 7 May 1998, reviving the 9 January 1998 Order, which dismissed the Complaint, an order dismissing an action without prejudice?

We distinguish a dismissal with prejudice from a dismissal without prejudice. The former disallows and bars the refiling of the complaint; whereas, the same cannot be said of a dismissal without prejudice.[38] Likewise, where the law permits, a dismissal with prejudice is subject to the right of appeal.[39]

To resolve the issue before us, it is critical to examine the Order of dismissal rendered by the court a quo. It can be recalled that on 9 January 1998, the trial court issued an Order dismissing petitioners' Complaint, on the ground that petitioners Gamolo and Molo had not shown their authority to sue for and in behalf of petitioner Strongworld. Subsequently, on petitioners' Motion for Reconsideration, the RTC reconsidered its 9 January 1998 Order of dismissal. Hence, on 30 March 1998, the RTC ordered the case reinstated. However, on 7 May 1998, upon Motion for Reconsideration of private respondent First People's Bank, the court a quo recalled the Order of 30 March 1998. The recall by the court a quo of the Order dated 30 March 1998 reinstated the Order dated 9 January 1998, which dismissed the Complaint. Finally, on 17 July 1998, the court a quo, upon petitioners' Motion for Clarification, enunciated that the Order of 7 May 1998, dismissing the case, is sustained.

As can be gleaned therefrom, the trial court's order of dismissal of 9 January 1998, was founded on the ground that the action was not instituted by the proper party in interest.[40] The trial court held that petitioners Gamolo and Molo, although admittedly officers of petitioner Strongworld, appear to have instituted the action for and in behalf of petitioner Strongworld, yet, their authority to sue or defend the corporation had not been shown in the Complaint.[41] No board resolution for the purpose had been attached or recited in the Complaint.[42]

Jurisprudence states that if the suit is not brought in the name of, or against, the real party in interest, a Motion to Dismiss may be filed on the ground that the Complaint states no cause of action.[43] Section 1(g), Rule 16 of the 1997 Revised Rules of Civil Procedure allows the filing of a Motion to Dismiss on the ground that the Complaint states no cause of action. Thus, in Aguila, Jr. v. Court of Appeals,[44] we pronounced:

> A real party in interest is one who would be benefited or injured by the judgment, or who is entitled to the

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> avails of the suit. This ruling is now embodied in Rule 3, Section 2 of the 1997 Revised Rules of Civil Procedure. Any decision rendered against a person who is not a real party in interest in the case cannot be executed. Hence, a complaint filed against such a person should be dismissed for failure to state a cause of action.[45]

Section 1, Rule 16 of the 1997 Revised Rules of Civil Procedure enumerates the grounds for which a Motion to Dismiss may be filed, viz.:

> SECTION 1. Grounds. - Within the time for but before filing the answer to the complaint or pleading asserting a claim, a motion to dismiss may be made on any of the following grounds:
>
> (a) That the court has no jurisdiction over the person of the defending party;
>
> (b) That the court has no jurisdiction over the subject matter of the claim;
>
> (c) That venue is improperly laid;
>
> (d) That the plaintiff has no legal capacity to sue;
>
> (e) That there is another action pending between the same parties for the same cause;
>
> (f) That the cause of action is barred by a prior judgment or by the statute of limitations;
>
> (g) That the pleading asserting the claim states no cause of action;
>
> (h) That the claim or demand set forth in the plaintiff's pleading has been paid, waived, abandoned, or otherwise extinguished;
>
> (i) That the claim on which the action is founded is unenforceable under the provisions of the statute of frauds; and
>
> (j) That a condition precedent for filing the claim has not been complied with.

Section 5 of the same Rule, recites the effect of a dismissal under Sections 1(f),[46] (h),[47] and (i),[48] thereof, thus:

> SEC. 5. Effect of dismissal. - Subject to the right of appeal, an order granting a motion to dismiss based on paragraphs (f), (h), and (i) of section 1 hereof shall bar the refiling of the same action or claim.

Briefly stated, dismissals that are based on the following grounds, to wit: (1) that the cause of action is barred by a prior judgment or by the statute of limitations; (2) that the claim or demand set forth in the plaintiff's pleading has been paid, waived, abandoned or otherwise extinguished; and (3) that the claim on which the action is founded is unenforceable under the provisions of the statute of frauds, bar the refiling of the same action or claim. Logically, the nature of the dismissal founded on any of the preceding grounds is "with prejudice" because the dismissal prevents the refiling of the same action or claim. Ergo, dismissals based on the rest of the grounds enumerated are without prejudice because they do not preclude the refiling of the same action.

Verily, the dismissal of petitioners' Complaint by the court a quo was not based on any of the grounds specified in Section 5, Rule 16 of the 1997 Revised Rules of Civil Procedure; rather, it was grounded on what was encapsulated in Section 1(g), Rule 16 of the 1997 Revised Rules of Civil Procedure. As the trial court ratiocinated in its 9 January 1998 Order, the Complaint is not prosecuted by the proper party in interest.[49] Considering the heretofore discussion, we can say that the order of dismissal was based on the ground that the Complaint states no cause of action. For this reason, the dismissal of petitioners' Complaint cannot be said to be a dismissal with prejudice which bars the refiling of the same action.

As has been earlier quoted, Section 1(h), Rule 41 of the 1997 Revised Rules of Civil Procedure mandates that no appeal may be taken from an order dismissing an action without prejudice. The same section provides that in such an instant where the final order is not appealable, the aggrieved party may file an appropriate special civil action under Rule 65.

The appellate court erred, thus, when it pronounced in its Decision of 24 May 2000 that petitioners' remedy is appeal under Section 1, Rule 41 of the 1997 Revised Rules of Civil Procedure.

A Petition for Certiorari under Rule 65 is available in cases when there is no appeal, nor any plain, speedy, and adequate remedy in the ordinary course of law. In the case at bar, appeal of the 7 May 1998 Order, reviving the Order of 9 January 1998, which dismissed petitioners' Complaint, and as reiterated in the 17 July 1998 Order is not a remedy available to petitioners as aggrieved parties.

In sum, the appellate court erred when it ruled that petitioners' Petition for Certiorari filed before it was not the proper remedy. The dismissal of the Complaint being without prejudice, the remedy available to the aggrieved party is Rule 65.

WHEREFORE, the petition is GRANTED. The Decision and Resolution of the Court of Appeals in CA-G.R. SP. No. 49462, dated 24 May 2000 and 2 April 2001 are hereby REVERSED and SET ASIDE. This case is REMANDED to the Court of Appeals which is directed to hear and decide petitioners' Petition for Certiorari with utmost dispatch. No costs against petitioners.
SO ORDERED.

Panganiban, C.J., (Chairperson), Ynares-Santiago, Austria-Martinez, and Callejo, Sr., JJ., concur.

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[1] Penned by Associate Justice Mariano M. Umali with Associate Justices Conrado M. Vasquez, Jr. and Eriberto U. Rosario, Jr., concurring; Rollo, pp. 34-38.

[2] Penned by Associate Justice Eriberto U. Rosario, Jr. with Associate Justices Conrado M. Vasquez, Jr. and Remedios Salazar-Fernando, concurring; Id. at 40.

[3] Records, Vol. I, pp. 1-8.

[4] Id. at 3. The particulars of the four checks are as follows:

Date Name of Bank Check No. Amount

04/22/96 CityTrust Bank -
Taytay Branch 049895 P1,914,412.92

5/10/96 Metrobank-
Salcedo, Makati 2740022318 P1,169,272.73

6/17/96 Asian Bank Corp.-
Legaspi Village II Branch LV0000189250 P1,405,249.34

9/13/96 RCBC - EDSA
Taft Branch
042144 P 596,680.23

TOTAL
P5,085,615.22

[5] Id.

[6] Id.

[7] Id. at 3-4.

[8] Id. at 6-7.

[9] Id. at 49-53.

[10] Id. at 74-88.

[11] Id. at 109-112.

[12] Id. at 113-115.

[13] Id. at 120.

[14] Id.

[15] Id. at 124-130.

[16] Id. at 146-149.

[17] Id. at 152.

[18] Id.

[19] Id.

[20] Id. at 155-158.

[21] Id. at 168-170.

[22] Id. at 166.

[23] Id.

[24] Id.

[25] Id. at 172. The Order erroneously referred to the Order of 7 May 1998, as Order dated March 20, 1998. See Order dated 17 July 1998; Id. at 188.

[26] Id. at 173-177.

[27] Id. at 176.

[28] Id. at 187-188.

[29] Supra note 25.

[30] Records, Vol. I., p. 187.

[31] G.R. No. L-75000, 27 February 1987, 148 SCRA 280.

[32] CA rollo, pp. 138-139.

[33] Id. at 140.

[34] Id. at 143-149.

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[35] Rollo, pp. 20-21.

[36] G.R. No. 120384, 13 January 2004, 419 SCRA 6.

[37] In Philippine Export, the Court cited the cases of Lucas v. Hon. Mariano, 150-A Phil. 296, 309 (1972); and Vda. de Haberer v. Martinez, 159 Phil. 200, 210-211 (1975) whereby appeal was allowed from an order dismissing an action. The aforecited cases were decided prior to the effectivity of the 1997 Rules of Civil Procedure. The 1997 Rules of Civil Procedure (Rule 1-71) became effective 1 July 1997, per resolution of the Supreme Court in Bar Matter No. 803 adopted in Baguio City on 8 April 1997.

[38] Under Section 5, Rule 16 of the 1997 Revised Rules of Court, dismissal on Motion to Dismiss shall bar the refilling of the same action or claim in the following cases, to wit:

(a) The cause of action is barred by a prior judgment or by the statute of limitations;
(b) The claim or demand set forth in the plaintiff's pleading has been paid, waived, abandoned or otherwise extinguished;
(c) The claim on which the action is founded is unenforceable under the provisions on the statute of frauds.

[39] Section 5 , Rule 16 of the 1997 Revised Rules of Court reads:
SEC. 5. Effect of dismissal. - Subject to the right of appeal, an order granting a motion to dismiss based on paragraphs (f), (h) and (i) of section 1 hereof shall bar the refiling of the same action or claim. (Underscoring supplied.)

[40] Section 2, Rule 3 of the 1997 Rules of Civil Procedure states:

SEC. 2. Parties in interest. - A real party in interest is the party who stands to be benefited or injured by the judgment in the suit, or the party entitled to the avails of the suit. Unless otherwise authorized by law or these Rules, every action must be prosecuted or defended in the name of the real party in interest.

[41] Id.

[42] Id.

[43] Caro v. Sucaldito, G.R. No. 157536, 16 May 2005, 458 SCRA 595, 606, citing cases. See also Shipside Incorporated v. Court of Appeals, G.R. No. 143377, 20 February 2001, 352 SCRA 334, 349; Balagtas v. Court of Appeals, 375 Phil. 480, 489 (1999).

[44] 377 Phil. 257 (1999).

[45] Id. at 266.

[46] Section 1 (f) of Rule 16 of the 1997 Rules of Civil Procedure states:

SECTION 1. Grounds. - Within the time for but before filing the answer to the complaint or pleading asserting a claim, a motion to dismiss may be made on any of the following grounds:

x x x x

(f) That the cause of action is barred by a prior judgment or by the statute of limitations;

[47] Id., (h) That the claim or demand set forth in the plaintiff's pleading has been paid, waived, abandoned, or otherwise extinguished; x x x.

[48] Id., (i) That the claim on which the action is founded is unenforceable under the provisions of the statue of frauds; x x x

[49] Records, Vol. I, p. 120.

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