

**BONIFACIO CONSTRUCTION MANAGEMENT CORPORATION,
PETITIONER, VS. THE HON. ESTELA PERLAS-BERNABE, IN HER
OFFICIAL CAPACITY AS PRESIDING JUDGE OF THE RTC OF MAKATI,
BRANCH 142, AND ...**

G.R. No. 148174. June 30, 2005

Ponente: SANDOVAL-GUTIERREZ, J.

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SANDOVAL-GUTIERREZ, J.:

This is a petition for review on certiorari assailing the Decision[1] of the Court of Appeals dated March 12, 2001 and its Resolution[2] dated May 8, 2001 in CA-G.R. SP No. 62512, entitled "Bonifacio Construction Management Corporation vs. The Honorable Estela Perlas-Bernabe as Presiding Judge, RTC of Makati City, Branch 142 and Gary Cruz."

The facts are as follows:

The Bonifacio Construction Management Corporation, petitioner, is a domestic corporation in charge of the Fort Bonifacio-Kalayaan-Buendia Flyover Project II, while Gary Cruz, private respondent, is a doctor of medicine with a Medical Clinic and Industrial Service Office located at No. 3434 Limbo St., cor. Kalayaan Avenue, Makati City.

On January 5, 1998, the construction of the Fort Bonifacio-Kalayaan-Buendia Flyover in Makati City commenced. Since then, business establishments within the vicinity of the construction site, including respondent's clinic, have been affected by the construction works. As a result, his patients and clients stopped visiting his medical clinic for fear of welding flames from the on-going construction. Furthermore, they could no longer park their vehicles near the medical clinic.

On September 25, 1998, respondent filed a complaint with the Office of the Barangay Chairman of Pinagkaisahan, Makati City.[3] In turn, the latter, in letters dated October 2 and 8, 1998,[4] advised petitioner to take appropriate action thereon. Both letters remained unheeded.

Consequently, on November 17, 1998, respondent sent petitioner a letter[5] demanding payment of P2,000.00 a day for loss of income due to the construction. But petitioner refused to pay, prompting respondent to file with the Regional Trial Court, Branch 142, Makati City a complaint for damages[6] against petitioner, docketed as Civil Case No. 99-521.

Petitioner filed a motion to dismiss[7] on the ground of lack of cause of action and respondent's failure to implead as co-defendant the State, a real party in interest. In an Order[8] dated February 10, 2000, the trial court denied the motion and required petitioner to file an answer.

Instead of filing an answer, petitioner, on February 28, 2000, filed an urgent omnibus motion[9] seeking reconsideration of the trial court's February 10, 2000 Order.

On June 19, 2000, the trial court issued an Order[10] denying petitioner's urgent omnibus motion, holding that the allegations in the complaint constitute a cause of action; and giving petitioner ten (10) days from notice within which to file its answer. On July 3, 2000, petitioner filed its answer.[11]

On August 16, 2000, petitioner filed another motion to dismiss[12] alleging that respondent, as plaintiff, failed to implead the contractor as an indispensable party. In an Order dated September 19, 2000,[13] the trial court denied the motion. Petitioner's subsequent motion for reconsideration was likewise denied.

Thus, petitioner filed with the Court of Appeals a petition for certiorari and/or prohibition under Rule 65 of the 1997 Rules of Court, as amended, alleging that respondent judge acted without jurisdiction or with grave abuse of discretion amounting to lack or excess of jurisdiction when she refused to dismiss the complaint in Civil Case No. 99-521.

On March 12, 2001, the Appellate Court rendered a Decision dismissing the petition for certiorari and/or prohibition. Petitioner filed a motion for reconsideration but the same was denied.

Hence, this petition.

Petitioner basically contends before the Court of Appeals that the trial court acted without or in excess of jurisdiction or with grave abuse of discretion when it denied its second motion to dismiss the complaint dated August 16, 2000 in Civil Case No. 99-521.

The petition for certiorari and prohibition filed by petitioner with the Court of Appeals is not the proper remedy to assail the denial by the trial court of its motion to dismiss. The Order of the trial court denying the motion to dismiss is merely interlocutory. An interlocutory order does not terminate nor finally dispose of the case, but leaves something to be done by the court before the case is finally decided on the merits. It is always under the control of the court and may be modified or rescinded upon sufficient grounds shown at any time before final judgment. This proceeds from the court's inherent power to control its processes and orders so as to make them conformable to law and justice.[14]

In *Indiana Aerospace University vs. Commission on Higher Education*,[15] we held:

"An order denying a motion to dismiss is interlocutory, and so the proper remedy in such a case is to appeal after a decision has been rendered. A writ of certiorari is not intended to correct every controversial interlocutory ruling: It is resorted only to correct a grave abuse of discretion or a whimsical exercise of judgment equivalent to lack of jurisdiction. Its function is limited to keeping an inferior court within its jurisdiction and to relieve persons from arbitrary acts — acts which courts or judges have no power or authority in law to perform. It is not designed to correct erroneous findings and conclusions made by the courts."

Assuming that certiorari is the proper remedy, we find no grave abuse of discretion committed by the trial court in denying petitioner's second motion to dismiss. We thus sustain the ruling of the Court of Appeals:

"xxx xxx xxx

We have carefully examined the records of the case and the pleadings filed and the challenged Orders of public respondent, and We are convinced that the latter cannot be faulted with grave abuse of discretion. By grave abuse of discretion is meant such capricious and whimsical exercise of judgment or is equivalent to lack of jurisdiction and mere abuse of discretion is not enough as it must be grave. (*Tañada vs. Angara*, 272 SCRA 18). There is no such showing on the part of public respondent. On the contrary, it is obvious to Us that public respondent court acted judiciously and with clear observance of due process.

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x x x Indeed the Motion To Dismiss filed by petitioner on August 17, 2000, more than a month after it filed its answer, is not sanctioned by the 1997 Rules of Civil Procedure. Section 1 Rule 16 of said Rules specifically provides that the Motion To Dismiss must be made 'within the time for but before filing the answer to the complaint or pleading asserting a claim' x x x Thus, a Motion To Dismiss may not therefore be made after an answer had already been filed, in keeping with the pronouncement of the Supreme Court in *Lagutan vs. Icao* (224 SCRA 9).

Besides, even granting *arguendo* that the party sought to be impleaded by petitioner is an indispensable party, still, as provided for under Sec. 11, Rule 3 of the 1997 Rules of Civil Procedure 'Neither misjoinder nor joinder of parties is ground for dismissal of an action. Parties may be dropped or added by order of the court' on motion of any party or on its own initiative at any stage of the action and on such terms as are just x x x (*italics for emphasis*). Clearly therefore, the Motion To Dismiss as correctly found by the lower court was procedurally improperly filed, and justifiably denied.

Additionally, by its Motion To Dismiss on the alleged ground of failure to implead or indispensable party, petitioner is dictating to private respondent whom to select as defendant. Such is contrary to the ruling of the Supreme Court in *Bank of America NT & SA vs. CA*, 186 SCRA 417, where it was held thus: (N)one of the defendants has the right to compel said plaintiff to prosecute the action against a party if he does not wish to do so. Of course, the plaintiff will have to suffer the consequences of any error he might commit in exercising his option, for the defendant that he does not implead or drop from the action, may well be an indispensable party. (*Italics for emphasis*).

From the foregoing disquisition therefore, it is all too clear that errors in this case are attributable not to public respondent court but to petitioner. Indeed the Motion To Dismiss it filed suffered from several jurisprudential and procedural flaws which did not escape the judicious scrutiny of public respondent and which correctly acted under such circumstances."

It is a well settled rule that after the trial court denied a motion to dismiss the complaint, the defendant should file an answer, proceed to trial and await judgment before interposing an appeal.

Here, after filing its answer, petitioner should have proceeded to trial. Should the decision of the lower court be adverse to him, his remedy is to appeal.

WHEREFORE, the petition is hereby DENIED. Costs against petitioner.

SO ORDERED.

Panganiban (Chairman), Corona, Carpio Morales, and Garcia, JJ., concur.

[1] Penned by Associate Justice Jose L. Sabio, Jr. and concurred in by Associate Justice Hilarion L. Aquino (retired) and Associate Justice Mercedes Gozo-Dadole; Rollo at 24-30.

[2] Rollo at 31.

[3] *Id.* at 43.

[4] *Id.* at 45 and 46.

[5] *Id.* at 202.

[6] *Id.* at 38.

[7] *Id.* at 48-54.

[8] Id. at 61.

[9] Id. at 62.

[10] Id. at 107.

[11] Id. at 149.

[12] Id. at 108.

[13] Id. at 115.

[14] East Asia Traders Inc. vs. Republic of the Philippines, G.R. No. 152947, July 7, 2004, 433 SCRA 716, 723, citing Bangko Silangan Development Bank vs. Court of Appeals, G.R. No. 110480, June 29, 2001, 360 SCRA 322.

[15] G.R. No. 139371, April 4, 2001, 356 SCRA 367, cited in East Asia Traders Inc. vs. Republic of the Philippines, *ibid.* at 724.

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