

**RUSTICO A. ARDIENTE and ASUNCION PALOMARDIENTE, petitioners,
vs. PROVINCIAL SHERIFF, REGISTER OF DEEDS OF QUEZON and
PENINSULA DEVELOPMENT BANK, respondents.**

G.R. No. 148448. August 17, 2004

Ponente: CARPIO MORALES, J.

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CARPIO MORALES, J.:

In mid-November 1979, the spouses Rustico Ardiente and Asuncion Paloma, together with their son Angel P. Ardiente and the latter's wife Gliceria Ardiente, obtained a loan in the amount of P100,000.00 from the Peninsula Development Bank (the bank) at its main office at Lucena City, to be amortized in six years, on account of which they executed a November 15, 1979 Promissory Note[1] in the same amount.

To secure the payment of the loan, the Ardientes executed in favor of the bank a Real Estate Mortgage[2] on November 14, 1979 over a parcel of land situated at Mabutag, Cawa, Buenavista, Quezon and covered by Transfer Certificate of Title (TCT) No. 29478, and three (3) parcels of land situated at Cadlit, Guinayangan, Quezon and covered by Original Certificate of Title (OCT) No. 0-5961.

Out of the proceeds of the loan, the Ardientes purchased a mini bus costing P81,875.00.

After the bus was in operation for several months, it met an accident in August 1980 as result of which it sustained heavy damages and rendered the Ardientes unable to meet their obligation to the bank. As the Ardientes were later granted by the bank an additional loan of P46,000 for which they executed an October 29, 1981 Promissory Note,[3] the Real Estate Mortgage was amended.

Demands for the payment of their obligation to the bank notwithstanding, the Ardientes failed to settle the same.

The bank thus extra-judicially foreclosed the mortgage and the parcels of land covered thereby were sold at public auction to the bank which was the highest bidder.

The bank later notified the Ardientes by letter of February 24, 1984[4] that they had one (1) year from November 11, 1983 or up to November 11, 1984 to redeem the foreclosed mortgage.

Two days before the period to redeem the foreclosed mortgage expired or on November 9, 1984, the spouses Rustico and Suncion Ardiente filed before the Regional Trial Court (RTC) of Quezon at Gumaca a complaint, denominated as Petition,[5] against the bank, the provincial Sheriff of Quezon, and the Register of deeds of Quezon, for Annulment of Auction Sale with Preliminary Injunction and Damages, anchored to two grounds as reflected in paragraph 16 of the Complaint:

- On two (2) legal grounds, therefore, namely, (a) that it was the defendant, not herein petitioners, who had violated the Real Estate Mortgage and Amended Real Estate Mortgage, and (b) that the requisite of notifying the mortgagors of the intended extra-judicial foreclosure sale was not duly complied with - the FORECLOSURE SALE should be annulled, which had supposedly taken place on November 11, 1983 in the Office of the Provincial Sheriff situated in the courthouse building, National Trial Court, Lucena City wherein

the alleged highest bidder was the defendant for the satisfaction of petitioners' alleged indebtedness of P247,279.14;[6] (Underscoring in the original; emphasis supplied)

As the following allegation in paragraph 15 of the Complaint shows, the Ardiente spouses capitalized on the alleged lack of notice to them of the "judicial foreclosure auction sale."

- And, the unkindest cut of all came up when, without first having been duly notified of an intended extra-judicial foreclosure auction sale, petitioners received a letter from the defendant, under date of February 24, 1984, informing them that "the one (1) year period within which to exercise their right to redeem the foreclosed properties commenced to run on November 11, 1983 to November 11, 1984" (a Xerox copy of which is hereto attached as Annex "A" and made an integral part hereof).[7] (Underscoring supplied)

On the above-quoted allegations in paragraphs 15 and 16 of the Complaint, the bank, in its Answer with Counterclaim, alleged:

x x x

15) Answering respondent admits the allegations contained in paragraph 15 of the petition, with the explanations and qualifications, that petitioners were duly notified of the extra-judicial foreclosure and public auction sale. There was sufficient notice and publication served to all concern[ed] of said public auction sale of the properties offered as collaterals.[8] (Underscoring supplied)

(16) Answering respondent specifically denies the allegations contained in paragraph [16] of the petition. The truth of the matter is that the petitioners have violated the terms and conditions of Real Estate Mortgage, Amended Real Estate Mortgage and that respondent has complied with the requisites of Art. 3135 as amended in relation to the application [for] extra-judicial proceeding of collaterals."[9] (Underscoring supplied)

To the Answer the spouses Ardiente filed a Reply and Answer to Counterclaim.[10]

The Complaint was later amended[11] whereby the spouses Ardiente alleged that, among other things, the purchase price of the mortgaged parcels of land was so "grossly and greatly inadequate," hence, the foreclosure sale should be annulled; by reason of the unlawful foreclosure of the real estate mortgage, they suffered damages; and to protect their interests, they filed a formal request with the Register of Deeds to cause a notice of lis pendens.

In compliance with the directive of Branch 61 of the Gumaca RTC, the parties submitted their respective memoranda.

In their memorandum, the defendants bank et al. proffered the following pertinent argument on the Ardiente spouses' claim that they were not previously notified of the foreclosure:

[I]t is maintained that there was notice, coupled with a publication of Notice of Public Auction Sale in a newspaper of general circulations (sic) supported by publishers' affidavit attached to the record in the Office of the Provincial Sheriff of Quezon at Calauag, Quezon. Personal notice was sent to the plaintiffs. However, said requirements in the extra-judicial foreclosure is dispensed with, in accordance with the decision of the Supreme Court in the case of -
BONNEVIE V. COURT OF APPEALS, 125 SCRA 122 (1983)

In extra-judicial foreclosure, Act No. 3135 personal notice on the mortgagor is not necessary. Section 3 thereof reads:

Sec. 3 – Notice shall be given by posting notices of the sale for not less than twenty (20) days in at least three (3) public places of the municipality or city where the property is situated, and if such property is worth more than P400.00, such notice shall also be published once a week for at least 3 consecutive weeks in a newspaper

of general circulation in the municipality or city.

Such phrase “once a week for at least 3 consecutive weeks”, as interpreted in “BASA vs. MERCADO” (61 Phil. 632) does not mean that the notice should be published for 3 full weeks.[12] (Emphasis and underscoring supplied)

By Decision of August 12, 1994,[13] the trial court, noting the absence of documentary evidence showing strict compliance with the statutory requirements on publication of notice of extra-judicial foreclosure of mortgage, declared the extra-judicial foreclosure and the sale of the mortgaged properties null and void. Thus, the trial court discoursed:

Respondent Bank maintained that it filed an extra-judicial foreclosure with the Provincial Sheriff of Quezon. After due notice and publication, these properties were sold at Public Auction Sale where a corresponding Certificate of Sale (Exh. 5) was issued in its name dated November 11, 1983, as the sole bidder (Memorandum for the Defendants, p.4). On page 7 of said Memorandum, it contended that there was notice, coupled with a publication of Notice of Public Auction Sale in a newspaper of general circulation supported by publisher’s affidavit attached to the record in the Office of the Provincial Sheriff of Quezon at Calauag, Quezon. Personal notice was sent to petitioners. (Record, pp. 358 & 361, Memorandum For the Defendants, pages 4 & 7). Despite these allegations on record, no documentary exhibits of such publication of notice of public auction sale in a newspaper of general circulations supported by publisher’s affidavit were ever submitted by respondent Bank. Considering that petitioners are clearly attacking the validity of the public auction sale for which respondent Bank was the sole bidder, said documentary exhibits should have been presented in court and not merely alleged to be attached to the record in the Office of the Provincial Sheriff of Quezon at Calauag, Quezon. The clear fact remains that these documents were not submitted to form part of the records of this case. No such proof of publication exists in the records. In the case of *Tambunting vs. Court of Appeals* (167 SCRA 17), the Hon. Supreme Court stressed that “failure to present proof of posting and publication rebuts the presumption of compliance with official duty”. To show compliance, the published notices and certificate of posting by the sheriff of the notice of sale on November 11, 1983 should have been presented.

Therefore, in the absence of convincing proof that the statutory provisions governing publication of notice of mortgage foreclosure sales have been strictly complied with, this Court has no other recourse except to declare as null and void the sale in favor of judgment creditor, made by respondent Sheriff on November 12, 1983, awarding the properties in question to respondent Bank, and for which, the titles in the name of petitioner-spouses were already cancelled and registered in its name. This Court also finds that petitioners are entitled to and deserving the reliefs prayed for.[14] (Emphasis and underscoring supplied),

Accordingly, the trial court disposed as follows:

WHEREFORE, judgment is hereby rendered, in favor of petitioners, and against the respondents, as follows:

- (1) Declaring as null and void the extrajudicial foreclosure and sale conducted by respondent Provincial Sheriff of Quezon;
- (2) Declaring as null and void all transactions/proceedings held subsequent thereto such as the execution of the final deed of sale and issuance of title to and in the name of respondent Bank;
- (3) Ordering the respondent Register of Deeds of Quezon to re-issue a new Transfer Certificate of Title to and in the name of petitioners in lieu of the former titles which had been deemed cancelled by virtue of the issuance of the titles which had been deemed cancelled by virtue of the issuance of the titles which had been issued in favor of respondent Corporation; and
- (4) Ordering all respondents, jointly and severally, to pay unto herein petitioners, the sum of P15,000, for attorney’s fees and litigation expenses of P10,000.

Costs against defendants.

SO ORDERED.[15]

The Defendants bank et al. thus appealed to the Court of Appeals upon the following assigned errors:

[I.]

THE LOWER COURT ERRED IN FINDING AND CONCLUDING THAT THERE WAS ABSENCE OF CONVINCING PROOF THAT THE STATUTORY PROVISIONS GOVERNING PUBLICATION OF NOTICE OF MORTGAGE FORECLOSURE SALE HAVE BEEN STRICTLY COMPLIED WITH.

[II.]

THE COURT A QUO ERRED IN DECLARING NULLAND VOID THE EXTRAJUDICIAL FORECLOSURE AND SALE CONDUCTED BY RESPONDENT PROVINCIAL SHERIFF OF QUEZON, AND ALL TRANSACTIONS/PROCEEDINGS HELD SUBSEQUENT THERETO SUCH AS THE EXECUTION OF THE FINAL DEED OF SALE AND ISSUANCE OF TITLE TO AND IN THE NAME OF RESPONDENT BANK.

[III.]

THE LOWER COURT ERRED IN ORDERING THE RRESPONDENT REGISTER OF DEEDS OF QUEZON TO REISSUE A NEW TRANSFER CERTIFICATE OF TITLE TO AND IN THE NAME OF PETITIONERS IN LIEU OF THE FORMER TITLES WHICH HAD BEEN DEEMED CANCELLED BY VIRTUE OF THE ISSUANCE OF THE TITLES WHICH HAD BEEN ISSUED IN FAVOR OF RESPONDENT CORPORATION.

[IV.]

THE TRIAL COURT ERRED IN AWARDING TO PLAINTIFFS-APPELLEES' ATTORNEY'S FEES ABD LITIGATION EXPENSES.[16] (Underscoring supplied)

By Decision of January 29, 2001,[17] the Court of Appeals reversed the decision of the trial court after finding the argument of the defendant-appellants bank et al. that the lack of required notice and publication of the extra-judicial foreclosure of mortgage was not averred in the complaint, hence, cannot be the basis of an adverse judgment. Explaining its reversal of the decision, the Court of Appeals held:

It is axiomatic that the complaint should inform the defendant of all the material facts on which the plaintiff relies to support his demand; it should state the theory of a cause of action which forms the bases of the plaintiff's claim of liability. The office, purpose or function of the complaint is to inform the defendant clearly and definitely of the claims made against him so that he may be prepared to meet the issues at the trial. Otherwise stated, if the wrong or omission of the defendant is not alleged in the complaint, then the defendant would be precluded from presenting evidence to refute the imputation of such wrong or present justification for the alleged omission. In this case, even perfunctory reading of the Petition and the Amended Petition, readily reveals the absence of any averment relating to the required posting and publication of the notice of foreclosure sale. Understandably then, the defendant-appellant Bank saw no need to present the Sheriff's Certification of Posting and the newspaper where the notice was published as well as the publisher's affidavit. Clearly, the presumption that the Provincial Sheriff of Quezon has discharged his official duty in a regular manner and that the defendant-appellant Bank complied with the requirements under the law will suffice. And while it may be true that the Supreme Court said, in the case of *Tambunting v. Court of Appeals* and relied upon by the trial court, that the presumption of compliance with official duty is rebutted by the failure to present proof of posting and publication of the notice of sale, such may be applied only when these omissions are alleged and raised by the party in the complaint.

The result would have been different if evidence of these issues were raised during the trial of the case with the acquiescence of the parties. Then, the rule on the amendment of the petition to conform to or authorize presentation of evidence may be applied, thus:

Sec. 5. Amendment to conform to or authorize presentation of evidence.- When issues not raised in the pleadings are tried with the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgments but failure to amend does not affect the result of the trial of these issues. x x x

As earlier stated however, the issue of lack of posting and publication was not even discussed nor even touched in the testimony of plaintiff-appellee Rustico Ardiente. His testimony is limited only to his receipt of a letter from the bank that their properties have been foreclosed and that they have one year to redeem the same. The plaintiffs-appellees only imputed to the defendant-appellant Bank its omission to give them personal notice of the foreclosure sale. However, it is jurisprudentially settled that personal notice to the mortgagor in extrajudicial foreclosure proceedings is not necessary. Hence, lack of personal notice to the mortgagors is not a ground to set aside the foreclosure sale. Ergo, the trial court erred in declaring the foreclosure null and void based on a ground not raised in the pleadings nor tried before it.[18] (Underscoring in the original; emphasis supplied)

Hence, the present petition for review filed by the Ardiente spouses proffering the following:

REASONS WARRANTING REVIEW

I.

RESPONDENT COURT OF APPEALS SERIOUSLY ERRED IN HOLDING THAT SINCE THE PETITIONER'S IN THEIR PETITION AND IN THEIR AMENDED PETITION DID NOT MENTION THE ABSENCE OF THE REQUIRED POSTING AND PUBLICATION OF THE NOTICE OF FORECLOSURE SALE, THERE IS NO NEED FOR THE DEFENDANT APPELLANT BANK TO PRESENT THE SHERIFF CERTIFICATION OF POSTING AND THE NEWSPAPER WHERE THE NOTICE WAS PUBLISHED AS WELL AS THE PUBLISHER'S AFFIDAVIT TO PROVE THE VALIDITY OF THE FORECLOSURE SALE.

II.

RESPONDENT COURT OF APPEALS SERIOUSLY ERRED IN REVERSING THE TRIAL COURT'S DECISION AND DISMISSING PETITIONER'S COMPLAINT.

III.

RESPONDENT COURT OF APPEALS SERIOUSLY ERRED IN NOT AWARDING ATTORNEY'S FEES AND LITIGATION EXPENSES TO THE PLAINTIFFS-APPELLEES.[19]

The spouses Ardientes (hereinafter referred to as petitioners) argue that paragraph 15 of their Complaint and paragraph 16 of the Amended Complaint show that they were "attacking the validity of the extra-judicial sale"; that the impleading of the sheriff demonstrates that they are "questioning the validity and legality of his performance of official duty"; that the bank was sufficiently informed of their "cause of action, theory of their case and relief being sought" as shown by the bank's allegations in paragraphs 15 and 16 of its Answer; and that in fact in the bank's Special and Affirmative Defenses, particularly paragraph 25 thereof which reads:

25) That answering respondent as well as the Office of Provincial Sheriff fully complied [with] the requirements of law under Act 3135 as amended, more specifically with regards to notices of the public auction sale as well as the extra-judicial foreclosure application in accordance with the law.[20],

an issue was tendered, the nature of which affirmative defense-answer called for the presentation of evidence, they citing *Benavides v. Alabastro*,^[21] but the bank did not present “proof of proper compliance with Act 3135, “AN ACT TO REGULATE THE SALE OF PROPERTY UNDER SPECIAL POWERS INSERTED IN OR ANNEXED TO REAL ESTATE MORTGAGES,: as to posting and publication of notices of public auction sale.

The Court is not persuaded.

With respect to petitioners’ paragraphs 15 and 16 allegations in their Complaint, clearly, they were questioning the validity of the extra-judicial foreclosure of the mortgage on the basis of lack of notice to them as mortgagors.

It is settled that personal notice to the mortgagor in extra-judicial foreclosure proceedings is not necessary, hence, not a ground to set aside the foreclosure sale.^[22]

With respect to petitioners’ argument that the bank, in paragraph 25 of its Answer, in fact put in issue its compliance with the requirements of Act 3135, “more specifically with regards to the notices of the public auction sale as well as the extra-judicial application in accordance with law,” to thus call for the presentation of evidence, they citing again *Benavides*,^[23] the same fails.

Benavides bears on the rendition of judgment on the pleadings. It holds that where the defendant’s answer tenders an issue, as where it does not only deny the material allegations of the complaint but also sets up certain special and affirmative defenses, the nature of such answer calls for presentation of evidence, hence, it is error to render a judgment on the pleadings thereon without such evidence.

No doubt, it is a well-settled rule that statutory provisions governing publication of notice of mortgage foreclosure sales must be strictly complied with, and that even slight deviations therefrom will invalidate the notice and the sale at least voidable.^[24]

Despite petitioners’ non-allegation of lack of publication of notice of foreclosure in their Complaint, the bank pleaded in its Answer (1) “that petitioners were duly notified of the extrajudicial foreclosure and public auction sale” and “[t]here was sufficient notice and publication served to all concern[ed] of said public auction sale,” and (2) that it and the Office of the provincial Sheriff “fully compl[ied] with the requirements of law under Act 3135, more specifically with regard to notices of the public auction as well as the extra-judicial foreclosure in accordance with law.”

Yet petitioners never refuted in their Reply and Answer to Counterclaim such defense of the bank nor presented evidence before the trial court to disprove the same.

In fact, in its Comment on petitioners’ Formal Offer of Evidence before the trial court, the bank, passing on Exhibit “D” – its letter to petitioners advising them that they had one year from November 11, 1993 to exercise their right of redemption, stated that said exhibit was admitted “with the qualification as to the purpose to the effect that said extra-judicial foreclosure was filed in accordance with law and that all requirements of said law were complied with and that plaintiffs were duly notified of said proceedings.”^[25]

Despite the bank’s repeated claim that the statutory requirements governing extra-judicial foreclosure had been complied with, the bank’s plea of lack of publication of notice of foreclosure was not raised by petitioners either in the Amended Complaint or in the Reply and Answer to Counterclaim. It was not also raised during the trial as the entire transcripts of the stenographic notes of the proceedings before the trial court show. Nor even in their memorandum filed before the trial court, petitioners having merely assailed the lack of “personal” notification to them of any “intended” extrajudicial foreclosure and the “grossly and greatly inadequate” purchase price of the lands.

As the appellate court thus held, the issue of lack of publication of notice cannot be raised for the first time on appeal.

In the Tambunting case cited by petitioners to support their thesis that failure to strictly comply with statutory requirements governing publication of notice of mortgage foreclosure sales renders the sale at least voidable, the therein mortgagors, in their complaint for annulment of mortgage and damages, sought to enjoin the extra-judicial foreclosure of mortgage. During the pendency of the case, the extra-judicial foreclosure pushed thru just the same. The mortgaged property was sold at public auction to the mortgagees, and the property was eventually sold to the Tambunting Realty. The mortgagors thereupon filed a Supplemental Complaint impleading the realty firm, the provincial sheriff as the officer responsible for holding the foreclosure, and the Register of Deeds for the subsequent transfer of the property “despite alleged non-compliance with the requirements of Act 3135, Sec. 3 (as amended by Act 4118) on posting and publication of the notice of foreclosure sale.” In other words, the lack of publication was raised in issue by the mortgagors in their Supplemental Complaint.

In the case of Go v. Court of Appeals,[26] as in the present case, despite the fact that the mortgagees pleaded as a defense in their Answer the “receipt of the ‘notice of the sale which was published in a newspaper of general circulation,’” the issue of lack of publication of the notice of foreclosure was never raised in issue by the mortgagors.

In disposing of the issue of lack of publication of the notice of foreclosure of mortgage which was raised for the first time on appeal, this Court in Go held:

Indeed, as correctly held by the respondent Court, the issue of lack of publication of the notice of foreclosure of the mortgage was raised only on appeal. Petitioner does not represent that he directly attacked in his complaint in Civil Case No. 8920 the validity of the foreclosure because of such lack of notice. His own Statement of the Facts and of the Case in the instant petition makes no reference to such lack of notice as one, or even just as a basis for any, of his causes of action in the complaint. He sought the cancellation of the contract of mortgage because he allegedly never received the amounts indicated in the promissory notes. Of course, nullity of the mortgage due to absence of consideration is leagues apart from the nullity of the foreclosure of a mortgage because of non-publication of the notice of foreclosure.

Additionally, petitioner presented no evidence before the trial court to prove the absence of publication of the notice despite the fact that private respondents, in their Answer, squarely pleaded as a defense the foreclosure sale and petitioner’s receipt of the “notice of the sale which was published in a newspaper of general circulation.” That the lack of publication of the notice of foreclosure was never raised in issue by petitioner and that it is not within the issues framed by the parties in the trial court are then too obvious. (Emphasis and underscoring supplied)[27]

WHEREFORE, there being no reversible error in the assailed decision, the petition is hereby DISMISSED.

No pronouncement as to costs.

SO ORDERED.

Panganiban, (Chairman), and Corona, JJ., concur.
Sandoval-Gutierrez, J., on leave.

[1] Exh. “E”; Exh. “3”, Exhibit Folder at 7.

[2] Exh. “A”; “Exh. “1,” Id. at 1.

[3] Exh. “F”; Exh. “4”, Id. at 8.

[4] Exh. “D,” Id. at 6.

[5] Original Records at 1-10.

[6] Id. at 6.

[7] Id. at 5-6.

[8] Id. at 23.

[9] Ibid.

[10] Id. at 39-41

[11] Id. at 51-62.

[12] Id. at 333.

[13] Id. at 343-348.

[14] Id. 347-348.

[15] Id. at 348.

[16] CA Rollo at 47-48.

[17] Id at 96-107.

[18] Id. at 103-105.

[19] Rollo at 28.

[20] Original Records at 25.

[21] 12 SCRA 553 (1964).

[22] Fortune Motors (Phils.), Inc. v. Metropolitan Bank & Trust Co., 265 SCRA 72, 81 (1996).

[23] Supra.

[24] Ouano v. Court of Appeals, 398 SCRA 525 (2003).

[25] Original Records at 256.

[26] 210 SCRA 661 (1992).

[27] Id. at 669-670.

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