

SPOUSES GREGORIO AND JOSEFA YU, PETITIONERS, VS. NGO YET TE, DOING BUSINESS UNDER THE NAME AND STYLE, ESSENTIAL MANUFACTURING, RESPONDENT.*G.R. No. 155868. February 06, 2007*

Ponente: AUSTRIA-MARTINEZ, J.

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Before us is a Petition for Review on Certiorari under Rule 45 of the Rules of Court assailing the March 21, 2001 Decision[1] of the Court of Appeals (CA) in CA-G.R. CV No. 52246[2] and its October 14, 2002 Resolution.[3]

The antecedent facts are not disputed.

Spouses Gregorio and Josefa Yu (Spouses Yu) purchased from Ngo Yet Te (Te) bars of detergent soap worth P594,240.00, and issued to the latter three postdated checks [4] as payment of the purchase price. When Te presented the checks at maturity for encashment, said checks were returned dishonored and stamped "ACCOUNT CLOSED".[5] Te demanded[6] payment from Spouses Yu but the latter did not heed her demands. Acting through her son and attorney-in-fact, Charry Sy (Sy), Te filed with the Regional Trial Court (RTC), Branch 75, Valenzuela, Metro Manila, a Complaint,[7] docketed as Civil Case No. 4061-V-93, for Collection of Sum of Money and Damages with Prayer for Preliminary Attachment.

In support of her prayer for preliminary attachment, Te attached to her Complaint an Affidavit executed by Sy that Spouses Yu were guilty of fraud in entering into the purchase agreement for they never intended to pay the contract price, and that, based on reliable information, they were about to move or dispose of their properties to defraud their creditors.[8]

Upon Te's posting of an attachment bond,[9] the RTC issued an Order of Attachment/Levy[10] dated March 29, 1993 on the basis of which Sheriff Constancio Alimurung (Sheriff Alimurung) of RTC, Branch 19, Cebu City levied and attached Spouses Yu's properties in Cebu City consisting of one parcel of land (known as Lot No. 11)[11] and four units of motor vehicle, specifically, a Toyota Ford Fierra, a jeep, a Canter delivery van, and a passenger bus.[12]

On April 21, 1993, Spouses Yu filed an Answer[13] with counterclaim for damages arising from the wrongful attachment of their properties, specifically, actual damages amounting to P1,500.00 per day; moral damages, P1,000,000.00; and exemplary damages, P50,000.00. They also sought payment of P120,000.00 as attorney's fees and P80,000.00 as litigation expenses.[14] On the same date, Spouses Yu filed an Urgent Motion to Dissolve Writ of Preliminary Attachment.[15] They also filed a Claim Against Surety Bond[16] in which they demanded payment from Visayan Surety and Insurance Corporation (Visayan Surety), the surety which issued the attachment bond, of the sum of P594,240.00, representing the damages they allegedly sustained as a consequence of the wrongful attachment of their properties.

While the RTC did not resolve the Claim Against Surety Bond, it issued an Order[17] dated May 3, 1993,

discharging from attachment the Toyota Ford Fierra, jeep, and Canter delivery van on humanitarian grounds, but maintaining custody of Lot No. 11 and the passenger bus. Spouses Yu filed a Motion for Reconsideration[18] which the RTC denied.[19]

Dissatisfied, they filed with the CA a Petition for Certiorari,[20] docketed as CA-G.R. SP No. 31230, in which a Decision[21] was rendered on September 14, 1993, lifting the RTC Order of Attachment on their remaining properties. It reads in part:

In the case before Us, the complaint and the accompanying affidavit in support of the application for the writ only contains general averments. Neither pleading states in particular how the fraud was committed or the badges of fraud purportedly committed by the petitioners to establish that the latter never had an intention to pay the obligation; neither is there a statement of the particular acts committed to show that the petitioners are in fact disposing of their properties to defraud creditors. x x x.

x x x x

Moreover, at the hearing on the motion to discharge the order of attachment x x x petitioners presented evidence showing that private respondent has been extending multi-million peso credit facilities to the petitioners for the past seven years and that the latter have consistently settled their obligations. This was not denied by private respondent. Neither does the private respondent contest the petitioners' allegations that they have been recently robbed of properties of substantial value, hence their inability to pay on time. By the respondent court's own pronouncements, it appears that the order of attachment was upheld because of the admitted financial reverses the petitioner is undergoing.

This is reversible error. Insolvency is not a ground for attachment especially when defendant has not been shown to have committed any act intended to defraud its creditors x x x.

For lack of factual basis to justify its issuance, the writ of preliminary attachment issued by the respondent court was improvidently issued and should be discharged.[22]

From said CA Decision, Te filed a Motion for Reconsideration but to no avail.[23]

Te filed with us a Petition for Review on Certiorari[24] but we denied the same in a Resolution dated June 8, 1994 for having been filed late and for failure to show that a reversible error was committed by the CA.[25] Entry of Judgment of our June 8, 1994 Resolution was made on July 22, 1994.[26] Thus, the finding of the CA in its September 14, 1993 Decision in CA-G.R. SP No. 31230 on the wrongfulness of the attachment/levy of the properties of Spouses Yu became conclusive and binding.

However, on July 20, 1994, the RTC, apparently not informed of the SC Decision, rendered a Decision, the dispositive portion of which reads:

WHEREFORE, premises considered, the Court finds that the plaintiff has established a valid civil cause of action against the defendants, and therefore, renders this judgment in favor of the plaintiff and against the defendants, and hereby orders the following:

- 1) Defendants are hereby ordered or directed to pay the plaintiff the sum of P549,404.00, with interest from the date of the filing of this case (March 3, 1993);
- 2) The Court, for reasons aforesated, hereby denies the grant of damages to the plaintiff;
- 3) The Court hereby adjudicates a reasonable attorney's fees and litigation expenses of P10,000.00 in favor of the plaintiff;
- 4) On the counterclaim, this Court declines to rule on this, considering that the question of the attachment

which allegedly gave rise to the damages incurred by the defendants is being determined by the Supreme Court.

SO ORDERED.[27] (Emphasis ours)

Spouses Yu filed with the RTC a Motion for Reconsideration[28] questioning the disposition of their counterclaim. They also filed a Manifestation[29] informing the RTC of our June 8, 1994 Resolution in G.R. No. 114700.

The RTC issued an Order dated August 9, 1994, which read:

x x x x

(2) With regard the counter claim filed by the defendants against the plaintiff for the alleged improvident issuance of this Court thru its former Presiding Judge (Honorable Emilio Leachon, Jr.), the same has been ruled with definiteness by the Supreme Court that, indeed, the issuance by the Court of the writ of preliminary attachment appears to have been improvidently done, but nowhere in the decision of the Supreme Court and for that matter, the Court of Appeal's decision which was in effect sustained by the High Court, contains any ruling or directive or imposition, of any damages to be paid by the plaintiff to the defendants, in other words, both the High Court and the CA, merely declared the previous issuance of the writ of attachment by this Court thru its former presiding judge to be improvidently issued, but it did not award any damages of any kind to the defendants, hence, unless the High Court or the CA rules on this, this Court could not grant any damages by virtue of the improvident attachment made by this Court thru its former presiding judge, which was claimed by the defendants in their counter claim.

(3) This Court hereby reiterates in toto its Decision in this case dated July 20, 1994. [30] (Emphasis ours)

The RTC also issued an Order dated December 2, 1994,[31] denying the Motion for Reconsideration of Spouses Yu.[32]

In the same December 2, 1994 Order, the RTC granted two motions filed by Te, a Motion to Correct and to Include Specific Amount for Interest and a Motion for Execution Pending Appeal.[33] The RTC also denied Spouses Yu's Notice of Appeal[34] from the July 20, 1994 Decision and August 9, 1994 Order of the RTC.

From said December 2, 1994 RTC Order, Spouses Yu filed another Notice of Appeal [35] which the RTC also denied in an Order[36] dated January 5, 1995.

Spouses Yu filed with the CA a Petition[37] for Certiorari, Prohibition and Mandamus, docketed as CA-G.R. SP No. 36205, questioning the denial of their Notices of Appeal; and seeking the modification of the July 20, 1994 Decision and the issuance of a Writ of Execution. The CA granted the Petition in a Decision[38] dated June 22, 1995.

Hence, Spouses Yu filed with the CA an appeal[39] docketed as CA-G.R. CV No. 52246, questioning only that portion of the July 20, 1994 Decision where the RTC declined to rule on their counterclaim for damages.[40] However, Spouses Yu did not dispute the specific monetary awards granted to respondent Te; and therefore, the same have become final and executory.

Although in the herein assailed Decision[41] dated March 21, 2001, the CA affirmed in toto the RTC Decision, it nonetheless made a ruling on the counterclaim of Spouses Yu by declaring that the latter had failed to adduce sufficient evidence of their entitlement to damages.

Spouses Yu filed a Motion for Reconsideration[42] but the CA denied it in the herein assailed Resolution[43] dated October 14, 2002.

Spouses Yu filed the present Petition raising the following issues:

- Whether or not the appellate court erred in not holding that the writ of attachment was procured in bad faith, after it was established by final judgment that there was no true ground therefor.
- Whether or not the appellate court erred in refusing to award actual, moral and exemplary damages after it was established by final judgment that the writ of attachment was procured with no true ground for its issuance.[44]

There is one preliminary matter to set straight before we resolve the foregoing issues.

According to respondent Te,[45] regardless of the evidence presented by Spouses Yu, their counterclaim was correctly dismissed for failure to comply with the procedure laid down in Section 20 of Rule 57. Te contends that as Visayan Surety was not notified of the counterclaim, no judgment thereon could be validly rendered.

Such argument is not only flawed, it is also specious.

As stated earlier, Spouses Yu filed a Claim Against Surety Bond on the same day they filed their Answer and Urgent Motion to Dissolve Writ of Preliminary Attachment.[46] Further, the records reveal that on June 18, 1993, Spouses Yu filed with the RTC a Motion to Give Notice to Surety.[47] The RTC granted the Motion in an Order[48] dated June 23, 1993. Accordingly, Visayan Surety was notified of the pre-trial conference to apprise it of a pending claim against its attachment bond. Visayan Surety received the notice on July 12, 1993 as shown by a registry return receipt attached to the records.[49]

Moreover, even if it were true that Visayan Surety was left in the proceedings a quo, such omission is not fatal to the cause of Spouses Yu. In *Malayan Insurance Company, Inc. v. Salas*,[50] we held that "x x x if the surety was not given notice when the claim for damages against the principal in the replevin bond was heard, then as a matter of procedural due process the surety is entitled to be heard when the judgment for damages against the principal is sought to be enforced against the surety's replevin bond." [51] This remedy is applicable for the procedures governing claims for damages on an attachment bond and on a replevin bond are the same.[52]

We now proceed to resolve the issues jointly.

Spouses Yu contend that they are entitled to their counterclaim for damages as a matter of right in view of the finality of our June 8, 1994 Resolution in G.R. No. 114700 which affirmed the finding of the CA in its September 14, 1993 Decision in CA-G.R. SP No. 31230 that respondent Te had wrongfully caused the attachment of their properties. Citing *Javellana v. D.O. Plaza Enterprises, Inc.*,[53] they argue that they should be awarded damages based solely on the CA finding that the attachment was illegal for it already suggests that Te acted with malice when she applied for attachment. And even if we were to assume that Te did not act with malice, still she should be held liable for the aggravation she inflicted when she applied for attachment even when she was clearly not entitled to it.[54]

That is a rather limited understanding of *Javellana*. The counterclaim disputed therein was not for moral damages and therefore, there was no need to prove malice. As early as in *Lazatin v. Twaño*,[55] we laid down the rule that where there is wrongful attachment, the attachment defendant may recover actual damages even without proof that the attachment plaintiff acted in bad faith in obtaining the attachment. However, if it is alleged and established that the attachment was not merely wrongful but also malicious, the attachment defendant may recover moral damages and exemplary damages as well. [56] Either way, the wrongfulness of the attachment does not warrant the automatic award of damages to the attachment defendant; the latter must first discharge the burden of proving the nature and extent of the loss or injury incurred by reason of the wrongful attachment.[57]

In fine, the CA finding that the attachment of the properties of Spouses Yu was wrongful did not relieve Spouses Yu of the burden of proving the factual basis of their counterclaim for damages.

To merit an award of actual damages arising from a wrongful attachment, the attachment defendant must prove, with the best evidence obtainable, the fact of loss or injury suffered and the amount thereof.[58] Such loss or injury must be of the kind which is not only capable of proof but must actually be proved with a reasonable degree of certainty. As to its amount, the same must be measurable based on specific facts, and not on guesswork or speculation. [59] In particular, if the claim for actual damages covers unrealized profits, the amount of unrealized profits must be established and supported by independent evidence of the mean income of the business undertaking interrupted by the illegal seizure. [60]

Spouses Yu insist that the evidence they presented met the foregoing standards. They point to the lists of their daily net income from the operation of said passenger bus based on used ticket stubs[60] issued to their passengers. They also cite unused ticket stubs as proof of income foregone when the bus was wrongfully seized.[62] They further cite the un rebutted testimony of Josefa Yu that, in the day-to-day operation of their passenger bus, they use up at least three ticket stubs and earn a minimum daily income of P1,500.00.[63]

In ruling that Spouses Yu failed to adduce sufficient evidence to support their counterclaim for actual damages, the CA stated, thus:

In this case, the actual damages cannot be determined. Defendant-appellant Josefa Yu testified on supposed lost profits without clear and appreciable explanation. Despite her submission of the used and unused ticket stubs, there was no evidence on the daily net income, the routes plied by the bus and the average fares for each route. The submitted basis is too speculative and conjectural. No reports regarding the average actual profits and other evidence of profitability necessary to prove the amount of actual damages were presented. Thus, the Court a quo did not err in not awarding damages in favor of defendants-appellants.[64]

We usually defer to the expertise of the CA, especially when it concurs with the factual findings of the RTC.[65] Indeed, findings of fact may be passed upon and reviewed by the Supreme Court in the following instances: (1) when the conclusion is a finding grounded entirely on speculations, surmises, or conjectures; (2) when the inference made is manifestly mistaken, absurd, or impossible; (3) where there is a grave abuse of discretion in the appreciation of facts; (4) when judgment is based on a misapprehension of facts; (5) when the lower court, in making its findings, went beyond the issues of the case and such findings are contrary to the admissions of both appellant and appellee; (6) when the factual findings of the CA are contrary to those of the trial court; (7) when the findings of fact are themselves conflicting; (8) when the findings of fact are conclusions made without a citation of specific evidence on which they are based; (9) when the facts set forth in the petition as well as in the petitioner's main and reply briefs are not disputed by the respondents; (10) when the findings of fact of the lower court are premised on the supposed absence of evidence and are contradicted by the evidence on record.[66] However, the present case does not fall under any of the exceptions. We are in full accord with the CA that Spouses Yu failed to prove their counterclaim.

Spouses Yu's claim for unrealized income of P1,500.00 per day was based on their computation of their average daily income for the year 1992. Said computation in turn is based on the value of three ticket stubs sold over only five separate days in 1992.[67] By no stretch of the imagination can we consider ticket sales for five days sufficient evidence of the average daily income of the passenger bus, much less its mean income. Not even the un rebutted testimony of Josefa Yu can add credence to such evidence for the testimony itself lacks corroboration.[68]

Besides, based on the August 29, 1994 Manifestation[69] filed by Sheriff Alimurung, it would appear that long

before the passenger bus was placed under preliminary attachment in Civil Case No. 4061-V-93, the same had been previously attached by the Sheriff of Mandaue City in connection with another case and that it was placed in the Cebu Bonded Warehousing Corporation, Cebu City. Thus, Spouses Yu cannot complain that they were unreasonably deprived of the use of the passenger bus by reason of the subsequent wrongful attachment issued in Civil Case No. 4061-V-93. Nor can they also attribute to the wrongful attachment their failure to earn income or profit from the operation of the passenger bus.

Moreover, petitioners did not present evidence as to the damages they suffered by reason of the wrongful attachment of Lot No. 11.

Nonetheless, we recognize that Spouses Yu suffered some form of pecuniary loss when their properties were wrongfully seized, although the amount thereof cannot be definitively ascertained. Hence, an award of temperate or moderate damages in the amount of P50,000.00 is in order.[70]

As to moral and exemplary damages, to merit an award thereof, it must be shown that the wrongful attachment was obtained by the attachment plaintiff with malice or bad faith, such as by appending a false affidavit to his application.[71]

Spouses Yu argue that malice attended the issuance of the attachment bond as shown by the fact that Te deliberately appended to her application for preliminary attachment an Affidavit where Sy perjured himself by stating that they had no intention to pay their obligations even when he knew this to be untrue given that they had always paid their obligations; and by accusing them of disposing of their properties to defraud their creditors even when he knew this to be false, considering that the location of said properties was known to him.[72]

The testimony of petitioner Josefa Yu herself negates their claim for moral and exemplary damages. On cross-examination she testified, thus:

Q: Did you ever deposit any amount at that time to fund the check?

A: We requested that it be replaced and staggered into smaller amounts.

COURT: Did you fund it or not?

Atty. Ferrer: The three checks involved?

Atty. Florido: Already answered. She said that they were not able to fund it.

Atty. Ferrer: And as a matter of fact, you went to the bank to close your account?

A: We closed account with the bank because we transferred the account to another bank.

Q: How much money did you transfer from that bank to which the three checks were drawn to this new bank?

A: I don't know how much was there but we transferred already to the Solid Bank.

Q: Who transferred?

A: My daughter, sir.[73] (Emphasis ours)

Based on the foregoing testimony, it is not difficult to understand why Te concluded that Spouses Yu never intended to pay their obligation for they had available funds in their bank but chose to transfer said funds instead of cover the checks they issued. Thus, we cannot attribute malice nor bad faith to Te in applying for the attachment writ. We cannot hold her liable for moral and exemplary damages.

As a rule, attorney's fees cannot be awarded when moral and exemplary damages are not granted, the exception

however is when a party incurred expenses to lift a wrongfully issued writ of attachment.[74] Without a doubt, Spouses Yu waged a protracted legal battle to fight off the illegal attachment of their properties and pursue their claims for damages. It is only just and equitable that they be awarded reasonable attorney's fees in the amount of P30,000.00.

In sum, we affirm the dismissal of the counterclaim of petitioners Spouses Yu for actual, moral, and exemplary damages. However, we grant them temperate damages and attorney's fees.

WHEREFORE, the petition is partly GRANTED. The March 21, 2001 Decision of the Court of Appeals is AFFIRMED with the MODIFICATION that petitioners' counterclaim is PARTLY GRANTED. Gregorio Yu and Josefa Yu are awarded P50,000.00 temperate damages and P30,000.00 attorney's fees.

No costs.

SO ORDERED.

Ynares-Santiago, (Chairperson), Callejo, Sr., and Chico-Nazario, JJ., concur.

[1] Rollo, p. 26.

[2] Entitled "Ngo Yet Te, doing business under the name and style ESSENTIAL MANUFACTURING, represented by her attorney-in-fact Charry N. Sy, Plaintiff-Appellee, v. Sps. Gregorio and Josefa Yu, doing business under the name and style ARCHIE'S STORE, Defendants-Appellants."

[3] Rollo, p. 45.

[4] Exhibit Envelope, Exhibits "A," "B," and "C," envelope of exhibits.

[5] Exhibits "A-1," "B-1," and "C-1," envelope of exhibits.

[6] Exhibit "H," envelope of exhibits.

[7] Records, p. 1.

[8] Id. at 10.

[9] Id. at 18.

[10] Id. at 19.

[11] Id. at 48.

[12] Id. at 47.

[13] Id. at 20.

[14] Id. at 22-23.

[15] Id. at 30.

[16] Id. at 28.

[17] Id. at 69.

[18] Id. at 88.

[19] Id. at 94.

[20] Id. at 230.

[21] Penned by Associate Justice Minerva P. Gonzaga-Reyes (now a retired member of this Court) and concurred in by Associate Justices Vicente V. Mendoza (now a retired member of this Court) and Pacita Canizares-Nye (deceased).

[22] Records, pp. 226-227.

[23] Id. at 229.

[24] Docketed as G.R. No. 114700.

[25] Records, p. 340.

[26] Id. at 409-410.

[27] Id. at 336-337.

[28] Id. at 371.

[29] Id. at 339.

[30] Id. at 345-346.

[31] Id. at 404.

[32] In the same December 2, 1994 Order, the RTC granted two motions filed by Te, a Motion to Correct and to Include Specific Amount for Interest and a Motion for Execution Pending Appeal. (Id.) Spouses Yu filed a Notice of Appeal from said Order but the same was denied by the RTC in an Order dated January 5, 1995. (Id. at 411 and 423) Spouses Yu filed with the CA a Petition for Certiorari, Prohibition and Mandamus, docketed as CA G.R. SP No. 36205, questioning the denial of their Notice of Appeal, the modification of the July 20, 1994 Decision and the issuance of a Writ of Execution. (Id. at 427) The CA granted the Petition in a Decision dated June 22, 1995. (Id. at 515)

[33] Id.

[34] Id. at 353 and 423.

[35] Id. at 411.

[36] Id. at 423.

[37] Id. at 427.

[38] Id. at 515.

[39] CA rollo, p. 43.

[40] Id. at 48.

[41] Penned by Associate Justice Ruben T. Reyes and concurred in by Associate Justices Presbitero J. Velasco, Jr. (now a member of this Court) and Juan Q. Enriquez, Jr., id. at 120.

[42] Id. at 131.

[43] Penned by Associate Justice Ruben T. Reyes and concurred in by Associate Justices Cancio C. Garcia (now a member of this Court) and Juan Q. Enriquez, Jr., id. at 162.

[44] Petition, rollo, p. 12.

[45] Id. at 111-112.

[46] See notes 13, 14 and 15.

[47] Records, p. 160.

[48] Id. at 172.

[49] Id. at 171-b.

[50] G.R. No. L-48820, May 25, 1979, 90 SCRA 252.

[51] Id. at 258-259. Emphasis ours.

[52] RULES OF COURT (1964), Rule 60, Sec. 10, reads:

The amount, if any, to be awarded to either party upon any bond filed by the other in accordance with the provisions of this Rule, shall be claimed, ascertained, and granted under the same procedure as prescribed in Section 20 of Rule 57.

[53] 143 Phil. 129 (1970).

[54] Rollo, pp. 13-16.

[55] 112 Phil. 733 (1961).

[56] Calderon v. Intermediate Appellate Court, G.R. No. 74696, November 11, 1987, 155 SCRA 531, 539.

[57] MC Engineering, Inc. v. Court of Appeals, 429 Phil. 634, 666 (2002). See also Carlos v. Sandoval, G.R. No. 135830, September 30, 2005, 471 SCRA 266, 296.

[58] Carlos v. Sandoval, *supra*; MC Engineering, Inc. v. Court of Appeals, *supra*; Rivera v. Solidbank Corporation, G.R. No. 163269, April 19, 2006, 487 SCRA 512, 546.

[59] Saguid v. Security Finance, Inc., G.R. No. 159467, December 9, 2005, 477 SCRA 256, 275; Villafuerte v. Court of Appeals, G.R. No. 134239, May 26, 2005, 459 SCRA 58, 69.

[60] Public Estates Authority v. Chu, G.R. No. 145291, September 21, 2005, 470 SCRA 495, 503; Villafuerte v. Court of Appeals, *supra* note 59.

[60] Exhibits "11-A" to "11-C," "12-A" to "12-C," "13-A" to "13-C," "14-A" to "14-C" and "15-A" to "15-C," envelope of exhibits.

[62] Rollo, p. 17.

[63] Id. at 18-21; TSN, March 8, 1994, pp. 56-63.

[64] CA rollo, pp. 129-130.

[65] Pilipinas Shell Petroleum Corporation v. John Bordman Ltd. of Iloilo, Inc., G.R. No. 159831, October 14, 2005, 473 SCRA 151, 162.

[66] Child Learning Center, Inc. v. Tagario, G.R. No. 150920, November 25, 2005, 476 SCRA 236, 241-242.

[67] There were 15 ticket stubs presented in evidence. Given that Spouses Yu issue three tickets stubs each day of operation, it follows that the 15 ticket stubs represent sales for five separate days.

[68] Saguid v. Security Finance, Inc., supra note 59.

[69] Records, p. 362.

[70] Villafuerte v. Court of Appeals, supra note 59, at 77.

[71] MC Engineering, Inc. v. Court of Appeals, supra note 57; Solidbank Corporation v. Mindanao Ferroalloy Corporation, G.R. No. 153535, July 28, 2005, 464 SCRA 409, 429; Philippine Commercial International Bank v. Intermediate Appellate Court, G.R. No. 73610, April 19, 1991, 196 SCRA 29, 36.

[72] Petition, rollo, pp. 13-16.

[73] TSN, April 26, 1994, pp. 14-15.

[74] Carlos v. Sandoval, supra note 57, at 299-300; MC Engineering, Inc. v. Court of Appeals, supra note 57, at 667.

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