

**BANCO DE ORO UNIVERSAL BANK, PETITIONER, VS. THE HON. COURT OF APPEALS AND SPS. GABRIEL G. LOCSIN AND MA. GERALDINE R. LOCSIN, RESPONDENTS.**

*G.R. NO. 160354. August 25, 2005*

Ponente: CARPIO MORALES, J.

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**CARPIO MORALES, J.:**

Subject of the present Petition for Review is the Court of Appeals June 5, 2003 Decision[1] annulling and setting aside the Orders[2] of the Regional Trial Court (RTC) of Mandaluyong denying respondents spouses Gabriel and Ma. Geraldine Locsin's Motion to Dismiss the complaint of petitioner, Banco de Oro Universal Bank.

The following antecedent facts are not disputed:

On September 28, 1995, respondents Locsins entered into a Term Loan Agreement (TLA) with petitioner under which they obtained a loan of P700,000.00 which was secured by a Real Estate Mortgage of their property covered by TCT No. N-138739 (1[st] TLA).

On February 29, 1996, the Locsins obtained a 2[nd] TLA from petitioner in the amount of P800,000.00, to secure which they executed a Real Estate Mortgage over their property covered by TCT No. 67286. This 2[nd] TLA was eventually settled on July 2, 1996, on account of which the mortgage was cancelled and the title was released on July 8, 1996.

On November 6, 1996, the parties entered into a Credit Line Agreement (CLA) under which the Locsins obtained a credit line of P2.5 Million, to secure which their business partners, the spouses Juanito and Anita Evidente, executed a Real Estate Mortgage of their (the Evidentes') properties covered by TCT Nos. N-166336 and N-166637. Monthly amortization of the obligation appears to have been religiously paid until October of 1997.

The Locsins having failed to comply with their obligation under the CLA, petitioner filed before the Quezon City Regional Trial Court (RTC) Executive Judge an application dated May 4, 1998 for the extra-judicial foreclosure of the mortgage which encumbered the Evidente properties under the CLA, as well as the mortgage of the Locsin property covering TCT N-67286 which secured the 2[nd] TLA. The application was granted and public auction of these properties was scheduled, and was actually carried out on July 23, 1998.

The public auction was later nullified, however, on petitioner's move, the Locsin property covered by TCT No. 67286 which secured the 2[nd] TLA having been erroneously included. An amended application for extrajudicial foreclosure was thus filed by petitioner, this time covering the same Evidente properties and TCT No. 138739, the property of the Locsins which secured the 1[st] TLA. Public auction of these properties was scheduled on August 26, 1998.

Two days before the scheduled public auction or on August 24, 1998, the Locsins filed before the Quezon City Regional Trial Court (RTC) a complaint against petitioner, the RTC Clerk of Court and Ex-Oficio Sheriff of Quezon City, and Sheriff VI Marino V. Cahero, for Specific Performance, Tort and Damages with Prayer for the

Issuance of a Temporary Restraining Order (TRO) and a Writ of Preliminary Injunction, docketed as Civil Case No. Q-98-35337.[3] The pertinent allegations of the Locsins' complaint are as follows:

x x x

- Defendant bank, through its Assistant Vice-President-Combank II, Agnes C. Tuason, told plaintiffs that the loan valuation of the two aforementioned properties [of the spouses Evidente securing the CLA] is PHP2.5 Million, and this was in fact the amount received by plaintiff from defendant bank . . .

- The spouses Evidente, through plaintiffs, paid for the monthly installments due on the [CLA] until October, 1997, as evidenced by OR No. 167588 dated October 31, 1997 issued by defendant bank. . . .

- The spouses Evidente were unable to make subsequent payments and the real estate mortgage over the Evidente properties was recommended for foreclosure.

x x x

- . . . [P]laintiffs advised defendant bank that they will be settling their 1[st] TLA in full and shall be taking the property covered by TCT No. N-138739 out of the mortgage.

- However, to the shock of plaintiffs, defendant bank through its Account Officer, Nelia Umbal, refused to release the said property because the Evidente properties, the mortgage of which secures . . . the CLA dated November 6, 1996, will be insufficient to cover the balance of the said CLA.

- Plaintiffs were surprised to learn that defendant bank capriciously, recklessly and oppressively gave a loan valuation of only PHP900,000.00 for each of [the] two Evidente properties, or a total of PHP1.8 Million. This valuation is unfair and unreasonable considering that the fair market value of these properties is around PHP5 Million. Furthermore, no reason was given by defendant bank for the sudden and unjust change in the valuation, which was originally pegged by defendant at PHP2.5 Million.

- In effect, the mortgaged property covered by TCT No. N-138739, which secures the 1[st] TLA dated September 28, 1995, and which has a loan valuation of PHP700,000.00, was also made a collateral for the CLA. Worse, the whole amount of the loan under the 1st TLA was declared due and demandable, although plaintiffs faithfully and regularly paid for the monthly amortization there[of].

- Thus, to complete, rather suspiciously, the security for the CLA which is for PHP2.5 Million, defendant bank further informed plaintiffs that it would cost them PHP1.4 Million to take the property covered by TCT No. N-138739 [which secured the first TLA] out of the mortgage, because the deficiency in the CLA secured by the Evidente properties must also be paid. This amount is preposterous considering that at the time, the remaining balance of the 1[st] TLA was only around PHP450,000.00. Moreover, plaintiffs were suffering from financial difficulties because of the sharp decline of the peso's purchasing power.

x x x

- Defendant bank filed with the Executive Judge of Quezon City, through public defendants herein, an Application for Extra-Judicial foreclosure of Real Estate Mortgage under Act No. 3135, as amended, dated May 4, 1998. The application sought the sale in a public auction of the Evidente properties and plaintiffs' property covered by TCT No. 67286 [which secured the second TLA and which TLA had been settled]. . . .

x x x

- Yet, defendant bank and public defendants allowed the public auction to proceed as scheduled [on July 23, 1998].

x x x

- In the meantime, without making any effort to cancel the effects of the public auction held on July 23, 1998, defendant bank filed with public defendants an Amended Application for Extra-Judicial Foreclosure of Real Estate Mortgage under Act No. 3135, as amended. The amended application sought the sale in a public auction of the same Evidente properties and plaintiffs' property covered by TCT No. N-138739 [which secured the first TLA].@@

- Acting upon the said application, public defendants issued another notice of Sheriff Sale dated July 28, 1998 which scheduled the public auction of the aforementioned real properties on August 26, 1998 . . .

- Plaintiffs' property covered by TCT No. N-138739 is erroneously included in the amended application and in the Notice of the Sheriff's Sale. The said mortgaged property secures the 1[st] TLA dated September 28, 1995, for which plaintiffs have faithfully and regularly paid for the monthly amortization due. On the other hand, defendant bank is foreclosing the said property and the two Evidente properties for alleged failure to pay the monthly installments due on the CLA dated November 8, 1996.

x x x

- Furthermore, defendant bank acted in bad faith and in willful breach of its contractual obligations to plaintiffs in understating the loan valuation of the two Evidente properties, and in effect declaring the property covered by TCT No. N-133739 [which secured the first TLA] as additional collateral for the said CLA. (Emphasis and underscoring supplied).

The plaintiffs Locsins thus prayed that:

A. Upon filing of this complaint, a temporary restraining order (TRO) be immediately issued ex-parte, enjoining defendants, their agents and/or representatives from enforcing the Notice of Sheriff's Sale dated July 28, 1998, and from proceeding with the scheduled public auction of the properties included therein, particularly plaintiffs' real property covered by TCT No. N-138739, on August 26, 1998, or on any date thereafter, until further orders from the Honorable Court.

B. After appropriate proceedings, a writ of preliminary injunction be issued, under the same tenor as above, and upon payment of such bond as may be fixed by the Honorable Court.

C. After trial on the merits, judgment be rendered:

- On the First Cause of Action, ordering defendant bank to faithfully comply with its obligations under the 1[st] TLA and the CLA, revert the loan valuation of the two Evidente properties covered by TCT's Nos. N-166336 and 166337 to PHP2.5 Million, and allow plaintiffs to take its property covered by TCT No. N-138739 out of the mortgage by paying the balance thereon, minus interests and penalties accruing from February 1998;

- On the First and Second Causes of Action, ordering defendant bank to pay plaintiffs PHP500,000.00 in actual damages;

- On the Third Cause of Action, ordering defendant bank to pay plaintiffs PHP1 Million in actual damages;

- On the Fourth Cause of Action, ordering defendant bank to pay plaintiffs PHP500,000.00 in moral damages;

- On the Fifth Cause of Action, ordering defendant bank to pay plaintiffs PHP300,000.00 in exemplary damages;

- On the Sixth Cause of Action, ordering defendant bank to [pay] plaintiffs PHP200,[000].00 for attorney's fees and litigation expenses;

- Making the injunction issued against defendants permanent; and

- Ordering defendants to pay costs of suit.

Other reliefs which are just and equitable are likewise prayed for.[4] (Emphasis and underscoring in the original; italics supplied).

Branch 233 of the Quezon City RTC denied the Locsins' prayer for the issuance of a TRO, by Order of August 25, 1998.

In its September 8, 1998 ANSWER[5] with Compulsory Counterclaim filed on September 11, 1998, petitioner denied that its Asst. Vice President Agnes Tuason had told the Locsins that the loan valuation of the Evidente properties was P2.5 million for it in fact told them that the P2.5 million loan was approved "inspite of the deficiency of the Evidente properties because of their [Locsins'] good paying record with [it]." And it denied (specifically) too the Locsins' complaints-allegations in paragraphs 19-25, alleging as follows:

8.2 All the promissory notes signed by [the Locsins] uniformly provide:

Upon the occurrence as to Maker or any Co-Maker of this Promissory Note of any of the following events of default, the outstanding principal, accrued interest and any other sum payable hereunder or under any related agreement shall become immediately due and payable without presentment, demand, protest or notice of any kind (other than notice of the event and fact of default) all of which are hereby expressly waived by the Maker and all of the Co-Makers, if any:

x x x

3) Failure by the Maker or any Co-Maker to perform or the violation of any provision of this Promissory Note or any related agreement;

x x x

6) The Maker or any Co-Maker fails to pay any money due under any other agreement, standby letter of credit or document evidencing, securing, guaranteeing or otherwise relating to indebtedness of the Maker or any Co-Maker to any other creditor, or there occurs, any event of default or any event which, but for the passage of time or the giving of notice, or both, would constitute under any such agreement, stand by letter of credit or document (and which has not been remedied within any applicable grace period):

x x x

8.3 The letter of approval of the P2.5 million loan of [the Locsins] has a cross-default provision, which reads:

3.6 A default on any avallment under this credit line facility shall automatically mean a default on [the Locsins] existing term loan under Promissory Note No. 29-01-9080-95 [covering the first TLA] and vice versa (Emphasis and underscoring supplied),[6]

on which letter the Locsins affixed their conformity; that in light of the Locsins' default in the settlement of their monthly obligations under the CLA, it sent them a January 7, 1998 demand letter advising them of the Past Due Status of their promissory note covering the P2.5 million account to thereby "automatically mean that [said promissory note] and the other loan account under [the promissory note covering the 1[st] TLA] with an outstanding balance of P460,652.95 are considered Due and Demandable already;" that after a follow up letter and a final letter of demand, the Locsins requested, by letter of February 26, 1998, that the promissory note under the 1st TLA and that under the CLA be treated separately and that one of their titles be released upon payment of P1.8 million; that by letter of March 5, 1998, it advised the Locsins that their request in their February 26, 1998 letter "regarding the release of one of the [two Evidente titles]" was approved, "subject to the partial payment on Principal plus all interests and charges amounting to P1,934,465.79 as of March 20, 1998"; that to its March 5, 1998 letter, the Locsins, by letter of March \_\_\_, (sic) 1998, replied as follows:

We would like to request for a thirty day extension on the deadline given us today for the payment of P1,900,000.00, or (sic) the release of one title under PN No. 11-01-0586-96 [covering the CLA] as the person very much interested in purchasing it has asked us for the same. At the same time we are also going to take out the property under PN No. 29-01-9080-95 [covering the first TLA], so that only one property under the fire (sic) account mentioned shall be left mortgaged to your bank.

Thank you for your kind consideration.[7] (Underscoring supplied);

that despite the grant of the Locsins' request for extension of 30 days or up to April 20, 1998 to pay P1.9 million as a condition "for the release of the title," the Locsins failed to come up therewith; and that the inclusion of the Locsins' mortgaged title covering the 1[st] TLA in the amended application for extra-judicial foreclosure was "not erroneous because of the cross-default provisions and acceleration clauses in the loan documents which [the Locsins] signed."

As Compulsory Counterclaim petitioner alleged that on account of the filing of the baseless and malicious suit, it was constrained to engage the services of its counsel at an agreed fee of P200,000.00. It thus prayed for the dismissal of the Locsins' complaint and the grant of its counterclaim.

En passant, it does not appear that the Locsins filed a Reply[8] to petitioners' Answer with Compulsory Counterclaim.

On March 26, 1999, the Locsins filed an Omnibus Motion[9] (To Amend the Designation of the Plaintiffs; and to Admit Supplemental Complaint), which appears to have been granted by the Quezon City RTC. In their Supplemental Complaint,[10] they repleaded in toto the allegations in their August 24, 1998 Complaint and additionally alleged that petitioner proceeded with the public auction of the properties covered by the mortgage in the 1[st] TLA and the mortgage in the CLA on September 23, 1998, "contrary to law."

The Locsins thus prayed in their Supplemental Complaint as follows:

- Ordering the cancellation of the public auction of TCT Nos. N-138739, N-166336 and N-166337 on September 23, 1998;
- Declaring said auction of no legal force and effect; and
- Granting the following reliefs prayed for by plaintiffs in their [original] Complaint, to wit:

x x x[11] (Emphasis and underscoring supplied).

By Answer[12] (To Supplemental Complaint) dated June 1, 1999, petitioner admitted that the public auction (which was originally scheduled on August 26, 1998) did take place on September 23, 1998. It denied, however, that it was contrary to law.

More than eight months after the Locsins filed their Supplemental Complaint reflecting their prayer for the nullification of the September 23, 1998 public auction sale or on November 29, 1999, petitioner filed a complaint against the Locsins before the RTC of Mandaluyong where it was docketed as Civil Case No. MC-99-935,[13] for Collection of Sum of Money, alleging as follows:

x x x

- Defendants failed to satisfy their obligations under the . . . Promissory Notes [covering the first TLA & the CLA] and Plaintiff deemed them in default;

x x x

- The [amended] extrajudicial sale was conducted on 23 September 1998 and Plaintiff was again declared the highest bidder . . .
- The total outstanding obligation of Defendants at the time of the foreclosure was PESOS: FIVE MILLION TWENTY THREE THOUSAND FOUR HUNDRED NINETY SIX & 64/100 (P5,023,496.64). However, the appraised value of the properties was only P3,879,406.80 and plaintiff thus submitted a bid of PESOS: THREE MILLION EIGHT HUNDRED SEVENTY NINE THOUSAND FOUR HUNDRED SIX & 80/100 (P3,879,406.80);
- After all expenses for the foreclosure and registration of the Certificate of Sale have been deducted from the aforementioned bid, there still remains an outstanding balance in the amount of PESOS: ONE MILLION ONE HUNDRED FORTY FOUR THOUSAND EIGHTY NINE & 84/100 (1,144,089.84), EXCLUSIVE OF INTEREST AT THE RATE OF TWENTY FIVE AND A HALF PERCENT (25.5%) per annum, which Plaintiff is entitled to recover from Defendants;
- On 09 February 1999, counsel for plaintiff sent a letter to defendants dated 05 February 1999, demanding from the latter the payment of said deficiency but Defendants refused and failed and continue to refuse and fail to pay said obligation . . .
- Due to Defendants' unreasonable refusal and failure to comply with Plaintiffs just demands, Plaintiff was compelled to institute the present action and to engage the services of counsel to whom it bound itself to pay the sum of P130,000.00, plus appearance fee of P2,000.00 and other legal costs and expenses.[14] (Emphasis in the original; underscoring supplied).

Petitioner accordingly prayed in its complaint that the Locsins be ordered to pay it jointly and severally

- the outstanding obligation in the sum of PESOS: ONE MILLION ONE HUNDRED FORTY FOUR THOUSAND EIGHTY NINE & 84/100 (1,144,089.84), plus interest thereon at the rate of twenty five and a half percent (25.5%) per annum from 23 September 1998, the date of the foreclosure sale, until the obligation has been fully paid;
- attorney's fees in the sum of P130,000.00, plus appearance fee of P2,000.00; and
- costs of suit and expenses of litigation.

Other just and equitable reliefs under the premises are likewise prayed for.[15] (Emphasis in the original).

To petitioner's complaint (for sum of money), the Locsins filed a Motion to Dismiss[16] on the ground that it should have been raised as compulsory counterclaim in their (the Locsins') complaint (for specific performance, damages and nullification of the public auction), and by failing to raise it as such, it is now "barred by the rules." To the Motion, petitioner filed its Opposition which merited the Locsins' filing of a Reply to Opposition.[17]

Branch 213 of the Mandaluyong RTC denied the Locsins' Motion to Dismiss petitioner's Complaint, by Order of September 18, 2000,[18] in this wise:

The motion to dismiss is premised on the ground that plaintiff's claim in the instant case should have been raised in the previous case, [C]ivil [C]ase No. Q98-35337, wherein plaintiff herein was the defendant, said claim being a compulsory counterclaim and for failure to raise the same, it is now barred by the rules.

It is noted, however, that the instant case is one for collection of alleged deficiency amount as the proceeds of the foreclosure sale of defendant's properties are not sufficient to cover the entire indebtedness. In effect, such claim did not arise as a consequence of [C]ivil Case No. 098-35337 but was already existing (sic) even before the institution of that earlier case.

Without necessarily delving into the veracity of plaintiff's claim but merely considering its origin and nature as

alleged in the complaint, said claim is merely permissive and not compulsory. Thus, such a claim can stand as an independent action.[19] (Underscoring supplied).

The Locsins' Motion for Reconsideration having been denied by the Mandaluyong RTC by Order of March 21, 2001,[20] they appealed to the Court of Appeals which, by the present assailed decision of June 5, 2003,[21] reversed the Orders of the Mandaluyong RTC, it finding that petitioner's complaint was a compulsory counterclaim which should have been raised in its Answer to the Locsins' complaint, and having failed to do so, it is now barred; that *litis pendentia* and *res judicata* apply to the case; and that petitioner violated the rule on forum shopping, hence, the dismissal of its complaint is warranted. Explained the appellate court:

[The Locsins'] complaint in Civil Case No. Q-98-35337, pending before Branch 223 of the Regional Trial Court of Quezon City asks specific performance by private respondent Banco de Oro of its obligations under the very same loan agreements covered by Real Estate Mortgages mentioned in private respondent's Complaint in Civil Case No. MC-99-935 before the Mandaluyong City Trial Court. In both cases, the real properties involved are those covered by TCT Nos. N-138739, [N-166336] and N-166337. The basis of the parties' respective complaints arose from the very same transactions, the Term Loan Agreement, dated September 28, 1995 and the Credit Line Agreement, dated November 6, 1996. Clearly, there is a logical connection between both claims which arose from the same transaction and are necessarily connected and it does not require the presence of third parties for its adjudication. A counterclaim is logically related to the opposing party's claim where separate trials of each of their respective claims would involve substantial duplication of effort and time by the parties and the courts.

Moreover, Sec. 2, Rule 9 of the Rules of Court provides:

"Sec. 2. Compulsory counterclaim, or cross-claim, not set up barred. - A compulsory counterclaim, or a cross claim, not set up shall be barred."

Private respondent should have raised its complaint as compulsory counterclaim in the Regional Trial Court of Quezon City. Failing to do so, it is now barred. The reason for the rule relating to counterclaims is to avoid multiplicity of suits and to enable the Courts to dispose of the whole matter in controversy in one action, and adjustment of defendant's demand by counterclaim rather than by independent suit. (*Reyes vs. Court of Appeals*, 38 SCRA 138).

[The Locsins'] second argument is that private respondent's complaint in Civil Case No. MC-99-935 constitutes *litis pendentia*, and therefore should have been dismissed by the trial court. For *litis pendentia* to be a ground for dismissal of an action, three elements must concur: (a) identity of parties, or at least such parties who represent the same interest in both actions; (b) identity of rights asserted and relief prayed for being founded on the same facts; and (c) the identity, with respect to the two preceding particulars in the two cases, is such that any judgment that may be rendered in the pending case, regardless of which party is successful, would amount to *res judicata* in the other.

Applying this test, the principle of *litis pendentia* and *res judicata* will certainly apply to the instant case, all three requisites are present. The parties are the same and what is involved in both Civil Case No. Q-98-35337 pending before the Quezon City Trial Court and Civil Case No. MC-99-935 before the Mandaluyong City Trial Court are the same subject matter and set of circumstances, which would entail presentation of the same evidence. Judgment in favor of one of the parties in Civil Case No. Q-9835337 would bar the institution of the case filed before the Mandaluyong City Trial Court.

Finally, [the Locsins] assert that Civil Case MC-99-935 should be dismissed since private respondent is guilty of willful and deliberate forum shopping. Jurisprudence has defined forum-shopping as the filing of multiple suits involving the same parties for the same cause of action, either simultaneously or successively, for the purpose of

obtaining a favorable judgment. Forum shopping exists where the elements of *litis pendentia* are present, and where the a final judgment in one case will amount to *res judicata* in the other. (*Heirs of Victorina Motus Penaverde v. Heirs of Mariano Penaverde*, 344 SCRA 69). Thus, there is forum shopping when there exist: a) identity of parties, or at least such parties as represent the same interest in both actions, b) identity of rights asserted and relief prayed for, the relief being founded on the same facts, and c) the identity of the two preceding particulars is such that any judgment rendered in the other action, will amount to *res judicata* in the action under consideration. (*Prubankers Association vs. Prudential Bank and Trust Company*, 302 SCRA 83). As discussed earlier, the elements of *litis pendentia* being present and that *res judicata* will eventually result, a decision by the Quezon City Trial Court would bar the institution of the Civil Case in the Mandaluyong City Trial Court for the collection of deficiency claim in the foreclosure sale of the petitioner's properties. Private respondent violated the rule on forum shopping and therefore, the summary dismissal of their action is warranted.[22] (*Italics in the original; underscoring supplied*).

Hence, the present Petition for Review on Certiorari,[23] petitioner raising the following assignment of errors:

- THE COURT OF APPEALS ERRED IN HOLDING THAT PETITIONER BANK'S COMPLAINT FOR COLLECTION OF SUM OF MONEY BASED ON DEFICIENCY CLAIM UNDER CIVIL CASE No. MC-99-935 IS A COMPULSORY COUNTERCLAIM AND SHOULD HAVE BEEN SET UP BY PETITIONER BANK IN PRIVATE RESPONDENTS' COMPLAINT FOR SPECIFIC PERFORMANCE, TORT AND DAMAGES, AND ANNULMENT OF FORECLOSURE IN CIVIL CASE NO. Q-98-35337.
- THE COURT OF APPEALS ERRED IN HOLDING THAT THERE IS *LITIS PENDENTIA* AND THUS, CIVIL CASE No. MC-99-935 SHOULD BE DISMISSED.
- THE COURT OF APPEALS ERRED IN HOLDING THAT THE PETITIONER BANK IS GUILTY OF FORUM SHOPPING.[24]

Petitioner argues that the Locsins' complaint is one based on tort, whereas its complaint before the Mandaluyong RTC is based on contract and law, hence, the two causes of action are separate and distinct; that under the test for the determination of whether the counterclaim is compulsory or permissive, its suit before the RTC of Mandaluyong for collection of deficiency judgment is not a compulsory, but permissive counterclaim and may, therefore, proceed independently of the Locsins' complaint.

Petitioner adds that its claim arises from the loan agreement, whereas the Locsins' claim arises from the annulment of the foreclosure sale; that *litis pendentia* and *res judicata* do not apply as grounds for dismissal of its complaint as a perusal of both complaints reveals different causes of action, and the rights asserted and the reliefs prayed for are different, and the rule on *lis pendens* "is applicable only when the judgment to be rendered in the action first instituted will be such that regardless of which party is successful, it will amount to *res judicata* as to the second action," it citing *Hongkong & Shanghai Bank v. Aldecon & Co.*[25]

Citing *Enriquez, et al. v. Ramos, et al.*,[26] petitioner further argues that an action for collection of a mortgage loan does not bar another for rescission of the mortgage if such is based on the non-compliance by the mortgagor of the mortgage contract.

Petitioner further cites *Roa v. PH Credit Corporation*,[27] wherein this Court ruled that the pendency of a replevin suit does not bar a proceeding for deficiency claim as there is no identity of subject matter, cause of action and reliefs prayed for.

Finally, petitioner cites *Bangko Silangan Development Bank v. Court of Appeals*,[28] wherein this Court held that:

The test to determine identity of the causes of action is to ascertain whether the same evidence necessary to sustain the second cause of action is sufficient to authorize a recovery in the first, even if the form or nature of the two (2) actions are different from each other. If the same facts or evidence would sustain both, the two (2) actions are considered the same within the rule that the judgment in the former is a bar to the subsequent action; otherwise, it is not. This method has been considered the most accurate test as to whether a former judgment is a bar in subsequent proceedings between the same parties. It has even been designated as infallible.

While it is true that the two (2) cases are founded in practically the same set of facts, as correctly observed by the Court of Appeals, it cannot be said that exactly the same evidence are needed to prove the causes of action in both cases. Thus, in Civil Case No. 91-56185 of the RTC of Manila, the evidence needed to prove that petitioner sustained damage to its reputation and goodwill is not the same evidence needed in Civil Case No. 221 of the RTC of Batangas to prove the allegation that a substantial amount of respondent Bausas' bank deposit in petitioner's bank was illegally withdrawn without her consent or authority, The RTC of Batangas and the Court of Appeals, therefore, did not abuse their discretion in denying petitioner's motion to dismiss which was based on the ground of *litis pendentia*.<sup>[29]</sup> (Emphasis and underscoring supplied).

By their Comment,<sup>[30]</sup> the Locsins maintain that petitioner's claim in Civil Case No. MC-99-935 is "logically related" to their claim in Civil Case No. Q-98-35337, as they involve the same parties, rely on the same facts, subject matter and series of

transactions and, therefore, would entail presentation of the same evidence; that petitioner having failed to set up its claim as a compulsory counterclaim<sup>[31]</sup> in Civil Case No. Q-98-35337, it is now barred from setting it up in Civil Case No. MC-99-935; and that *litis pendentia* and *res judicata* proscribe the filing of a separate complaint by petitioner which is guilty of "willful and deliberate forum shopping."

The petition is impressed with merit.

It bears noting that when petitioner filed its Answer with Counterclaim to the Locsins' complaint on September 11, 1998, the Real Estate Mortgages covering the 1<sup>st</sup> TLA and the CLA had not been extrajudicially foreclosed, the extra-judicial foreclosure having taken place subsequent thereto or on September 23, 1998.

It bears noting too that until after the Locsins allegedly refused and failed to settle the alleged deficiency amount of their outstanding obligation, despite petitioner's February 5, 1999 letter of demand sent to the Locsins on February 9, 1999, petitioner's cause of action had not arisen.

Petitioner could not, therefore, have set its claim - subject of its complaint in Civil Case No. MC-99-935 as, assuming *arguendo* that it is, a compulsory counterclaim when it filed on September 11, 1998 its Answer with Compulsory Counterclaim to the Locsins' complaint.<sup>[32]</sup>

The counterclaim must be existing at the time of filing the answer, though not at the commencement of the action for under Section 3 of the former Rule 10, the counterclaim or cross-claim which a party may aver in his answer must be one which he may have "at the time" against the opposing party. That phrase can only have reference to the time of the answer. Certainly a premature counterclaim cannot be set up in the answer. This construction is not only explicit from the language of the aforecited provisions but also serves to harmonize the aforecited sections of Rule 10, with section 4 of the same rule which provides that "a counterclaim . . . which either matured or was acquired by a party after serving his pleading may, with the permission of the court, be presented as a counterclaim . . . by supplemental pleading before judgment."

Thus a party who fails to interpose a counterclaim although arising out of or is necessarily connected with the transaction or occurrence of the plaintiff's suit but which did not exist or mature at the time said party files his answer is not thereby barred from interposing such claim in a future litigation. . .<sup>[33]</sup> (Emphasis and

underscoring supplied).

While petitioner could have, after the Locsins filed on March 26, 1999 a Supplemental Complaint in Civil Case No. Q-98-35337, set up, in its Supplemental Answer, its claim subject of Civil Case No. MC-99-935, again assuming arguendo that it is a Compulsory Counterclaim, the setting up of such "after-acquired counterclaim," is merely permissive, not compulsory.[34]

At all events, even if the claim of petitioner - subject of its complaint in Civil Case No. MC-99-935 is a compulsory counterclaim which should have been set up in its Answer to the Locsins' Supplemental Complaint, technicality should give way to justice and equity to enable petitioner to pursue its "after-acquired" claim against the Locsins.

As for the issue of whether petitioner's complaint is dismissible on the grounds of *litis pendentia* or *auter action* pendant, and forum shopping, the above-quoted and recited allegations of the pleadings of the parties do not reflect identity of rights asserted and reliefs sought, as well as basis thereof, to a degree sufficient to give rise to the abatement of petitioner's complaint on any of these grounds.

WHEREFORE, the petition is hereby GRANTED.

The assailed decision of the Court of Appeals is SET ASIDE.

Let the case be REMANDED to the court of origin, Branch 213 of the Regional Trial Court of Mandaluyong, which is hereby DIRECTED to continue with dispatch the proceedings in Civil Case No. MC-99-935.

No costs.

**SO ORDERED.**

Panganiban, (Chairman), Sandoval-Gutierrez, Corona, and Garcia, JJ., concur.

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[1] CA Rollo at 128-136.

[2] Order dated September 18, 2000 and Order dated March 21, 2001, CA Rollo at 35 & 36, respectively.

[3] CA Rollo at 39-58.

[4] Id. at 56-57.

[5] Id. at 59-68.

[6] Id. at 60-61.

[7] Id. at 65.

[8] Rule 6, Sec. 10. Reply. - A reply is a pleading, the office or function of which is to deny, or allege facts in denial or avoidance of new matters alleged by way of defense in the answer and thereby join or make issue as to such new matters. If a party does not file such reply, all the new matters alleged in the answer are deemed controverted.

If the plaintiff wishes to interpose any claims arising out of the new matters so alleged, such claims shall be set forth in an amended or supplemental complaint."

Rule 11, Sec. 6. Reply. - A reply may be filed within ten (10) days from service of the pleading respondent to.

[9] CA Rollo at 69-72.

[10] Id. at 73-75.

[11] Id. at 74.

[12] Id. at 76-77.

[13] Id. at 79-83.

[14] Id. at 81.

[15] Id. at 82.

[16] Id. at 84-89.

[17] Id. at 90-93.

[18] Vide note 2.

[19] Ibid.

[20] Ibid.

[21] Vide note 1.

[22] Id. at 132, 134-135.

[23] Rollo at 25-47 exclusive of annexes.

[24] Id. at 34.

[25] 30 Phil. 255 (1915) cited in FRANCISCO, REVISED RULES OF COURT, Vol. I, p. 924.

**[26] 7 SCRA 265 (1963).**

**[27] 223 SCRA 371 (1993).**

**[28] 360 SCRA 322 (2001).**

[29] Rollo at 41.

[30] Id. at 205-214.

[31] Rule 6, Sec. 7. Compulsory counterclaim. - A compulsory counterclaim is one which, being cognizable by the regular courts of justice, arises out of or is connected with the transaction or occurrence constituting the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. Such a counterclaim must be within the jurisdiction of the court both as to the amount and the nature thereof, except that in an original action before the Regional Trial Court, the counterclaim may be considered compulsory regardless of the amount.

[32] Rule 11, Sec. 8. Existing counterclaim or cross-claim. - A compulsory counterclaim or a cross-claim that a defending party has at the time he files his answer shall be contained therein.

[33] National Marketing Corporation v. Federation of United Namarco Distributors, Inc. 49 SCRA 238, 268-269 (1973).

[34] Rule 11, Sec. 9. Counterclaim or cross-claim arising after answer. - A counterclaim or a cross-claim which either matured or was acquired by a party after serving his pleading may, with the permission of the court, be presented as a counterclaim or cross-claim by supplemental pleading before judgment. (Emphasis supplied); *National Marketing Corporation v. Federation of United Namarco Distributors, Inc.*, supra note 33 at 265 citing *Wright & Miller, Federal Practice and Procedure, Civil Section 1411*, pp. 54-55, citing: *Stahl v. Ohio River Co.*, C.A. 3d. 1970, 424 F. 2d 52. *Esquire, Inc. v. Varga Enterprises, Inc.*, C.A. 7[th], 1950, 185 F. 2d 14; *Denys Fisher (Spirograph) Ltd. v. Louis Marx & Co.*, D.C. W. Va. 1969, 306 F. Supp. 956; *Goldlawr, Inc. v. Shurbert*, D.C. Pa. 1967, 268 F. Supp. 965; *Marcus v. Marcoux*, D.C.R.I. 1967, 41 F.R.D. 332; *Local Union 499 of Int'l. Bhd. of Elec. Workers, AFL-CIO v. Iowa Power & Light Co.*, D.C. Iowa 1964, 224 F. Supp. 731, 738; *Slavics v. Wood*, D.C. Pa. 1964, 36 F.R. D. 47; *Allstate Ins. Co. v. Valdez* D.C. Mich. 1962, 29 F.R. 479; *Miner v. Commerce Oil Ref. Corp.*, D.C.R. 1961, 198 F. Supp 887, vacated on other grounds C.A. 1[st], 1962, 303 F. 2d 125; *Hartford Acc. & Indem. Co. v. Levitt & Sons, Inc.*, D.C. Pa. 1959, 24 F.R.D. 230; *Cyclotherm Corp. v. Miller*, D.C. Pa. 1950, 11 F.R.D. 88; *Goodyear Tire & Rubber Co. v. Marbon Corp.*, D.C. Del. 1940, 32 F. Supp. 279, 280; *Cold Metal Process Co. v. United Engineering & Foundry Co.*, C.A. 3d, 1951, 190 F. 2d 217; *Magna Pictures Corp. v. Paramount Pictures Corp.*, D.C. Cal. 1967, 265 F. Supp. 144; *RFC v. First Nat. Bank of Cody*, D.C. Wyo, 1955, 17 F.R.D. 397.

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