SPOUSES ERNESTO ZARATE AND MA. ROSARIO ZARATE, PETITIONERS, VS. MAYBANK PHILIPPINES, INC. AND PHILMAY PROPERTY, INC., RESPONDENTS.

G.R. NO. 160976. June 08, 2005

Ponente: CALLEJO, SR., J.

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CALLEJO, SR., J.:

This is a petition for review on certiorari of the Decision[1] of the Court of Appeals (CA) in CA-G.R. SP No. 66321, dated May 22, 2003, as well as the Resolution[2] dated October 8, 2003 denying the motion for reconsideration thereof.

The Antecedents

The spouses Ernesto and Ma. Rosario R. Zarate obtained a loan of P1,900,000.00 from the PNB Republic Bank (now the Maybank Philippines, Inc.). As security therefor, the spouses Zarate executed a Real Estate Mortgage[3] dated July 28, 1993 over a parcel of land in Pasig covered by Transfer Certificate of Title No. 23717. Upon the failure of the spouses to pay their loan and its increments totaling P3,170,401.18, the bank had the mortgage extrajudicially foreclosed. The property was eventually sold at public auction where the bank was declared the highest bidder. The Sheriff then executed a Certificate of Sale which was registered with the Office of the Sheriff on November 27, 1996.[4]

On October 13, 1997, the spouses Zarate received a notice from the bank, informing them that the period to redeem the property was about to expire on November 27, 1997. The bank then requested that the property be redeemed on or before the said date. The redemption price was pegged at for P4,593,752.96, inclusive of interests after foreclosure and exclusive of amounts receivables and interests thereon which amounted to P405,714.13.[5] On November 7, 1997, the spouses Zarate replied that they had previously remitted P708,950.00 to stay the scheduled sale at public auction. They requested that the bank waive the penalty charges, attorney's fees, miscellaneous expenses and the interests imposed after the auction sale; they, likewise, requested for an extension of the redemption period.[6] In a Letter[7] dated February 12, 1998, the spouses Zarate again requested for a 90-day extension to redeem the property. As a sign of good faith, they promised to remit P200,000.00. The bank reiterated its request for the spouses to redeem the property in a Letter dated April 21, 1998. Ma. Rosario Zarate, thereafter, complained to the bank, through a Letter dated May 25, 1998, that their payment of P708,950.00 had not been reflected in their Statement of Account.[8]

Before the bank could consolidate its title over the property, the spouses Zarate filed a Complaint[9] for Injunction and Damages with prayer for temporary restraining order/writ of preliminary injunction against the bank and its real estate subsidiary, Philmay Property, Inc. (PPI). The complaint was filed on October 27, 1998 before the Regional Trial Court (RTC) of Pasig City, Branch 261, and was docketed as Civil Case No. 67089. It contained the following prayer:

> WHEREFORE, it is respectfully prayed that upon the filing of the complaint, a temporary restraining order be issued enjoining the defendants from making any attempt to consolidate title over the subject property and if they have already done so, that they be stopped from taking over possession thereof.
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> Further, after due hearing, for the Honorable Court to issue an order directing the defendants to issue a true and proper accounting of plaintiffs' accountability and to extend the period to redeem the subject property.
>
> Further, after due hearing, for the Honorable Court to issue an order directing the defendants to pay, jointly and severally, the plaintiffs :
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> - The amount of not less than PhP100,000.00 as and for moral damages;
>
> - The amount of not less than PhP50,000.00 as and for exemplary damages;
>
> - The amount of not less than PhP100,000.00 as and for attorney's fees;
>
> - The cost of suits
>
> Other reliefs just and equitable in the premises are likewise prayed for.[10]

The spouses Zarate alleged, inter alia, that their failure to redeem the property within the extension period granted by Maybank was due to the latter's failure to include their payment of P708,950.00 via PCIBank Manager's Check No. 33908 dated July 24, 1995. Such payment was not included in the statement of account which the bank furnished them. Moreover, according to the spouses, the interest charged by the bank on their loans exceeded those provided by law.

On October 30, 1998, the trial court received ex parte the testimony[11] of Ma. Rosario Zarate in support of their plea for the issuance of a temporary restraining order. The spouses Zarate offered in evidence the receipt issued by the bank, dated November 18, 1997, and a Certification, of even date, also issued by the bank, acknowledging receipt of P1,000,000.00.[12] Ma. Rosario Zarate admitted, however, that the bank had returned the amount.[13] The trial court did not rule on the spouses' offer of documentary evidence, on their plea that they needed time to raise the money to redeem the property.

On November 19, 1998, the defendants filed their Answer[14] to the complaint, traversing the material allegations thereof and interposing a counterclaim. They maintained that their transactions with the spouses Zarate were above-board, and that contrary to the couples' claim, the P708,950.00 payment was duly reflected on their November 27, 1997 statement of account. They explained that more than half of the P708,950.00 was applied to the outstanding interests and penalties, and what remained was P223,593.00, the amount reflected on the statement of account opposite the column unpaid interest as of July 24, 1995.[15] They prayed that the complaint be dismissed, and, by way of counterclaim, asked for the recovery of exemplary damages, attorney's fees, and costs of the suit.[16]

The issues having been joined, the pre-trial conference was scheduled on January 18, 1999. It was, however, postponed several times due to the parties' attempts to settle the case amicably. Presiding Judge Benjamin V. Pelayo had likewise retired, and it was not until September 28, 1999 that the case was again set for a pre-trial conference by the new Presiding Judge, Agnes Reyes-Carpio.[17]

On motion of the spouses Zarate, pre-trial was reset to their suggested date, October 26, 1999.[18] On the said date, however, the spouses again moved for a resetting of the pre-trial conference, on the ground that there was no proof of service of the notice thereof on their counsel. The pre-trial was reset to December 7, 1999, then again to February 7, 2000, and thereafter to March 20, 2000 to enable the parties to settle the case.[19] Upon the parties' failure to arrive at an amicable settlement, the trial was set on May 22, 2000 for the spouses Zarate to begin

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adducing their evidence, and their counsel was duly notified in open court of the setting.[20] However, the said counsel filed a motion for the resetting of the trial on the ground that he had to attend the hearing of another case in the Quezon City RTC. Thus, trial was reset to July 10, 2000. During the said date, however, the spouses Zarate filed, through counsel, a motion for postponement, on the same ground that the latter had another hearing. The trial court again reset the trial to September 11, 2000, during which only the spouses' counsel appeared and asked for another resetting; he apparently found it difficult to get in touch with his clients and was intending to withdraw as their counsel.

The trial court again reset the hearing to October 23, 2000, with a warning that the spouses Zarate's failure to appear on the said date would warrant a dismissal of the case for their failure to prosecute for an unreasonable length of time. The spouses Zarate refused to receive the notices of the scheduled trial from their counsel, prompting the trial court to issue an Order on September 11, 2000 directing the process server to personally serve the said order on them, with the following warning:

> Should the plaintiffs still fail to appear on the next scheduled hearing which is hereby set on October 23, 2000 at 8:30 o'clock (sic) in the morning, the Court shall have no alternative but to dismiss the case for their failure to prosecute the same.
>
> SO ORDERED.[21]

A copy of the trial court's September 11, 2000 Order was served on the spouses on September 15, 2000.

During the trial of October 23, 2000, the spouses and their counsel failed to appear. The spouses' nephew, Jovi Zarate, submitted before the trial court a Motion to Cancel the Hearing, as her aunt Ma. Rosario was advised by her doctor to rest. No reason, however, was offered to explain Ernesto Zarate's absence. The trial court granted the motion, and reset the hearing anew to 8:30 a.m. of November 28, 2000. The spouses were duly notified of the setting through their nephew, but again failed to appear for trial on the said date. The trial court forthwith issued an Order dismissing the complaint for lack of interest to prosecute the case. Upon the manifestation of the defendant banks' counsel that the counterclaims would no longer be pursued, the trial court dismissed the same.[22]

On December 27, 2000, the spouses Zarate filed a motion for the reconsideration of the trial court's Order, which they claimed to have received on December 21, 2000. They alleged that there had been "a mix-up in the schedule of their counsel" and that the trial court's Order setting the case for trial on November 28, 2000 was received by their counsel in the afternoon of even date.[23] The spouses further alleged that their counsel was also attending trial in Criminal Case No. 116124-H before Branch 163 of the RTC of Pasig.

On February 8, 2001, the trial court issued an Order[24] denying the motion. The spouses filed another motion for the reconsideration of the November 28, 2000 and February 8, 2001 Orders of the trial court. They further manifested that they were adopting as their evidence-in-chief the evidence presented during the ex parte hearing of their plea for a writ of preliminary injunction.

On May 22, 2001, the trial court issued an Order[25] denying the second motion for reconsideration for being pro-forma, declaring that its November 28, 2000 Order had become final and executory. The trial court, likewise, stated that the spouses' adoption of their evidence during the ex parte hearing of their application for injunctive relief was impermissible since the defendant banks were not able to cross-examine Ma. Rosario Zarate. The trial court pointed out that this was due to the suspension of the proceedings for the issuance of a writ of preliminary injunction on the spouses' plea for more time to raise money with which to redeem their property.[26]

On August 28, 2001, the spouses filed a petition for certiorari with prayer for preliminary injunction and

temporary restraining order before the CA, seeking the nullification of the Orders of the RTC, dated November 28, 2000, February 8, 2001 and May 22, 2001. The spouses relied on the following grounds:

> I
>
> The COURT A QUO COMMITTED GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION IN DISMISSING PETITIONERS' COMPLAINT AND MOTIONS FOR RECONSIDERATION FOR FAILURE TO PROSECUTE FOR AN UNREASONABLE PERIOD OF TIME.
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> II
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> THE COURT A QUO COMMITTED GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION BY NOT ORDERING THE CASE TO PROCEED BY DIRECTING RESPONDENT TO CROSS-EXAMINE PETITIONERS' WITNESS.
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> III
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> THE COURT A QUO COMMITTED GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION IN DENYING PETITIONERS' MOTION FOR RECONSIDERATION ON THE GROUND THAT THE SAME IS PRO-FORMA/SECOND MOTION FOR RECONSIDERATION.[27]

On May 22, 2003, the CA rendered judgment dismissing the petition,[28] holding that the RTC did not commit grave abuse of its discretion in issuing the assailed Orders. The spouses Zarate filed a motion for reconsideration of the said decision, which the appellate court denied.[29]

The petitioners filed the present petition for review on certiorari, alleging the following:

> I
>
> THE COURT OF APPEALS COMMITTED AN ERROR IN LAW WHEN IT AFFIRMED THE REGIONAL TRIAL COURT'S DISMISSAL OF PETITIONERS' COMPLAINT AND MOTIONS FOR RECONSIDERATION, FOR FAILURE TO PROSECUTE FOR AN UNREASONABLE PERIOD OF TIME.
>
> II
>
> THE COURT OF APPEALS COMMITTED AN ERROR IN LAW WHEN IT AFFIRMED THE DECISION OF THE TRIAL COURT INSTEAD OF ORDERING THE CASE TO PROCEED BY DIRECTING RESPONDENT TO CROSS-EXAMINE PETITIONERS' WITNESS.
>
> III
>
> THE COURT OF APPEALS COMMITTED AN ERROR IN LAW IN AFFIRMING THE DECISION OF THE TRIAL COURT DENYING PETITIONERS' MOTION FOR RECONSIDERATION ON THE GROUND THAT THE SAME IS PRO-FORMA/SECOND MOTION FOR RECONSIDERATION.[30]

The petitioners insist that their absence during the trial set for 8:30 a.m. of October 23, 2000 and November 28, 2000 were excusable. They aver that the trial court committed grave abuse of discretion amounting to excess of jurisdiction in failing to consider as their evidence-in-chief the evidence presented during the hearing of their plea for the issuance of a writ of preliminary injunction, and to order the respondents to cross examine the petitioner Ma. Rosario Zarate. The petitioners maintain that the CA erred in declaring their second motion for reconsideration was pro forma, and that the appellate court should have remanded the case to the RTC for cross-examination of petitioner Ma. Rosario Zarate.

The petition has no merit.

The ruling of the CA that the petitioners failed to establish that the RTC committed grave abuse of discretion in issuing the assailed orders is correct. Grave abuse of discretion means such capricious and whimsical exercise of judgment which is equivalent to excess or lack of jurisdiction. The abuse of discretion must be so patent and gross as to amount to an evasion of a positive duty or a virtual refusal to perform a duty enjoined by law, or to act at all in contemplation of law, or where the power is exercised in an arbitrary and despotic manner by reason of personal hostility.[31] Moreover, certiorari cannot be used as a substitute for lost or lapsed remedy of appeal, especially if such was occasioned by one's own neglect or error in the choice of remedies.[32]

In this case, the petitioners failed to appeal the trial court's November 28, 2000 Order. After the denial of their December 27, 2000 Motion for Reconsideration, the petitioners filed their second motion for reconsideration, but by then, the trial court's November 28, 2000 Order had already become final and executory. This is so because under Section 5, Rule 37 of the 1997 Rules of Court, such motion for reconsideration is a prohibited pleading; hence, did not toll the period to appeal,[33] to wit:

> SECTION 5. Second motion for new trial. – A motion for new trial shall include all grounds then available and those not so included shall be deemed waived. A second motion for new trial, based on a ground not existing nor available when the first motion was made, may be filed within the time herein provided excluding the time during which the first motion had been pending.
>
> No party shall be allowed a second motion for reconsideration of a judgment or final order.[34]

The first sentence implements the Omnibus Motion Rule under Section 8, Rule 15 of the Rules of Court.[35]

Having lost the right of appeal, the petitioners were proscribed from filing their petition for certiorari in the CA.

It bears stressing that the petitioners could have invoked their plea that the evidence adduced during the hearing of October 30, 1998 be considered as their evidence-in-chief or part thereof in their December 27, 2000 Motion for Reconsideration of the November 28, 2000 Order. The petitioners, however, did so only in their second motion for reconsideration. The Court is convinced that this belated and last minute plea was a last-ditch attempt to gloss over their counsel's ineptitude, and further prolong the proceedings in the RTC.

The records show that the proceedings of October 30, 1998 was ex parte, and as such, the respondents had no opportunity to cross-examine petitioner Ma. Rosario Zarate. The petitioners offered their documentary evidence, but the trial court did not act thereon, as they likewise pleaded for more time to produce money with which to redeem the property subject of their complaint. Even during the pre-trial and subsequent hearings, the petitioners failed to submit the matter on the evidence for the court's consideration.

In Ortigas and Company Limited Partnership v. Velasco,[36] the Court emphasized that –

> ... The propriety or acceptability of such a second motion for reconsideration is not contingent upon the averment of "new" grounds to assail the judgment, i.e., grounds other than those theretofore presented and rejected. Otherwise, attainment of finality of a judgment might be staved off indefinitely, depending on the party's ingeniousness or cleverness in conceiving and formulating "additional flaws" or "newly discovered errors" therein, or thinking up some injury or prejudice to the rights of the movant for reconsideration. "Piece-meal" impugnation of a judgment by successive motions for reconsideration is anathema, being precluded by the salutary axiom that a party seeking the setting aside of a judgment, act or proceeding must set out in his motion all the grounds therefor, and those not so included are deemed waived and cease to be available for subsequent motions.
>
> For all litigation must come to an end at some point, in accordance with established rules of procedure and jurisprudence. As a matter of practice and policy, courts must dispose of every case as promptly as possible; and in fulfillment of their role in the administration of justice, they should brook no delay in the termination of

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cases by stratagems or maneuverings of parties or their lawyers. ...

In this case, the petitioners did not allege and establish any valid justification for their failure to invoke in their December 27, 2000 Motion for Reconsideration their plea that the evidence during the hearing of October 30, 1998 be considered as their evidence-in-chief. As such, the petitioners' plea for the relaxation of the Rules of Court and a liberal application thereof is unjustified.

It must be stressed that the petitioners are bound to prosecute their complaint with assiduousness. They were obliged to give the necessary assistance to their counsel, as their interest in the outcome of the case was at stake. They were wrong to expect that all they needed was to sit back, relax and await a favorable outcome.[37]

On the other hand, a lawyer must not neglect a legal matter entrusted to him. Like all professionals, he is expected to devise ways to follow the course of his cases and to keep his files updated.[38] As a member of the Bar, he is expected to exercise due diligence in the practice of his profession. Thus, every case a lawyer accepts deserves his full attention, diligence, skill and competence. He is mandated to exert his best efforts to protect, within the bounds of the law, the interest of his client with competence and diligence and he should never neglect a legal matter entrusted to him.[39] Moreover, a counsel is required to inquire, from time to time, and whenever necessary, about the status of handled cases, as well as motions filed for a client.[40] Upon the failure to do so, both counsel and client cannot be heard to complain that the latter's right to due process was violated. Indeed, the general rule is that the mistake and negligence of counsel is binding on the client. This is based on the rule that any act performed by the lawyer within the scope of the express or implied authority is regarded as an act of the client.[41]

In this case, the negligence of the petitioners is accompanied by that of their counsel.

The records show that the petitioners were scheduled to commence presenting their evidence-in-chief as early as 8:30 a.m. of May 22, 2000. The petitioners, through counsel, were notified in open court of the said setting, and yet moved for the resetting of the trial on the ground that their counsel had to attend to a hearing of another case at the Quezon City RTC. Nonetheless, the court accommodated the petitioners and their counsel, and reset the trial to July 10, 2000. Again, the petitioners and their counsel failed to appear and filed a motion for postponement for the same reason "[t]heir counsel was scheduled to appear for the hearing of another case at the Quezon City RTC." Again, the trial court accommodated the petitioners and their counsel and reset the trial to September 11, 2000. The petitioners failed to appear again before the trial court to adduce their evidence; their counsel, for his part, asked for a postponement of the trial on the flimsy ground that it was difficult to get in touch with the petitioners who were residing in Pasig City (where his office was located), and even informed the court that he was going to withdraw as their counsel. Again, the trial court reset the hearing to October 23, 2000, this time, with the warning that the failure on the part of the petitioners to appear on the said date to adduce evidence would impel it to dismiss the complaint for failure to prosecute the case for an unreasonable length of time. To ensure the appearance of the petitioners for the trial on said date, the trial court went out of its way to cause the service of a copy of the order on the petitioners, but the latter refused to receive the same. This impelled the trial court to order its process server to personally deliver copies of the said order to the petitioners. The record shows that the copies were received by the petitioners on September 15, 2000. Again, the petitioners and their counsel failed to appear before the court for the trial of October 23, 2000. There was no explanation for the failure of the counsel for the petitioners to appear before the trial court. Instead, their nephew, Jovi Zarate, appeared before the court with a motion to cancel the hearing prepared by the petitioners' counsel on the ground that the petitioner Ma. Rosario Zarate was advised by her doctor to rest. No verified medical certificate was submitted by the petitioners attesting to the nature of the illness of petitioner Ma. Rosario Zarate; nor was there any reason offered by the petitioners to explain why petitioner Ernesto Zarate or their counsel was not in court. In fine, the petitioners and

their counsel assumed that the trial court would grant their motion in any event.

Despite all this, the trial court still granted the petitioners' motion and reset the trial to 8:30 a.m. of November 28, 2000. The petitioners were notified of the setting through their nephew, but again failed to appear for trial. Neither did the petitioners pray for the resetting of the trial, nor offer an explanation for their absence and that of their counsel. Running out of patience, the trial court finally dismissed the petitioners' complaint for failure to prosecute their action for an unreasonable length of time despite repeated admonitions from the trial court.

The allegation that the counsel for the petitioners received a copy of the Order dated October 23, 2000 in the afternoon of November 28, 2000 cannot justify the petitioners' absence and that of their counsel during the trial of November 28, 2000. It bears stressing that the petitioners were duly notified of the said hearing in open court on November 28, 2000. The petitioners and their counsel cannot feign ignorance of the said setting because it was incumbent upon the latter to make inquiries on the trial court's action on his motion, as well as the schedule of the next hearing date. The petitioners were also duty-bound to inquire from their nephew and their counsel when the trial was set by the RTC. The petitioners must bear the consequences of their counsel's inaction and negligence, as well as their own.

The Court also notes that during the period of May 22, 2000 to November 28, 2000, the petitioners failed to present a witness and mark any documents in evidence. The only pleadings filed by them, through their counsel, were motions for postponement on different dates, and during which dates they continuously failed to appear.

Section 3, Rule 17 of the Rules of Court provides that the court may dismiss the complaint if for no justifiable cause the plaintiff fails to appear on the presentation of the evidence-in-chief, or for his failure to prosecute his action for an unreasonable length of time. It is clear in this case that the petitioners inexorably delayed the trial of the case without any justifiable reasons therefor. The trial court was thus justified in dismissing the petitioners' complaint.

IN LIGHT OF ALL THE FOREGOING, the petition is DENIED for lack of merit. The Decision of the Court of Appeals in CA-G.R. SP No. 66321, dated May 22, 2003, and the Resolution dated October 8, 2003 are AFFIRMED. Costs against the petitioners.

SO ORDERED.

Austria-Martinez, Acting Chairman, Tinga, and Chico-Nazario, JJ., concur.
Puno, (Chairman), J., on official leave.,

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[1] Penned by Associate Justice Juan Q. Enriquez, Jr., with Associate Justices Rodrigo V. Cosico and Hakim S. Abdulwahid concurring.

[2] Rollo, p. 28.

[3] Rollo, pp. 145-148.

[4] Id. at 134.

[5] Id. at 128.

[6] Rollo, pp. 125-126.

[7] Id. at 127.

[8] Id. at 129.

[9] Id. at 115.

[10] Rollo, pp. 121-122.

[11] Id. at 162-197.

[12] Exhibits " F" and "F-1."

[13] TSN, 30 October 1998, p. 33.

[14] Rollo, p. 131.

[15] Id. at 134.

[16] Id. at 138.

[17] Id. at 260.

[18] Id.

[19] Rollo, p. 260.

[20] Id. at 261.

[21] Id. at 262.

[22] Rollo, p. 110.

[23] Id. at 112.

[24] Rollo, pp. 111-112.

[25] Id. at 113-114.

[26] Id. at 157-158.

[27] CA Rollo, p. 27.

[28] Id. at 367-371.

[29] Id. at 412.

[30] Rollo, p. 51.

[31] Duero v. Court of Appeals, G.R. No. 131282, 4 January 2002, 373 SCRA 11.

[32] Sumndad v. Harrigan, G.R. No. 132358, 12 April 2002, 381 SCRA 8.

[33] Ortigas and Company Limited. Partnership v. Velasco, G.R. No. 109645, 4 March 1996, 254 SCRA 234.

[34] Emphasis supplied.

[35] Regalado, Remedial Law Compendium, 6th ed., p. 386.

[36] Supra.

[37] Greenhills Airconditioning and Services, Inc. v. National Labor Relations Commission, G.R. No. 112850, 27 June 1995, 245 SCRA 384.

[38] Zarate-Bustamante v. Libatique, A.C. No. 4990, 2 September 2001, 366 SCRA 8.

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[39] In Re: Atty. David Briones, A.C. No. 5486, 15 August 2001, 363 SCRA 1.

[40]Oriental Assurance Corporation v. Solidbank Corporation, G.R. No. 139882, 16 August 2000, 338 SCRA 305.

[41] Lao v. Court of Appeals, G.R. No. 115307, 8 July 1997, 275 SCRA 237.

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