

PHILIPPINE RADIANT PRODUCTS, INC., REPRESENTED BY DR. MANUEL T. ANG, PETITIONER, VS. METROPOLITAN BANK & TRUST COMPANY, INC. RESPONDENT.

G.R. NO. 163569. December 09, 2005

Ponente: CALLEJO, SR., J.

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CALLEJO, SR., J.:

Before the Court is a petition for review on certiorari of the Decision[1] of the Court of Appeals (CA) in CA-G.R. SP No. 73432 which set aside the September 20, 2002 Order[2] of the Regional Trial Court (RTC), Tagum City, Branch 2, in Civil Case No. 3400, dismissing the appeal of petitioner Philippine Radiant Products, Inc.

The factual and procedural antecedents are as follows:

On February 1, 2001, the Philippine Radiant Products, Inc. (PRPI) filed a complaint[3] against the Aurora Textile Finishing Company (ATFC), the Philippine Savings Bank (PSB), and the Metropolitan Bank & Trust Company, Inc. (MBTC) in the RTC of Tagum City, for specific performance and damages with a plea for a temporary restraining order or a writ of preliminary injunction. PRPI alleged, inter alia, that it had been ordering from ATFC yards of medical plaster cloth backing since 1990 and up to the present time. To pay for its purchases from ATFC, PRPI opened a savings account and a current account with PSB and opened a Letter of Credit at MBTC. PSB would charge all payments made by PRPI to ATFC against its account with PSB and then remit the same to MBTC. The latter would then remit the payment to ATFC.

On August 12, 2000, an order for 35,000 yards of medical plaster cloth backing was placed by PRPI and accepted by ATFC. The shipment arrived at the port of Manila. However, the agreed port of destination was the Davao City port. When the shipment of 35,000 yards of medical plaster cloth backing finally arrived at Davao City, PRPI discovered that the said 35,000 yards cloth backing were not vinyl coated. PRPI immediately informed PSB and MBTC of the discrepancy. PRPI also informed ATFC that the 35,000 yards medical plaster cloth backing they delivered was not vinyl coated. ATFC promised PRPI that it would send to the Philippines a technician to perform vinyl coating on the 35,000 yards of the medical plaster cloth backing.

In the meantime, ATFC demanded payment of the shipment and was poised to collect from PSB and MBTC. PRPI thus prayed in its complaint for injunctive relief to enjoin PSB and MBTC from making payment to ATFC for the shipment.[4] PRPI likewise prayed for payment of attorney's fees, but despite its repeated requests to ATFC to make good its commitments, the same remained unanswered.[5]

PRPI prayed that:

- That a Temporary Restraining Order and/or Writ of Preliminary Injunction be issued prohibiting the defendants METROPOLITAN BANK and TRUST COMPANY and PHILIPPINE SAVINGS BANK in paying the defendant AURORA TEXTILE FINISHING COMPANY;
- That the defendant AURORA TEXTILE FINISHING COMPANY be ordered to send its technician in the

Philippines to perform the vinyl coating of the 35,000 yards of medical plaster cloth backing in the sum of One Million Eight Hundred Ninety Thousand (P1,890,000.00);

- That Aurora Textile Finishing Company be ordered to pay for Attorney's Fees in the amount of P100,000.00;
- That Aurora Textile Finishing Company be ordered to pay damages and actual expenses incurred by the plaintiff to be proven during the Trial or the sum equivalent to Two Hundred Thousand (P200,000.00) Pesos.[6]

The case was docketed as Civil Case No. 3400.

On February 21, 2001, the RTC issued an Order[7] enjoining the PSB and MBTC to suspend payment for the goods to ATFC until final orders of the court.

On March 13, 2001, MBTC filed its Answer[8] in which it interposed in the special and affirmative defense that it had already paid the amount on January 31, 2001 under the Letter of Credit with ATFC named as beneficiary. MBTC interposed compulsory counterclaim.

MBTC prayed that, after due proceedings, judgment be rendered as follows:

WHEREFORE, premises considered, it is most respectfully prayed [of] the Honorable Court:

- That the complaint be dismissed;
- To order plaintiff to pay the sum of:
 - 1.) P200,000.00 as attorney's fees plus P2,000.00 as appearance fees per hearing and to reimburse the cost and expenses incurred by the defendant Metropolitan Bank and Trust Company as proven at the trial.

Defendant Metropolitan Bank and Trust Company prays for such other reliefs as the Honorable Court may consider just and equitable under the premises.[9]

MBTC appended to its answer a copy of the Irrevocable Documentary Credit No. DMO 112/00.[10]

On April 5, 2002, MBTC filed a complaint[11] against PRPI and/or Dr. Manuel T. Ang in the RTC of Davao City for the collection of the cost of the unpaid import bills plus charges in the amount of US\$50 discrepancy fee or in the total amount of US\$48,492.60 relative to the Letter of Credit No. DMO 112/00 and attorney's fees. The case was docketed as Civil Case No. 29,066-2002.

In its complaint, MBTC prayed that, after due proceedings, judgment be rendered in its favor, thus:

WHEREFORE, premises considered, it is respectfully prayed that this Honorable Court:

- Immediately order the issuance of a writ of preliminary attachment upon the filing by the plaintiff of an attachment bond in the sum fixed by this Honorable Court, directing the sheriff to attach the properties of defendants sufficient to satisfy plaintiff's claim of USD48,492.60 or its peso equivalent.
- After due notice and hearing, judgment be rendered in favor of the plaintiff directing the defendants to pay the following:
 - USD48,492.60 or its peso equivalent as principal obligation plus accrued interest and penalty charges;
 - 10% for and as attorney's fees plus P1,500.00 per court appearance;
 - Cost of the bond.

Such other reliefs just and equitable under the premises are, likewise, prayed for.[12]

In its amended answer to MBTC's complaint, PRPI interposed the special and affirmative defense of litis pendentia and forum shopping. Acting thereon, on April 8, 2003, the RTC of Davao City issued an Order^[13] dismissing the complaint in the said case on the ground of litis pendentia. MBTC appealed the said Order to the CA.

Meanwhile, on June 14, 2002, the RTC of Tagum City rendered judgment in Civil Case No. 3400 in favor of PRPI and against MBTC and ATFC. The fallo of the decision reads:

WHEREFORE, in view of the foregoing, judgment is hereby rendered ordering Metropolitan Bank and Trust Company and Aurora Textile Finishing Company to pay plaintiff, jointly and severally, the following:

- One Million Eight Hundred Ninety Thousand (P1,890,000.00) Pesos for actual damage;
- Three Million Pesos (P3,000,000.00) for loss of income of the plaintiff;
- Ten Million Pesos (P10,000,000.00) for moral damages;
- One Hundred Thousand Pesos (P100,000.00) for exemplary damages;
- Three Hundred Thousand Pesos (P300,000.00) for attorney's fee.
- and to pay the cost.

SO ORDERED.^[14]

On June 26, 2002, PRPI received a copy of the decision and filed a motion for execution pending appeal.^[15] The following day, MBTC received its copy of the decision and filed a motion for reconsideration thereof and the consequent dismissal of the complaint.^[16]

On August 22, 2002, the RTC of Tagum City issued an Order partially granting the motion for reconsideration of MBTC. The fallo of the decision, as amended, reads:

WHEREFORE, in view of the foregoing, the award of actual damages in the amount of Php 1,800,000.00 as mandated in the decision is ordered deleted and the award of attorney's fees in the amount of P300,000.00 is ordered reduced to P100,000.00.

SO ORDERED.^[17]

On the same day, the RTC of Tagum City issued an Order^[18] partially granting the motion of PRPI for the partial execution of the decision pending appeal, thus:

WHEREFORE, in view of the foregoing, partial execution of Judgment pending appeal is hereby granted, ordering Metropolitan Bank and Trust Company and Aurora Textile Finishing Company to pay plaintiff, jointly and severally, the following:

- One Million Five Hundred Thousand (P1,500,000.00) Pesos for loss of income;
- Five Million (P5,000,000.00) Pesos for moral damages;
- Fifty Thousand (P50,000.00) Pesos for exemplary damages;
- Fifty Thousand (P50,000.00) Pesos for attorney's fees.

SO ORDERED.^[19]

On August 23, 2002, the Ex-Officio Sheriff issued a Writ of Execution^[20] in compliance with the said order granting partial execution pending appeal. On August 27, 2002, the Sheriff arrived at the Davao City office of

MBTC and served copies of the August 22, 2002 Orders and the writ of execution on William R. Vidanes, the manager of MBTC, who endorsed the said orders to Patricia Uy, the General Manager of the Davao City branch.[21]

On August 30, 2002, the counsel of MBTC received copies of the August 22, 2002 Orders of the court. He filed a Notice of Appeal of the RTC of Tagum City's decision and its August 22, 2002 Order partially granting MBTC's motion for reconsideration of the decision.[22]

PRPI opposed the appeal of MBTC contending that it was filed beyond the period therefor. PRPI alleged that MBTC received a copy of the August 22, 2002 Order denying its motion for reconsideration on August 27, 2002, and not on August 30, 2002 as alleged by MBTC. PRPI relied on the Initial Report[23] of the Ex-Officio Sheriff dated September 2, 2002 on his service of the writ of execution and said order wherein he stated, inter alia, that he talked by telephone to MBTC's counsel, when he served on August 27, 2002 the Orders dated August 22, 2002 of the RTC of Tagum City on Vidanes and Uy and said counsel ordered him to leave the copies of the orders with Uy.

MBTC declared, in its Reply and Surrejoinder, that the period for appeal should be reckoned from August 30, 2002 when its counsel received, by registered mail, the August 22, 2002 Order of the RTC of Tagum City denying its motion for reconsideration and not from August 27, 2002 when Vidanes and Uy were served with copies of said orders. MBTC also alleged that its counsel objected to the service on Vidanes and Uy of the August 22, 2002 Order denying its motion for reconsideration considering that separate copies of said order had been served on its counsel of record.

At the hearing on PRPI's motion for clarification, the Ex-Officio Sheriff testified that he was told by Atty. Emmanuel Galicia, Jr., MBTC's counsel, when they talked on the telephone on August 22, 2002, to just leave the copies of the August 22, 2002 Order with Uy.[24]

On September 20, 2002, the RTC of Tagum City issued an Order[25] denying MBTC's notice of appeal and declaring the June 14, 2002 Decision final and executory. The RTC of Tagum City gave credence to the testimony of the sheriff. MBTC filed a motion to present Atty. Galicia to refute the testimony of the Ex-Officio Sheriff. The motion was set for hearing on October 1, 2002.

When MBTC received the September 20, 2002 Order of the RTC of Tagum City, it filed an urgent motion for reconsideration *ex abundanti ad cautelam*[26] with a tender of the testimony of Atty. Galicia refuting the testimony of the sheriff. The lawyer testified and belied the testimony of the sheriff. Appended to the motion was the affidavit of Atty. Galicia in support thereof.[27]

PRPI, for its part, filed a motion for the full execution of the June 14, 2002 Decision of the RTC of Tagum City.[28] The motions of PRPI and MBTC were set for hearing on September 27, 2002 at 8:30 a.m. and 2:00 p.m., respectively.[29]

On October 4, 2002, the RTC of Tagum City issued an Order[30] reiterating its September 20, 2002 Order denying MBTC's notice of appeal and declaring its June 14, 2002 Decision final and executory. On October 7, 2002, the said RTC issued an Order[31] directing the issuance of a writ of execution. On the following day, the Ex-Officio Sheriff issued the writ of execution.[32]

On October 8, 2002, MBTC filed a petition for certiorari against PRPI and the Sheriff with the CA for the nullification of the June 14, 2002 Decision and the Orders dated August 22, 2002, September 20, 2002 and October 4, 2002 of the RTC of Tagum City, with a prayer for injunctive relief. The case was docketed as CA-G.R. SP No. 73241 and raffled to the Special Ninth Division of the appellate court. However, the CA failed to act on

MBTC's plea for injunctive relief.

Worse, on October 17, 2002, the CA issued a Resolution dismissing the petition for the following reasons:

- 1) the VERIFICATION/CERTIFICATION AGAINST FORUM SHOPPING was signed by one Patricia A. Uy, the Branch Manager of Petitioner Metropolitan Bank & [Trust] Company, however, no Special Power of Attorney, as alleged, is attached to the petition to establish Patricia A. Uy's authority to sign the verification and certification of non-forum shopping in behalf of the petitioner-corporation;
- 2) Copies of Annexes "D," "E," and "F" are mere machine copies of the certified RTC orders of September 20, 2002, October 4, 2002 and October 7, 2002, respectively. (Section 3, paragraphs 3 and 4, Rule 46, 1997 Revised Rules of Court).

ACCORDINGLY, the petition is hereby DISMISSED.[33]

On the same day, MBTC filed a "Notice of Withdrawal of Petition," in CA-G.R. SP No. 73241 dated October 14, 2002, a copy of which was served on the RTC, on the same day, alleging therein that it noticed that its petition lacked certain technical requirements which, if uncorrected, would unduly prejudice its interests.[34] MBTC manifested that it was withdrawing its petition without prejudice to the refileing thereof or to the filing of another petition.

After the withdrawal of the petition in the CA, MBTC refiled its petition for certiorari and mandamus in the appellate court on October 18, 2002. The case was docketed as CA-G.R. SP No. 73432 and raffled to the First Division. MBTC prayed that:

- Immediately upon the filing of this Petition, the Honorable Court issue a temporary restraining order and thereafter, a writ of preliminary injunction:
- a) To restrain the public respondent, Honorable Erasto D. Salcedo, presiding judge of Branch 2 of the Regional Trial Court, Tagum City from further acting on the case, save only to give due course to the Notice of Appeal timely filed by Metrobank;
- b) To restrain the public respondent Sheriff Sulpicio Santillan from executing or threatening to execute the questioned 14 June 2002 decision and 22 August 2002 orders of the respondent judge.
- c) Thereafter, on the merits, the Honorable Court of Appeals render a decision:
 - a) Making the writ of preliminary injunction permanent;
 - b) Issuing a writ of mandamus to compel the respondent judge to give due course to the Notice of Appeal timely filed by Metrobank, and to transmit all the records of this case in due course, for proper appellate proceedings; and
 - c) Ordering private respondent Radiant to pay Metrobank attorney's fees of not less than TWO HUNDRED FIFTY THOUSAND Pesos (P250,000.00) plus treble the costs of suit.

Other just and equitable relief are, likewise, prayed for.[35]

Meanwhile, MBTC received a demand from the Sheriff for the remittance of P14,551,680.00 based on the Writ of Execution issued on October 7, 2002.[36] MBTC filed a motion ex abundanti ad cautelam[37] dated October 21, 2002 for the quashal of the Writ of Execution. MBTC also filed with the RTC a Manifestation and Motion dated October 21, 2002, alleging therein that despite the pendency of CA-G.R. SP No. 73432, the Sheriff persisted in implementing the writ of execution issued by the RTC. MBTC prayed that:

WHEREFORE, it is respectfully prayed of this Honorable Court to defer the implementation of the writ of

execution and to issue the appropriate order:

- Directing Sheriff Sulpicio Santillan to cease and desist from any and all proceedings relative to this case, specifically from implementing the writ of execution issued by this court, and
- Cancelling the annotation of the notice of levy and attachment made on any of Metrobank's Torrens title, pending resolution of the Petition for Certiorari by the Court of Appeals.

SO ORDERED.[38]

MBTC appended thereto a copy of the first page of its petition in CA-G.R. SP No. 73241 and the demand for the payment of the aforesaid amount.[39] MBTC received a notice of sale at public auction of its property covered by TCT No. 160610 on November 26, 2002.[40] MBTC was impelled to file with the appellate court, in CA-G.R. SP No. 73432, an urgent motion for the early resolution of its plea for a temporary restraining order.[41]

However, on October 28, 2002, the RTC of Tagum City denied MBTC's motion *ex abundanti ad cautelam*. The said court ruled that MBTC was guilty of forum shopping for filing its motion despite the pendency of its petition in the CA. MBTC filed a motion for the reconsideration thereof, but on November 18, 2002, the RTC issued an Order[42] denying the same.

In the meantime, MBTC received on November 5, 2002 the CA Resolution dated October 17, 2002 in CA-G.R. SP No. 73241. MBTC filed a Motion dated November 11, 2002 to modify the October 17, 2002 Resolution[43] so that the dismissal of its petition be based solely on its notice of withdrawal of its petition. However, on May 7, 2003, the CA issued a Resolution[44] denying the motion for modification of the decision because MBTC had refiled its petition. An Entry of Judgment[45] was made of record on June 8, 2003.

In its comment on the petition in CA-G.R. SP No. 73432, PRPI averred that the Order dismissing MBTC's appeal is in accordance with the rules; hence, the allusion of grave abuse of discretion is a mere product of MBTC's imagination and that the award of damages to PRPI is within the ambit of the applicable law and established jurisprudence.[46] PRPI also alleged that the petition should be dismissed on the ground of *res judicata*. It posited that the Resolution dated October 17, 2002 of the CA in CA-G.R. SP No. 73241 dismissing its first petition was with prejudice and barred the refiling of the same petition with the First Division of the appellate court.[47]

On February 4, 2004, the CA rendered a Decision[48] in CA-G.R. SP No. 73432 granting the petition and annulling the assailed orders of the RTC. The fallo of the decision reads:

WHEREFORE, the assailed Order dated September 20, 2002 which denied Metrobank's notice of appeal is hereby ANNULLED and SET ASIDE. Accordingly, respondent judge is hereby ordered to give due course to the notice of appeal timely filed by petitioner Metrobank.

SO ORDERED.[49]

The CA ruled that the dismissal of the petition by the Special Ninth Division in CA-G.R. SP No. 73241 was not a resolution of the case on the merits. Hence, MBTC may refile its petition for certiorari and mandamus. The appellate court declared that, in any event, the petition before it was filed within the period therefor.

The CA delved into the merits of the petition and held that MBTC's appeal from the decision of the RTC was within the period therefor. The service by the Ex-Officio Sheriff on MBTC, through Patricia Uy, of the August 22, 2002 Order of the RTC denying the motion for reconsideration of its decision was not made on MBTC absent a specific order from the RTC authorizing the service thereof on the petitioner and not on its counsel. Thus, the appellate court concluded, the RTC committed grave abuse of discretion amounting to excess or lack of jurisdiction in dismissing MBTC's appeal.

PRPI filed a motion for reconsideration of the decision of the appellate court. On April 27, 2004, the CA denied the motion.[50]

PRPI, now the petitioner, filed its petition for review on certiorari of the decision and resolution of the CA.[51]

The petitioner avers that: (1) respondent MBTC's petition filed with the CA was barred by the October 17, 2002 Resolution of the Special Ninth Division dismissing its petition in CA-G.R. SP No. 73241 with prejudice; (2) respondent MBTC is guilty of forum shopping; hence, the CA should have dismissed the petition in CA-G.R. SP No. 73432; (3) the decision of the RTC, as amended, had become final and executory and a petition for certiorari and mandamus could not be resorted to by the respondent for its lost right to appeal.

The petitioner maintains that the dismissal of the respondent's petition in CA-G.R. SP No. 73241 was with prejudice and barred its petition in CA-G.R. SP No. 73432 before the CA. Moreover, the petitioner argues, the refiling by the respondent of its petition in CA-G.R. SP No. 73432 constitutes willful and deliberate forum shopping which warrants the outright dismissal of said petition. Additionally, the respondent indulged in willful and deliberate forum shopping when it refiled its complaint in Civil Case No. 29,066-2002 in the RTC of Davao City despite the pendency of Civil Case No. 3400 in the RTC of Tagum City and when it filed a motion ex abundanti ad cautelam in Civil Case No. 3400 for the reconsideration of the Order of said court despite the pendency of CA-G.R. SP Nos. 73241 and 73432 in the CA. Moreover, the respondent sought the modification of the Resolution of the CA in CA-G.R. SP No. 73241 despite the refiling of its petition, docketed as CA-G.R. SP No. 73432, before the First Division thereof.

The petition is denied for lack of merit.

Section 5, Rule 7 of the Rules of Civil Procedure reads:

SEC. 5. Certification against forum shopping. — The plaintiff or principal party shall certify under oath in the complaint or other initiatory pleading asserting a claim for relief, or in a sworn certification annexed thereto and simultaneously filed therewith: (a) that he has not theretofore commenced any action or filed any claim involving the same issues in any court, tribunal or quasi-judicial agency and, to the best of his knowledge, no such other action or claim is pending therein; (b) if there is such other pending action or claim, a complete statement of the present status thereof; and (c) if he should thereafter learn that the same or similar action or claim has been filed or is pending, he shall report that fact within five (5) days therefrom to the court wherein his aforesaid complaint or initiatory pleading has been filed.

It has been held that forum shopping is the act of a party against whom an adverse judgment has been rendered in one forum, of seeking another (and possibly favorable) opinion in another forum (other than by appeal or the special civil action of certiorari), or the institution of two (2) or more actions or proceedings grounded on the same cause on the supposition that one or the other court would make a favorable disposition.[52] Thus, it has been held that there is forum shopping — (1) when, as a result of an adverse decision in one forum, a party seeks a favorable decision (other than by appeal or certiorari) in another; or (2) if, after he has filed a petition before the Supreme Court, a party files a motion before the Court of Appeals, since in such a case, he deliberately splits appeals "in the hope that even on one case in which a particular allowable remedy sought for is dismissed, another case (offering a similar remedy) would still be open;" or (3) where a party attempts to obtain a preliminary injunction in another court after finality to obtain the same from the original court.[53] Forum shopping exists where the elements of *litis pendentia* are present or where a final judgment in one case will amount to *res judicata* in another.[54]

The petitioner contends that the dismissal by the CA of the petition in CA-G.R. SP No. 73241 due to the failure of respondent MBTC (the petitioner therein) to append a Resolution of its Board of Directors authorizing Patricia Uy

to file the petition for and in its behalf and certified true copies of the orders subject thereof was with prejudice. This contention is not correct. Section 5, Rule 7 of the Rules of Civil Procedure plainly provides that such dismissal is without prejudice unless, otherwise, made upon motion and after hearing. So is the dismissal of the petition for failure of the petitioner to append thereto the requisite copies of the subject order/orders. Indeed, the subsequent submission of the requirements of Section 3, Rule 42 of the said Rules, at the initiative of the petitioner, is a compliance with said Rule.[55]

Contrary to the petitioner's contention, the respondent was not guilty of forum shopping when it filed its petition in CA-G.R. SP No. 73432 on October 18, 2002, after filing its "Notice of Withdrawal" of its Petition in CA-G.R. SP No. 73241 on October 17, 2002.

First. The respondent could have filed an amended petition and appended the required duplicate original copy or certified true copy of the order. However, the respondent was proscribed from filing an amended petition and appending thereto the requisite resolution of its Board of Directors authorizing petitioner Uy to file the petition under Section 5, Rule 7 of the 1997 Rules of Civil Procedure.[56] Hence, the only recourse of the respondent was to refile its petition docketed as CA-G.R. SP No. 73432.

Second. The respondent filed its petition in CA-G.R. SP No. 73241 as early as October 8, 2002. No action was taken by the CA on said petition and respondent's plea for injunctive relief, on account probably of the retirement of Justice Wenceslao Agnir, Jr., a member of the Ninth Division, and the need for his replacement via a raffle. But the respondent realized that its petition in CA-G.R. SP No. 73241 was defective. It then filed its Notice of Withdrawal of Petition with the CA alleging that its petition was defective and prayed to refile its petition:

- Metrobank filed the instant Petition for Certiorari and Mandamus with Extremely Urgent Prayer for Issuance of a Temporary Restraining Order with the Honorable Court on 10 October 2002, by personal delivery.
- However, in the zeal to prepare and file the same petition speedily due to the extreme urgency of the situation, counsel discovered that certain technical requirements were inadvertently omitted which, if left uncorrected, might unduly prejudice Metrobank's substantial rights.
- In the interest of accuracy and with utmost good faith, Metrobank most respectfully notifies the Honorable Court of its intention to WITHDRAW, as it hereby respectfully withdraws, the instant Petition WITHOUT PREJUDICE to the timely filing of another Petition, this time in strict conformity with what the Rules and applicable jurisprudence prescribe.[57]

By withdrawing its petition before the CA could have acted thereon and refiling the same, it could not be said that the respondent did so in order to obtain a favorable decision or action. In *Executive Secretary v. Gordon*,[58] this Court held that:

In the case at bar, although respondent Richard J. Gordon filed a petition for prohibition before this Court and, after two days, filed substantially the same petition before the Regional Trial Court of Olongapo City, the fact remains that (1) before filing his petition in the Olongapo court he first filed a notice of withdrawal of his petition which this Court later granted and (2) he withdrew his petition in this Court for the following reasons: Due, however, to the present policy of the Court requiring parties and their counsel to adhere strictly to the hierarchy of courts and in order to obviate any technical objection on this ground, petitioner has deemed it fit to withdraw, as he hereby withdraws, the instant petition so that it may be filed in the proper court where it can be ventilated on its merits.

No adverse decision had been rendered by this Court against respondent Gordon for which reason he thought it proper to institute the second action in the trial court. The situation he found himself in is similar to that in which a party, after filing a suit, realizes he made a mistake because the court in which he has brought the case has no

jurisdiction. He, therefore, withdraws his action and refiles it in the proper forum. For, indeed, the policy of this Court respecting the hierarchy of courts and consequently prohibiting the filing of a petition in this Court in view of the concurrent jurisdiction with the lower courts has been consistently observed in the absence of any compelling reason for departing from such policy. It is clear from respondents' actions and explanation that they had no intention of disregarding court processes. They in fact complied with Rule 7, §5 of the Rules of Civil Procedure.[59]

Although the CA resolved, on November 2, 2002, in CA-G.R. SP No. 73241, to deny the motion of the respondent to amend its October 17, 2002 Order, the CA did so because it denied the motion as moot since the respondent herein had refiled its petition in said case.

In view of the foregoing, and considering the opposition/comment filed by the respondents, and it further appearing that the petitioner has refiled the instant petition on October 18, 2002 which has been docketed in the First Division of this Court as CA-G.R. SP No. 73432, we resolved to deny the present motion.

WHEREFORE, the instant motion to amend, modify and/or reconsider (17 October 2002 Order) is hereby DENIED. Our dismissal of the Resolution of October 17, 2002 stands.

SO ORDERED.[60]

Third. The respondent cannot, likewise, be faulted for filing its motion ex abundanti cautelam for the quashal of the writ of execution issued by the RTC and its Manifestation and Motion ex abundanti ad cautelam in the RTC in Civil Case No. 3400. It appears that, despite the filing of the petitions in CA-G.R. SP Nos. 73241 and 73432, the Sheriff went through the process of implementing the writ of execution issued by the RTC, by issuing a notice of levy and had the same annotated at the dorsal portion of the property of the respondent covered by TCT No. 160610 and setting the sale thereof at public auction. The Sheriff ignored the pendency of CA-G.R. SP Nos. 73241 and 73432 on account of the failure of the CA to act on the petition for writ of temporary restraining order. The respondent had two remedies at that time to protect its rights and interests: (1) file the motion in the RTC in Civil Case No. 3400 ex abundanti ad cautelam for the said court to suspend, in the meantime, the enforcement of its writ of execution or to quash the same, and for the RTC to suspend all proceedings until after the CA shall have resolved its plea for a temporary restraining order or writ of preliminary injunction conformably with the ruling of this Court in *Eternal Gardens Memorial Park Corporation v. Court of Appeals*,^[61] and/or (2) file a motion in the CA in CA-G.R. SP No. 73432 for it to resolve its plea for injunctive relief. The respondent sought relief in the CA and in the RTC via a motion ex abundanti ad cautelam. On November 25, 2002, the CA resolved in CA-G.R. SP No. 73432 to grant the plea of the respondent for a writ of preliminary injunction upon a bond of P500,000.00, precisely because of the precipitate enforcement by the Sheriff of the writ of execution issued by the RTC.^[62]

Fourth. Relative to the filing by the respondent of a complaint against the petitioner in the RTC of Davao City, docketed as Civil Case No. 29,066-2002, it appears on record that the order of the said RTC dismissing the complaint on the ground of *litis pendentia* has been appealed to the CA. This Court cannot preempt the CA and resolve the issue of whether the respondent indulged in forum shopping when it filed its complaint in said case. Suffice it to say that the only issue in CA-G.R. SP No. 73432 was whether the RTC of Tagum City committed grave abuse of discretion amounting to excess or lack of jurisdiction in dismissing respondent MBTC's appeal and ordering the execution of the decision. The matter of whether the respondent indulged in forum shopping in filing its complaint in Civil Case No. 29,066-2002 was not raised in or the subject matter of CA-G.R. SP No. 73432.

In nullifying the September 20 and October 4, 2002 Orders of the RTC of Tagum City, the CA declared that service of a copy of the assailed RTC Order on Uy on August 27, 2002 did not amount to service thereof on

respondent MBTC. Service of such order on the respondent took place on August 30, 2002 when Atty. Galicia received his copy of the order by registered mail.

The petitioner asserts that the ruling of the CA is not correct. It posits that, as stated by the RTC, based on the testimony of the Sheriff, Atty. Galicia, the counsel of record of the respondent in the RTC, learned of the August 22, 2002 Order of the RTC denying the respondent's motion for reconsideration of its decision when he informed Atty. Galicia on August 27, 2002 of said order, copies of which he was serving on William Vidanes, the Davao City Bank Manager of the respondent. According to the Sheriff, Atty. Galicia instructed him to just leave the copy of the order with Vidanes or Uy. The petitioner avers that, as against the testimony of the respondent, that of the Sheriff, who is presumed to have acted regularly, should prevail.

The contention of the petitioner is incorrect. It bears stressing that the respondent was represented by Atty. Galicia and Atty. Silvanio Liza whose offices were located in Davao City. The August 22, 2002 Order of the RTC denying the respondent's motion for reconsideration of its decision was sent to said counsel by registered mail. Service of the order on the manager of respondent MBTC and not on its counsel was not notice to the said respondent. The only exception is when the service upon the party itself has been ordered by the court.[63]

The service of the sheriff of the August 22, 2002 Order through Vidanes and/or Uy on August 27, 2002 was not service on the respondent. Neither could the respondent be deemed to have been notified thereof as of August 27, 2002 for purposes of appeal.

We have examined the CA Rollo and the pleadings of the parties in this case and find no evidence that Atty. Galicia waived the service of the August 22, 2002 Order of the RTC on the respondent, through counsel, as provided in the 1997 Rules of Civil Procedure. The initial report of the Sheriff and his testimony before the RTC are incongruent. The initial report of the Sheriff reads:

That on August 27, 2002 at about 11:45 a.m., I served a copy of the Writ of Execution, together with a duplicate copy of two (2) orders dated August 22, 2002, to Metro Bank, Davao City, which was received personally by Mr. William Vidanes, Manager, and he indorsed the said writ to the Metrobank's General Manager, Mrs. Patricia Uy, in her office at second floor, Metro Bank Building, Davao City, and she called up and referred to their counsel thru telephone. I talked to the counsel of Metro Bank thru telephone and he questioned me regarding the said execution why I served it when in fact they have not yet received any order from the court;

That on September 02, 2002, I went back again to Metro Bank, Davao City, to follow up about the said writ but Mr. William R. Vidanes informed me that Mrs. Patricia Uy, Gen. Manager of the said bank is on leave and that he doesn't know of any development with regards to the said writ because the Gen. Manager is the one in-charge of it.[64]

The report does not state that respondent MBTC's counsel, Atty. Galicia, instructed the Sheriff to leave copies of the Orders with Vidanes or Uy.

When the Sheriff testified during the hearing of the motion of the petitioner for clarification, he declared that Atty. Galicia ordered him to leave a copy of the August 22, 2002 Order of the RTC with Uy, which he did, and that Vidanes acknowledged having received a copy of the said order.[65]

However, when he testified, Atty. Galicia belied the testimony of the Sheriff and declared that:

ATTY. DIOLA:

Thank you, Your Honor. Let us go to the testimony of Sheriff Santillan on the hearing of September 18, on page 8 of the Transcript of Stenographic Notes, I quote the question and answer. Now, a question to Sheriff

Santillan: "Now, what was your conversation with Atty. Galicia all about over the phone?" Answer: "I informed Atty. Galicia that I have a writ of execution to be served to Metro Bank." Then Question: "When he questioned you according to your report regarding the execution why you served it when in fact they have not received any order yet from the Court, what was your reply? Answer: "I informed him that I have a copy of the order denying the Motion for Reconsideration." What can you say to the testimony of Sheriff Santillan when he informed you that he had a copy of the order denying the motion for reconsideration?

A

That is a very big lie.

Q

What is the truth Atty. Galicia?

A

The Sheriff did not mention that he has any copy of the orders at that time he served the writ of execution. He told me that the order was sent by registered mail to us.

Q

You said order? Was it in the singular; in the plural, or was it clear to you?

A

In the singular.

Q

And what order was referred to you by Sheriff Santillan, as far as your (sic) understood it?

A

As far as I understood it, it was the order granting the Motion for execution pending appeal because at that time he was serving or implementing the writ of execution.

Q

Then, furthermore, there was this question to Sheriff Santillan, and I quote: "Then, what was the reply of Atty. Galicia? A-Atty. Galicia told Miss Patricia Uy not to receive the order but he ordered me to leave a copy of the order in front of Miss Patricia Uy." Number 2 – "What can you say to this answer, or to this testimony of Sheriff Santillan"

A

Again, that is not true.

Q

What is the truth?

A

It appears to me that the Sheriff made me a liar before this Honorable Court. The Sheriff did not mention any order at that time that we had a conversation over the phone. He merely informed me that he has with him the writ of execution and he is mandated by the court to implement it and so I told him that it is still premature because we have not yet received any copy of any order.

ATTY. DIOLA:

Q

And what was Sheriff Santillan's reply to you?

A

He replied that I am here to implement, as ordered by the court and so I requested that the phone be given back to Miss Uy and I told Miss Uy that if the Sheriff will insist, just let him leave a copy but do not acknowledge official receipt of that copy. I did not tell the Sheriff to leave any order.

Q

You are referring to the writ of execution issued by the court?

A

The order or any order, the writ of execution because according to him, he has a copy of the writ at that time. If he would insist in serving the writ, then I advised Miss Patricia Uy to just let him leave but do not receive any copy because we have not yet received a copy of any order granting our motion for execution pending appeal.

Q

At that point in that discussion that you had with Sheriff Santillan, did he say that the order had been sent to you by registered mail?

A

When I told him why are you serving the writ of execution when in fact we have not yet received a copy of any order granting the motion for execution, and he replied that the order had been sent to us by mail.

Q

Now, do you confirm that the order or orders of the court were actually sent to you by mail, is that a correct information?

A

In the proceedings of this case, all the orders from this court regarding this case or relative to this case, we have received it by mail.

Q

With respect to the August 22, 2002 orders when [did] you actually receive them?

A

Our office actually received copies of the two (2) August 22 orders and August 30, 2002 that was Friday.

Q

And do you have any evidence to show that said orders were delivered to you or to your office on August 30, 2002?

A

Yes, we have secured a certification from the Postmaster.

ATTY. DIOLA:

Q

If I will show to you a certification, will you be able to identify it?

A

Yes.

And aside from that, I can clearly recall that it was on August 30, 2002 because at that time, when I arrived from the court in Davao City to our office, I was informed by Atty. Liza that the two (2) August 22 orders were already received by our office and I went near him and he was dictating already a notice of appeal to our Secretary and at that time I was in a hurry. That was why I can exactly recall it was August 30 because I was also in a hurry because I had also a hearing in Lupon in the afternoon at 1:30, so I told Atty. Liza to take care of the notice of appeal.

Q

I'm showing to you a certification dated September 26, 2002 issued by Aquilina J. Niepes, Postmaster IV of the Philippine Postal Corporation, Region XI, is this the certification that you are referring to?

A

Yes.[66]

We are inclined to believe the testimony of Atty. Emmanuel Galicia. The testimony of counsel is congruent with the initial report of the Sheriff that he (Atty. Galicia) questioned the service of the orders on the bank manager of the respondent, and that neither Uy nor Vidanes acknowledged receipt of copies of the orders of the RTC. (Vidanes acknowledged receipt of only a true copy of the writ of execution.)

It was not part of the duties of the Sheriff to serve copies of the assailed Order of the RTC on the counsel of the respondent unless directed by the said court. Such duty devolved on its process server. The Sheriff had a copy of the assailed order because it was forwarded to him by the Branch Clerk of the RTC for the purpose of the implementation of the writ of execution.[67]

We do not believe that a practicing lawyer will simply allow the Sheriff to just leave copies of the orders of the court especially an order on his motion for reconsideration on the bank manager and waive his right to be served with copies thereof as required by the 1997 Rules of Civil Procedure. The least that a lawyer would do is to order the Sheriff to deliver the order to his office and for the sheriff to serve the writ of execution on the bank manager. Atty. Galicia knew that he filed a motion for reconsideration only on July 12, 2002 which was the fifteenth day from his receipt of the assailed decision on June 27, 2002.

Knowledge by Atty. Galicia of the existence of the assailed Order on August 27, 2002 during his telephone conversation with the Sheriff does not amount to service thereof on the respondent as contemplated in Section 13, Rule 13 of the 1997 Rules of Civil Procedure. Service on the respondent of the assailed order on Atty. Galicia took place only on August 30, 2002 when he, in fact, received the said order through registered mail.

IN LIGHT OF ALL THE FOREGOING, the petition is DENIED for lack of merit.

SO ORDERED.

Puno, (Chairman), Austria-Martinez, Tinga, and Chico-Nazario, JJ., concur.

[1] Penned by Associate Justice Eloy R. Bello, Jr. (retired), with Associate Justices Amelita G. Tolentino and Regalado E. Maambong, concurring; rollo, pp. 62-73.

[2] Penned by Acting Presiding Judge Erasto D. Salcedo; rollo, pp. 756-759.

[3] Rollo, pp. 164-178.

[4] Rollo, pp. 164-178.

[5] Ibid.

[6] Id. at 170-171.

[7] Id. at 179.

[8] Rollo, pp. 180-196.

[9] Id. at 183.

[10] Id. at 185.

[11] Id. at 197-203.

[12] Rollo, pp. 201-202.

[13] Id. at 145-149.

[14] Rollo, p. 315.

[15] CA rollo, pp. 118-122.

[16] Rollo, pp. 316-325.

[17] Id. at 336.

[18] CA rollo, pp. 82-84.

[19] CA rollo, p. 84.

[20] Id. at 123-125.

[21] Rollo, p. 339.

[22] Id. at 343-344.

[23] CA rollo, p. 134.

[24] Id. at 347.

[25] Id. at 85-88.

[26] CA rollo, pp. 155-159.

[27] Id. at 161-162.

[28] Id. at 163-165.

[29] Id.

[30] Id. at 89-90.

[31] Id. at 179.

[32] Id. at 180-182.

[33] CA rollo, p. 276.

[34] Id. at 294-295.

[35] CA rollo, p. 41.

[36] Id. at 199.

[37] Id. at 187-190.

[38] CA rollo, p. 194.

[39] Id. at 197-198.

[40] Id. at 205.

[41] Id. at 201-203.

[42] Rollo, pp. 155-156.

[43] CA rollo, pp. 290-291.

[44] Rollo, pp. 151-153.

[45] Id. at 154.

[46] CA rollo, pp. 252-274.

[47] Id. at 253.

[48] Rollo, pp. 62-73.

[49] Id. at 73.

[50] Rollo, p. 102.

[51] The case was submitted for decision before the ruling of the Court in *Neypes v. Court of Appeals*, G.R. No. 141524, September 15, 2005.

[52] *Chemphil Export & Import Corporation v. Court of Appeals*, G.R. Nos. 112438-39, December 12, 1995, 251 SCRA 257.

[53] *Executive Secretary v. Gordon*, G.R. No. 134171, November 18, 1998, 298 SCRA 736.

[54] *Melo v. Court of Appeals*, G.R. No. 123686, November 16, 1999, 318 SCRA 94.

[55] *Jaro v. Court of Appeals*, G.R. No. 127536, February 19, 2002, 377 SCRA 282.

[56] *Melo v. Court of Appeals*, *supra*, pp. 103-104.

[57] Rollo, p. 788.

[58] *Supra*, note 52.

[59] *Supra*, note 57, pp. 741-742.

[60] Rollo, p. 804.

[61] G.R. No. L-50054, August 17, 1988, 164 SCRA 421.

[62] CA rollo, pp. 207-208.

[63] Section 2, Rule 13, 1997 Rules of Civil Procedure.

[64] CA rollo, p. 183. (Underscoring supplied)

[65] Rollo, pp. 480-482.

[66] Rollo, pp. 503-506.

[67] Rollo, pp. 483-484.

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