

SPOUSES SANTIAGO AND RUFINA TANCHAN, PETITIONERS, VS. ALLIED BANKING CORPORATION, RESPONDENT.

G.R. No. 164510. November 25, 2008

Ponente: AUSTRIA-MARTINEZ, J.

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AUSTRIA-MARTINEZ, J.:

By way of Petition for Review under Rule 45 of the Rules of Court, spouses Santiago and Rufina Tanchan (petitioners) seek the modification of the June 15, 2004 Decision[1] of the Court of Appeals (CA) which affirmed the August 3, 2001 Decision[2] and August 8, 2002 Order[3] of Branch 137, Regional Trial Court (RTC), Makati in Civil Case No. 98-2468.[4]

The relevant facts are of record.

For value received, Cebu Foremost Construction, Inc. (Foremost), through its Chairman and President Henry Tanchan (Henry) and his spouse, Vice-President and Treasurer Ma. Julie Ann Tanchan (Ma. Julie Ann) executed and delivered to Allied Banking Corporation (respondent) seven US\$ promissory notes,[5] including Promissory Note No. 0051-97-03696[6] (Exhibit "G") for US\$379,000.00, at 9.50% interest rate per annum, due on February 9, 1998.

Foremost also issued to respondent several Philippine peso promissory notes[7] covering various loans in the aggregate amount of Php28,900,000.00, including Promissory Note No. 0051-97-03688 (Exhibit "H") for PhpP16,500,000.00, at an interest rate of 14.5% per annum, due on February 9, 1998.[8]

All the foregoing promissory notes are secured by two Continuing Guaranty/ Comprehensive Surety Agreements (CG/CSA) executed in the personal capacities of spouses Henry and Ma. Julie Ann (Spouses Tanchan) and Henry's brother, herein petitioner Santiago Tanchan (Santiago),[9] for himself and as attorney-in-fact of his wife and co-petitioner Rufina Tanchan (Rufina) under a Special Power of Attorney, dated April 30, 1993, which grants Santiago authority to:

x x x borrow and/or contract debts and obligations involving, affecting or creating a charge or liability on, or which may involve, affect or create a liability on the Property and/or my interest therein, whether or not such debt/s or obligation/s contracted or to be contracted will benefit me or the family, and to sign, execute and deliver in my name to or in favor of any party, under such terms and conditions as my attorney-in-fact may deem necessary, appropriate or convenient, any and all documents instruments or contract/s (including without limitations, promissory notes, loan agreements, assignments, surety or guaranty undertakings, security agreements) involving, affecting or creating a charge or liability on the Property." [10]

The liability of the sureties under both CG/CSAs is limited to Php150,000,000.00.[11]

Exhibit "G" and all the Philippine peso promissory notes, including Exhibit "H", are secured not only by the two CG/CSAs but also by a Real Estate Mortgage executed on February 14, 1997 by Henry, for himself and as the legal guardian of the minors Henry Paul L. Tanchan and Don Henry L. Tanchan; his wife Ma. Julie Ann; and

Spouses Pablo and Milagros Lim, over real properties registered in their names under Transfer Certificates of Title No. 115804, No. 111149, No. 110672 and No. 3815, all located in Cebu City.[12]

In separate final demand letters, both dated May 14, 1998, respondent sought from Foremost payment of US\$1,054,000.00, as the outstanding principal balance, exclusive of interest and charges, of its obligations under the seven US\$ promissory notes, and PhP28,900,000.00 under its Philippine peso promissory notes.[13] Separate demands for payment were also made upon Spouses Tanchan[14] and the petitioners[15] as sureties.

In a letter dated April 6, 1998, Foremost offered to cede to respondent, by way of dacion en pago, the mortgaged real properties in full payment of its loan obligations.[16][]

On August 3, 1998, respondent instituted the extra-judicial foreclosure of the real estate mortgage to satisfy its claim against Foremost in the aggregate "amount of PhP55,578,826.77, inclusive of interest, other charges and attorney's fees, equivalent to 10% of the total amount due as of May 3, 1998, plus the costs and expenses of foreclosure." [17] At the public auction sale, respondent's bid of only PhP37,745,283.67 for all the mortgaged properties, including the buildings and improvements thereon,[18] was adjudged the sole and highest bid.

On October 13, 1998, respondent filed with the RTC a Complaint for Collection of Sum of Money with Petition for Issuance of Writ of Preliminary Injunction against Foremost, Spouses Tanchan and herein petitioners (collectively referred to as Foremost, et al.), praying that they be ordered to pay, jointly and severally, the following amounts:[19]

Promissory Note

Amount

0051-96-09495

US\$ 80,000.00 plus interest at the rate of 11.4% per annum from December 29, 1997 until fully paid and a penalty charge on the unpaid interest at the rate of 1% per month reckoned from December 29, 1997 until fully paid and a penalty charge on the unpaid principal reckoned from May 28, 1998 until fully paid.

0051-96-17617

US\$110,000.00 plus interest at the rate of 11.4% per annum and a penalty charge at the rate of 1% per month, all reckoned from December 29, 1997 until fully paid.

0051-96-19008

US\$250,000.00 plus interest at the rate of 11.4% per annum and a penalty charge at the rate of 1% per month all reckoned from November 30, 1997 until fully paid.

0051-96-24801

US\$115,000.00 plus interest at the rate of 11.4% per annum and a penalty charge at the rate of 1% per month all reckoned from December 29, 1997 until fully paid.

0051-96-00603

US\$75,000.00 plus interest at the rate of 11.4% per annum and a penalty charge at the rate of 1% per month all reckoned from December 29, 1997 until fully paid.

0051-97-02444

US\$45,000.00 plus interest at the rate of 11.4% per annum and a penalty charge at the rate of 1% per month all reckoned from December 29, 1997 until fully paid.

0051-97-03696 (Exhibit "G")

US\$379,000.00 plus interest at the rate of 11.4% per annum reckoned from January 8, 1998 until fully paid and a penalty charge at the rate of 1% per month from February 9, 1998 until fully paid.

0051-97-03688 (Exhibit "H")

PhpP7,466,795.67 plus interest at the rate of 20% per annum and a penalty charge at the rate of 3% per month from August 10, 1998. (Emphasis supplied)

Respondent also prayed for payment of attorney's fees equivalent to 25% of the total amount due, expenses and costs of suit,

In support of its application for issuance of a writ of preliminary attachment, respondent submitted an Affidavit executed by Elmer Elumbaring (Elumbaring), Branch Cashier/Loans Supervisor, Cebu, Jakosalem Branch, stating that:

- Defendants [Foremost, et al.] committed fraud in contracting the obligations upon which the action is brought in that: a) to induce plaintiff [respondent] to grant the credit accommodation they represented to the plaintiff [respondent] that they were in a financial position to pay their obligations on maturity date in consideration of which plaintiff [respondent] granted the credit accommodations. It turned out, however, that they were not in such financial position when they failed to pay their obligations on maturity date; b) they falsely represented that the proceeds of the Loan would be used as additional working capital in consideration of which, plaintiff [respondent] granted the loans but when defendants [Foremost, et al.] received the said proceeds, they diverted the same to a purpose other than that for which they were intended as shown by the fact that defendants [Foremost, et al.] were not able to fully pay the obligations at its maturity date;
- There is no security whatsoever for the claim plaintiff [respondent] seeks to enforce by this action, and only by the issuance of a writ of preliminary attachment can its interest be protected.[20]

The application for writ of preliminary attachment was granted by the RTC in an Order dated November 3, 1998, to wit:

WHEREFORE, finding plaintiff's [respondent's] application for the issuance of a writ of preliminary attachment sufficient in form and substance, and the ground set forth therein being among those allowed by the Rules (Rule 57, Sec. 1 [e]), let a Writ of Preliminary Attachment issue against the properties of defendants Cebu Foremost Construction, Incorporated, Santiago Tanchan, Jr., Rufina C. Tanchan, Henry Tanchan and Ma. Julie Ann T. Tanchan, upon plaintiff's [respondent's] filing of a bond in the amount of FIFTY-FOUR MILLION (P54,000,000.00) PESOS, conditioned to answer for whatever damage that the said defendants [Foremost, et al.] may suffer by reason of the issuance of said writ should the Court finally adjudge that plaintiff [respondent] was not entitled thereto.

SO ORDERED.[21]

Thus, armed with a writ of attachment,[22] the sheriff levied several parcels of land registered in the name of Foremost, et al.[23]

In their Amended Answer with Counterclaim,[24] Foremost, et al. acknowledged the authenticity and due execution of the promissory notes but denied liability for the amounts alleged in the Complaint, the computation of which they dispute due to the arbitrariness of the imposition of new interest rates. They impugned the cause of action of respondent to collect the amount due under Exhibit "G" and Exhibit "H" in view of the bank's prior extra-judicial foreclosure of the securities thereon, which recourse bars collection of the amounts due on the same promissory notes.[25]

Foremost, et al. questioned the inclusion of Rufina as a party-defendant even when she was not bound by the CG/CSAs which her husband Santiago signed in excess of his authority under the special power of attorney to contract loans for the family but not to guarantee loans obtained by third persons.[26][]

The issuance of the writ of preliminary attachment was likewise objected to by Foremost on the ground that it contracted the loans in good faith but was prevented from paying the same only because of the economic crisis that beset the country. On the part of Spouses Tanchan and herein petitioners, they claim that they had no personal participation or influence in the loan transactions except to ensure its payment; hence, they could not have practiced fraud upon respondent because they did not personally contract the loans with it.[27] Thus, each sought payment of Php100,000,000.00 as moral damages for the emotional and mental vexation visited upon them by respondent in causing the unwarranted preliminary attachment of their properties.[28]

At the pre-trial, respondent submitted an Amended Pre-trial Brief where it admitted that Foremost's Exhibit "G" and Exhibit "H" were among those secured by the real estate mortgage[29]that it earlierforeclosed, but the proceeds of the foreclosure sale satisfied only part of the amounts due on said promissory notes and left a deficiency which is now the subject of their complaint.[30][]

The RTC issued a Pre-trial Order which limited the issues to be resolved to the following:

- Does the [respondent] have a cause of action with respect to the promissory notes marked as [Exhibits] G[31] and H[32]?
- Is [petitioner] Rufina C. Tanchan liable on the basis of the Continuing Guaranty/Comprehensive Surety Agreements because of her authority from [sic] Santiago Tanchan, Jr. was limited to borrow money only for the benefit of the family?
- Is the unilateral increase of the interest rate of [respondent] valid?
- What is the amount and nature of the damages that should be adjudged against the losing party in favor of the prevailing party?[33]

As directed by the RTC in its Pre-trial Order, both parties presented affidavits in lieu of direct examination of their witnesses.

For respondent, Fresno Bandilla (Bandilla), Manager, Legal Department, testified that the obligations of Foremost which were secured by the real estate mortgage had amounted to Php61,155,339.36 as of the date of the foreclosure sale, and that with respondent's bid of only Php37,745,283.67 being adjudged the lone and highest bid, there remained an unpaid balance of Php23,415,115.69.[34] Elumbaring corroborated Bandilla's testimony.[35]

On the other hand, Henry averred that even in the wake of the Asian financial crisis, Foremost struggled to meet interest payments on its loan obligations with respondent, but the point came when there were no more construction jobs to be had, and Foremost was constrained to default on its obligations.[36][]

Santiago testified that he and his spouse could not have defrauded respondent because they did not directly contract the loans with it but merely acted as sureties. Thus, the issuance of the writ of attachment against their properties was arbitrary, and brought upon them social humiliation and emotional torment.[37]

After the parties submitted their respective memoranda,[38]the RTC rendered its August 31, 2001 Decision, the dispositive portion of which reads:

WHEREFORE, judgment is hereby rendered ordering defendants Cebu Foremost Construction, Inc., Santiago Tanchan, Jr., Rufina C. Tanchan, Henry Tanchan and Ma. Julie Ann Tanchan, solidarily, [to] pay plaintiff

Allied Banking Corporation the following amounts: (1) US \$80,000.00, plus 8.75 % interest per annum from 7 June 1996 to 6 May 1997, 9.5% interest per annum from 7 May 1997 until fully paid, and 1% penalty per month on the amount due from maturity date and until fully paid; (2) US \$110,00.00, plus 8.75% interest per annum from 24 September to 29 May 1997, 9.5% interest per annum from 30 May 1997 until fully paid, and 1% penalty per month on the amount due from maturity date until fully paid; (3) US \$570,000.00, plus 8.75% interest per annum from 8 October 1996 to 29 May 1997, 9.5% interest per annum from 30 May 1997 until fully paid, and 1% penalty per month on the amount due from maturity date until fully paid; (4) US \$115,000.00 plus 9.5% interest per month from 12 December 1996 until fully paid, and 1% penalty per month on the amount due from maturity date until fully paid; (5) US \$75,000.00, plus 9.5% interest per annum from 7 January 1997 until fully paid, and 1% penalty per month on the amount due from maturity date until fully paid; (7) US \$379,000.00, plus 9.5% interest per annum from 12 February 1997 to 8 December 1997, 11.4% interest per annum from 9 December 1997 until fully paid, and 1% penalty per month on the amount due from maturity date until fully paid; (8) P7,582,945.85, plus 28.5% interest per annum, and 3% penalty per month, from the foreclosure sale on 10 August 1998 until fully paid; (9) attorney's fees equivalent to 10% of the amount due plaintiff. However, the liability of defendants' Santiago Tanchan, Jr., Rufina C. Tanchan, Henry Tanchan and Ma. Julie Ann T. Tanchan is limited to P150,00,000.00 only.

Defendants' counterclaims are dismissed for lack of sufficient merit.

SO ORDERED.[39]

Foremost, et al. filed a Motion for Partial Reconsideration of Decision on the ground that respondent failed to state a cause of action for the payment of any deficiency account under Exhibit "G" and Exhibit "H". Its Complaint does not contain any allegation regarding a deficiency account; nor even an allusion to the foreclosure sale conducted in partial satisfaction of said promissory notes. Although in its Amended Pre-trial Brief, respondent mentioned that a deficiency account remained after the foreclosure of the real estate mortgage, such statement did not have the effect of amending the Complaint itself. Neither did the testimonies of Bandilla and Elumbaring about a deficiency account take the place of a specific allegation of such cause of action in the Complaint. Thus, in the absence of an allegation in the Complaint of a cause of action for the payment of a deficiency account, the RTC had no factual or legal basis to grant such claim.[40]

Spouses Tanchan and herein petitioners also filed a Motion to Lift the Writ of Preliminary Attachment.[41]

The RTC denied the Motion to Lift the Writ of Attachment in an Order[42] dated September 25, 2001, and the Motion for Partial Reconsideration, in an Order[43] dated August 8, 2002.

Foremost, et al. appealed to the CA under the following assignment of errors:

- The lower court erred in not holding that having opted to extra-judicially foreclose the real estate mortgage which was executed to secure the promissory notes marked as Exhibits "G" and "H", the [respondent] is barred from filing an action for collection of the same;
- The lower court erred in not holding that Rufina Tanchan did not authorize her husband, Santiago J. Tanchan, Jr. to sign the Continuing Guaranty/ Comprehensive Surety Agreement marked as Exhibit "I"; and
- The lower court erred in not lifting the writ of preliminary attachment and granting the claim for damages of the individual defendants by virtue of the wrongful issuance of the writ of preliminary attachment.[44]

The CA dismissed the appeal in the June 15, 2004 Decision assailed herein.

Only petitioners took the present recourse to raise the following issues:

- Whether or not the petitioners as mere sureties of the loans obtained by Cebu Foremost Construction, Inc. were guilty of fraud in incurring the obligations so that a writ of preliminary attachment may be issued against

them?

- Whether or not the respondent may claim for deficiency judgment on its seventh and eighth causes of action, not having alleged in its complaint that said loans were secured by a real estate mortgage and after the foreclosure there was a deficiency as in fact in its complaint, the respondent sought full recovery of the promissory notes subject of its seventh and eighth cause of action?

- Whether or not the lower court and the Court of Appeals erred in not awarding petitioners damages for the wrongful issuance of a writ of preliminary attachment against them?[45]

Being interrelated, the first and third issues will be resolved jointly.

The issues involve the validity of the writ of preliminary attachment as against the properties of petitioners only, but not as against the properties of Foremost and Spouses Tanchan, neither of whom appealed before the Court. The discussion that follows, therefore, shall pertain only to the effect of the writ on petitioners.

One of the grounds cited by the CA in refusing to discharge the writ of attachment is that "it is now too late for [petitioners] to question the validity of the writ" because they waited three long years to have it lifted or discharged.[46]

Under Section 13, Rule 57 of the Rules of Court, a party whose property has been ordered attached may file a motion "with the court in which the action is pending" for the discharge of the attachment on the ground that it has been improperly issued or enforced. In addition, said party may file, under Section 20, Rule 57, a claim for damages on account of improper attachment within the following periods:

Sec. 20. Claim for damages on account of improper, irregular or excessive attachment. - An application for damages on account of improper, irregular or excessive attachment must be filed before the trial or before appeal is perfected or before the judgment becomes executory, with due notice to the attaching obligee or his surety or sureties, setting forth the facts showing his right to damages and the amount thereof. Such damages may be awarded only after proper hearing and shall be included in the judgment on the main case.

If the judgment of the appellate court be favorable to the party against whom the attachment was issued, he must claim damages sustained during the pendency of the appeal by filing an application in the appellate court with notice to the party in whose favor the attachment was issued or his surety or sureties, before the judgment of the appellate court becomes executory. The appellate court may allow the application to be heard and decided by the trial court.[47] (Emphasis supplied)

Records reveal that the RTC issued the writ of preliminary attachment on November 3, 1998,[48] and as early as March 23, 1999, in their Amended Answer with Counterclaim, petitioners already sought the discharge of the writ.[49] Moreover, after the RTC rendered its Decision on August 3, 2001 but before appeal therefrom was perfected, petitioners filed on August 23, 2001 a Motion to Lift the Writ of Preliminary Attachment, reiterating their objection to the writ and seeking payment of damages for its wrongful issuance.[50]

Clearly, petitioners' opposition to the writ was timely.

The question now is whether petitioner has a valid reason to have the writ discharged and to claim damages.

It should be borne in mind that the questioned writ of preliminary attachment was issued by the RTC under Section 1(d), Rule 57 of the Rules of Court, to wit -

Sec. 1. Grounds upon which attachment may issue. - A plaintiff or any proper party may, at the commencement of the action or at any time thereafter, have the property of the adverse party attached as security for the satisfaction of any judgment that may be recovered in the following cases:

x x x x

(d) In an action against a party who has been guilty of a fraud in contracting the debt or incurring the obligation upon which the action is brought, or in concealing or disposing of the property for the taking, detention or conversion of which the action is brought;

x x x x.

and on the basis solely of respondent's allegations in its Complaint "that defendants [Foremost, et al.] failed to pay their obligations on maturity dates, with the amount of US\$1,054,000.00 and Php7,466,795.69 remaining unpaid; that defendants are disposing/concealing their properties with intent to defraud the plaintiff and/or are guilty of fraud in the performance of their obligations; and that there is no security whatsoever for the claim sought to be enforced." [51]

Petitioners argue that the foregoing allegations are not sufficient to justify issuance of the writ, especially in the absence of findings that they, as sureties, participated in specific fraudulent acts in the execution and performance of the loan agreements with respondent. [52]

In refusing to lift the writ, the RTC held that the lack of a specific factual finding of fraud in its decision is not among the grounds provided under Sections 12 and 13, Rule 57 of the Rules of Court for the discharge of the writ. [53] The CA agreed for the reason that the RTC's affirmative action on the complaint filed by respondent signifies its agreement with the allegations found therein that Foremost, et al., including herein petitioners, committed fraudulent acts in procuring loans from respondent. [54]

Both courts are in error.

The present case fits perfectly into the mold of *Allied Banking Corporation v. South Pacific Sugar Corporation*, [55] where a writ of preliminary attachment issued in favor of Allied Banking Corporation was discharged by the lower courts for lack of evidence of fraud. In sustaining the discharge of the writ, the Court held:

Moreover, even a cursory examination of the bank's complaint will reveal that it cited no factual circumstance to show fraud on the part of respondents. The complaint only had a general statement in the Prayer for the Issuance of a Writ of Preliminary Attachment, reproduced in the attached affidavit of petitioner's witness Go who stated as follows:

x x x x

- Defendants committed fraud in contracting the obligations upon which the present action is based and in the performance thereof. Among others, defendants induced plaintiff to grant the subject loans to defendant corporation by willfully and deliberately misrepresenting that, one, the proceeds of the loans would be used as additional working capital and, two, they would be in a financial position to pay, and would most certainly pay, the loan obligations on their maturity dates. In truth, defendants had no intention of honoring their commitments as shown by the fact that upon their receipt of the proceeds of the loans, they diverted the same to illegitimate purposes and then brazenly ignored and resisted plaintiff's lawful demands for them to settle their past due loan obligations

x x x x

Such general averment will not suffice to support the issuance of the writ of preliminary attachment. It is necessary to recite in what particular manner an applicant for the writ of attachment was defrauded x x x.

Likewise, written contracts are presumed to have been entered into voluntarily and for a sufficient consideration. Section 1, Rule 131 of the Rules of Court instructs that each party must prove his own

affirmative allegations. To repeat, in this jurisdiction, fraud is never presumed. Moreover, written contracts such as the documents executed by the parties in the present case, are presumed to have been entered into for a sufficient consideration. (Citations omitted)

In the aforecited case — as in the present case — the bank presented the testimony of its account officer who processed the loan application, but the Court discarded her testimony for it did not detail how the corporation induced or deceived the bank into granting the loans.[56]

Also apropos is *Ng Wee v. Tankiansee*[57] where the appellate court was questioned for discharging a writ of preliminary attachment to the extent that it affected the properties of respondent Tankiansee, a corporate officer of Wincorp, both defendants in the complaint for damages which petitioner Ng Wee had filed with the trial court. In holding that the appellate court correctly spared respondent Tankiansee from the writ of preliminary attachment, the Court cited the following basis:

In the instant case, petitioner's October 12, 2000 Affidavit is bereft of any factual statement that respondent committed a fraud. The affidavit narrated only the alleged fraudulent transaction between Wincorp and Virata and/or Power Merge, which, by the way, explains why this Court, in G.R. No. 162928, affirmed the writ of attachment issued against the latter. As to the participation of respondent in the said transaction, the affidavit merely states that respondent, an officer and director of Wincorp, connived with the other defendants in the civil case to defraud petitioner of his money placements. No other factual averment or circumstance details how respondent committed a fraud or how he connived with the other defendants to commit a fraud in the transaction sued upon. In other words, petitioner has not shown any specific act or deed to support the allegation that respondent is guilty of fraud.

The affidavit, being the foundation of the writ, must contain such particulars as to how the fraud imputed to respondent was committed for the court to decide whether or not to issue the writ. Absent any statement of other factual circumstances to show that respondent, at the time of contracting the obligation, had a preconceived plan or intention not to pay, or without any showing of how respondent committed the alleged fraud, the general averment in the affidavit that respondent is an officer and director of Wincorp who allegedly connived with the other defendants to commit a fraud, is insufficient to support the issuance of a writ of preliminary attachment x x x. Verily, the mere fact that respondent is an officer and director of the company does not necessarily give rise to the inference that he committed a fraud or that he connived with the other defendants to commit a fraud. While under certain circumstances, courts may treat a corporation as a mere aggroupment of persons, to whom liability will directly attach, this is only done when the wrongdoing has been clearly and convincingly established. (Emphasis supplied)

Indeed, a writ of preliminary attachment is too harsh a provisional remedy to

be issued based on mere abstractions of fraud.[58] Rather, the rules require that for the writ to issue, there must be a recitation of clear and concrete factual circumstances manifesting that the debtor practiced fraud upon the creditor at the time of the execution of their agreement in that said debtor had a pre-conceived plan or intention not to pay the creditor.[59] Being a state of mind, fraud cannot be merely inferred from a bare allegation of non-payment of debt or non-performance of obligation.[60]

As shown in *Ng Wee*, the requirement becomes all the more stringent when the application for preliminary attachment is directed against a defendant officer of a defendant corporation, for it will not be inferred from the affiliation of one to the other that the officer participated in or facilitated in any fraudulent practice attributed to the corporation. There must be evidence clear and convincing that the officer committed a fraud or connived with the corporation to commit a fraud; only then may the properties of said officer, along with those of the corporation, be held under a writ of preliminary attachment.

There is every reason to extend the foregoing rule, by analogy, to a mere surety of the defendant. A surety's involvement is marginal to the principal agreement between the defendant and the plaintiff; hence, in order for the surety to be subject to a proceeding for issuance of a writ of preliminary attachment, it must be shown that said surety participated in or facilitated the fraudulent practice of the defendant, such as by offering a security solely to induce the plaintiff to enter into the agreement with the defendant.

There is neither allegation nor innuendo in the Complaint of respondent or the Affidavit of Elumbaring that petitioners as sureties or officers of Foremost participated in or facilitated the commission of fraud by Foremost, et al. against respondent. In fact, there is no mention of petitioners, much less a recital of their role or influence in the execution of the loan agreements. The RTC cited an allegation that petitioners are disposing/concealing their properties with intent to defraud respondent, but there is no hint of such scheme in the five paragraphs of the Complaint^[61] or in the four corners of the Affidavit of Elumbaring.^[62] All that is alleged is that Foremost obtained loans from respondent but failed to pay the same, but as the Court has repeatedly held, no fraud can be inferred from a mere failure to pay a loan.^[63]

In fine, there was no factual basis for the issuance of a writ of preliminary attachment against the properties of petitioners. The immediate dissolution of the writ is called for.

In so ruling, however, the Court does not go so far as to grant petitioners' claim for moral damages. A wrongful attachment may give rise to liability for moral damages but evidence must be adduced not only of the torment and humiliation brought upon the defendant by the attaching party but also of the latter's bad faith or malice in causing the wrongful attachment,^[64] such as evidence that the latter deliberately made false statements in its application for attachment.^[65] Absent such evidence of malice, the attaching party cannot be held liable for moral damages.^[66]

In the present case, petitioners cite the allegations made by respondent in its application for attachment as evidence of bad faith. However, the allegations in question contain nothing but the stark truth that Foremost obtained loans and that it failed to pay. The Court fails to see any malice in such bare allegations as would make respondent liable to petitioners for moral damages.

To recapitulate, the Court partly dissolves the writ of preliminary attachment for having wrongfully issued against the properties of petitioners who were not shown to have committed fraud in the execution of the loan agreements between Foremost and respondent, but declines to award moral damages to petitioners in the absence of evidence that respondent acted with malice in causing the wrongful issuance of the writ.

The second issue involves that portion of the August 3, 2001 RTC Decision awarding respondent "(7) US \$379,000.00, plus 9.5% interest per annum from 12 February 1997 to 8 December 1997, 11.4% interest per annum from 9 December 1997 until fully paid, and 1% penalty per month on the amount due from maturity date until fully paid" under Promissory Note No. 0051-97-03696, and "(8) P7,582,945.85, plus 28.5% interest per annum, and 3% penalty per month, from the foreclosure sale on 10 August 1998 until fully paid" under Promissory Note No. 0051-97-03688.

Petitioners argue that respondent is barred from claiming any amount under the Promissory Notes, Exhibits "G" and "H", because it had already elected to foreclose on the mortgage security, and it failed to allege in its pleadings that a deficiency remained after the public auction sale of the securities and that what it is seeking is the payment of such deficiency.^[67]

There is no question that a mortgage creditor has a single cause of action against a mortgagor debtor, which is to recover the debt; but it has the option of either filing a personal action for collection of sum of money or

instituting a real action to foreclose on the mortgage security.[68] An election of the first bars recourse to the second; otherwise, there would be multiplicity of suits in which the debtor would be tossed from one venue to another, depending on the location of the mortgaged properties and the residence of the parties.[69] On the other hand, a creditor who elects to foreclose on the mortgage may yet file an independent civil action for recovery of whatever deficiency may remain in the outstanding obligation of the debtor, after deducting the price obtained in the sale of the mortgaged properties at public auction.[70] The complaint, though, must specifically allege that what is being sought is the recovery of the deficiency,[71] or that in the pre-trial, such claim be raised as an issue.[72]

Contrary to petitioners' argument, it is clear from the allegations in the Complaint that what respondent sought was the payment of the deficiency amount under the subject promissory notes. In particular, while the Promissory Note, Exhibit "H", is for the amount of Php16,500,000.00, what respondent sought to recover was only Php7,582,945.85, consistent with the fact that part of said promissory note has been satisfied from the proceeds of the extra-judicial foreclosure. While the exact phrase "deficiency account" is not employed in the Complaint, the intention of respondent to recover the same is borne out by its allegations.

More importantly, in the Pre-trial Order issued by the RTC, the right of respondent to recover the deficiency account under the subject promissory notes was raised as a specific issue.

WHEREFORE, the petition is PARTLY GRANTED. The June 15, 2004 Decision of the Court of Appeals is MODIFIED to the effect that the November 3, 1998 Writ of Preliminary Attachment is LIFTED and DISSOLVED insofar as it affects the properties of petitioners Spouses Santiago and Rufina Tanchan.

No costs.

SO ORDERED.

Ynares-Santiago, (Chairperson), Chico-Nazario, Nachura, and Reyes, JJ., concur.

[1] Penned by Associate Justice Mariano C. del Castillo, and concurred in by Associate Justices Roberto A. Barrios and Magdangal M. de Leon, rollo, p. 41.

[2] Records, p. 347.

[3] Id. at 409.

[4] Entitled, "Allied Banking Corporation, Plaintiff-Appellee versus Cebu Foremost Construction, Inc., Santiago Tanchan, Jr., Rufina C. Tanchan, Henry Tanchan and Ma. Julie Ann Tanchan, Defendants-Appellants."

[5] Promissory Notes No. 0051-96-09495, No. 0051-96-17617, 0051-96-19008, 0051-96-24801, 0051-96-00603, 0051-97-02444, records, pp. 15-26.

[6] Exhibit "G", id. at 27-28.

[7] Promissory Notes No. 0051-97-03335, No. 0051-97-05478, No. 0051-97-05680, No. 0051-97-09783, No. 0051-97-13871, id. at 184-190.

[8] Exhibit "H", id. at 29-30.

[9] See dorsal portions of Exhibit "J" and Exhibit "I", id. at 31-32.

[10] Exhibit "N", id. at 141.

- [11] Exhibits "I" and "J", records, pp. 31-32.
- [12] Exhibit "5", id. at 145-146.
- [13] Exhibit "K", id. at 139.
- [14] Id. at 194.
- [15] Exhibit "K", id. at 139.
- [16] Exhibit "3", id. at 143.
- [17] Exhibit "W", id. at 179.
- [18] Exhibit "O", records, p. 134.
- [19] Complaint, id. at 8-10.
- [20] Records, p. 13.
- [21] Id at 34.
- [22] Id. at 46.
- [23] Id. at 80.
- [24] Records, p. 93.
- [25] Id. at 94.
- [26] Id.
- [27] Id. at 95.
- [28] Id. at 96.
- [29] Records, p. 105.
- [30] Id. at 106.
- [31] Promissory Note No. 0051-97-03696, id. at 191.
- [32] Promissory Note No. 0051-97-03688, id. at 183.
- [33] Id. at 452.
- [34] Affidavit, id. at 156-157.
- [35] Exhibits "P" thru "T", id. at 171-175.
- [36] Affidavit, records, p. 256. See also TSN, September 27, 1999, pp. 7-9.
- [37] Affidavit, id. at 262. See also TSN, September 27, 1999, pp. 4-6.
- [38] Id. at 297 and 319.
- [39] Id. at 353-354.
- [40] Records, pp. 364-365.
- [41] Id. at 355.

- [42] Id. at 406.
- [43] Id. at 409.
- [44] Brief for Defendants-Appellants, CA rollo, pp. 23-24.
- [45] Memorandum for Petitioner, rollo, p. 125.
- [46] CA Decision, CA rollo, p. 94.
- [47] See *Carlos v. Sandoval*, G.R. No. 135830, September 30, 2005, 471 SCRA 266.
- [48] Records, p. 34.
- [49] Id. at 94.
- [50] Id. at 355.
- [51] Complaint, records, pp. 8-10.
- [52] Memorandum, rollo, pp. 126-127.
- [53] RTC Decision, records, p. 407.
- [54] CA Decision, rollo, pp. 54-55.
- [55] G.R. No. 163692, February 4, 2008, 543 SCRA 585.
- [56] *Allied Banking Corporation v. South Pacific Sugar Corporation*, supra note 55.
- [57] G.R. No. 171124, February 13, 2008, 545 SCRA 263.
- [58] *PCL Industries Manufacturing Corporation v. Court of Appeals*, G.R. No. 147970, March 31, 2006, 486 SCRA 214.
- [59] *FCY Construction Group, Inc. v. Court of Appeals*, G.R. No. 123358, February 1, 2000, 324 SCRA 270, citing *Liberty Insurance Corporation v. Court of Appeals*, G.R. No. 104405, May 13, 1993, 222 SCRA 37.
- [60] *Philippine Bank of Communications v. Court of Appeals*, G.R. No. 115678, February 23, 2001, 352 SCRA 616.
- [61] Complaint, records, pp. 7-8.
- [62] Id. at 13-14.
- [63] *Philippine National Construction Corporation v. Hon. Dy*, G.R. No. 156887, October 3, 2005, 472 SCRA 1.
- [64] *Yu v. Ngo Yet Te*, G.R. No. 155868, February 6, 2007, 514 SCRA 423; *D.M. Wenceslao and Associates, Inc. v. Readycon*, G.R. No. 154106, June 29, 2004, 433 SCRA 251.
- [65] *Philippine Commercial Industrial Bank v. Alejandro*, G.R. No. 175587, September 21, 2007, 533 SCRA 738.
- [66] *California Bus Lines, Inc. v. State Investment House, Inc.*, G.R. No. 147950, December 11, 2003, 418 SCRA 297.
- [67] Memorandum for Petitioner, rollo, p. 125.
- [68] *Bank of America, NT & SA v. American Realty Corporation*, G.R. No. 133876, December 29, 1999, 321 SCRA 659.

[69] Suico Rattan & Buri Interiors, Inc. v. Court of Appeals, G.R. No. 138145, June 15, 2006, 490 SCRA 560.

[70] Quirino Gonzales Logging Concessionaire v. Court of Appeals, G.R. No. 126568, April 30, 2003, 402 SCRA 181.

[71] Suico Rattan & Buri Interiors, Inc. v. Court of Appeals, supra note 69.

[72] PCI Leasing & Finance, Inc. v. Dai, G.R. No. 148980, September 21, 2007, 533 SCRA 611.

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