

**SPOUSES RAMON M. NISCE AND A. NATIVIDAD PARAS- NISCE,
PETITIONERS, VS. EQUITABLE PCI BANK, INC., RESPONDENT.***G.R. NO. 167434. February 19, 2007*

Ponente: CALLEJO, SR., J.

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On November 26, 2002, Equitable PCI Bank[1] (Bank) as creditor-mortgagee filed a petition for extrajudicial foreclosure before the Office of the Clerk of Court as Ex-Officio Sheriff of the Regional Trial Court (RTC) of Makati City. It sought to foreclose the following real estate mortgage contracts executed by the spouses Ramon and Natividad Nisce over two parcels of land covered by Transfer Certificate of Title (TCT) Nos. S-83466 and S-83467 of the Registry of Deeds of Rizal: one dated February 26, 1974; two (2) sets of “Additional Real Estate Mortgage” dated September 27, 1978 and June 3, 1996; and an “Amendment to Real Estate Mortgage” dated February 28, 2000. The mortgage contracts were executed by the spouses Nisce to secure their obligation under Promissory Note Nos. 1042793 and BD-150369, including a Suretyship Agreement executed by Natividad. The obligation of the Nisce spouses totaled P34,087,725.76 broken down as follows:

Spouses Ramon & Natividad Nisce - - - - - P17,422,285.99

Natividad P. Nisce (surety) - - - - - US\$57,306.59

and - - - - - P16,665,439.77[2]

On December 2, 2002, the Ex-Officio Sheriff set the sale at public auction at 10:00 a.m. on January 14, 2003,[3] or on January 30, 2003 in the event the public auction would not take place on the earlier setting.

On January 28, 2003, the Nisce spouses filed before the RTC of Makati City a complaint for “nullity of the Suretyship Agreement, damages and legal compensation” with prayer for injunctive relief against the Bank and the Ex-Officio Sheriff. They alleged the following: in a letter[4] dated December 7, 2000 they had requested the bank (through their lawyer-son Atty. Rosanno P. Nisce) to setoff the peso equivalent of their obligation against their US dollar account with PCI Capital Asia Limited (Hong Kong), a subsidiary of the Bank, under Certificate Deposit No. 01612[5] and Account No. 090-0104 (Passbook No. 83-3041);[6] the Bank accepted their offer and requested for an estimate of the balance of their account; they complied with the Bank’s request and in a letter dated February 11, 2002, informed it that the estimated balance of their account as of December 1991 (including the 11.875% per annum interest) was US\$51,000.42,[7] and that as of December 2002, Natividad’s US dollar deposit with it amounted to at least P9,000,000.00; they were surprised when they received a letter from the Bank demanding payment of their loan account, and later a petition for extrajudicial foreclosure.

The spouses Nisce also pointed out that the petition for foreclosure filed by the Bank included the alleged obligation of Natividad as surety for the loan of Vista Norte Trading Corporation, a company owned and managed by their son Dino Giovanni P. Nisce (P16,665,439.77 and US\$57,306.59). They insisted, however, that the suretyship agreement was null and void for the following reasons:

- (a) x x x [I]t was executed without the knowledge and consent of plaintiff Ramon M. Nisce, who is by law the administrator of the conjugal partnership;
- (b) The suretyship agreement did not redound to the benefit of the conjugal partnership and therefore did not bind the same;
- (c) Assuming, arguendo, that the suretyship contract was valid and binding, any obligation arising therefrom is not covered by plaintiffs' real estate mortgages which were constituted to secure the payment of certain specific obligations only.[8]

The spouses Nisce likewise alleged that since they and the Bank were creditors and debtors with respect to each other, their obligations should have been offset by legal compensation to the extent of their account with the Bank.

To support their plea for a writ of preliminary and prohibitory injunction, the spouses Nisce alleged that the amount for which their property was being sold at public auction (P34,087,725.76) was grossly excessive; the US dollar deposit of Natividad with PCI Capital Asia Ltd. (Hong Kong), and the obligation covered by the suretyship agreement had not been deducted. They insisted that their property rights would be violated if the sale at public auction would push through. Thus, the spouses Nisce prayed that they be granted the following reliefs:

- (1) that upon the filing of this Complaint and/or after due notice and summary hearing, the Honorable Court immediately issue a temporary restraining order (TRO) restraining defendants, their representatives and/or deputies, and other persons acting for and on their behalf from proceeding with the extrajudicial foreclosure sale of plaintiffs' mortgaged properties on 30 January 2003 or on any other dates subsequent thereto;
- (2) that after due notice and hearing and posting of the appropriate bond, the Honorable Court convert the TRO to a writ of preliminary prohibitory injunction;
- (3) that after trial on the merits, the Honorable Court render judgment –
 - (a) making the preliminary injunction final and permanent;
 - (b) ordering defendant Bank to set off the present peso value of Mrs. Nisce's US dollar time deposit, inclusive of stipulated interest, against plaintiffs' loan obligations with defendant Bank;
 - (c) declaring the Deed of Suretyship dated 25 May 1998 null and valid and without any binding effect as to plaintiff spouses, and ordering defendant Bank to exclude the amounts covered by said suretyship contract from plaintiffs' obligations with defendant Bank;
 - (d) ordering defendant Bank to pay plaintiffs the following sums:
 - (i) at least P3,000,000.00 as moral damages;
 - (ii) at least P1,500,000.00 as exemplary damages; and
 - (iii) at least P500,000.00 as attorney's fees and for other expenses of litigation.

Plaintiffs further pray for costs of suit and such other reliefs as may be deemed just and equitable.[9]

On same day, the Bank filed an "Amended Petition" with the Office of the Executive Judge for extrajudicial foreclosure of the Real Estate Mortgage to satisfy the spouses' loan account of P30,533,552.24, exclusive of interests, penalties and other charges; and the amounts of P16,665,439.77 and US\$57,306.59 covered by the suretyship agreement executed by Natividad Nisce.[10]

In the meantime, the parties agreed to have the sale at public auction reset to January 30, 2003.

In its Answer to the complaint, the Bank alleged that the spouses had no cause of action for legal compensation since PCI Capital was a different corporation with a separate and distinct personality; if at all, offsetting may occur only with respect to the spouses' US\$500.00 deposit account in its Paseo de Roxas branch.

In the meantime, the Ex-Officio Sheriff set the sale at public auction at 10:00 a.m. on March 5 and 27, 2003.[11] The spouses Nisce then filed a Supplemental Complaint with plea for a temporary restraining order to enjoin the sale at public auction.[12] Thereafter, the RTC conducted hearings on the plaintiffs' plea for a temporary restraining order, and the parties adduced testimonial and documentary evidence on their respective arguments.

The Case for the Spouses Nisce

Natividad frequently traveled abroad and needed a facility with easy access to foreign exchange. She inquired from E.P. Nery, the Bank Manager for PCI Bank Paseo de Roxas Branch, about opening an account. He assured her that she would be able to access it from anywhere in the world. She and Nery also agreed that any balance of account remaining at maturity date would be rolled over until further instructions, or until she terminated the facility.[13] Convinced, Natividad deposited US\$20,500.00 on July 19, 1984, and was issued Passbook No. 83-3041.[14] Upon her request, the bank transferred the US\$20,000.00 to PCI Capital Asia Ltd. in Hong Kong via cable order.[15]

On July 11, 1996, the spouses Nisce secured a P20,000,000.00 loan from the Bank under Promissory Note No. BD-150369.[16] The maturity date of the loan was July 11, 2001, payable in monthly installments at 16.731% interest per annum. To secure the payment of the loan account, they executed an Amendment to the Real Estate Mortgage over the properties[17] located in Makati City covered by TCT Nos. S-83466 and S-83467.[18] They later secured another loan of P13,089,936.90 on March 1, 2000 (to mature on March 1, 2005) payable quarterly at 13.9869% interest per annum; this loan agreement is evidenced by Promissory Note (PN) No. 1042793[19] and covered by a Real Estate Mortgage[20] executed on February 28, 2000. They made a partial payment of P13,866,666.50 on the principal of their loan account covered by PN No. BD-150369, and P5,348,239.82 on the interests.[21] These payments are evidenced by receipts and checks.[22] However, there were payments totaling P4,600,000.00 received by the Bank but were not covered by checks or receipts.[23] As of September 2000, the balance of their loan account under PN No. BD-150369 was only P4,333,333.46.[24] They also made partial payment on their loan account under PN No. 1042793 which, as of May 30, 2001, amounted to P2,218,793.61.[25]

On July 20, 1984, PCI Capital issued Certificate of Deposit No. CD-01612;[26] proof of receipt of the US\$20,000.00 transferred to it by PCI Bank Paseo de Roxas Branch as requested by Natividad. The deposit account was to earn interest at the rate of 11.875% per annum, and would mature on October 22, 1984, thereafter to be payable at the office of the depositary in Hong Kong upon presentation of the Certificate of Deposit.

In June 1991, two sons of the Nisce spouses were stranded in Hong Kong. Natividad called the Bank and requested for a partial release of her dollar deposit to her sons. However, she was informed that according to its computer records, no such dollar account existed. Sometime in November 1991, she submitted her US dollar passbook with a xerox copy of the Certificate of Deposit for the PCIB to determine the whereabouts of the account.[27] She reiterated her request to the Bank on January 27, 1992[28] and September 11, 2000.[29]

In the meantime, in 1994, the Equitable Banking Corporation and the PCIB were merged under the corporate name Equitable PCI Bank.

In a letter dated December 7, 2000, Natividad confirmed to the Bank, through Ms. Shellane R. Casaysayan, her offer to settle their loan account by offsetting the peso equivalent of her dollar account with PCI Capital under

Account No. 090-0104.[30] Their son, Atty. Rosanno Nisce, later wrote the Bank, declaring that the estimated balance of the US dollar account with PCI Capital as of December 1991 was US\$51,000.42.[31] Atty. Nisce corroborated this in his testimony, and stated that Ms. Casaysayan had declared that she would refer the matter to her superiors.[32] A certain Rene Esteven also told him that another offer to setoff his parents' account had been accepted, and he was assured that its implementation was being processed.[33] On cross examination, Atty. Nisce declared that there was no response to his request for setoff,[34] and that Esteven assured him that the Bank would look for the records of his mother's US dollar savings deposit.[35] He was later told that the Bank had accepted the offer to setoff the account.[36]

The Case for the Bank

The Bank adduced evidence that, as of January 31, 2003, the balance of the spouses' account under the two promissory notes, including interest and penalties, was P30,533,552.24.[37] It had agreed to restructure their loans on March 31, 1998, but they nevertheless failed to pay despite repeated demands.[38] The spouses had also been furnished with a statement of their account as of June 2001. Thus, under the terms of the Real Estate Mortgage and Promissory Notes, it had the right to the remedy of foreclosure. It insisted that there is no showing in its records that the spouses had delivered checks amounting to P4,600,000.00.[39]

According to the Bank, Natividad's US\$20,000.00 deposit with the PCIB Paseo de Roxas branch was transferred to PCI Capital via cable order,[40] and that it later issued Certificate of Deposit No. 01612 (Non-transferrable).[41] In a letter dated May 9, 2001, it informed Natividad that it had acted merely as a conduit in facilitating the transfer of the funds, and that her deposit was made with PCI Capital and not with PCIB. PCI Capital had a separate and distinct personality from the PCIB, and a claim against the former cannot be made against the latter. It was later advised that PCI Capital had already ceased operations.[42]

The spouses Nisce presented rebuttal documentary evidence to show that PCI Capital was registered in Hong Kong as a corporation under Registration No. 84555 on February 27, 1989[43] with an authorized capital stock of 50,000,000 (with par value of HKD1.00); the PCIB subscribed to 29,039,993 issued shares at the par value of HKD1.00 per share;[44] on October 25, 2004, the corporate name of PCI Capital was changed to PCI Express Padala (HK) Ltd.;[45] and the stockholdings of PCIB remained at 29,039,999 shares.[46]

On March 24, 2003, the RTC issued an Order[47] granting the spouses Nisce's plea for a writ of preliminary injunction on a bond of P10,000,000.00. The dispositive portion of the Order reads:

WHEREFORE, in order not to render the judgment ineffectual, upon filing by the plaintiffs and the approval thereof by the court of a bond in the amount of Php10,000,000.00, which shall answer for any damage should the court finally decide that plaintiffs are not entitled thereto, let a writ of preliminary injunction issue enjoining defendants Equitable-PCI Bank, Atty. Engracio M. Escasinas, Jr., and any person or entity acting for and in their behalf from proceeding with the extrajudicial foreclosure sale of TCT Nos. 437678 and 437679 registered in the names of the plaintiffs.[48]

After weighing the parties' arguments along with their documentary evidence, the RTC declared that justice would be best served if a writ of preliminary injunction would be issued to preserve the status quo. It had yet to resolve the issue of setoff since only Natividad dealt with the Bank regarding her dollar account. It also had to resolve the issue of whether the Bank had failed to credit the amount of P4,600,000.00 to the spouses Nisce's account under PN No. BD-150369, and their claim that the Bank had effectively accelerated the respective maturity dates of their loan.[49] The spouses Nisce posted the requisite bond which was approved by the RTC.

The Bank opted not to file a motion for reconsideration of the order, and instead assailed the trial court's order before the CA via petition for certiorari under Rule 65 of the Rules of Court. The Bank alleged that the RTC had

acted without or in excess of its jurisdiction, or with grave abuse of its discretion amounting to lack or excess of jurisdiction when it issued the assailed order;[50] the spouses Nisce had failed to prove the requisites for the issuance of a writ of preliminary injunction; respondents' claim that their account with petitioner had been extinguished by legal compensation has no factual and legal basis. It further asserted that according to the evidence, Natividad made the US\$20,000.00 deposit with PCI Capital before it merged with Equitable Bank – hence, the Bank was not the debtor of Natividad relative to the dollar account. The Bank cited the ruling of this Court in *Escaño v. Heirs of Escaño and Navarro*[51] to support its arguments. It insisted that the spouses Nisce had failed to establish “irreparable injury” in case of denial of their plea for injunctive relief.

The spouses, for their part, pointed out that the Bank failed to file a motion for reconsideration of the trial court's order, a condition sine qua non to the filing of a petition for certiorari under Rule 65 of the Rules of Court. Moreover, the error committed by the trial court is a mere error of judgment not correctible by certiorari; hence, the petition should have been dismissed outright by the CA. They reiterated their claim that they had made a partial payment of P4,600,000.00 on their loan account which petitioner failed to credit in their favor. The Bank had agreed to debit their US dollar savings deposit in the PCI Capital as payment of their loan account. They insisted that they had never deposited their US dollar account with PCI Capital but with the Bank, and that they had never defaulted on their loan account. Contrary to the Bank's claim, they would have suffered irreparable injury had the trial court not enjoined the extrajudicial foreclosure of the real estate mortgage.

On December 22, 2004, the CA rendered judgment granting the petition and nullifying the assailed Order of the RTC.[52] The appellate court declared that a petition for certiorari under Rule 65 of the Rules of Court may be filed despite the failure to file a motion for reconsideration, particularly in instances where the issue raised is one of law; where the error is patent; the assailed order is void, or the questions raised are the same as those already ruled upon by the lower court. According to the appellate court, the issue raised before it was purely one of law: whether the loan account of the spouses was extinguished by legal compensation. Thus, a motion for the reconsideration of the assailed order was not a prerequisite to a petition for certiorari under Rule 65.

The appellate court further declared that the trial court committed grave abuse of its discretion in issuing the assailed order, since no plausible reason was given by the spouses Nisce to justify the injunction of the extrajudicial foreclosure of the real estate mortgage. Given their admission that they had not settled the obligations secured by the mortgage, the Bank had a clear right to seek the remedy of foreclosure.

The CA further declared as devoid of factual basis the spouses Nisce's argument that the Bank should have applied, by way of legal compensation, the peso equivalent of their time deposit with PCI Capital as partial settlement of their obligations. It held that for compensation to take place, the requirements set forth in Articles 1278 and 1279 of the Civil Code of the Philippines must be present; in this case, the parties are not mutually creditors and debtors of each other. It pointed out that the time deposit which the spouses Nisce sought to offset against their obligations to the Bank is maintained with PCI Capital. Even if PCI Capital is a subsidiary of the Bank, compensation cannot validly take place because the Bank and PCI Capital are two separate and distinct corporations. It pointed out the settled principle “that a corporation has a personality separate and distinct from its stockholders and from other corporations to which it may be connected.”

The CA further declared that the alleged P4,600,000.00 payment on PN No. BD-150369 was not pleaded in the spouses' complaint and supplemental complaint before the court a quo. What they alleged, aside from legal compensation, was that the mortgage is not liable for the obligation of Natividad Nisce as surety for the loans obtained by a trading firm owned and managed by their son. The CA further pointed out that the Bank precisely amended the petition for foreclosure sale by deleting the claim for Natividad's obligation as surety. The appellate court concluded that the injunctive writ was issued by the RTC without factual and legal basis.[53]

The spouses Nisce moved to have the decision reconsidered, but the appellate court denied the motion. They thus filed the instant petition for review on the following grounds:

5.1. THE HONORABLE COURT OF APPEALS ERRED IN TAKING COGNIZANCE OF THE PETITION FOR CERTIORARI DESPITE THE BANK'S FAILURE TO FILE A MOTION FOR RECONSIDERATION WITH THE TRIAL COURT.

5.2. THE HONORABLE COURT OF APPEALS COMMITTED REVERSIBLE ERROR WHEN IT PREMATURELY RULED ON THE MERITS OF THE MAIN CASE.

5.3. THE HONORABLE COURT OF APPEALS ERRED IN HOLDING THAT RESPONDENT JUDGE HAD COMMITTED GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION IN ISSUING A TEMPORARY RESTRAINING ORDER AND A WRIT OF PRELIMINARY INJUNCTION IN FAVOR OF THE SPOUSES NISCE.[54]

Petitioners aver that the CA erred in not dismissing respondent Bank's petition for certiorari outright because of the absence of a condition precedent: the filing of a motion for reconsideration of the assailed Order of the RTC before filing the petition for certiorari in the CA. They insist that respondent bank's failure to file a motion for reconsideration of the assailed Order deprived the RTC of its option to resolve the issue of whether it erred in issuing the writ of preliminary injunction in their favor.

Petitioners insist that in resolving whether a petition for a writ of preliminary injunction should be granted, the trial court and the appellate court are not to resolve the merits of the main case. In this case, however, the CA resolved the bone of contention of the parties in the trial court: whether the loan account of petitioners with respondent bank had been extinguished by legal compensation against petitioner Natividad Nisce's US dollar savings account with PCI Capital in Hong Kong. The CA reversed the assailed order of the trial court by resolving the main issue in the trial court on its merits, and declaring that the US dollar savings deposit of the petitioner Natividad Nisce with the PCI Capital cannot be used to offset the loan account of petitioners with respondent bank. In fine, according to petitioners, the CA preempted the ruling of the RTC on the main issue even before the parties could be given an opportunity to complete the presentation of their respective evidences. Petitioners point out that in the assailed Order, the RTC declared that to determine whether respondent had credited petitioners for the amount of P4,600,000.00 under PN No. BD-150369 and whether respondent as mortgagee-creditor accelerated the maturities of the two (2) promissory notes executed by petitioner, there was a need for a full-blown trial and an exhaustive consideration of the evidence of the parties.

Petitioners further insist that a petition for a writ of certiorari is designed solely to correct errors of jurisdiction and not errors of judgment, such as errors in the findings and conclusions of the trial court. Petitioners maintain that the trial court's erroneous findings and conclusions (according to respondent bank) are not the proper subjects for a petition for certiorari. Contrary to the findings of the CA, they did not admit in the trial court that they were in default in the payment of their loan obligations. They had always maintained that they had no outstanding obligation to respondent bank precisely because their loan account had been offset by the US dollar deposit of petitioner Natividad Nisce, and that they had made check payments of P4,600,000.00 which respondent bank had not credited in their favor. Likewise erroneous is the CA ruling that they would not suffer irreparable damage or injury if their properties would be sold at public auction following the extrajudicial foreclosure of the mortgage. Petitioners point out that their conjugal home stands on the subject properties and would be lost if sold at public auction. Besides, petitioners aver, the injury to respondent bank resulting from the issuance of a writ of preliminary injunction is amply secured by the P10,000,000.00 injunction bond which they had posted.

For its part, respondent avers that, as held by the CA, the requirement of the filing of a motion for reconsideration of the assailed Order admits of exceptions, such as where the issue presented in the appellate court is the same

issue presented and resolved by the trial court. It insists that petitioners failed to prove a clear legal right to injunctive relief; hence, the trial court committed grave abuse of discretion in issuing a writ of preliminary injunction.

Respondent maintains that the sole issue involved in the petition for certiorari of respondent in the CA was whether or not the trial court committed grave abuse of its discretion in issuing the writ of preliminary injunction. Necessarily, the CA would have to delve into the circumstances behind such issuance. In so doing, the CA had to consider and calibrate the testimonial and documentary evidence adduced by the parties. However, the RTC and the CA did not resolve with finality the threshold factual and legal issue of whether the loan account of petitioners had been paid in full before it filed its petition for extrajudicial foreclosure of the real estate mortgage.

The Ruling of the Court

The Petition in the Court of Appeals Not Premature

The general rule is that before filing a petition for certiorari under Rule 65 of the Rules of Court, the petitioner is mandated to comply with a condition precedent: the filing of a motion for reconsideration of the assailed order, and the subsequent denial of the court a quo. It must be stressed that a petition for certiorari is an extraordinary remedy and should be filed only as a last resort. The filing of a motion for reconsideration is intended to afford the public respondent an opportunity to correct any actual error attributed to it by way of re-examination of the legal and factual issues.^[55] However, the rule is subject to the following recognized exceptions:

- (a) where the order is a patent nullity, as where the court a quo has no jurisdiction; (b) where the questions raised in the certiorari proceeding have been duly raised and passed upon by the lower court, or are the same as those raised and passed upon in the lower court; (c) where there is an urgent necessity for the resolution of the question and any further delay would prejudice the interests of the Government or of the petitioner or the subject matter of the action is perishable; (d) where, under the circumstances, a motion for reconsideration would be useless; (e) where petitioner was deprived of due process and there is extreme urgency for relief; (f) where, in a criminal case, relief from an order of arrest is urgent and the granting of such relief by the trial court is improbable; (g) where the proceedings in the lower court are a nullity for lack of due process; (h) where the proceedings were ex parte or in which the petitioner had no opportunity to object; and (i) where the issue raised is one purely of law or public interest is involved.^[56]

As will be shown later, the March 24, 2003 Order of the trial court granting petitioner's plea for a writ of preliminary injunction was issued with grave abuse of discretion amounting to excess or lack of jurisdiction and thus a nullity. If the trial court issues a writ of preliminary injunction despite the absence of proof of a legal right and the injury sustained by the plaintiff, the writ is a nullity.^[57]

Petitioners Are Not Entitled to a Writ of Preliminary Prohibitory Injunction

Section 3, Rule 58 of the Rules of Court provides that a preliminary injunction may be granted when the following have been established:

- (a) That the applicant is entitled to the relief demanded, and the whole or part of such relief consists in restraining the commission or continuance of the act or acts complained of, or in requiring the performance of an act or acts, either for a limited period or perpetually;
- (b) That the commission, continuance or nonperformance of the act or acts complained of during the litigation would probably work injustice to the applicant; or
- (c) That a party, court, agency or a person is doing, threatening, or is attempting to do, or is procuring or suffering to be done, some act or acts probably in violation of the rights of the applicant respecting the subject

of the action or proceeding, and tendering to render the judgment ineffectual.

The grant of a preliminary injunction in a case rests on the sound discretion of the court with the caveat that it should be made with great caution. The exercise of sound judicial discretion by the lower court should not be interfered with except in cases of manifest abuse. Injunction is a preservative remedy for the protection of the parties' substantive rights and interests. The sole aim of a preliminary injunction is to preserve the status quo within the last actual status that preceded the pending controversy until the merits of the case can be heard fully. Moreover, a petition for a preliminary injunction is an equitable remedy, and one who comes to claim for equity must do so with clean hands. It is to be resorted to by a litigant to prevent or preserve a right or interest where there is a pressing necessity to avoid injurious consequences which cannot be remedied under any standard of compensation. A petition for a writ of preliminary injunction rests upon an alleged existence of an emergency or of a special reason for such a writ before the case can be regularly tried. By issuing a writ of preliminary injunction, the court can thereby prevent a threatened or continued irreparable injury to the plaintiff before a judgment can be rendered on the claim.[58]

The plaintiff praying for a writ of preliminary injunction must further establish that he or she has a present and unmistakable right to be protected; that the facts against which injunction is directed violate such right;[59] and there is a special and paramount necessity for the writ to prevent serious damages. In the absence of proof of a legal right and the injury sustained by the plaintiff, an order for the issuance of a writ of preliminary injunction will be nullified. Thus, where the plaintiff's right is doubtful or disputed, a preliminary injunction is not proper. The possibility of irreparable damage without proof of an actual existing right is not a ground for a preliminary injunction.[60]

However, to establish the essential requisites for a preliminary injunction, the evidence to be submitted by the plaintiff need not be conclusive and complete.[61] The plaintiffs are only required to show that they have an ostensible right to the final relief prayed for in their complaint.[62] A writ of preliminary injunction is generally based solely on initial or incomplete evidence.[63] Such evidence need only be a sampling intended merely to give the court an evidence of justification for a preliminary injunction pending the decision on the merits of the case, and is not conclusive of the principal action which has yet to be decided.[64]

It bears stressing that findings of the trial court granting or denying a petition for a writ of preliminary injunction based on the evidence on record are merely provisional until after the trial on the merits of the case shall have been concluded.[65]

The trial court, in granting or dismissing an application for a writ of preliminary injunction based on the pleadings of the parties and their respective evidence must state in its order the findings and conclusions based on the evidence and the law. This is to enable the appellate court to determine whether the trial court committed grave abuse of its discretion amounting to excess or lack of jurisdiction in resolving, one way or the other, the plea for injunctive relief. The trial court's exercise of its judicial discretion whether to grant or deny an application for a writ of preliminary injunction involves the assessment and evaluation of the evidence, and its findings of facts are ordinarily binding and conclusive on the appellate court and this Court.[66]

We agree with respondent's contention that as creditor-mortgagee, it has the right under the real estate mortgage contract and the amendment thereto to foreclose extrajudicially, the real estate mortgage and sell the property at public auction, considering that petitioners had failed to pay their loans, plus interests and other incremental amounts as provided for in the deeds. Petitioners contend, however, that if respondent bank extrajudicially forecloses the real estate mortgage and has petitioners' property sold at public auction for an amount in excess of the balance of their loan account, petitioner's contractual and substantive rights under the real estate mortgage

would be violated; in such a case, the extrajudicial foreclosure sale may be enjoined by a writ of preliminary injunction.

Respondent bank sought the extrajudicial foreclosure of the real estate mortgage and was to sell the property at public auction for P30,533,552.24. The amount is based on Promissory Notes No. 1042793 and BD-150369, interests, penalty charges, and attorney's fees, as of January 31, 2003, exclusive of all interests, penalties, other charges, and foreclosure costs accruing thereafter.[67] Petitioners asserted before the trial court that respondents sought the extrajudicial foreclosure of the mortgaged deed for an amount far in excess of what they owed, because the latter failed to credit P4,600,000.00 paid in checks but without any receipts having been issued therefor; and the P9,000,000.00 peso equivalent of the US\$20,000.00 deposit of petitioner Natividad Nisce with PCIB under Passbook No. 83-3041 and Certificate of Deposit No. CD-01612 issued by PCI Capital on July 23, 1984. Petitioners maintain that the US\$20,000.00 dollar deposit should be setoff against their account with respondent against their loan account, on their claim that respondent is their debtor insofar as said deposit is concerned.

It was the burden of petitioners, as plaintiffs below, to adduce preponderant evidence to prove their claim that respondent bank was the debtor of petitioner Natividad Nisce relative to her dollar deposit with PCIB, and later transferred to PCI Capital in Hong Kong, a subsidiary of respondent Bank. Petitioners, however, failed to discharge their burden.

Under Article 1278 of the New Civil Code, compensation shall take place when two persons, in their own right, are creditors and debtors of each other. In order that compensation may be proper, petitioners were burdened to establish the following:

- (1) That each one of the obligors be bound principally, and that he be at the same time a principal creditor of the other;
- (2) That both debts consist in a sum of money, or if the things due are consumable, they be of the same kind, and also of the same quality if the latter has been stated;
- (3) That the two debts be due;
- (4) That they be liquidated and demandable;
- (5) That over neither of them there be any retention or controversy, commenced by third persons and communicated in due time to the debtor.[68]

Compensation takes effect by operation of law when all the requisites mentioned in Article 1279 of the New Civil Code are present and extinguishes both debts to the concurrent amount even though the creditors and debtors are not aware of the compensation. Legal compensation operates even against the will of the interested parties and even without their consent.[69] Such compensation takes place *ipso jure*; its effects arise on the very day on which all requisites concur.[70]

As its minimum, compensation presupposes two persons who, in their own right and as principals, are mutually indebted to each other respecting equally demandable and liquidated obligations over any of which no retention or controversy commenced and communicated in due time to the debtor exists. Compensation, be it legal or conventional, requires confluence in the parties of the characters of mutual debtors and creditors, although their rights as such creditors or their obligations as such debtors need not spring from one and the same contract or transaction.[71]

Article 1980 of the New Civil Code provides that fixed, savings and current deposits of money in banks and similar institutions shall be governed by the provisions concerning simple loans. Under Article 1953, of the same

Code, a person who secures a loan of money or any other fungible thing acquires the ownership thereof, and is bound to pay the creditor an equal amount of the same kind and quality. The relationship of the depositors and the Bank or similar institution is that of creditor-debtor. Such deposit may be setoff against the obligation of the depositor with the bank or similar institution.

When petitioner Natividad Nisce deposited her US\$20,500.00 with the PCIB on July 19, 1984, PCIB became the debtor of petitioner. However, when upon petitioner's request, the amount of US\$20,000.00 was transferred to PCI Capital (which forthwith issued Certificate of Deposit No. 01612), PCI Capital, in turn, became the debtor of Natividad Nisce. Indeed, a certificate of deposit is a written acknowledgment by a bank or borrower of the receipt of a sum of money or deposit which the Bank or borrower promises to pay to the depositor, to the order of the depositor; or to some other person; or to his order whereby the relation of debtor and creditor between the bank and the depositor is created.[72] The issuance of a certificate of deposit in exchange for currency creates a debtor-creditor relationship.[73]

Admittedly, PCI Capital is a subsidiary of respondent Bank. Even then, PCI Capital [PCI Express Padala (HK) Ltd.] has an independent and separate juridical personality from that of the respondent Bank, its parent company; hence, any claim against the subsidiary is not a claim against the parent company and vice versa.[74] The evidence on record shows that PCIB, which had been merged with Equitable Bank, owns almost all of the stocks of PCI Capital. However, the fact that a corporation owns all of the stocks of another corporation, taken alone, is not sufficient to justify their being treated as one entity. If used to perform legitimate functions, a subsidiary's separate existence shall be respected, and the liability of the parent corporation, as well as the subsidiary shall be confined to those arising in their respective business.[75] A corporation has a separate personality distinct from its stockholders and from other corporations to which it may be conducted. This separate and distinct personality of a corporation is a fiction created by law for convenience and to prevent injustice.

This Court, in *Martinez v. Court of Appeals*[76] held that, being a mere fiction of law, peculiar situations or valid grounds can exist to warrant, albeit sparingly, the disregard of its independent being and the piercing of the corporate veil. The veil of separate corporate personality may be lifted when, inter alia, the corporation is merely an adjunct, a business conduit or an alter ego of another corporation or where the corporation is so organized and controlled and its affairs are so conducted as to make it merely an instrumentality, agency, conduit or adjunct of another corporation; or when the corporation is used as a cloak or cover for fraud or illegality; or to work injustice; or where necessary to achieve equity or for the protection of the creditors. In those cases where valid grounds exist for piercing the veil of corporate entity, the corporation will be considered as a mere association of persons. The liability will directly attach to them.[77]

The Court likewise declared in the same case that the test in determining the application of the instrumentality or alter ego doctrine is as follows:

1. Control, not mere majority or complete stock control, but complete dominion, not only of finances but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own;
2. Such control must have been used by the defendant to commit fraud or wrong, to perpetuate the violation of a statutory or other positive legal duty, or dishonest and unjust act in contravention of plaintiff's legal rights; and
3. The aforesaid control and breach of duty must proximately cause the injury or unjust loss complaint of.

The Court emphasized that the absence of any one of these elements prevents "piercing the corporate veil." In applying the "instrumentality" or "alter ego" doctrine, the courts are concerned with reality and not form, with

how the corporation operated and the individual defendant's relationship to that operation.[78]

Petitioners failed to adduce sufficient evidence to justify the piercing of the veil of corporate entity and render respondent Bank liable for the US\$20,000.00 deposit of petitioner Natividad Nisce as debtor.

On hindsight, petitioners could have spared themselves the expenses and tribulation of a litigation had they just withdrawn their deposit from the PCI Capital and remitted the same to respondent. However, petitioner insisted on their contention of setoff.

On the P4,600,000.00 paid in checks allegedly remitted by petitioners to respondent in partial payment of their loan account, petitioners failed to adduce in evidence the checks to show that, indeed, the checks were drawn by petitioners and delivered to respondent, and that respondent was able to cash the checks. The only evidence adduced by petitioners is a piece of paper listing the serial numbers of the checks and the amount of each check:

PAYMENTS MADE & RECEIVED BY EBC BUT W/O RECEIPTS

1. Dec. 29, 1997 - EBC-0000039462 -P2,000,000.00

2. Jan. 22, 1998 - BC-213016118C
- 1,000,000.00

3. Feb. 24, 1998
- UB -0000074619 - 800,000.00

4. Mar. 23, 1998 - EBC-213016121C - 800,000.00

P 4,600,000.00

IN LIGHT OF ALL THE FOREGOING, the petition is DENIED for lack of merit. The Decision of the Court of Appeals is AFFIRMED. Costs against petitioners.

SO ORDERED.

Ynares-Santiago, Austria-Martinez, and Chico-Nazario, JJ., concur.

[1] Formerly the Philippine Commercial and International Bank and the Equitable Banking Corporation. The two banks were later merged under the corporate name "Equitable PCI Bank."

[2] Records, pp. 47-50.

[3] Id. at 46.

[4] Exhibit "K."

[5] Exhibit "H."

[6] Supra note 4.

[7] Exhibit "L-1."

[8] Records, p. 9.

[9] Id. at 12-14.

[10] Id. at 67-69.

[11] Id. at 193.

[12] Id. at 186-193.

[13] Exhibit "U."

[14] Exhibit "I."

[15] The cable order reads:

Philippine Commercial International Bank

CABLE ORDER

FULL RATE TELEX PREPARED BY: AUTHORIZED SIGNATURE

NIGHT LETTER Beth Mundo

TESTED BY DATE

7.19.84 (Sgd.) Illegible

SEND TO: PCI CAPITAL ASIA LIMITED HONG KONG

TEST ATTN: MR. EDUARDO CARREON/VP

MESSAGE: VALUE TODAY WE CREDITED YOUR ACCOUNT WITH CHASE MANHATTAN BANK NEW YORK FOR US DOLLARS: TWENTY THOUSAND ONLY (US\$20,000.00) AS TIME DEPOSIT PLACEMENT IN FAVOR OF A. NATIVIDAD PARAS NISCE FOR A PERIOD OF 90 DAYS STOP BY ORDER OF THE SAME UNDER OUR REF NO. PDR TT343 84-90-010 (PASEO DE ROXAS BR) STOP PLS TELEX CONFIRMATION AS WE HAVE INSTRUCTED CHASE MANHATTAN BANK NY TO CREDIT YOUR ACCOUNT ON EVEN DATE STOP PLS SEND CERTIFICATE OF DEPOSIT VIA POUCH ATTN: E.P. NERY/AVP STOP THANKS AND REGARDS FULLSTOP
PCIB PASEO DE ROXAS SUNDRIES

[16] Exhibit "U-2."

[17] Exhibit "E."

[18] Exhibit "A" & "B."

[19] Exhibit "U-3."

[20] Exhibit "F."

[21] Exhibit "U-5."

[22] Exhibits "U-5," "U-5-A" to "U-5-FF."

[23] Exhibit "U-6."

[24] Exhibit "Q-1."

[25] Exhibit "U-7."

[26] Exhibit "H."

[27] Exhibit "I."

[28] Id.

[29] Exhibit "J."

- [30] Exhibit “K.”
- [31] Exhibits “L” & “L-1.”
- [32] TSN, March 4, 2003, p. 82.
- [33] TSN, April 4, 2003, p. 91.
- [34] TSN, March 4, 2003, pp. 97-98.
- [35] Id. at 98.
- [36] Id. at 99.
- [37] Exhibit “4-H.”
- [38] Exhibits “4-I” to “4-M.”
- [39] TSN, February 8, 2005, p. 7.
- [40] Exhibit “8.”
- [41] Exhibit “7.”
- [42] Records, p. 170.
- [43] Exhibit “B-1”-rebuttal.
- [44] Exhibit “B-2-A”-rebuttal.
- [45] Exhibit “C-1”-rebuttal.
- [46] Exhibit “D-3-A”-rebuttal.
- [47] Records, pp. 412-416.
- [48] Id.
- [49] Id. at 416.
- [50] Rollo, p. 112.
- [51] 28 Phil. 73 (1914).
- [52] Penned by Associate Justice Edgardo P. Cruz, with Associate Justices Godardo A. Jacinto and Jose C. Mendoza (both retired), concurring; rollo, pp. 35-43.
- [53] Id. at 41-43.
- [54] Id. at 16.
- [55] *Sevillana v. I.T. (International) Corporation*, G.R. No. 99047, April 16, 2001, 356 SCRA 451, 462.
- [56] *Tan, Jr. v. Sandiganbayan*, 354 Phil. 467, 469-470 (1998).
- [57] *Ong Ching Kian Chuan v. Court of Appeals*, 415 Phil. 365, 374-375 (2001), citing *Developers Group of Companies, Inc. v. Court of Appeals*, 219 SCRA 715 (1993); *Inter-Asia Services Corporation v. Court of Appeals*, 331 Phil. 708 (1996).
- [58] *Del Rosario v. Court of Appeals*, 325 Phil. 424, 431-432 (1996).

- [59] Searth Commodities Corporation v. Court of Appeals, G.R. No. 64220, March 31, 1992, 207 SCRA 622, 628.
- [60] Medina v. Greenfield Development Corporation, G.R. No. 140228, November 19, 2004, 443 SCRA 150, 159.
- [61] Olalia, et al. v. Hizon, et al., 274 Phil. 66, 74 (1991).
- [62] Los Baños Rural Bank, Inc. v. Africa, 433 Phil. 930, 940 (2002).
- [63] La Vista Association, Inc. v. Court of Appeals, 344 Phil. 30, 44 (1997).
- [64] Saulog v. Court of Appeals, 330 Phil. 590, 602 (1996).
- [65] Tambaoan v. Court of Appeals, 417 Phil. 638, 694 (2001).
- [66] Golangco v. Court of Appeals, G.R. No. 124724, December 22, 1997, 283 SCRA 293.
- [67] Records, pp. 67-69.
- [68] Article 1279, New Civil Code.
- [69] Bank of the Philippine Island v. Court of Appeals, 325 Phil. 930, 938 (1996).
- [70] Republic v. Court of Appeals, G.R. No. 25012, July 22, 1975, 65 SCRA 186, 190.
- [71] Mavest (U.S.A.) Inc. v. Sampaguita Garment Corporation, G.R. No. 127454, September 21, 2005, 470 SCRA 440, 449.
- [72] Ma v. Community Bank, 494 F. Supplement 252.
- [73] Gendrickson v. Buchbinder, 465 F. Supplement 1250.
- [74] Velarde v. Lopez, Inc., G.R. No. 153886, January 14, 2004, 419 SCRA 422, 431.
- [75] MR Holdings, Ltd. v. Bajar, G.R. No. 138104, April 11, 2002, 380 SCRA 617, 641.
- [76] G.R. No. 131673, September 10, 2004, 438 SCRA 130.
- [77] Id. at 150-151.
- [78] Id. at 151.
- [79] Exhibit "U-6."

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