

**ELOISA MERCHANDISING, INC. AND TREBEL INTERNATIONAL, INC.,
PETITIONERS, VS. BANCO DE ORO UNIVERSAL BANK AND ENGRACIO
M. ESCASINAS, JR., IN HIS CAPACITY AS EX-OFFICIO SHERIFF OF ...**

G.R. No. 192716. June 13, 2012

Ponente: VILLARAMA, JR., J.

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VILLARAMA, JR., J.:

Assailed in this petition for review on certiorari under Rule 45 are the Decision[1] dated March 30, 2010 and Resolution[2] dated June 15, 2010 of the Court of Appeals (CA) in CA-G.R. CV No. 89779. The CA affirmed the trial court's dismissal of petitioners' complaint on the ground of failure to prosecute.

On November 11, 1993, petitioner Eloisa Merchandising, Inc. (EMI) executed in favor of respondent Banco de Oro Universal Bank (BDO) a real estate mortgage (REM) over its properties located at No. 129 Neptune St., Bel-Air Village II, Makati City, Metro Manila and covered by Transfer Certificate of Title Nos. 157092 and 157093. The REM was further amended on May 16, 1996, December 23, 1996, September 16, 1998 and July 2, 1999 to secure the principal obligation totalling Twenty-Nine Million Nine Hundred Thousand Pesos (P29,900,000.00) drawn from the Credit Line Agreement of EMI and Term Loan Agreement of Trebel International, Inc. (Trebel). EMI likewise executed a Continuing Suretyship in favor of BDO to secure the credit accommodation extended by BDO to petitioner's affiliate, Trebel.[3]

On January 10, 2002, BDO initiated foreclosure proceedings by filing an application for extrajudicial foreclosure before the Office of the Ex-Officio Sheriff of the Regional Trial Court (RTC) of Makati City.[4] Accordingly, respondent Engracio M. Escasinas, Jr. issued a notice setting the auction sale of the mortgaged property on March 7, 2002.

On March 1, 2002, petitioners filed a Complaint[5] for "annulment of Real Estate Mortgage, Injunction & Damages With Prayer for Issuance of a Writ of Preliminary Injunction and/or Temporary Restraining Order," docketed as Civil Case No. 02-245 of the RTC of Makati City, Branch 59. Petitioners alleged the following as grounds for nullity of the REM: (1) the contract is in the nature of a third-party mortgage to secure the loans of Trebel despite the fact that EMI is not in the suretyship business; (2) after maturity of the loans, BDO granted Trebel extensions of time to pay without notice to EMI, thus extinguishing the corporate guaranty or suretyship and REM, pursuant to Art. 2079 of the Civil Code; (3) under the promissory notes, BDO unilaterally fixed an adjustable, "floating" interest rate on each interest period as may be favorable to it, a potestative condition which is null and void under Art. 1308 of the Civil Code; and (4) the penalty of 3% per month or 36% per annum is exorbitant and excessive. Petitioners further claimed that BDO acted with malice and evident bad faith in initiating the extrajudicial foreclosure proceedings.

BDO filed a motion to dismiss[6] on the ground of lack of cause of action which can be determined from the facts alleged in the complaint and considering all annexes, motions and evidence on record.

On May 7, 2002, petitioners filed an amended complaint[7] which impleaded the Register of Deeds and alleged

that the mortgaged property was sold at a public auction on March 7, 2002.

On July 18, 2002, petitioners filed a “Motion for Leave to File and to Admit Second Amended Complaint,”[8] which averred that the Register of Deeds of Makati City has consolidated the titles over the foreclosed properties and issued new titles in the name of BDO.

On November 28, 2002, the trial court issued an order[9] granting the motion to admit second amended complaint and denying the motion to dismiss. BDO was directed to file a responsive pleading.

On January 17, 2003, BDO filed its Answer[10] traversing the allegations of the complaint and asserting that: (1) there was only forbearance on BDO’s part before filing the extrajudicial foreclosure due to insistent request of petitioners who repeatedly promised to settle their obligations, and for humanitarian reasons; (2) the loan documents clearly stated that no prior demand is necessary before the entire obligation becomes due and demandable; (3) on June 22, 1999, Trebel obtained a “Term Loan Agreement” in addition to the previously granted P5,000,000.00 Credit/Trust Receipts Line granted by BDO, from which Trebel availed of P19,900,000.00, part of which was used to pay off EMI’s loans; in consideration thereof, EMI executed a Continuing Suretyship and the Fourth Amended REM to the extent of P29,900,000.00 in favor of BDO; (4) Trebel subsequently made several drawings from its own credit lines in the total amount of P29,880,000.00 under Promissory Notes (PNs) executed on various dates; (5) because Trebel failed to satisfy its loan obligations under the aforesaid PNs, BDO was compelled to file an application for extrajudicial foreclosure of the REM on January 10, 2002, and BDO won as the highest bidder during the public auction sale; (6) EMI was not a third-party mortgagor considering that it secured its own obligations and Trebel has assumed its obligations in full; the veil of corporate fiction maybe pierced in this case, and EMI is already estopped from raising the issue of ultra vires act after Trebel had defaulted on its obligations; (7) with the execution of the Continuing Suretyship, EMI bound itself solidarily with the principal debtor, Trebel, and the right of BDO to proceed against EMI as surety exists independently of its right to proceed against Trebel; EMI as surety is not even entitled to a notice of the principal’s default; (8) the Conforme Letter dated June 14, 1999 sent by BDO to EMI showed the consent of Mr. Roberto L. Del Rosario (President) and Ms. Emma M. Del Rosario (Finance Manager) who both signed the said letter which provides for a floating interest rate based on the 364-day Treasury Bill Rates plus 4% or the BDO Reference Rate plus 7.5%; T-Bill Rates are one of the most objective and generally used standard for interest rates; and (9) the liquidated penalty was part of the parties’ agreement, which will not accrue until Trebel defaults on its obligations with BDO.

In the Notice of Pre-Trial[11] dated January 22, 2003, the trial court set the pre-trial conference on February 27, 2003. In compliance with the trial court’s directive, the parties submitted their respective pre-trial briefs.

On March 13, 2003, petitioners filed a “Motion to Admit Supplemental Complaint” which further alleged that BDO’s petition for issuance of a writ of possession was granted by the RTC of Makati City, Branch 143 in a Decision dated February 18, 2003. EMI reiterated that its rights as surety-mortgagor were violated in the railroad ex parte proceedings implementing the writ of possession even as EMI’s pending motion for reconsideration was still unresolved by Branch 143.[12]

In its Order[13] dated June 19, 2003, the trial court denied the motion to admit supplemental complaint on the ground that the matters raised in the supplemental complaint were improper as they pertain to issuances by another branch in a separate petition for writ of possession.

At the scheduled pre-trial conference on June 26, 2003, on motion of petitioners, they were allowed to present evidence ex parte in view of the absence of BDO which was non-suited. In its motion for reconsideration, BDO’s counsel cited extraordinary and non-moving traffic as reason for his failure to arrive on time for the pre-trial

conference. The trial court, in an Order dated August 27, 2003, granted the said motion, reinstated the case and set the case again for pre-trial conference on September 26, 2003, later moved to November 10, 2003, and finally rescheduled to January 12, 2004 by agreement of the parties.[14]

On July 16, 2003, petitioners filed a motion for reconsideration of the June 19, 2003 Order denying their motion to admit supplemental complaint; BDO filed its opposition to the said motion.

For failure of the petitioners to appear despite due notice at the scheduled pre-trial conference on January 12, 2004, the case was ordered dismissed.[15] In their motion for reconsideration, petitioners' counsel claimed that his failure to attend was due to his accidental falling on the stairs of his house in the morning of January 12, 2004, due to which he had to be attended by a "hilot". In an Order dated May 7, 2004, the trial court reconsidered the dismissal and scheduled anew the pre-trial conference on June 29, 2004, which date was subsequently reset to August 3, 2004 for lack of proof of service upon petitioners' counsel.[16]

Since petitioners again failed to appear on the re-scheduled pre-trial conference on August 3, 2004, the trial court issued the following Order:

When this case was called for pre-trial conference, only counsel for the defendants appeared. There was no appearance on the part of the plaintiffs, despite the fact that as early as June 29, 2004, they were notified for today's hearing. The Court, however, is in receipt of a Motion to Reset filed by counsel for the plaintiff, alleging among others, that he is to appear at the MTC of San Jose, Batangas, which was set earlier than the hearing of this case. The Court finds the ground not meritorious because counsel of plaintiffs in open Court on June 29, 2004 signed the notification for the hearing of this case. Counsel could have objected to the chosen date if indeed he was not available. Likewise, the records will show that on January 12, 2004, this case was also dismissed for failure of the plaintiffs to appear for pre-trial conference. This should have served as a warning to herein plaintiffs.

In view hereof, upon motion of the herein defendants, the above-entitled case is hereby ordered dismissed pursuant to Section 5, Rule 18 of the Rules of Court.

SO ORDERED.[17] (*Italics supplied.*)

Petitioners moved to reconsider the above order, their counsel alleging that he had misplaced or lost his calendar book and could not have ascertained the availability of his schedule. Stressing that he had no intention to ignore the hearing as in fact he filed a motion to reset the same six days prior to the scheduled hearing, petitioners' counsel pleaded for the kind indulgence of the court.

On December 29, 2004, the trial court issued an Order[18] granting petitioners' motion for reconsideration "in the interest of justice" and reinstating the case. The trial court, however directed petitioners to be "more circumspect in attending to this case."

In its Order[19] dated September 20, 2005, the trial court dismissed the case for failure of petitioners to prosecute their case. Citing the two previous dismissals on account of petitioners' non-appearance at the pre-trial conference, the trial court said that "[f]rom the date of its second reconsideration of the order of dismissal on December 29, 2004 until today, plaintiffs did not do anything to prosecute the instant case."

Petitioners filed a motion for reconsideration in which they averred that:

1. After the reconsideration of the Order of dismissal on December 29, 2004, the plaintiffs counsel, Atty. Anselmo A. Marqueda, on several occasion, passed by the court and diligently followed-up the hearing of this case. He was assured by an officer of the court to just wait for the notice of hearing that they will issue in the instant case.

2. While waiting for the notice of hearing from this court, the respective counsels of the parties negotiated in earnest for an amicable settlement of the case. During the last telephone conversation with Atty. Roy P.R. Talao, the defendant's bank counsel, and the undersigned agree on some proposals for settlement which are however subject to final confirmation of their respective clients. The plaintiff believe that the parties are very close to agree and enter into an amicable settlement of this case.

3. Apart from the reliance of the undersigned counsel on the statement of the court officer to just wait for the notice of hearing, the undersigned counsel suffered a handicap in making a personal follow-up of this case because of his numerous travels and lengthy sojourn in the province due to family conflict and death of a member of the family.

x x x x[20]

In its Order[21] dated April 10, 2006, the trial court denied petitioners' motion for reconsideration, as follows:

x x x Records show that this case has been dismissed thrice (January 12, 2004; August 3, 2004 and September 20, 2005). The first two dismissals were due to the failure of the plaintiffs to appear during the pre-trial conference despite notice. In both cases plaintiffs were admonished to be more circumspect in attending to this case. This time the instant case was dismissed due to inaction of herein plaintiffs for unreasonable length of time.

The Court has been lenient for quite sometime however, plaintiffs seemed inclined to abuse the Court's leniency. Finding no compelling reason to reconsider the assailed order, motion is hereby DENIED.

SO ORDERED.

A

Aggrieved, petitioners appealed to the CA arguing that the trial court erred in dismissing the case for failure to prosecute considering that (1) the trial court has not yet resolved petitioners' motion for reconsideration of the order denying their motion to admit supplemental complaint; (2) petitioners are very much interested to prosecute this case to protect their rights in the premises; (3) petitioners have valid and meritorious causes of action; (4) petitioners may not be deprived of their day in court by the negligence of their counsel; and (5) non-suit or default judgment is not encouraged as it violates due process.[22]

By Decision dated March 30, 2010, the CA affirmed the trial court's dismissal of the case. The CA said that petitioners cannot justify their prolonged inaction by belatedly raising as issue the pending motion for reconsideration from the trial court's denial of their motion to admit the supplemental complaint, when all along they were aware that the case was at the pre-trial stage as in fact the case was twice dismissed for their failure to attend the pre-trial conference. Under the circumstances stated in its September 20, 2005 Order, the CA held that the trial court cannot be faulted for dismissing the case on the ground of petitioners' failure to prosecute their action, citing this Court's ruling in *Olave v. Mistas*. [23]

The CA also denied the motion for reconsideration filed by the petitioners.

Petitioners contend that the only reason for the trial court's dismissal of the case was the failure of their counsel to move to set the case for pre-trial. However, Section 1, Rule 18 of the 1997 Rules of Civil Procedure, as amended, imposing upon the plaintiff the duty to promptly move to set the case for pre-trial, had been repealed and amended by A.M. No. 03-1-09-SC which took effect on August 16, 2004. This amendment to the rule on pre-trial now imposes on the clerk of court the duty to issue a notice of pre-trial if the plaintiff fails to file a motion to set the case for pre-trial conference.

Petitioners point out that the case was not yet ripe for pre-trial because of the unresolved pending motion for

reconsideration of the trial court's denial of the motion to admit supplemental complaint. In any event, petitioners assert that they are very much interested to prosecute the case as they have presented evidence in their application for the issuance of TRO and writ of preliminary injunction, amended the complaint several times, their representatives have always been attending as notified by their lawyers, and their counsel was following up the case but the Clerk of Court could not set the case for pre-trial because of the pending motion. As to the prior dismissals of the case, these should not be taken as badges of failure to prosecute because these had been set aside on meritorious grounds. The circumstances that respondent BDO itself had been declared in default for failure to appear at the pre-trial on June 26, 2003 and has asked repeatedly for extensions of time from the court, the ongoing negotiations with BDO for amicable settlement even at the appeal stage, and petitioners' meritorious causes of action, justify a liberal application of the rules so that petitioners will be given their day in court.

Respondent BDO, on the other hand, asserts that the failure of petitioners to move for the setting of the case for pre-trial conference, coupled with their repeated violations of the Rules which prompted the trial court to dismiss their complaint twice, are sufficient grounds for the trial court to finally dismiss the complaint. A.M. No. 03-1-09-SC did not remove plaintiff's obligation to set the case for pre-trial. Petitioners' claim that they relied on a supposed assurance by a court personnel to set the case for pre-trial is doubtful, aside from being contradictory to the admission of petitioners' counsel that he "suffered a handicap in making a personal follow-up of this case because of [his] numerous travels and lengthy sojourn in the province due to family conflict and death of a member of the family."

As to the alleged negotiations for an amicable settlement, respondent admitted there were talks during court hearings and telephone calls but these were casual and at best, exploratory. No serious offer was made by petitioners, much less concretized. At any rate, even if true, such talks is not a ground to tarry and delay the prosecution of the case which had been pending with the trial court for more than three years and had not even left the pre-trial stage. If indeed petitioners were sincere in their desire to settle, they should have promptly moved for the setting of pre-trial so that the case can be referred for mandatory mediation proceedings.

The petition has no merit.

Under Section 3,[24] Rule 17 of the 1997 Rules of Civil Procedure, as amended, the failure on the part of the plaintiff, without any justifiable cause, to comply with any order of the court or the Rules, or to prosecute his action for an unreasonable length of time, may result in the dismissal of the complaint either *motu proprio* or on motion by the defendant. The failure of a plaintiff to prosecute the action without any justifiable cause within a reasonable period of time will give rise to the presumption that he is no longer interested to obtain from the court the relief prayed for in his complaint; hence, the court is authorized to order the dismissal of the complaint on its own motion or on motion of the defendants. The presumption is not, by any means, conclusive because the plaintiff, on a motion for reconsideration of the order of dismissal, may allege and establish a justifiable cause for such failure.[25] The burden to show that there are compelling reasons that would make a dismissal of the case unjustified is on the petitioners.[26]

Under Section 1, Rule 18 of the 1997 Rules of Civil Procedure, as amended, it is the duty of the plaintiff, after the last pleading has been served and filed, to promptly move *ex parte* that the case be set for pre-trial. On August 16, 2004, A.M. No. 03-1-09-SC (Re: Proposed Rule on Guidelines to be Observed by Trial Court Judges and Clerks of Court in the Conduct of Pre-Trial and Use of Deposition-Discovery Measures) took effect, which provides that:

Within five (5) days from date of filing of the reply, the plaintiff must promptly move *ex parte* that the case be set for pre-trial conference. If the plaintiff fails to file said motion within the given period, the Branch COC shall issue a notice of pre-trial.

We note that when the above guidelines took effect, the case was already at the pre-trial stage and it was the failure of petitioners to set the case anew for pre-trial conference which prompted the trial court to dismiss their complaint.

In *Olave v. Mistas*,^[27] this Court said that even if the plaintiff fails to promptly move for pre-trial without any justifiable cause for such delay, the extreme sanction of dismissal of the complaint might not be warranted if no substantial prejudice would be caused to the defendant, and there are special and compelling reasons which would make the strict application of the rule clearly unjustified. In the more recent case of *Espiritu v. Lazaro*,^[28] this Court affirmed the dismissal of a case for failure to prosecute, the plaintiff having failed to take the initiative to set the case for pre-trial for almost one year from their receipt of the Answer. Although said case was decided prior to the effectivity of A.M. No. 03-1-09-SC, the Court considered the circumstances showing petitioners' and their counsel's lack of interest and laxity in prosecuting their case.

In this case, while there was no substantial prejudice caused to herein respondent, who has already consolidated the ownership of petitioners' properties, secured new titles in its name and successfully implemented a writ of possession issued by another branch, there was neither patent abuse in the trial court's dismissal of the complaint for the third time, the earlier two dismissals having been precipitated by petitioners' non-appearance at the pre-trial conference. Contrary to petitioners' assertion, the trial court did not find their offered excuses as meritorious or justifiable; the trial court in the exercise of discretion simply reinstated the case "in the interest of justice" but explicitly warned petitioners to be more circumspect in attending to the case.

However, despite the trial court's leniency and admonition, petitioners continued to exhibit laxity and inattention in attending to their case. Assuming domestic problems had beset petitioners' counsel in the interregnum, with greater reason should he make proper coordination with the trial court to ensure his availability on the date to be chosen by the trial court for the long-delayed conduct of a pre-trial conference. Petitioners themselves did nothing to get the case moving for nine months and set the case anew for pre-trial even as BDO was already seeking their judicial ejectment with the implementation of the writ of possession issued by Branch 143. Such circumstance also belies their pretense that the parties were then still negotiating for a settlement. We have held that a party cannot blame his counsel when he himself was guilty of neglect; and that the laws aid the vigilant, not those who slumber on their rights. *Vigilantibus sed non dormientibus jura subveniunt*.^[29]

We also agree with the CA that petitioners are belatedly raising as issue the unresolved motion for reconsideration of the denial of petitioners' motion to admit supplemental complaint. Petitioners did not even file a motion to resolve the said pending incident which, in any event, could have been brought to the trial court's attention had petitioners acted promptly to have the case set anew for pre-trial conference soon after or within a reasonable time from the reinstatement of the case on December 29, 2004.

While under the present Rules, it is now the duty of the clerk of court to set the case for pre-trial if the plaintiff fails to do so within the prescribed period, this does not relieve the plaintiff of his own duty to prosecute the case diligently. This case had been at the pre-trial stage for more than two years and petitioners have not shown special circumstances or compelling reasons to convince us that the dismissal of their complaint for failure to prosecute was unjustified.

WHEREFORE, the petition for review on certiorari is DENIED. The Decision dated March 30, 2010 and Resolution dated June 15, 2010 of the Court of Appeals in CA-G.R. CV No. 89779 are hereby AFFIRMED and UPHELD.

Costs against the petitioners.

SO ORDERED.

Leonardo-De Castro,[*] (Acting Chairperson), Bersamin, Del Castillo, and Perlas-Bernabe,**] JJ., concur.

[*] Designated Acting Chairperson of the First Division per Special Order No. 1226 dated May 30, 2012.

[**] Designated Acting Member of the First Division per Special Order No. 1227 dated May 30, 2012.

[1] Rollo, pp. 34-43. Penned by Associate Justice Fernanda Lampas Peralta with Associate Justices Marlene Gonzales-Sison and Ruben C. Ayson concurring.

[2] Id. at 68.

[3] Records, pp. 78-105, 113-116, 179-180.

[4] Id. at 13-15.

[5] Id. at 1-10.

[6] Id. at 205-217.

[7] Id. at 225-237.

[8] Id. at 312-326.

[9] Id. at 361-363.

[10] Id. at 367-380.

[11] Id. at 381-382.

[12] Id. at 403-409.

[13] Id. at 443.

[14] Id. at 445-449, 460, 462-463.

[15] Id. at 465.

[16] Id. at 466-468, 473, 475.

[17] Id. at 479.

[18] Id. at 490.

[19] Id. at 492.

[20] Id. at 493-494.

[21] Id. at 510.

[22] CA rollo, p. 32.

[23] G.R. No. 155193, November 26, 2004, 444 SCRA 479.

[24] SEC. 3. Dismissal due to fault of plaintiff. – If, for no justifiable cause, the plaintiff fails to appear on the date of the presentation of his evidence in chief on the complaint, or to prosecute his action for an unreasonable length of time, or to comply with these Rules or any order of the court, the complaint may be dismissed upon

motion of the defendant or upon the court's own motion, without prejudice to the right of the defendant to prosecute his counterclaim in the same or in a separate action. This dismissal shall have the effect of an adjudication upon the merits, unless otherwise declared by the court.

[25] *Malayan Insurance Co., Inc. v. Ipil International, Inc.*, G.R. No. 141860, August 31, 2006, 500 SCRA 371, 380, citing *Olave v. Mistas*, supra note 23 at 494.

[26] *Espiritu v. Lazaro*, G.R. No. 181020, November 25, 2009, 605 SCRA 566, 573.

[27] Supra note 23 at 495.

[28] Supra note 26 at 572-573.

[29] *Heirs of the Late Flor Tungpalan v. Court of Appeals*, G.R. No. 136207, June 21, 2005, 460 SCRA 392, 397-398, citing *Villanueva v. People*, G.R. No. 135098, April 12, 2000, 330 SCRA 695, 703 and *Mendoza v. Cayas*, 98 Phil. 107, 111.

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