

## SECOND DIVISION

[ G.R. NO. 142731, June 08, 2006 ]

**BANK OF THE PHILIPPINE ISLANDS (FORMERLY FAR EAST BANK AND TRUST COMPANY), PETITIONER, VS. COURT OF APPEALS AND JIMMY T. GO, RESPONDENTS.**

### DECISION

**AZCUNA, J.:**

This is a petition for review on certiorari filed by Bank of the Philippine Islands of the decision and resolution of the Court of Appeals, which in turn partially denied a petition for certiorari questioning the temporary restraining order (TRO) and preliminary injunction issued by Judge Urbano C. Victorio, Sr. <sup>[1]</sup>

The facts as narrated in the Court of Appeals decision are as follows:

Petitioner, Far East Bank and Trust Company, granted a total of eight (8) loans to Noah's Arc Merchandising (Noah's Ark, for brevity). Per Certificate of Registration issued by the Department of Trade and Industry (Rollo, p. 40), Noah's Ark is a single proprietorship owned by Mr. Albert T. Looyuko. The said loans were evidenced by identical Promissory Notes all signed by Albert T. Looyuko, private respondent Jimmy T. Go and one Wilson Go. Likewise, all loans were secured by real estate mortgage constituted over a parcel of land covered by Transfer Certificate of Title [No.] 160277 registered in the names of Mr. Looyuko and herein private respondent. Petitioner, claiming that Noah's Ark defaulted in its obligations, extrajudicially foreclosed the mortgage. The auction sale was set on 14 April 1998 but on 8 April 1998 private respondent filed a complaint for damages with prayer [for] issuance of TRO and/or writ of preliminary injunction seeking [to] enjoin the auction sale. [I]n the Order dated 14 April 1998 a temporary restraining order was issued and in the same order the application for Preliminary Injunction was set for hearing [i]n the afternoon of the same day (Rollo, p. 142).<sup>[2]</sup>

In an order<sup>[3]</sup> dated April 15, 1998, Judge Victorio extended the TRO for another 15 days, for a total of 20 days. The Court of Appeals decision continues thus:

After hearing, the 7 May 1998 Order granted the application for preliminary injunction which shall take effect upon posting of a bond in the amount of Two Hundred Thousand Pesos (P200,000.00). The dispositive portion read:

"WHEREFORE, it appearing that the acts complained of would be in violation of plaintiff's right and would work injustice to the plaintiff and so as not to render ineffectual whatever

judgment may be issued in this case, the application [for] preliminary injunction is hereby granted and the defendants and all persons acting in their behalf are hereby ordered to cease, desist, and refrain from proceeding with the scheduled foreclosure and public auction sale of the mortgaged property covered by TCT No. 160277 until further orders from this Court.

This Order shall be effective upon petitioner's filing of a bond in the amount of Two Hundred Thousand Pesos (P200,000.00) to answer for any and all damages that defendants may suffer by reason of the issuance of the writ of preliminary injunction.

As prayed for, defendants are hereby directed to file their answer on or before May 14, 1998. Copy furnished plaintiff.

SO ORDERED." (Rollo p. 175)

Private-respondent then filed a bond as required by the order. Petitioner moved for a reconsideration of the aforementioned order which motion was denied in the Order dated 30 July 1998 on the ground that the extrajudicial foreclosure was premature as to four (4) promissory notes. The dispositive portion read:

"WHEREFORE, premises considered, the motion for reconsideration is hereby denied and the other pending incident pertaining thereto are noted and this case be set for pre-trial.

LET THEREFORE, a notice of pre-trial be sent to the parties.

SO ORDERED." (Rollo, p. 219)<sup>[4]</sup>

After petitioner's motion for reconsideration was denied in an order dated July 30, 1998, petitioner filed a petition for certiorari with the Court of Appeals, praying that the orders dated May 7, 1998 and July 30, 1998, granting the writ of preliminary injunction and denying the motion for reconsideration, respectively, be annulled and set aside and the writ of preliminary injunction be dissolved. Furthermore, petitioner asked to be allowed to proceed with the auction sale of the property.

The Court of Appeals promulgated its decision dated August 26, 1999 which partially denied the petition for certiorari, stating as follows:

The issue in this case is: "Whether the trial court erred in the issuance of the Writ of Preliminary Injunction or not."

Petitioner averred that private respondent had not shown any right which should be protected by an injunction. Private respondent naturally claimed otherwise and asserted that since four (4) of the promissory notes have not yet matured there was no basis to foreclose the mortgage (Comment, p 15). He also claimed that his right to due process entitles him to legal demand prior to the filing of the foreclosure proceedings against the subject property (Comment, p. 16).

It has been held that an injunction may be issued in order to preserve the status quo. Thus, in *Cagayan de Oro City Landless Residents Association, Inc., v. Court of Appeals* (254 SCRA 220 [1996]) it was held:

As an extraordinary remedy, injunction is calculated to preserve the status quo of things and is generally availed of to prevent actual or threatened acts, until the merits of the case can be heard. x x x. (254 SCRA 228).

In the case at bar, there is a need to first settle the question of whether the demand made by petitioner was sufficient to render private respondent in default or not. In *Rose Packing Co., Inc. v. Court of Appeals* (167 SCRA 309 [1988]) it was held that the question of whether the debtor is in default should first be settled to determine if the foreclosure was proper. In the same case it was also held that said question should be resolved by the trial court, to wit:

While petitioner corporation does not deny, in fact, it admits its indebtedness to respondent bank (Brief for Petitioner, pp. 7-11), there were matters that needed the preservation of the status quo between the parties. The foreclosure sale was premature.

First was the question of whether or not petitioner corporation was already in default.

x x x

Petitioner corporation alleges that there had been no demand on the part of respondent bank previous to its filing a complaint against petitioner and Rene Knecht personally for collection on petitioner's indebtedness (Brief for Petitioner, p.13). For an obligation to become due there must generally be a demand. Default generally begins from the moment the creditor demands the performance of the obligation. Without such demand, judicial or extrajudicial, the effects of default will not arise. (*Namarco v. Federation of United Namarco Distributors, Inc.* 49 SCRA 238 [1973]; *Borje v. CFI of Misamis Occidental*, 88 SCRA 576 [1979]. Whether petitioner corporation is already in default or not and whether demand had been properly made or not had to be determined in the lower court. (167 SCRA 317-318).

We now come to the matter of sufficiency of the bond filed by private respondent. Petitioner claims that the P200,000.00 bond is grossly insufficient. It argued, thus:

By enjoining petitioner from conducting the auction sale of the mortgaged property, petitioner has already suffered damages in the amount of P715,077.78 representing filing and publication fees. Yet damages to be incurred by petitioner by reason of the injunction are not limited to filing and

publication fees, granting that the case will drag on for more than a year, which is usually the case. The injunction would deprive petitioner FEBTC of its own income from the foreclosed property or from the proceeds of the foreclosure sale. Obviously it is easily more than P200,000.00 (Rollo, p. 31).

The Court agrees with petitioner that the amount of the bond is insufficient. In *Valencia v. Court of Appeals*, (263 SCRA 275 [1996]) the Supreme Court explained that the bond is for the protection against loss or damage by reason of the injunction, to wit:

The said bond was supposed to answer only for damages which may be sustained by private respondents, against whom the mandatory injunction was issued, by reason of the issuance thereof, and not to answer for damages caused by the actuations of petitioner, which may or may not be related at all to the implementation of the mandatory injunction. The purpose of the injunction bond is to protect the defendant against loss or damage by reason of the injunction in case the court finally decides that the plaintiff was not entitled to it, and the bond is usually conditioned accordingly. Thus, the bondsmen are obligated to account to the defendant in the injunction suit for all damages, or costs and reasonable counsel's fees incurred or sustained by the latter in case it is determined that the injunction was wrongfully issued. (263 SCRA 288-289)

Private respondent's contention that considering the market value of the property, the bond is reasonable and proper (Rollo, p. 240) cannot be upheld considering that no proof of the value of the property was even presented to buttress this assertion.

However, the insufficiency of the amount of the bond prescribed by the trial court does not warrant the lifting of the writ of injunction. The Court notes that under Section 7, Rule 58 of the 1997 Rules of Civil Procedure the applicant, in case the bond is insufficient, may still file one sufficient in amount, to wit:

*Sec. 7. Service of copies of bond; effect of disapproval of same.* - - x x x. If the applicant's bond is found to be insufficient in amount, or if the surety or sureties thereon fail to justify, and a bond sufficient in amount with sufficient sureties approved after justification is not filed forthwith, the injunction shall be dissolved. x x x.

The Court considers a bond of Five Million Pesos (P5,000,000.00) to be more appropriate in the present case.

WHEREFORE, considering the foregoing premises the petition for certiorari is DENIED; however, private respondent is ordered to file an injunctive bond in the amount of P5,000,000.00.

SO ORDERED.<sup>[5]</sup>

Petitioner filed a motion for reconsideration which was denied in a resolution dated April 3, 2000 by the Court of Appeals on the ground that all the matters raised in the motion for reconsideration had already been passed upon in the decision.<sup>[6]</sup>

Petitioner filed the instant petition for review on certiorari questioning the August 26, 1999 decision and the April 3, 2000 resolution. The following issues were raised by petitioner:

3.1 Whether the Honorable Court of Appeals can resolve the issue of the sufficiency of demand.

3.2 Whether private respondent Go is entitled to a temporary restraining order and a writ of preliminary injunction.

3.3 Whether the Complaint of private respondent Go has been rendered moot and academic.

For the purpose of clarity, the issues are restated thus:

1. Whether or not the private respondent was entitled to the TRO and writ of preliminary injunction.
2. Whether or not the TRO and writ of preliminary injunction were properly issued by Judge Victorio.

On the first issue, this Court finds that private respondent was not entitled to the TRO and the writ of preliminary injunction. Section 3 of Rule 58 of the Rules of Court provides the grounds for the issuance of a preliminary injunction, to wit:

A preliminary injunction may be granted when it is 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 non-performance 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 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 tending to render the judgment ineffectual.

As will be discussed below, private respondent is not entitled to the relief of injunction against the extrajudicial foreclosure and auction sale. Neither are the extrajudicial foreclosure and auction sale violative of private respondent's rights.