

THIRD DIVISION

[G.R. No. 108634, July 17, 1997]

**ANTONIO P. TAN, PETITIONER, VS. THE COURT OF APPEALS AND
DPG DEVELOPMENT AND MANAGEMENT CORP., RESPONDENTS.**

D E C I S I O N

FRANCISCO, J.:

Petitioner Antonio P. Tan was the lessee of a piece of property located at 3658 Ramon Magsaysay Boulevard, Sampaloc, Manila when on April 21, 1986, respondent DPG Development and Management Corporation (DPG for brevity) acquired ownership thereof by purchase from one Manuel J. Gonzales. Subsequently, DPG filed with the Metropolitan Trial Court of Manila on April 13, 1989 an ejectment suit for nonpayment of rentals against Vermont Packaging, Inc. which was managed by petitioner.

During the pendency of said suit, petitioner, on January 24, 1990, filed Civil Case No. 90-51767 against the Register of Deeds of Manila and DPG for cancellation/annulment of TCT No. 169146 issued in the name of DPG. In a nutshell, this complaint challenges the validity of TCT No. 169146 which, according to petitioner, emanated from TCT No. 165501 that covered parcels of land outside of Manila.

DPG received summons and the copy of the complaint on February 6, 1990. More than a month later or on March 22, 1990, DPG's then counsel, Atty. Abundio Bello, filed a motion for extension of time to file its answer to the complaint. The motion was granted. However, instead of filing the answer within the extended period, Atty. Bello filed a second motion for more time to file answer. The court granted the motion but only for fifteen (15) days from April 25, 1990.

As DPG still failed to file its answer, petitioner filed a motion to declare the former in default. On May 22, 1990, the trial court granted the motion and accordingly declared DPG in default. Petitioner thereafter presented evidence.

On October 5, 1990, the trial court rendered a decision in Civil Case No. 90-51767 favoring petitioner, the dispositive portion of which reads:

"WHEREFORE, it is hereby ordered that TCT No. 169146 registered in the name of defendant DPG Development & Management Corporation be cancelled with the consequential effect that the land reverts to the government disposable to qualified applicants. It is further ordered that the Bureau of Lands consider the application of the plaintiff for the purchase of the area occupied by him pursuant to the recommendation of the land investigator on the matter.

Attorney's fees in the amount of P5,000.00.

Cost of suit.” [1]

DPG received a copy of the trial court’s decision on October 25, 1990. Nine (9) days later or on November 3, 1990, Atty. Benjamin S. Formoso filed a notice of appearance as new counsel for DPG. On the same day, said counsel filed a motion for new trial and to admit answer with counterclaim.

Petitioner filed a comment thereon with an omnibus motion to strike out DPG’s motion for new trial, coupled with a prayer for the issuance of a writ of execution.

On November 23, 1990, the trial court issued an Order denying, in effect, the motion for new trial, the entirety of which reads:

“ORDER

Today is the consideration of the Motion for New Trial and Motion to Admit Answer of DPG Dev. & Mgt. Corp. filed by Atty. Benjamin Formoso. The plaintiff opposed the Motion for New Trial on the following grounds:

- 1) Defendant is represented by counsel of record in the person of Atty. Abundio Bello and that there is no substitution of counsel by the mere filing of Notice of Appearance by Atty. Benjamin Formoso;
- 2) Defendant did not even file the requisite motion to lift order of default to regain its standing or personality before the Court and that the mere filing of motion by the alleged new counsel did not automatically suspend the running of the period; and
- 3) That the decision in the above-entitled case had not become final and executory.

The records will show that Atty. Abundio Bello filed a Withdrawal of Appearance (sic) on November 5, 1990 after the defendant DPG Dev. & Mgt. Corp. had already been furnished with a copy of the decision by this Court, and that the Notice of Appearance of Atty. Benjamin Formoso on November 2, 1990 was actually ahead of the withdrawal of appearance by Atty. Abundio Bello on November 5, 1990. Such being the case, the appearance of new counsel Atty. Benjamin Formoso, granting that he is the authorized counsel for the defendant, did not actually stop the running of the period within which to appeal the adverse decision of the court.

The Decision of the Court dated October 5, 1990 had already become final and executory, and the Motion for New Trial need not be acted upon by the Court.

WHEREFORE, let there be issued a Writ of (sic) Execution in the above-entitled case, the same to be implemented by Branch Sheriff Ramon G. Enriquez of this Court.

SO ORDERED.”

DPG questioned this Order through a petition for certiorari before public respondent Court of Appeals (CA) claiming that the trial court gravely abused its discretion and

exceeded its jurisdiction in failing to take action on and/or in denying its motion for new trial and to admit answer, and in granting petitioner's omnibus motion to strike out said motion for new trial and prayer for the issuance of a writ of execution.

In its Decision of October 23, 1992 disposing of DPG's petition for certiorari,^[2] the CA ruled for DPG, the dispositive portion of which reads:

"WHEREFORE, the petition is hereby GRANTED. As prayed for, the ORDER of the respondent judge issued on November 23, 1990, is hereby ANNULLED and SET ASIDE.

As a consequence,

- (1) The writ of execution and alias writ of execution that have been issued are likewise declared null and void;
- (2) Petitioner's motion for new trial and for admission of answer that the order of November 23, 1990 has, in effect, denied is considered GRANTED;
- (3) Petitioner's Answer to the private respondent's complaint in Civil Case No. 90-51767 is, accordingly, considered ADMITTED; and
- (4) The DECISION of respondent judge in said case is hereby VACATED, and respondent judge is hereby ordered to conduct a new trial in said civil case. Conformably to Section 5 of Rule 37 however, the recorded evidence taken upon the former trial so far as the same is material and competent to establish the issues, shall be used at the new trial without retaking the same.

SO ORDERED."

Hence, this petition, with the following principal arguments raised by petitioner in support thereof:

- 1) the CA should not have entertained DPG's petition for certiorari considering that no motion for reconsideration of the trial court's October 5, 1990 Decision was first filed by DPG and that the proper remedy is an appeal;
- 2) the filing of the motion for new trial did not interrupt the finality of the trial court's Decision inasmuch as there was no valid substitution between DPG's previous counsel on record Atty. Bello and new counsel Atty. Formoso who filed the said motion for new trial.

The petition must fail.

On the first argument, as a rule, the special civil action of certiorari will not lie unless a motion for reconsideration is first filed before the respondent court to allow it an opportunity to correct its errors.^[3] However, this rule admits of certain recognized exceptions such as (a) where the order is a patent nullity,^[4] as where the Court a quo had no jurisdiction;^[5] (b) where the questions raised in the certiorari proceeding have been duly raised and passed upon by the lower court,^[6] or are the same as those raised and passed upon in the lower court;^[7] (c) where

there is an urgent necessity for the resolution of the question and any further delay would prejudice the interests of the Government^[8] or of the petitioner^[9] or the subject matter of the action is perishable;^[10] (d) where, under the circumstances, a motion for reconsideration would be useless;^[11] (e) where petitioner was deprived of due process and there is extreme urgency for relief;^[12] (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;^[13] (g) where the proceedings in the lower court are a nullity for lack of due process;^[14] (h) where the proceedings was ex parte or in which the petitioner had no opportunity to object;^[15] and (i) where the issue raised is one purely of law or where public interest is involved.^[16] It is exceptive circumstance (b) that justified DPG's non-filing of a motion for reconsideration, inasmuch as DPG's petition for certiorari before the CA involved a similar issue or question passed upon by the trial court in its November 23, 1990 Order, i.e., the propriety of the motion for new trial filed by DPG's new counsel (Atty. Formoso).

It must also be stressed that what is determinative of the propriety of certiorari is the danger of failure of justice without the writ, not the mere absence of all other legal remedies.^[17] Thus, even when appeal is available and is the proper remedy, a writ of certiorari has been allowed when the orders of the lower court were issued either in excess of or without jurisdiction.^[18] Certiorari may also be availed of where an appeal would be slow, inadequate and insufficient^[19] and that to strictly observe the general rule would result in a miscarriage of justice.^[20] This is especially true when the petition, such as DPG's certiorari petition before the CA, appears to be meritorious and the trial judge indeed seems to have committed grave abuse of discretion.

This brings us to the second argument which touches on the heart of the matter. There is no question that the remedy against a judgment by default is a motion for new trial under Rule 37 of the Rules of Court which should be filed within the period for perfecting an appeal, and that the timely filing thereof interrupts the 15-day reglementary period. The CA has thus correctly observed that:

"It is settled in Our jurisprudence that a motion for new trial is the appropriate remedy when the defendant discovers that he has been declared in default and that a judgment has already been rendered, which has not, however, become final and executory as yet. (Leyte vs. Cusi, Jr., 152 SCRA 496; Tiburcio vs. Castro, 161 SCRA 583; Dolos vs. Court of Appeals, 188 SCRA 413; Circle Finance Corp vs. Court of Appeals, 196 SCRA 166). It is not required that the defendant file first a motion to lift the order of default 'to regain his standing.'

"The filing of a motion for new trial suspends the reglementary period for the attainment by the decision of finality. (Rule 41, Section 3; PCIBank vs. Ortiz, 150 SCRA 383) for

'If a new trial be granted, x x x the judgment shall be vacated, and the action shall stand for trial de novo, x x x.' (Rule 37, Section 5)"^[21]

There is also no dispute that a motion for new trial (and to admit answer with counterclaim) was filed on behalf of DPG within the 15-day appeal period, i.e., on