FOURH DIVISION

[CA-G.R. CV NO. 73935, August 31, 2006]

SPOUSES VERMONT T. DY AND LUZVIMINDA L. DY, PLAINTIFFS--APPELLANTS, VS. METROPOLITAN BANK AND TRUST COMPANY AND ORLANDO CORUÑA, DEFENDANTS-APPELLEES.

D E C I S I O N

GUARIÑA III, J.:

The narrow question presented by this appeal is whether the plaintiff may be non-suited for failure to prosecute where the defendant has itself failed to file an answer despite the lapse of a considerable time. The mutual inaction of the parties is one for the book. Instead of moving towards a joinder of issues, the parties wait in the wings for each other to take the next step. As a result, the whole proceedings have grounded to a halt. The attitude of the parties to this case is flippant, if not pathetic.

The facts are as follows : On July 17, 1998, the plaintiffs Vermont and Luzviminda Dy filed a complaint with the Regional Trial Court of Quezon City for the nullification of the extra-judicial foreclosure proceeding initiated by the defendant Metropolitan Bank and Trust Company against them. [1] The application for TRO was forthwith scheduled for hearing and resolved on July 30 by an order denying the issuance of the provisional writ. [2] The proceedings had lain fallow since then. Almost a year later, on June 30, 1999, the court directed the plaintiffs to show cause why the case should not be dismissed for failure to prosecute. The defendant bank saw its cue and filed a motion to dismiss on July 12 saying that from the time the motion for TRO was denied, *the plaintiffs had not done anything to keep the proceeding moving*. [3] In an opposition, [4] the plaintiffs rationalized the delay by alleging that negotiations were being undertaken by them for the restructuring of their loan with the bank. They further said that the defendant did not bother to file an answer so that they were not able to set the case for pre-trial. The defendant denied the existence of the negotiations in a reply. It showed a letter sent by it to its lawyer on August 19, 1999 to confirm that the plaintiffs had not negotiated for the restructuring of their loan and that the allegation was only a subterfuge to delay the collection of the account. [5]

Another year and a half elapsed from the filing of the motion to dismiss to its resolution. On November 27, 2000, over the opposition of the plaintiffs, the court dismissed the case for failure to prosecute. [6] It took note of the denial of the defendant that there were negotiations for the restructuring of the loan. While it acknowledged that the defendant did not file an answer, if faulted the plaintiffs for not taking the necessary steps to have the case resolved.

With the summary denial of their motion for reconsideration, [7] the plaintiffs appealed. They pleaded under a lone assignment of error for the reversal of the

order of dismissal and reinstatement of the case. The dismissal was alleged to be unwarranted considering the equally serious lapse of the defendant in not filing an answer despite a lower court order. They argued that they had no intent to delay the case and were interested in prosecuting it.

They say with a straight face that the case had been pending for only a few months and was not even set for pre-trial yet when the court ordered them to explain why the case should not be dismissed for failure to prosecute. Impervious of the denials of the defendant, they repeat the myth that they had been exploring possibilities with the defendant on how to restructure their loan and proudly assert that they have a good cause of action lurking in the alleged fact that their loan was not yet due at the time the defendant moved to foreclose their mortgage.

The defendant bank has played a winning gambit. It stressed that even if it is liable to be declared in default for not filing an answer, it would still be necessary for the plaintiffs to file a motion to declare it in default. But no such motion was filed. The defendant was thus never legally in default. The plaintiffs failed unaccountably to prosecute their case in not moving for its default.

We have presented the argument of the plaintiffs at length in order to expose the gossamer foundation of half-truths and misleading propositions on which they rest. As pointed out by the defendant, there was no negotiation of any kind between the parties that might call for a deferment or suspension of the proceedings. There was no order violated when it did not file the answer. The case was not pending *for only a few months*. When the motion to dismiss was filed, it was already 19 days short of one year from the time the TRO was denied. The plaintiffs unctuously parade the absence of a pre-trial schedule to explain why the case was inactive, perhaps hoping we will not realize that pre-trial may be set only upon their motion. [8] All told, they did nothing for a year after the defendant's answer was due, and nothing still for a year and a half after the motion to dismiss was filed until the case was finally dismissed.

We affirm the dismissal.

The declared rationale for the dismissal of this case is reflected in the pronouncement of the court that the plaintiffs failed to take the necessary steps towards its early resolution. In the context in which this is said, it is clear that the downfall of the plaintiffs was in not moving at all to declare the defendant in default. The one aspect of the case that cannot be ignored is that the defendant was in a state of default for failing to file the answer. For the case to go forward, the rules mandate that the plaintiffs would have to move to declare it in default.

Section 3, Rule 9 of the Rules of Court provides that if the defendant fails to answer within the time allowed, the court shall, upon motion of the plaintiff with notice to the defendant, and proof of such failure, declare the defendant in default. The provision at once tells us that the court cannot *motu proprio* declare the defendant in default. A motion must be filed by the plaintiff with notice to the defendant. What it may do is put the inactive plaintiff on notice that he may be non-suited for failure to prosecute, prodding him by indirection to file the motion.

Section 3, Rule 17 in turn states that if for no justifiable cause, the plaintiff fails to prosecute his action for an unreasonable length of time, the complaint may be