

TWELFTH DIVISION

[CA-G.R. CV. NO. 68505, August 11, 2006]

**SPS. EFREN & ZOSIMA RIGOR, PLAINTIFFS-APPELLANTS, VS.
WESTMONT BANK & ATTY. MAXIMO B. SILAO, DEFENDANTS-
APPELLEES.**

D E C I S I O N

MENDOZA, J.:

This is an appeal from the August 16, 2000 Decision^[1] of the Regional Trial Court, Branch 63, Tarlac City, in Civil Case No. 8657 for *Annulment and/or Declaration of Nullity of Real Estate Mortgage Contract, Extrajudicial Foreclosure Proceedings, Damages and Preliminary Injunction With Prayer for a Restraining Order* filed by Spouses Efren and Zosima Rigor (*plaintiffs-appellants*) against Westmont Bank and Atty. Maximo B. Silao (*defendants-appellees*). The dispositive portion of said decision reads:

"WHEREFORE, judgment is hereby rendered –

1. declaring *valid the Real Estate Mortgage* dated April 19, 1996;
2. declaring *null and void the waiver of the right of redemption* therein stated and plaintiffs may redeem the subject property within one year from the registration of the certificate of sale, and if the said certificate of sale was already registered and the one year period from registration had lapsed, then *the redemption shall be within one year from the finality of this judgment*;
3. dismissing the counterclaim.

No costs.

SO ORDERED."

The *Complaint* ^[2] of the plaintiffs-appellants alleges:

"4. THAT on April 19, 1996, a loan/credit accommodation of P2, 300,000.00 was granted by defendant bank to herein plaintiffs and, in order to secure payment thereof, plaintiffs were made to execute in favor of defendant bank a mortgage over two (2) parcels of land including the buildings and improvements existing thereon situated in Bo. Binauganan, Tarlac, Tarlac, a Xerox copy of the mortgage contract entered into is hereto attached and made an integral part hereof as Annex 'A';

5. THAT under paragraph 5 of said mortgage contract, Annex 'A' hereof, it is distinctly provided that:

X x x.

In case of the sale pursuant to the provisions of this paragraph, such sale, whether made to the MORTGAGEE or to any other person or persons, shall be made free from any right of redemption on the part of the MORTGAGOR, the right of redemption granted by Section 6 of said Act No. 3135 as amended by Act 4118 and Sec. 78, Rep. Act No. 337, being expressly waived by the MORTGAGOR, and the said President of the MORTGAGEE at the time, or his substitute or substitutes, is/are hereby expressly authorized and empowered at such sale to execute and deliver, on behalf of the MORTGAGOR or in his/its name and stead, such deeds of conveyances as may be necessary or proper *for the purpose of vesting in the purchaser at such sale full, complete and absolute title to the property so sold*, free from all liens and encumbrances whatsoever.

X x x x

6. THAT upon the application of defendant bank, defendant notary public is causing the sale of the properties described under Annex 'A' on April 17, 1998 in extrajudicial foreclosure, a Xerox copy of the 'Notice of Extrajudicial Sale' is hereto attached and made an integral part hereof as Annex 'B.'

7. THAT the extrajudicial foreclosure of plaintiffs' properties aforementioned is anchored upon a void and illegal contract of mortgage (Annex 'A');

8. THAT the nullity and illegality of said mortgage contract (Annex 'A') proceeds from the fact that it stipulates that ownership of the properties would automatically pass to the vendee, such being a *pactum commissorium*;

9. THAT foreclosure is being resorted to by defendant bank purposely to circumvent the prohibition against said *pactum commissorium*, it having taken away plaintiffs' right of redemption granted them under the law by conveniently providing and stipulating in said contract that '(I)n case of the sale pursuant to the provisions of this paragraph, such sale, whether made to the Mortgagee or to any other person or persons, shall be made free from any right of redemption on the part of the Mortgagor, the right of redemption granted by Section 6 of said Act No. 3135 as amended by Act 4118 and Sec. 78, Rep. Act No. 337, being expressly waived by the Mortgagor';

10. THAT while it may be argued that rights may be waived, such waiver must not be contrary to law, public order, public policy, morals or good customs, or prejudicial to a third person with a right recognized by law (Article 6 Civil Code), such that the stipulation on plaintiffs' waiver, effectively removing and denying them of their right of redemption guaranteed by law (Act 3135), is contrary to public policy;

11. THAT it must be noted that public policy favors redemption (Lee Chuy Realty Corporation vs. Court of Appeals, 250 SCRA 596) and that the POLICY of the law is to aid rather than defeat the right of redemption (Bodiogan vs. Court of Appeals, 248 SCRA 496; and Tibajia vs. Court of Appeals, 193 SCRA 581);

12. THAT in virtue of the nullity and illegality of the mortgage contract (Annex 'A'), the extrajudicial foreclosure of plaintiffs' properties sought by defendant bank finds no legs to stand on and so must necessarily fail;

13. THAT plaintiffs are entitled to the relief demanded in this complaint and the whole or part of which consists in restraining defendants from proceeding with the extrajudicial foreclosure sale of plaintiffs' properties scheduled on April 17, 1998 at 2:00 P.M. as per Annex 'B' hereof;

14. THAT the continuance of the aforesaid extrajudicial foreclosure proceedings by defendants would work grave injustice to the plaintiffs, and that great and irreparable damage and injury would result to them before the matter can be heard unless a temporary restraining order is issued;

15. THAT defendants are in the process of carrying out the illegal foreclosure sale in violation of plaintiffs' rights and tends to render the judgment in this case ineffectual;

xxx."

On the other hand, *defendants-appellees* contend that the provisions of the Real Estate Mortgage (REM) are valid and binding and do not violate any provision of the Civil Code and other laws. Their stand as can be gleaned from their *Answer*^[3] is as follows:

"7. Paragraph 5 of the Real Estate Mortgage is not *pactum commissorium* since it does not provide for an automatic appropriation by defendant Westmont of the properties mortgaged in case of default on the loan by the plaintiffs. The properties will have to be foreclosed in accordance with law, as what defendant Atty. Maximo Silao is in the process of doing (Uy Tong vs. Court of Appeals, 161 SCRA 383; Northern Motors, Inc. vs. Herrera, 49 SCRA 392). The essence of *pactum commissorium* is that ownership will pass to the mortgagee by mere default of the mortgagor. In the questioned provision, defendant Westmont does not become the owner of the mortgaged properties by mere non-payment or default of the mortgagor. Section 5 of the mortgage deed merely authorizes the President of the Mortgagee or his substitute to execute and deliver the deeds of conveyance to the winning bidder in the foreclosure sale, which may be another person or entity and not necessarily defendant Westmont.

8. The fact that plaintiffs waived their right to redemption under Section 5 of the Real Estate Mortgage does not make such provision *pactum commissorium*. The right of redemption, which is a consequence of

foreclosure, may be waived and does not run counter to the prohibition on pactum commissorium. Such waiver is likewise not against public policy, morals and/or good customs.

9. Besides, even assuming *arguendo* that the waiver by plaintiffs of the right of redemption is void, only that portion of the Real Estate Mortgage may be declared void and not the entire agreement which can exist independently without the waiver.”

As stated earlier, the trial court, in its August 16, 2000 Decision, held the REM valid but declared the waiver of the right of redemption null and void.

Not satisfied, *plaintiffs-appellants* seek the intercession of this Court anchoring their plea on the following:

ASSIGNMENT OF ERRORS

I

THE LOWER COURT ERRED IN DECLARING VALID THE REAL ESTATE MORTGAGE DATED APRIL 19, 1996 WHILE RULING THAT THE WAIVER OF THE RIGHT OF REDEMPTION IS CONTRARY TO LAW.

II

THE LOWER COURT ERRED IN HOLDING THAT THERE IS NO PACTUM COMMISSORIUM.

III

THE LOWER COURT ERRED IN HOLDING THAT THERE WAS SUBSTANTIAL COMPLIANCE WITH THE REQUIREMENTS OF ACT 3135 ON THE EXTRAJUDICIAL FORECLOSURE OF APPELLANTS’ MORTGAGED PROPERTIES.

In their Appeal Brief,^[4] *plaintiffs-appellants* argue that the illegal provision in paragraph 5 of the mortgage contract pertaining to the waiver of the right of redemption entirely affected said mortgage contract and, so, said contract is null and void for being contrary to law. They claim that due to the waiver of the right of redemption provision, said contract qualifies as an “automatic appropriation” and, therefore, null and void because the security is in substance a *pactum commissorium*. They argue that defendants-appellees would not have entered into the contract and extended the loan to them without incorporating in the contract said waiver provision.

Moreover, they contend that the promissory notes and the real estate mortgage contract they executed were prepared contract forms of defendant bank and that their only participation was to affix their signatures thereon. Citing jurisprudence on the matter, it is their position that since it was the defendant bank which prepared the said documents, any doubt or ambiguity in the terms thereof must be construed against it. Lastly, *plaintiffs-appellants* espouse the position that there was no

substantial compliance with the requirements of Act No. 3135 on extrajudicial foreclosure on the ground that there was 1) no posting of the notices of the extrajudicial foreclosure sale; 2) no publication of the notice of extrajudicial foreclosure in a newspaper of general circulation in the province where the properties are located; and 3) no public auction sale conducted.

Traversing plaintiffs-appellants' arguments, *defendants-appellees* counter^[5] that contracts of adhesion per se are not null and void outright because the validity and/or enforceability of which depends on the peculiar circumstances obtaining in each case and the nature of the conditions or terms sought to be enforced; that assuming that said mortgage contract is one of adhesion, such fact does not ipso facto render the same null and void; that plaintiffs-appellants failed to cite any provision in the mortgage contract that is obscure or unclear necessitating interpretation thereof; that plaintiffs-appellants never raised as an issue before the trial court that it intended that it would be bound by said mortgage contract only if the waiver of the right of redemption appearing on paragraph 5 thereof was incorporated therein; that plaintiffs-appellants admitted that they voluntarily executed said mortgage contract to secure the fulfillment of their loan obligations with defendant bank; that having complied with the legal requirements of a valid real estate mortgage, there is no doubt that said mortgage contract is valid; that said mortgage contract does not provide for an automatic appropriation of the mortgaged properties in the event of non-payment of the principal obligations; that plaintiffs-appellants only authorized it to foreclose said mortgaged properties, at the latter's option, in case of default; that the authority to foreclose said mortgaged properties is not equivalent to automatic appropriation as said contract did not contain any stipulation for it; that copies of the notice of extrajudicial foreclosure were posted in three public places and it was published once a week for three consecutive weeks in a newspaper of general circulation in the Philippines; and that a public auction was held on April 17, 1998.

The instant case, thus, poses the following issues: (1) whether or not the subject REM is valid for being a contract of adhesion, for being obscure, and for containing the waiver of the right of redemption; (2) whether or not the subject REM was actually a *pactum commissorium* because there was an "automatic appropriation" clause; and (3) whether or not there was compliance with the requirements of Act No. 3135 on extrajudicial foreclosure.

After carefully weighing the arguments advanced by both parties, We find the appeal bereft of merit. The April 19, 1996 REM^[6] containing a waiver of the right of redemption is not entirely invalid. In the execution of the subject REM, all the essential requirements of a mortgage as provided under Article 2085 of the Civil Code have been complied with. Said article reads:

"Art. 2085. The following requisites are essential to the contracts of pledge and *mortgage*:

- (1) That they be constituted to secure the fulfillment of a principal obligation;
- (2) That the pledgor or mortgagor be the absolute owner of the thing pledged or mortgaged;