Republic of the Philippines
Supreme Court
Manila

FIRST DIVISION

ROASTERS PHILIPPINES, INC., doing business under the name of KENNY ROGERS ROASTERS, Petitioner,	**G.R. No. 191874**
	Present:
	SERENO, *C.J.*, *Chairperson*, LEONARDO-DE CASTRO, BERSAMIN, PEREZ, and PERLAS-BERNABE, *JJ.*
-versus-	
GEORGE GAVIOLA, KARLA HELENE GAVIOLA, KASHMEER GEORGIA GAVIOLA, KLAIRE MARLEI GAVIOLA, and DR. MARIA LEISA M. GAVIOLA, Respondents.	Promulgated: SEP 02 2015

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D E C I S I O N

PEREZ, *J.*:

This Petition for *Certiorari* seeks to reverse the 11 December 2009 Decision[1] and 30 March 2010 Resolution[2] of the Court of Appeals in CA-G.R. SP No. 106728 which annulled the Orders of the Regional Trial Court (RTC) of Las Piñas City, Branch 198 that the complaint be dismissed for failure of respondents to prosecute the case.

On 9 April 2003, respondents Georgia Gaviola and Maria Leisa M. Gaviola (Maria Leisa), together with their children Karla Helene, Kashmeer Georgia and Klaire Marlei, filed a Complaint for Damages against Roasters

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1 *Rollo*, pp. 40-48; Penned by Associate Justice Pampio A. Abarintos with Associate Justices Juan Q. Enriquez, Jr. and Francisco P. Acosta concurring.

2 Id. at 50.

Philippines before the RTC of Las Piñas City. The family was hospitalized due to "acute gastroenteritis and possible food poisoning"[3] when they dined at Kenny Rogers Roasters restaurant Duty-Free Branch in Parañaque.

Petitioner filed a Motion to Dismiss on the ground of failure to state a cause of action. The trial court denied the motion to dismiss, as well as the subsequent motion for reconsideration filed by petitioner.

In its Answer *Ad Cautelam*, petitioner alleged that the complaint states no cause of action; that it is not the direct and real owner of the said Kenny Rogers branch; and that there was no valid demand made by respondents. Petitioner counterclaimed for damages.[4]

Meanwhile, petitioner filed a Petition for *Certiorari* before the Court of Appeals questioning the refusal of the trial court to dismiss the complaint. On 14 March 2005,[5] the appellate court dismissed the petition. On 7 March 2006,[6] the Court of Appeals issued a Resolution declaring the 14 March 2005 Decision to have become final and executory as of 20 July 2005.

On 26 April 2007, petitioner filed a Motion to Dismiss on the ground of failure of respondents to prosecute the pending case alleging that respondents had not filed any pleading to revive or re-activate their case since the 14 March 2005 Decision of the Court of Appeals has become final and executory. In response to the Motion to Dismiss, respondents filed a Manifestation with Motion to Set the Case for Pre-Trial. The trial court denied the Motion to Dismiss filed by petitioner and set the pre-trial to 6 August 2007.[7] Petitioner filed a motion for reconsideration from said order but it was denied by the trial court.[8] On 12 November 2007, the trial court referred the case to mediation. Petitioner meanwhile filed a petition for *certiorari* before the Court of Appeals assailing the denial of its Motion to Dismiss. Petitioner also filed the corresponding motion to suspend proceedings before the trial court in view of the pendency of its *certiorari* petition. The Court of Appeals eventually denied the petition on 18 April 2008 which prompted the trial court to deny petitioner's motion to suspend proceedings. The trial court set the hearing for 19 May 2008.[9]

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3 Records, pp. 10-14.
4 CA *rollo*, pp. 51-58.
5 Records, pp. 247-252; CA-G.R. SP No. 81149, penned by Associate Justice Arcangelita M. Romilla-Lontok with Associate Justices Rodrigo V. Cosico and Danilo B. Pine concurring.
6 Id. at 392.
7 Id. at 420-421; Penned by Judge Erlinda Nicolas-Alvaro.
8 Id. at 422-423.
9 Id. at 675.

During the presentation of their evidence-in-chief on 19 May 2008, respondents failed to attend the hearing. Consequently, the trial court issued an Order[10] dismissing the Complaint for failure to prosecute pursuant to Section 3, Rule 17 of the Rules of Court.

In their Motion for Reconsideration, respondents explained that on the day of the hearing, respondent Maria Leisa had a prior engagement in the United States of America (USA), which nonetheless did not push through because the latter was hospitalized due to profuse bleeding.

The trial court denied the motion for reconsideration on 26 August 2008.[11]

Respondents changed their counsel and the new counsel filed a Motion for Leave to file a Second Motion for Reconsideration and the Second Motion for Reconsideration with the following attachments: 1) Affidavit of Merit executed by Maria Leisa; 2) Certificate of Confinement; and 3) Certification from Dr. Marlyn Dee attesting to Maria Leisa's confinement.

In Maria Leisa's affidavit, she explained that they were able to secure their tickets for Manila to Hong Kong leg but they were mere chance passengers in their connecting flight to USA. However, in the early morning of 19 May 2008, she suffered profuse vaginal bleeding and had to be rushed to the hospital by her husband.

On 23 October 2008, the trial court denied the second motion for reconsideration for lack of merit. [12]

Respondents filed a Notice of Appeal from the 19 May 2008, 26 August 2008 and 23 October 2008 Orders of the trial court. On 18 November 2008, the trial court denied the appeal on the ground that the orders appealed from are mere interlocutory orders. [13]

Respondents then filed a petition for *certiorari* before the Court of Appeals alleging grave abuse of discretion on the part of the trial court judge

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10 Id. at 1192.
11 Id. at 1193-1195.
12 Id. at 1196.
13 Id. at 1197.

in dismissing the case for failure to prosecute, for affirming the dismissal of the case, and for denying the appeal taken by respondents.

On 11 December 2009, the Court of Appeals rendered the assailed Decision annulling the orders of the trial court and directing the reinstatement of the case.

The appellate court found grave abuse of discretion on the part of the trial court for ordering the dismissal of the case for failure to prosecute despite the existence of a justifiable cause for the non-appearance of respondents in the scheduled hearing for presentation of evidence-in-chief. The appellate court held that the motion for postponement filed by respondents' counsel and Maria Leisa's unexpected hospital confinement were sufficient justifications for their non-appearance.

Moreover, the appellate court ruled that the order of the dismissal of the trial court is not an interlocutory order but a final order which is a proper subject of appeal, hence, respondents' correctly filed a notice of appeal.

Petitioner filed the instant petition raising the following issues:

I. WHETHER OR NOT THE COURT OF APPEALS IN GRANTING THE PETITION FOR CERTIORARI VIOLATED THE WELL-SETTLED RULE ON FINALITY OF ORDERS AND JUDGMENTS.

II. WHETHER THE COURT OF APPEALS MANIFESTLY ERRED IN FINDING THAT THE TRIAL COURT COMMITTED GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION IN DENYING RESPONDENTS' SECOND MOTION FOR RECONSIDERATION.

III. WHETHER OR NOT THE COURT OF APPEALS COMMITTED SERIOUS AND REVERSIBLE ERROR IN FINDING THAT THE TRIAL COURT COMMITTED GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION IN DENYING RESPONDENTS' NOTICE OF APPEAL.

IV. WHETHER OR NOT THE COURT OF APPEALS COMMITTED SERIOUS AND REVERSIBLE ERROR IN NOT HOLDING RESPONDENTS BOUND BY THE ACTIONS OF THEIR FORMER COUNSEL AND MORE SO, BY THEIR NEW COUNSEL.

V. WHETHER OR NOT THE COURT OF APPEALS MANIFESTLY ERRED IN GIVING DUE COURSE TO RESPONDENTS' PETITION FOR CERTIORARI, HAVING FAILED TO COMPLY WITH THE REQUIREMENTS OF VERIFICATION AND CERTIFICATE OF NON-FORUM SHOPPING.

VI. WHETHER OR NOT THE COURT OF APPEALS COMMITTED SERIOUS AND REVERSIBLE ERROR IN HOLDING THAT RESPONDENTS HAVE JUSTIFIABLE CAUSE FOR THEIR ABSENCE ON THE DATE OF THE PRESENTATION OF THEIR EVIDENCE IN CHIEF.

VII. WHETHER OR NOT THE COURT OF APPEALS COMMITTED SERIOUS AND REVERSIBLE ERROR IN FINDING THAT THERE IS NO PATTERN OF DELAY IN THE PROCEDURAL HISTORY OF THE CASE TANTAMOUNT TO A FAILURE TO PROSECUTE.[14]

Petitioner argues that the 19 May 2008 Order dismissing the case for failure to prosecute and the 26 August 2008 Order denying the Motion for Reconsideration have already attained finality when respondents chose to file a second motion for reconsideration, instead of filing a notice of appeal. The petition for *certiorari* before the Court of Appeals was filed out of time because the petition was filed more than 60 days upon receipt of the denial of respondents' first motion for reconsideration on 10 September 2008.

Petitioner contends that since the second motion for reconsideration filed by respondents is a prohibited pleading, the period to appeal began to run from the denial of the first motion for reconsideration. Thus, the Notice of Appeal is also filed out of time.

Petitioner claims that negligence of counsel should bind the client, more so in this case where it is the new counsel who filed the second motion for reconsideration submitting the same arguments as contained in the first motion for reconsideration.

Petitioner argues that the petition for *certiorari* should have been dismissed outright for non-compliance with the requirements on verification and certification of non-forum shopping.

Finally, petitioner asserts that there is no justifiable cause for the absence of respondents during the presentation of evidence-in-chief. Their

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[14] *Rollo*, pp. 19-20.

excuse, according to petitioner, is highly doubtful. Petitioner also avers that respondents had shown lack of interest in pursuing the case.

Petitioner harps on the failure of the appellate court to tackle the issues on the finality of the assailed RTC Orders and the propriety of the filing of the Second Motion for Reconsideration. We cannot fault the appellate court for not dealing with said issues. The Court of Appeals centered its discussion on the RTC Order dismissing the case for failure to prosecute. In ruling that there are sufficient justifications for respondents' non-appearance during the hearing for presentation of evidence-in-chief, the Court of Appeals reversed the RTC Order. The reversal of the order dismissing the case is tantamount to admission of the Second Motion for Reconsideration. By giving due course to the Second Motion for Reconsideration, the Notice of Appeal and Petition for *Certiorari* are deemed to have been filed on time.

The resolution of this case, therefore, rests on whether or not the case should be dismissed for failure of respondents to prosecute.

We differ from the ruling of the Court of Appeals.

Section 3, Rule 17 of the 1997 Rules of Civil Procedure, provides:

> VIII. 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.

An action may be dismissed for failure to prosecute in any of the following instances: (1) if the plaintiff fails to appear at the time of trial; or (2) if he fails to prosecute the action for an unreasonable length of time; or (3) if he fails to comply with the Rules of Court or any order of the court.[15]

The fundamental test for *non prosequitur* is whether, under the circumstances, the plaintiff is chargeable with want of due diligence in

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15 *De Knecht v. CA*, 352 Phil. 833, 849 (1998).

failing to proceed with reasonable promptitude. There must be unwillingness on the part of the plaintiff to prosecute.[16]

The trial court's basis for dismissing the case is summed up as follow:

> In view of the objection interposed by [petitioner's] counsel Atty. Chemtou Patricia B. Lamit for the postponement of the hearing and considering that the [respondents] have been long notified of today's hearing, and considering further that none of the [respondents'] supposed ten (10) witnesses particularly the [respondents] themselves appeared, the Court is constrained to DISMISS this case for failure to prosecute in accordance with Section 3, Rule 17 of the 1997 Rules of Civil Procedure.[17]

The basis for such pronouncement lies on the first of three instances mentioned in the Rules, *i.e.*, that plaintiffs failed to appear at the time of trial. The excuse proffered by respondents was not acceptable to the trial court that made the following observation when it denied the motion for reconsideration by respondents:

> The explanations offered as regards the absence of [respondents] and their witnesses do not merit reconsideration.
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> Significantly during the 19 May 2008 hearing, [respondents'] counsel Atty. John Patrick Lubaton, manifested that he filed a motion for postponement as early as 15 May 2008 as [Maria Leisa], the complaining [respondent] left to attend a conference in the United States of America from 14 May to 18 May 2008, together with her family.
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> A careful scrutiny of the cancelled plane tickets attached to the motion discloses, however, that [Maria Leisa] and her children were issued tickets for a trip to Hong Kong on 15 May 2008 and their destination was not the United States contrary to the claim by [respondent Maria Leisa] in the instant motion and by counsel during the 19 May 2008 hearing. Also, co-[respondent] and the husband of [Maria Leisa] George Gaviola was not among those issued with ticket for travel to Hong Kong. Hence, counsel and [respondents] were not candid with this court when they sought postponement of the hearing on 19 May 2008 as George Gaviola was not going to travel either to Hong Kong or United States.
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> As regards the certificates presented regarding the medical condition of [Maria Leisa], the same could not likewise be given much credence because it was not supported by an affidavit of the issuing officer regarding the veracity thereof.

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16 *Shimizu Philippines Contractors, Inc. v. Magsalin, et al.*, 688 Phil. 385, 398 (2012) citing *Producers Bank of the Philippines v. Court of Appeals*, 396 Phil. 497, 505-506 (2000) and *Gapoy v. Adil*, 171 Phil. 653, 658 (1978).

17 Records, p. 1192.

> The above facts could only lead this court to conclude that [respondents] and counsel lack candor in their dealing with the court. They made excuses one after another in order to explain their failure to appear on the date of initial hearing. It should be stressed that other [respondents] and witnesses who were not sick or out of the country on 19 May 2008 should have been presented.[18]

The conclusion of the trial court is well-based. The factual antecedents were unrebutted. Furthermore, the actions exhibited by respondents demonstrate their lack of interest in prosecuting the case. Almost two years had lapsed from finality of the Court of Appeals Decision dated 14 March 2005 but respondents have not filed any pleading to revive the case. Respondents acted only upon the behest of petitioner who filed a Motion to Dismiss. On the scheduled pre-trial on 6 August 2007, respondents and counsel again failed to appear.[19] Respondents failed to attend the mediation set by the trial court. And finally, on the 19 May 2008 hearing for the initial presentation of their evidence-in-chief, respondents failed to appear.

All told, the trial court correctly dismissed the case for failure of respondents to prosecute.

We next discuss the propriety of the pleadings filed subsequent to the dismissal by the RTC of the case for failure of respondents to prosecute.

A second motion for reconsideration, as a rule, is a prohibited pleading which shall not be allowed except for extraordinarily persuasive reasons and only after an express leave shall have first been obtained.[20]

The trial court found no persuasive reason to grant the Second Motion for Reconsideration and we affirm.

The trial court denied respondents' First Motion for Reconsideration on 26 August 2008. The period to appeal is reckoned from the receipt of the denial of their First Motion for Reconsideration, which was on 10 September 2008 and respondents had until 25 September 2008 to file their Notice of Appeal. But instead of filing a Notice of Appeal, respondents filed a

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18 Id. at 1194-1195.

19 Id. at 331.

20 *Tirazona v. Phil. Eds Techno Service, Inc.*, 596 Phil. 683, 687 (2009) citing *Ortigas and Company Limited Partnership v. Velasco,* 324 Phil. 483, 489 (1996).

Motion for Leave of Court to Admit Second Motion for Reconsideration and their Second Motion for Reconsideration on 18 and 19 September 2008, respectively. Considering that a second motion for reconsideration is a *pro forma* motion and does not toll the reglementary period for an appeal,[21] the period to appeal lapsed. Therefore, the impugned RTC Orders became final and executory. The Notice of Appeal was correctly denied by the trial court.

It must be emphasized that the correct reason for the denial by the trial court of the Notice of Appeal is the lapse of the period to appeal, not that the questioned dismissal order is an interlocutory order.

We reproduce the assailed Order for ready scrutiny:

> ORDER
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> Acting on the "Notice of Appeal" filed by [respondent] through counsel from the Order of this Court dated 19 May 2008, 26 August 2008 and 23 October 2008 the court resolves to deny due course to the said appeal, considering that the Order appealed from is a mere interlocutory Order which may not be the subject of an appeal pursuant to Rule 41 Section 1 of the 1997 Rules of Civil Procedure to wit:
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> *"No appeal may be taken from:*
>
> *a) An order denying a motion for new trial or reconsideration;*
> *b) An order denying a petition for relief or any similar motion seeking relief from judgment;*
> *c) An interlocutory order*;"
>
> **It must be stressed that, the trial of this case, is not yet terminated in view of the pendency of the scheduled hearing on the counterclaim on 19 January 2009.** [22] (Emphasis Supplied)

The fact stressed by the trial court clearly states the reason why it considered the order appealed from as interlocutory. Here, the trial court is in error. Section 3, Rule 17 of the 1997 Rules of Civil Procedure is explicit that the dismissal of the complaint due to failure to prosecute "shall have the effect of an adjudication upon the merits unless otherwise declared by the Court." The Rule says:

> If, for no justifiable cause, the plaintiff to appear on the date of the presentation of his evidence in chief on the complaint, or to prosecute his

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21 *Guzman v. Guzman*, G.R. No. 172588, 13 March 2013, 693 SCRA 318, 328-329.

22 CA *rollo*, p. 30.

> 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 separate action. **This dismissal shall have the effect of an adjudication upon the merits unless otherwise declared by the court**. (Emphasis supplied)

In the herein questioned order of dismissal, there was no mention of any reason why the ruling should not be considered as an adjudication on the merits. The respondent, therefore, had the right to appeal the dismissal of their complaint. They could have timely done so. But, as already discussed, they filed the Notice of Appeal only after the lapse of the reglementary period to do so.

The case of *Pinga v. Heirs of German Santiago*[23] settled the conflicting jurisprudence on the dismissal of a complaint for failure to prosecute. The Court elucidated:

> To be certain, when the Court promulgated the 1997 Rules of Civil Procedure, including the amended Rule 17, those previous jural doctrines that were inconsistent with the new rules incorporated in the 1997 Rules of Civil Procedure were implicitly abandoned insofar as incidents arising after the effectivity of the new procedural rules on 1 July 1997. *BA Finance*, or even the doctrine that a counterclaim may be necessarily dismissed along with the complaint, clearly conflicts with the 1997 Rules of Civil Procedure. The abandonment of *BA Finance* as doctrine extends as far back as 1997, when the Court adopted the new Rules of Civil Procedure. If, since then, such abandonment has not been affirmed in jurisprudence, it is only because no proper case has arisen that would warrant express confirmation of the new rule. That opportunity is here and now, and we thus rule that the dismissal of a complaint due to fault of the plaintiff is without prejudice to the right of the defendant to prosecute any pending counterclaims of whatever nature in the same or separate action. We confirm that *BA Finance* and all previous rulings of the Court that are inconsistent with this present holding are now abandoned.
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> Accordingly, the RTC clearly erred when it ordered the dismissal of the counterclaim, since Section 3, Rule 17 mandates that the dismissal of the complaint is without prejudice to the right of the defendant to prosecute the counterclaim in the same or separate action. If the RTC were to dismiss the counterclaim, it should be on the merits of such counterclaim. Reversal of the RTC is in order, and a remand is necessary for trial on the merits of the counterclaim.
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[23] 526 Phil. 868 (2006).

> The formalistic distinction between a complaint and a counterclaim does not detract from the fact that both of them embody causes of action that have in their end the vindication of rights. While the distinction is necessary as a means to facilitate order and clarity in the rules of procedure, it should be remembered that the primordial purpose of procedural rules is to provide the means for the vindication of rights. A party with a valid cause of action against another party cannot be denied the right to relief simply because the opposing side had the good fortune of filing the case first. Yet this in effect was what had happened under the previous procedural rule and correspondent doctrine, which under their final permutation, prescribed the automatic dismissal of the compulsory counterclaim upon the dismissal of the complaint, whether upon the initiative of the plaintiff or of the defendant.
>
> Thus, the present rule embodied in Sections 2 and 3 of Rule 17 ordains a more equitable disposition of the counterclaims by ensuring that any judgment thereon is based on the merit of the counterclaim itself and not on the survival of the main complaint. Certainly, if the counterclaim is palpably without merit or suffers jurisdictional flaws which stand independent of the complaint, the trial court is not precluded from dismissing it under the amended rules, provided that the judgment or order dismissing the counterclaim is premised on those defects. At the same time, if the counterclaim is justified, the amended rules now unequivocally protect such counterclaim from peremptory dismissal by reason of the dismissal of the complaint.[24]

Having figured out the incorrectness of the reversal by the Court of Appeals of the dismissal order of the trial court, we must hasten to point out that the trial of the case must nonetheless proceed, not for the sake of the respondents who as we have seen failed to prosecute their complaint, but for the litigation of the counterclaim of the petitioner, in compliance with the Rule.

WHEREFORE, the petition is **GRANTED**. The Decision and Resolution dated 11 December 2009 and 30 March 2010, respectively of the Court of Appeals in CA-G.R. SP No. 106728, are **REVERSED and SET ASIDE.** The Regional Trial Court of Las Piñas City, Branch 198 Orders dated 19 May 2008, 26 August 2008, 23 October 2008 and 18 November 2008 are **REINSTATED.** Trial on petitioner's counterclaim shall proceed.

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[24] Id. at 887-893.

SO ORDERED.

JOSE PORTUGAL PEREZ
Associate Justice

WE CONCUR:

MARIA LOURDES P. A. SERENO
Chief Justice
Chairperson

TERESITA J. LEONARDO-DE CASTRO
Associate Justice

LUCAS P. BERSAMIN
Associate Justice

ESTELA M. PERLAS-BERNABE
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, I certify that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

MARIA LOURDES P. A. SERENO
Chief Justice