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misconduct on the job are imputed on the sales agent, and these charges are supported with evidence, they constitute sufficient reasons for termination of employment. Well established in our jurisprudence is the right of an employer to dismiss an employee whose continuance in the service is inimical to the employer's interest. (*Manila Trading and Supply Co. vs. Philippine Labor Union*, 71 Phil. 124; *Engineering Equipment, Inc. vs. NLRC*, 133 SCRA 752.)

WHEREFORE, the petition is granted and the temporary restraining order is hereby made permanent. The resolution of public respondent National Labor Relations Commission dated December 28, 1984 and the Decision of the Labor Arbiter dated September 16, 1983 are reversed and set aside. No special pronouncement as to costs.

SO ORDERED.

Yap, Narvasa, Melencio-Herrera, and *Cruz, JJ.*, concur.

SECOND DIVISION

[G.R. No. L-70262. June 25, 1986]

E & L MERCANTILE, INC., and EMMANUEL J. SANTIAGO, *petitioners, vs.* **THE HONORABLE INTERMEDIATE APPELLATE COURT and PHILIPPINE CREOSOTING CORPORATION,** *respondents.*

SYLLABUS

1. REMEDIAL LAW; CIVIL PROCEDURE; MOTIONS; THREE-DAY NOTICE OF HEARING; REQUIREMENT IS TO AFFORD THE ADVERSE PARTY AN OPPORTUNITY TO BE HEARD.— As a general rule, notice

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of motion is required where a party has a right to resist the relief sought by the motion. Principles of natural justice demand that his right should not be affected without an opportunity to be heard. The three-day notice required by the rules is intended not for the benefit of the movant but to avoid surprises upon the adverse party and to give the latter time to study and meet the arguments of the motion. (*Yap v. Court of Appeals,* 115 SCRA 104, 107; and other cases cited)

2. **ID.; ID.; ID.; PROCEDURAL DUE PROCESS NOT DENIED DESPITE LACK OF SERVICE OF THREE-DAY-NOTICE; CASE AT BAR.**— The test is opportunity to be heard, to have time to study the motion and meaningfully oppose or controvert the grounds upon which it is based. The records show that because the setting of the motion for execution pending appeal did not comply with the three-day-notice rule and because the private respondent failed to appear at the January 6, 1984 hearing, the trial court decided not to resolve the motion at that time. Instead it gave the respondent company *five days from receipt* of the order within which to comment on the motion for execution. Only then would the motion be deemed submitted for resolution. x x x Only twenty (20) days after receiving the court order to comment on the now granted motion for execution did the private respondent act. On February 20, 1984, Atty. Demetriou filed her opposition to the motion for execution pending appeal. Atty. Demetriou challenged the motion as pro-forma for failing to comply with the three-day notice rule. She conveniently overlooked the fact that her opposition was filed fifteen (15) days beyond the grace period given by the trial court and that the five (5) day period was much longer than the three (3) days mandated by the Rules. And, we should note that the other counsel, Atty. Quesada again had been given a copy of the January 6 order by registered mail at his address of record but two notices were also returned unclaimed. This five days period was not the only opportunity given to the private respondent to challenge the disputed motion. The new counsel, Atty. Javellana also filed on February 29, 1984 an opposition to the petitioner's motion to be allowed to substitute a real estate mortgage in lieu of a cash bond. Again, the motion for execution was attacked as pro-forma by the respondent. The rule in *De Borja v. Tan* (93 Phil. 167), that "what the law prohibits is not the absence of previous notice, but the absolute absence thereof and lack of opportunity to be heard," is the applicable doctrine.

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3. **ID.; ID.; RULES OF PROCEDURE ARE LITERALLY CONSTRUED.** — Procedural due process is not based solely on a mechanistic and literal application of a rule such that any deviation is inexorably fatal. Rules of procedure, and this includes the three (3) days notice requirement, are liberally construed in order to promote their object and to assist the parties in obtaining just, speedy, and inexpensive determination of every action and proceeding (Section 2, Rule 1, Rules of Court). In *Case of Nantz v. Jugo* (77 Phil. 517), this Court made it clear that lapses in the literal observance of a rule of procedure may be overlooked when they have not prejudiced the adverse party and have not deprived the court of its authority. A party cannot ignore a more than sufficient opportunity to exercise its right to be heard and once the court performs its duty and the outcome happens to be against the negligent party, suddenly interpose a procedural violation already cured, insisting that everybody should again go back to square one. Dilatory tactics cannot be the guiding principle.

APPEARANCES OF COUNSEL

Pedrosa, Castellanes & Bautista Law Offices for petitioners.
Yolanda Q. Javellana for private respondent.

D E C I S I O N

GUTIERREZ, JR., *J.*:

This petition for review seeks to nullify and set aside the Intermediate Appellate Court's decision dated May 29, 1984 and its resolution dated March 5, 1986 which respectively declared the petitioner's motion for execution pending appeal null and void and denied a motion for reconsideration of the decision.

On August 22, 1983, private respondent Philippine Creosoting Corporation (PCC) filed a complaint against petitioner E & L Merchandising Inc. for collection of a sum of money. The complaint was docketed as Civil Case No. 50102. The complaint, in substance, alleged that the petitioner purchased creosoted wood piles from the respondent in the total amount of

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P244,548.90 but failed to pay for the same. To said complaint, the petitioner filed a counterclaim alleging that in the course of their business dealings, it had delivered to the respondent quantities of lumber, poles, and piles to be treated at the latter's creosoting plant and that of these items amounting to P5,460,504.80 and held in trust, there remained unaccounted for 1,158 units of poles and lumber valued at P4,873,064.90 which the private respondent failed to deliver or account for to the petitioner inspite of demands.

On a finding that there was no genuine issue of any material fact between the parties, the trial court rendered a summary judgment and ruled:

"WHEREFORE, judgment is hereby rendered in favor of the defendants and against the plaintiff:

"1. Dismissing the plaintiffs complaint; and

"2. On the defendant corporation's counterclaim, ordering the plaintiff to pay to the defendant E & L Mercantile, Inc. (a) the sum of P5,460,504.91 less the sum of P244,548.90 claimed by the plaintiff in its complaint, or a balance of P5,215,956.01, with interest at the legal rate from the filing of the Answer on September 8, 1983 up to the time it will be paid; and (b) attorney's fees and expenses of litigation equal to 10% of the balance aforestated.

"Costs against the plaintiff."

On January 4, 1984, the petitioner filed a motion for execution pending appeal based on three grounds, namely — (a) any appeal that may be taken from the decision would only be dilatory; (b) the movant was putting up a bond for P5,215,956.01 to answer for damages; and (c) the execution pending appeal was necessary to prevent the decision being a mere pyrrhic victory for the movant since the plaintiff was retrenching its business and disposing of its assets. The notice of hearing addressed to the clerk of court requested him to submit the motion for resolution on January 6, 1984 at 8:30 a.m.

A copy of the motion was served on Atty. Harriette Demetriou, counsel for the private respondent, by personal service on January 4, 1984. Another copy sent by registered mail to the other

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counsel, Atty. Antonio Fa. Quesada, was returned unclaimed after two notices.

Counsel for the private respondent failed to appear at the January 6, 1984 hearing. The petitioner's counsel filed a memorandum of authorities in support of the motion for execution.

Instead of resolving the motion, the trial court issued an order giving the private respondent *five (5) days from receipt of said order* to comment, "after which the said motion shall be deemed submitted."

On January 31, 1984, Atty. Demetriou went to the court. It was then, according to her, that she received a copy of the January 6, 1984 order. She was also able to secure a copy of the December 23, 1983 decision of the court. Meanwhile, a copy of the decision sent to respondent's other counsel, Atty. Quesada, by registered post to his address of record was returned unclaimed after two postmaster's notices remained unheeded.

On February 8, 1984, the trial court issued an order granting execution pending appeal on the basis of the grounds stated in the motion and directed that upon the filing and approval of a bond in the amount of P5,737,551.61, a writ of execution shall forthwith issue.

Atty. Demetriou filed a notice of appeal on February 15, 1984 and an opposition to the motion for execution pending appeal on February 20, 1984.

On February 23, 1984, a new counsel in the person of Atty. Yolanda Quisumbing Javellana substituted for Attys. Demetriou and Quesada with their written conformity.

Meanwhile, on February 21, 1984, the petitioner filed a motion asking that it be allowed to execute a mortgage of real estate in lieu of the required cash bond. On February 29, 1984, the respondent's new counsel opposed the above motion. She also manifested that since private respondent had filed on February 20, 1984 its opposition to execution pending appeal, the grounds for the opposition should be considered as a motion for

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reconsideration of the February 8, 1984 order.

Disregarding its still unresolved motion for substitution of bond by real estate mortgage, the petitioner filed a surety bond in the amount of P5,000,000.00. The bond was approved and a corresponding writ of execution pending appeal was issued on March 1, 1984.

On March 5, 1984, the sheriff levied upon the respondent's properties, both real and personal and issued a notice of sheriff's sale to be held on March 15, 1984.

On March 12, 1984, the private respondent filed a petition for *certiorari* and prohibition with an application for writ of preliminary injunction before the Intermediate Appellate Court. In the absence of the required bond, the appellate court did not issue any preliminary injunction. As a result, the sale of the properties levied upon was conducted on April 17, 1984. A certificate of sale was issued in favor of the petitioner as the highest bidder.

On May 29, 1984, the appellate court rendered a decision granting the petition on a finding that the motion for a writ of execution pending appeal filed with the trial court failed to comply with the requirement of three days notice to the adverse party.

The dispositive portion of the decision reads:

"WHEREFORE, judgment is hereby rendered granting the petition and declaring null and void the orders of respondent Court of February 8, 1984 and March 1, 1984, as well as the writ of execution of March 1, 1984, and all proceedings emanating or based on said orders and writ of execution, including the sale at public auction of petitioner's properties on April 17, 1984, the order of respondent Court of April 30, 1984 ordering petitioner to allow the Deputy-Sheriff ingress and egress to its compound at Km. 77, San Fernando, Pampanga is hereby also set aside.

"Respondents are hereby permanently restrained from enforcing the questioned orders of respondent Court and the writ issued pursuant thereto and if possession of the properties levied and sold at public auction had been delivered to private respondent as purchaser at the

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auction sale on April 17, 1984, which sale has herein been declared null and void and set aside, said respondent is hereby ordered to restore possession thereof to petitioner at its expense.

"With costs against private respondent."

In this petition, the petitioner contends that the three-day notice on motions required by Section 2, Rule 26 of the Rules of Court is not a hard and fast rule as to admit of no possible exceptions, especially in relation to motions for writs of execution pending appeal, with the result that any deviation therefrom will render such order and the proceedings held thereon null and void as ruled by the appellate court. Petitioner further contends that the rules should be liberally construed in order to promote their object and to assist the parties in obtaining just, speedy, and inexpensive determination of every action and proceeding; (citing the case of *de Borja, et al. v. Tan, et al.*, 93 Phil. 167) and that what the law prohibits is not the want of previous notice, but the absolute absence thereof and the lack of opportunity to be heard.

As a general rule, notice of motion is required where a party has a right to resist the relief sought by the motion. Principles of natural justice demand that his right should not be affected without an opportunity to be heard. The three day notice required by the rules is intended not for the benefit of the movant but to avoid surprises upon the adverse party and to give the latter time to study and meet the arguments of the motion. (*Yap v. Court of Appeals*, 115 SCRA 104, 107, citing *Amante v. Sunga*, 64 SCRA 192 [1975], citing 60 C.J.S. 15 and *J.M. Tuason & Co., Inc. v. Magdangal*, 4 SCRA 84 [1962]).

The service of the notice of hearing on Atty. Demetriou on January 4, 1984 was one day short of the required three-day notice. Was the private respondent thereby denied its right to procedural due process — of its opportunity to oppose the motion for execution pending appeal? Or suppose the respondent's counsel failed to receive the notice altogether. Would the omission necessarily be fatal?

The test is opportunity to be heard, to have time to study

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the motion and meaningfully oppose or controvert the grounds upon which it is based.

The records show that because the setting of the motion for execution pending appeal did not comply with the three-day-notice rule and because the private respondent failed to appear at the January 6, 1984 hearing, the trial court decided not to resolve the motion at that time. Instead it gave the respondent company *five days from receipt* of the order within which to comment on the motion for execution. Only then would the motion be deemed submitted for resolution.

According to Atty. Demetriou, she received a copy of this January 6, 1984 order only on January 31, 1984 when she went to the trial court to get her copy of the December 28, 1983 decision. The respondent corporation, therefore, had five days from January 31, 1983 to comment on and oppose the motion for execution.

The respondent corporation did not avail itself of the five (5) days given by the trial court. On February 8, 1984, the court granted the motion for execution pending appeal and fixed the petitioner's bond at P5,737,551.61.

Only twenty (20) days after receiving the court order to comment on the now granted motion for execution did the private respondent act. On February 20, 1984, Atty. Demetriou filed her opposition to the motion for execution pending appeal. Atty. Demetriou challenged the motion as pro-forma for failing to comply with the three-day notice rule. She conveniently overlooked the fact that her opposition was filed fifteen (15) days beyond the grace period given by the trial court and that the five (5) day period was much longer than the three (3) days mandated by the Rules. And, we should note that the other counsel, Atty. Quesada again had been given a copy of the January 6 order by registered mail at his address of record but two notices were also returned unclaimed.

This five days period was not the only opportunity given to the private respondent to challenge the disputed motion. The new counsel, Atty. Javellana also filed on February 29, 1984

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an opposition to the petitioner's motion to be allowed to substitute a real estate mortgage in lieu of a cash bond. Again, the motion for execution was attacked as pro-forma by the respondent.

Procedural due process is not based solely on a mechanistic and literal application of a rule such that any deviation is inexorably fatal. Rules of procedure, and this includes the three (3) days notice requirement, are liberally construed in order to promote their object and to assist the parties in obtaining just, speedy, and inexpensive determination of every action and proceeding (Section 2, Rule 1, Rules of Court). In *Case and Nantz v. Jugo* (77 Phil. 517), this Court made it clear that lapses in the literal observance of a rule of procedure may be overlooked when they have not prejudiced the adverse party and have not deprived the court of its authority.

A party cannot ignore a more than sufficient opportunity to exercise its right to be heard and once the court performs its duty and the outcome happens to be against that negligent party, suddenly interpose a procedural violation already cured, insisting that everybody should again go back to square one. Dilatory tactics cannot be the guiding principle.

The rule in *De Borja v. Tan* (93 Phil. 167), that "what the law prohibits is not the absence of previous notice, but the absolute absence thereof and lack of opportunity to be heard", is the applicable doctrine. (See also *Aguilar v. Tan*, 31 SCRA 205; *Omico v. Vallejos*, 63 SCRA 285; *Sumadchat v. Court of Appeals*, 111 SCRA 488.) In *Llanto v. Ali Dimaporo, et al.* (16 SCRA 599), we stated:

"x x x Even conceding for present purposes that there was no previous notice of hearing of the motion to dismiss before the court ruled (May 15, 1961) on the same adversely to petition, still this alleged defect was fully cured by his motion for reconsideration aforesaid (filed June 24, 1961), which was overruled. By the standard in *De Borja, et al. v. Tan, etc., et al.*, 93 Phil. 167, 171, 'the interested parties were given their day in court, and the previous objection of lack of notice or opportunity to be heard fully met.' As the De Borja decision points out, what the law prohibits 'is not the absence of

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previous notice, but the absolute absence thereof and lack of opportunity to be heard.' (See also: *Embate v. Penolio*, 93 Phil. 782; *Parina v. Cobangbang, et al.*, G.R. No. L-8398, March 21, 1956.)"

Parenthetically, in connection with this Court's order to elevate the records of the Intermediate Appellate Court which are pertinent to this case, it was ascertained that the latter court has already rendered its decision in the precursor civil case, AC-G.R. No. CV-02852 on January 6, 1986. The appellate court affirmed the trial court's decision ordering the herein respondent corporation to pay the petitioner P5,215,956.01 with interests at the legal rate, and attorney's fees and expenses of litigation equal to 10% of said amount. The appellate court and the trial court are, at the very least, agreed on the basic merits of the main case and on the judgment sought to be executed.

Considering all the foregoing, we find the order directing execution pending appeal as well as the proceedings taken pursuant to it without any constitutional or legal infirmity.

WHEREFORE, the judgment raised to us on review is hereby REVERSED and SET ASIDE. The orders of the Regional Trial Court dated February 8, 1984 and March 1, 1984 and the processes issued pursuant thereto are AFFIRMED. No costs.

SO ORDERED.

Feria (Chairman), Fernan, Alampay, and *Paras, JJ.*, concur.