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SECOND DIVISION

[G.R. No. 201675. June 19, 2013]

JUANITO ANG, for and behalf of SUNRISE MARKETING (BACOLOD), INC.,* *petitioner, vs.* **SPOUSES ROBERTO and RACHEL ANG,** *respondents.*

SYLLABUS

COMMERCIAL LAW; CORPORATION CODE; DERIVATIVE SUIT, NOT A CASE OF; WHERE THE COMPLAINT FAILED TO SATISFY THE REQUIREMENTS FOR A DERIVATIVE SUIT.— [W]e find that the Complaint is not a derivative suit. The Complaint failed to show how the acts of Rachel and Roberto resulted in any detriment to SMBI. The CA-Cebu correctly concluded that the loan was not a corporate obligation, but a personal debt of the Ang brothers and their spouses. x x x SMBI was never a party to the Settlement Agreement or the Mortgage. It was never named as a co-debtor or guarantor of the loan. Both instruments were executed by Juanito and Anecita in their personal capacity, and not in their capacity as directors or officers of SMBI. Thus, SMBI is under no legal obligation to satisfy the obligation. The fact that Juanito and Anecita attempted to constitute a mortgage over "their" share in a corporate asset cannot affect SMBI. The Civil Code provides that in order for a mortgage to be valid, the mortgagor must be the "absolute owner of the thing x x x mortgaged." Corporate assets may be mortgaged by authorized directors or officers on behalf of the corporation as owner, "as the transaction of the lawful business of the corporation may reasonably and necessarily require." However, the wording of the Mortgage reveals that it was signed by Juanito and Anecita in their personal capacity as the "owners" of a pro-indiviso share in SMBI's land and not on behalf of SMB[.] x x x Juanito and Anecita, as stockholders of SMBI, are not co-owners of SMBI assets. They do not own *pro-indiviso* shares, and therefore, cannot

* In the lower courts and in some pleadings filed with this Court, petitioner named itself as "Sunrise Marketing (Bacolod), Inc., represented by Juanito Ang."

> mortgage the same except in their capacity as directors or officers of SMBI. We also find that there is insufficient evidence to suggest that Roberto and Rachel fraudulently and wrongfully removed Nancy as a stockholder in SMBI's reportorial requirements. x x x That it took four years for them to make any attempt to question Nancy's exclusion as stockholder negates their allegation of fraud. Since damage to the corporation was not sufficiently proven by Juanito, the Complaint cannot be considered a *bona fide* derivative suit. A derivative suit is one that seeks redress for injury to the corporation, and not the stockholder. No such injury was proven in this case. The Complaint also failed to allege that all available corporate remedies under the articles of incorporation, by-laws, laws or rules governing the corporation were exhausted, as required under the Interim Rules. x x x Furthermore, there was no allegation that there was an attempt to remove Rachel or Roberto as director or officer of SMBI, as permitted under the Corporation Code and the by-laws of the corporation. Thus, the Complaint failed to satisfy the requirements for a derivative suit under the Interim Rules.

APPEARANCES OF COUNSEL

Lyndon P. Caña for petitioner.
Poblador Bautista & Reyes for Rachel Ang.
Filomeno B. Tan for Roberto Ang.

D E C I S I O N

CARPIO, *J.*:

The Case

This petition for review[1] assails the Decision[2] of the Court of Appeals-Cebu (CA-Cebu) dated 20 September 2011 in CA-G.R. SP No. 05546. The CA-Cebu reversed and set aside the Order[3] of the Regional Trial Court, Branch 53, Bacolod City

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[1] Under Rule 45 of the 1997 Rules of Civil Procedure.

[2] *Rollo*, pp. 581-592. Penned by Acting Executive Justice Pampio A. Abarintos, with Justices Eduardo B. Peralta, Jr. and Gabriel T. Ingles, concurring.

[3] *Id.* at 170-179. Penned by Judge Pepito B. Gellada.

Supreme Court E-Library

(RTC Bacolod) dated 27 September 2010 in Commercial Court Case No. 09-070 entitled *Sunrise Marketing (Bacolod), Inc., represented by Juanito Ang v. Spouses Roberto and Rachel Ang*.

The Facts

Sunrise Marketing (Bacolod), Inc. (SMBI) is a duly registered corporation owned by the Ang family.[4] Its current stockholders and their respective stockholdings are as follows:[5]

Stockholder	Number of Shares
Juanito Ang	8,750
Anecita Ang	1,250
Jeannevie Ang	2,500
Roberto Ang	8,750
Rachel Ang	3,750
Total	25,000

Juanito Ang (Juanito) and Roberto Ang (Roberto) are siblings. Anecita Limoco-Ang (Anecita) is Juanito's wife and Jeannevie is their daughter. Roberto was elected President of SMBI, while Juanito was elected as its Vice President. Rachel Lu-Ang (Rachel) and Anecita are SMBI's Corporate Secretary and Treasurer, respectively.

On 31 July 1995, Nancy Ang (Nancy), the sister of Juanito and Roberto, and her husband, Theodore Ang (Theodore), agreed to extend a loan to settle the obligations of SMBI and other corporations owned by the Ang family, specifically Bayshore Aqua Culture Corporation, Oceanside Marine Resources and JR Aqua Venture.[6] Nancy and Theodore issued a check in the amount of $1,000,000.00 payable to "Juanito Ang and/or Anecita Ang and/or Roberto Ang and/or Rachel Ang." Nancy was a

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[4] *Id.* at 70.

[5] *Id.* at 239.

[6] TSN, 12 May 2009, p. 28.

Supreme Court E-Library

former stockholder of SMBI, but she no longer appears in SMBI's General Information Sheets as early as 1996.[7] Nancy and Theodore are now currently residing in the United States. There was no written loan agreement, in view of the close relationship between the parties. Part of the loan was also used to purchase real properties for SMBI, for Juanito, and for Roberto.[8]

On 22 December 2005, SMBI increased its authorized capital stock to ₱10,000,000.00. The Certificate of Increase of Capital Stock was signed by Juanito, Anecita, Roberto, and Rachel as directors of SMBI.[9] Juanito claimed, however, that the increase of SMBI's capital stock was done in contravention of the Corporation Code.[10] According to Juanito, when he and Anecita left for Canada:

> x x x Sps. Roberto and Rachel Ang took over the active management of [SMBI]. Through the employment of sugar coated words[,] they were able to successfully manipulate the stocks sharings between themselves at 50-50 under the condition that the procedures mandated by the Corporation Code on increase of capital stock be strictly observed (valid Board Meeting). No such meeting of the Board to increase capital stock materialized. It was more of an accommodation to buy peace x x x.[11]

Juanito claimed that payments to Nancy and Theodore ceased sometime after 2006. On 24 November 2008, Nancy and Theodore, through their counsel here in the Philippines, sent a demand letter to "Spouses Juanito L. Ang/Anecita L. Ang and Spouses Roberto L. Ang/Rachel L. Ang" for payment of the principal amounting to $1,000,000.00 plus interest at ten percent (10%) per annum, for a total of $2,585,577.37 within ten days from receipt of the letter.[12] Roberto and Rachel then sent a letter

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[7] Securities and Exchange Commission Website, http://www.sec.gov.ph (visited on 13 March 2013).

[8] *Rollo*, p. 19.

[9] *Id.* at 107.

[10] *Id.* at 20.

[11] *Id.* at 54-55.

[12] *Id.* at 86.

Supreme Court E-Library

to Nancy and Theodore's counsel on 5 January 2009, saying that they are not complying with the demand letter because they have not personally contracted a loan from Nancy and Theodore.

On 8 January 2009, Juanito and Anecita executed a Deed of Acknowledgment and Settlement Agreement (Settlement Agreement) and an Extra-Judicial Real Estate Mortgage (Mortgage). Under the foregoing instruments, Juanito and Anecita admitted that they, together with Roberto and Rachel, obtained a loan from Nancy and Theodore for $1,000,000.00 on 31 July 1995 and such loan shall be secured by:

a) Juanito and Anecita's fifty percent share over a parcel of land registered in the name of SMBI;

b) a parcel of land registered in the name of Juanito Ang;

c) Juanito's fifty percent share in 7 parcels of land registered in his and Roberto's name;

d) a parcel of land registered in the name of Roberto;

e) a parcel of land registered in the name of Rachel; and

f) Roberto and Rachel's fifty percent share in 2 parcels of land registered in the name of their son, Livingstone L. Ang (Livingstone), and in another lot registered in the name of Livingstone and Alvin Limoco Ang.[13]

A certain Kenneth C. Locsin (Locsin) signed on behalf of Nancy and Theodore, under a Special Power of Attorney which was not attached as part of the Settlement Agreement or the Mortgage, nor included in the records of this case.

Thereafter, Juanito filed a "Stockholder Derivative Suit with prayer for an *ex-parte* Writ of Attachment/Receivership" (Complaint) before the RTC Bacolod on 29 January 2009. He alleged that "the intentional and malicious refusal of defendant Sps. Roberto and Rachel Ang to [settle] their 50% share x x x

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[13] *Id.* at 93-103.

Supreme Court E-Library

[of] the total obligation x x x will definitely affect the financial viability of plaintiff SMBI."[14] Juanito also claimed that he has been "illegally excluded from the management and participation in the business of [SMBI through] force, violence and intimidation" and that Rachel and Roberto have seized and carted away SMBI's records from its office.[15]

The Complaint sought the following reliefs:

a) Issuance of an *ex-parte* Writ of Attachment and/or Garnishment, with a Break Open Order covering the assets of the spouses Roberto and Rachel Ang, or any interest they may have against third parties;

b) Placement of SMBI under Receivership pending resolution of the case;

c) Enforcement of Juanito's right to actively participate in the management of SMBI;

d) Issuance of an Order compelling the Spouses Roberto and Rachel Ang to:

   i. Render an accounting of the utilization of the loan amounting to $2,585,577.37 or ₱120,229,347.26;

   ii. Pay fifty percent of the aforementioned loan, amounting to ₱60,114,673.62;

   iii. Explain why Nancy was removed as a stockholder as far as SMBI's reportorial requirements with the SEC are concerned;

   iv. Restore Juanito's right to actively manage the affairs of the corporation; and

   v. Pay attorney's fees amounting to ₱20,000.00.

On 29 January 2009, the RTC Bacolod issued an Order[16] granting the application for an *ex-parte* writ of attachment and

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[14] *Id.* at 57.

[15] *Id.* at 60.

[16] *Id.* at 119-120. Penned by Judge Pepito B. Gellada.

Supreme Court E-Library

break open order. Atty. Jerry Basiao, who filed an application for appointment as Receiver of SMBI, was directed by the RTC Bacolod to furnish the required Receivership Bond.[17] On the same date, Roberto and Rachel moved to quash the writ of attachment and set aside the break open order and appointment of receiver.[18] They claimed that these were issued in violation of their right to due process:

> Records of this case would show that the complaint was filed before [the RTC Bacolod] at 2:50 p.m. of January 29, 2009. x x x
>
> xxx xxx xxx
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> [C]ounsel for the defendant-spouses went to [the RTC Bacolod] at around 3:00 p.m. on January 29, 2009 [to inquire on] the status of the case and was informed that the last pleading on record is his entry of appearance with the conformity of the defendant Rachel Ang. Counsel was however informed by the clerk of court that the Honorable Judge has already issued an order directing the issuance of the writ of preliminary attachment, receivership and break open order but said order was not officially released yet x x x. Due to the undersigned counsel's insistence, however, said clerk of court of this Honorable Court furnished him a copy of said order x x x. [T]he clerk of court and the clerk in charge of civil cases assured [counsel] that no writ of preliminary attachment was prepared or issued x x x. Despite [such] assurance x x x [and counsel's advice that they shall move to quash the order the following morning], that afternoon, the clerk of court x x x clandestinely, hurriedly and surreptitiously, for reasons known only [to] her, x x x prepared the writ of attachment x x x.[19]

In her Verified Answer *Ad Cautelam* which was filed on 10 February 2009, Rachel prayed that the Complaint be dismissed as it was not a *bona fide* derivative suit as defined under the Interim Rules of Procedure for Intra-Corporate Controversies[20] (Interim Rules). According to Rachel, the Complaint, although

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[17] *Id.* at 121-122.

[18] *Id.* at 244-262.

[19] *Id.* at 256-258.

[20] Took effect on 1 April 2001.

Supreme Court E-Library

labelled as a derivative suit, is actually a collection suit since the real party in interest is not SMBI, but Nancy and Theodore:

> [T]he cause of action does not devolve on the corporation as the alleged harm or wrong pertains to the right of the Sps. Theodore and Nancy Ang, as creditors, to collect the amount allegedly owed to them. x x x
>
> xxx xxx xxx
>
> That the instant suit is for the benefit of a non-stockholder and not the corporation is obvious when the primary relief prayed for in the Complaint which is for the defendants "to pay the amount of Php 60,114,673.62 plus interest which is 50% of the loan obligations of plaintiff [SMBI] to its creditor Sps. Theodore and Nancy Ang." Otherwise stated, the instant suit is nothing but a complaint for sum of money shamelessly masked as a derivative suit.[21]

Rachel also argued that the Complaint failed to allege that Juanito "exerted all reasonable efforts to exhaust all intra-corporate remedies available under the articles of incorporation, by-laws, laws or rules governing the corporation to obtain the relief he desires," as required by the Interim Rules.

During cross-examination, Juanito admitted that there was no prior demand for accounting or liquidation nor any written objection to SMBI's increase of capital stock. He also conceded that the loan was extended by persons who are not stockholders of SMBI. Thus, Rachel filed a Motion for Preliminary Hearing on Affirmative Defenses on 27 November 2009, arguing that in view of Juanito's admissions, the Complaint should be dismissed pursuant to Section 1 of the Interim Rules. Juanito filed his Opposition thereto on 8 January 2010,[22] arguing that applying this Court's ruling in *Hi-Yield Realty, Inc. v. Court of Appeals*,[23] the requirement for exhaustion of intra-corporate remedies is no longer needed when the corporation itself is "under the complete control of the persons against whom the suit is

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[21] *Rollo*, pp. 211-212.

[22] *Id.* at 469.

[23] G.R. No. 168863, 23 June 2009, 590 SCRA 548.

Supreme Court E-Library

filed." Juanito also alleged that he and Anecita were deceived into signing checks to pay off bogus loans purportedly extended by Rachel's relatives in favor of SMBI. Some of the checks were payable to cash, and were allegedly deposited in Rachel's personal account.[24] He also claimed that Rachel's Motion is disallowed under the Interim Rules.

On 9 February 2009, Juanito moved that Rachel and her daughter, Em Ang (Em), as well as their counsel, Atty. Filomeno Tan, Jr. (Atty. Tan) be held in contempt. Juanito claimed that on the date the writ of attachment and break open order were issued, Atty. Tan, accompanied by Rachel and Em, "arrogantly demanded from the Clerk in charge of Civil Cases that he be furnished a copy of the [said orders] x x x otherwise he will tear the records of the subject commercial case." Juanito also accused Atty. Tan of surreptitiously photocopying the said orders prior to service of the summons, Complaint, Writ of Attachment and Attachment Bond. According to Juanito, the purpose of obtaning a copy of the orders was to thwart its implementation. Thus, when the authorities proceeded to the SMBI premises to enforce the orders, they found that the place was padlocked, and that all corporate documents and records were missing. On 14 December 2010, the Sheriff and other RTC Bacolod employees then filed a Verified Complaint against Atty. Tan before this Court, which also contained the foregoing allegations.[25]

Rachel then filed a Reply on 27 January 2010, claiming that Juanito's reliance on the *Hi-Yield* case is misplaced:

> The facts x x x of this case are strikingly different from that in *Hi-Yield Realty*. In that case, the Supreme Court noted that the complaining stockholder was a minority stockholder. However, in the case at bar, Juanito Ang is one of the biggest stockholders of [SMBI]. x x x [H]e is a member of [SMBI's] Board of Directors and is even the vice-president thereof. Furthermore, in *Hi-Yield Realty,* the Supreme Court noted that the complaining stockholder was excluded from the affairs of the corporation. However, the evidence

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[24] *Rollo*, p. 484.

[25] *Id.* at 663.

thus far presented, particularly Juanito Ang's admission, show that he and his wife, Anecita, participate in the disbursement of [SMBI's] funds x x x.[26]

Juanito filed his Rejoinder on 2 March 2010.

The Ruling of the RTC Bacolod

On 27 September 2010, the RTC Bacolod issued an Order which stated that:

> WHEREFORE, premises considered[,] the court hereby rules that the present action is a DERIVATIVE SUIT and [the] Motion to Dismiss based on Affirmative Defenses raised by defendants is DENIED for lack of merit.[27]

The RTC Bacolod found that the issuance of the checks to settle the purported obligations to Rachel's relatives, as well as the removal of Nancy as a stockholder in SMBI's records as filed with the SEC, shows that Rachel and Roberto committed fraud. The Order likewise stated that the requirement of exhaustion of intra-corporate remedies is no longer necessary since Rachel and Roberto exercised complete control over SMBI.

Aggrieved, Rachel filed a Petition for *Certiorari* with the CA-Cebu.

The Ruling of the CA-Cebu

On 20 September 2011, the CA-Cebu promulgated its Decision which reversed and set aside the Order of the RTC Bacolod dated 27 September 2010. According to the CA-Cebu, the Complaint filed by Juanito should be dismissed because it is a harassment suit, and not a valid derivative suit as defined under the Interim Rules. The CA-Cebu also found that Juanito failed to exhaust intra-corporate remedies and that the loan extended by Nancy and Theodore was not SMBI's corporate obligation. There is nothing on record to show that non-payment of the loan will result in any damage or prejudice to SMBI.

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[26] *Id.* at 492.

[27] *Id.* at 179.

Supreme Court E-Library

Juanito then filed a Motion for Reconsideration with Prayer for Voluntary Inhibition on 28 October 2011. In his Motion, Juanito pointed out that Rachel filed her Petition for *Certiorari* without previously filing a Motion for Reconsideration, warranting the dismissal of the said Petition. The CA-Cebu denied the Motion.

Hence, this petition.

The Issues

The issues raised in the instant petition are:

I. Whether based on the allegations of the complaint, the nature of the case is one of a derivative suit or not.

Corollary to the above, whether the Honorable Court of Appeals erred x x x in ordering the dismissal of the Complaint on the ground that the case is not a derivative suit.

II. Whether the Honorable Court of Appeals x x x seriously erred in considering evidence *aliunde*, that is, other than the four corners of the complaint, in determining the nature of the complaint, in utter violation of the doctrine that the jurisdiction is determined by law and allegations of the complaint alone.

III. Granting *arguendo*, but without necessarily admitting that the complaint is not one of a derivative suit, but only an ordinary civil action, whether the Honorable Court of Appeals x x x gravely erred in dismissing the petition entirely, when the Regional Trial Court *a quo* has jurisdiction also over the case as an ordinary civil action, and can just proceed to hear the same as such.[28]

The Ruling of this Court

The petition has no merit.

We uphold the CA-Cebu's finding that the Complaint is not a derivative suit. A derivative suit is an action brought by a stockholder on behalf of the corporation to enforce corporate rights against the corporation's directors, officers or other

[28] *Id.* at 23-24.

Supreme Court E-Library

insiders.[29] Under Sections 23[30] and 36[31] of the Corporation Code, the directors or officers, as provided under the by-laws,[32] have the right to decide whether or not a corporation should sue. Since these directors or officers will never be willing to sue themselves, or impugn their wrongful or fraudulent decisions, stockholders are permitted by law to bring an action in the name of the corporation to hold these directors and officers accountable.[33] In derivative suits, the real party in interest is the corporation, while the stockholder is a mere nominal party.

This Court, in *Yu v. Yukayguan*,[34] explained:

> The Court has recognized that a stockholder's right to institute a derivative suit is not based on any express provision of the Corporation Code, or even the Securities Regulation Code, but is impliedly recognized when the said laws make corporate directors or officers liable for damages suffered by the corporation and its stockholders for violation of their fiduciary duties. Hence, a stockholder may sue for mismanagement, waste or dissipation of corporate assets because of a special injury to him for **which he is otherwise without redress**. In effect, the suit is an action for specific performance of an obligation owed by the corporation to the stockholders to assist its rights of action when the corporation has been put in default by the wrongful refusal of the directors or management to make suitable

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[29] Jose Campos, Jr. and Ma. Clara L. Campos, *THE CORPORATION CODE, COMMENTS NOTES AND CASES* 819-820 (1990).

[30] Sec. 23. *The board of directors or trustees.*— Unless otherwise provided in this Code, the corporate powers of all corporations formed under this Code shall be exercised, all business conducted and all property of such corporations controlled and held by the board of directors or trustees to be elected from among the holders of stocks, or where there is no stock, from among the members of the corporation, who shall hold office for one (1) year until their successors are elected and qualified.

[31] Sec. 36. *Corporate powers and capacity.* — Every corporation incorporated under this Code has the power and capacity:

1. To sue and be sued in its corporate name; x x x

[32] Section 25, Corporation Code.

[33] *Yu v. Yukayguan*, G.R. No. 177549, 18 June 2009, 589 SCRA 588.

[34] *Id.* at 618, citing *Bitong v. Court of Appeals*, 354 Phil. 516 (1998).

Supreme Court E-Library

measures for its protection. The basis of a stockholder's suit is always one in equity. However, it cannot prosper without first complying with the legal requisites for its institution. (Emphasis in the original)

Section 1, Rule 8 of the Interim Rules imposes the following requirements for derivative suits:

(1) [The person filing the suit must be] a stockholder or member at the time the acts or transactions subject of the action occurred and the time the action was filed;

(2) [He must have] exerted all reasonable efforts, and alleges the same with particularity in the complaint, to exhaust all remedies available under the articles of incorporation, by-laws, laws or rules governing the corporation or partnership to obtain the relief he desires;

(3) No appraisal rights are available for the act or acts complained of; and

(4) The suit is not a nuisance or harrassment suit.

Applying the foregoing, we find that the Complaint is not a derivative suit. The Complaint failed to show how the acts of Rachel and Roberto resulted in any detriment to SMBI. The CA-Cebu correctly concluded that the loan was not a corporate obligation, but a personal debt of the Ang brothers and their spouses. The check was issued to "Juanito Ang and/or Anecita Ang and/or Roberto Ang and/or Rachel Ang" and not SMBI. The proceeds of the loan were used for payment of the obligations of the other corporations owned by the Angs as well as the purchase of real properties for the Ang brothers. SMBI was never a party to the Settlement Agreement or the Mortgage. It was never named as a co-debtor or guarantor of the loan. Both instruments were executed by Juanito and Anecita in their personal capacity, and not in their capacity as directors or officers of SMBI. Thus, SMBI is under no legal obligation to satisfy the obligation.

The fact that Juanito and Anecita attempted to constitute a mortgage over "their" share in a corporate asset cannot affect SMBI. The Civil Code provides that in order for a mortgage to

be valid, the mortgagor must be the "absolute owner of the thing x x x mortgaged."[35] Corporate assets may be mortgaged by authorized directors or officers on behalf of the corporation as owner, "as the transaction of the lawful business of the corporation may reasonably and necessarily require."[36] However, the wording of the Mortgage reveals that it was signed by Juanito and Anecita in their personal capacity as the "owners" of a pro-indiviso share in SMBI's land and not on behalf of SMBI:

> This [Mortgage] is made and executed by and between:
>
> Spouses JUANITO and ANECITA ANG, of legal age, Filipino citizens, resident[s] of Sunrise Marketing Building at Hilado Street, Capitol Shopping Center, Bacolod City, hereinafter referred to as the MORTGAGOR[S];
>
> Spouses THEODORE and NANCY ANG, x x x hereinafter referred to as the MORTGAGEE[S] represented in this instance through their attorney-in-fact, Mr. Kenneth Locsin;
>
> xxx xxx xxx
>
> In order to ensure payment x x x the MORTGAGORS hereby CONVEY unto the MORTGAGEES by way of EXTRA-JUDICIAL REAL ESTATE MORTGAGE **their** 50% rights and interests over the following real properties to wit:
>
> a. Those registered in the name of SUNRISE MARKETING (BACOLOD), INC. x x x
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> xxx xxx xxx[37] (Emphasis supplied)

Juanito and Anecita, as stockholders of SMBI, are not co-owners of SMBI assets. They do not own pro-indiviso shares, and therefore, cannot mortgage the same except in their capacity as directors or officers of SMBI.

We also find that there is insufficient evidence to suggest that Roberto and Rachel fraudulently and wrongfully removed Nancy as a stockholder in SMBI's reportorial requirements.

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[35] Article 2085.

[36] Section 36, Corporation Code.

[37] *Rollo*, p. 98.

Supreme Court E-Library

As early as 2005, when SMBI increased its capital stock, Juanito and Anecita already knew that Nancy was not listed as a stockholder of SMBI. However, they attempted to rectify the error only in 2009, when the Complaint was filed. That it took four years for them to make any attempt to question Nancy's exclusion as stockholder negates their allegation of fraud.

Since damage to the corporation was not sufficiently proven by Juanito, the Complaint cannot be considered a *bona fide* derivative suit. A derivative suit is one that seeks redress for injury to the corporation, and not the stockholder. No such injury was proven in this case.

The Complaint also failed to allege that all available corporate remedies under the articles of incorporation, by-laws, laws or rules governing the corporation were exhausted, as required under the Interim Rules. The CA-Cebu, applying our ruling in the *Yu* case, pointed out:

> x x x No written demand was ever made for the board of directors to address private respondent Juanito Ang's concerns.
>
> The fact that [SMBI] is a family corporation does not exempt private respondent Juanito Ang from complying with the [Interim] Rules. In the x x x Yu case, the Supreme Court held that a family corporation is not exempt from complying with the clear requirements and formalities of the rules for filing a derivative suit. There is nothing in the pertinent laws or rules [which state that there is a] distinction between x x x family corporations x x x [and] other types of corporations in the institution [by] a stockholder of a derivative suit.[38]

Furthermore, there was no allegation that there was an attempt to remove Rachel or Roberto as director or officer of SMBI, as permitted under the Corporation Code and the by-laws of the corporation. Thus, the Complaint failed to satisfy the requirements for a derivative suit under the Interim Rules.

The CA-Cebu correctly ruled that the Complaint should be dismissed since it is a nuisance or harassment suit under Section 1(b) of the Interim Rules. Section 1(b) thereof provides:

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[38] *Id.* at 588.

b) *Prohibition against nuisance and harassment suits.* — Nuisance and harassment suits are prohibited. In determining whether a suit is a nuisance or harassment suit, the court shall consider, among others, the following:

(1) The extent of the shareholding or interest of the initiating stockholder or member;

(2) Subject matter of the suit;

(3) Legal and factual basis of the complaint;

(4) Availability of appraisal rights for the act or acts complained of; and

(5) Prejudice or damage to the corporation, partnership, or association in relation to the relief sought.

In case of nuisance or harassment suits, the court may, *motu proprio* or upon motion, forthwith dismiss the case.

Records show that Juanito, apart from being Vice President, owns the highest number of shares, equal to those owned by Roberto. Also, as explained earlier, there appears to be no damage to SMBI if the loan extended by Nancy and Theodore remains unpaid. The CA-Cebu correctly concluded that "a plain reading of the allegations in the Complaint would readily show that the case x x x was mainly filed [to collect] a debt allegedly extended by the spouses Theodore and Nancy Ang to [SMBI]. Thus, the aggrieved party is not SMBI x x x but the spouses Theodore and Nancy Ang, who are not even x x x stockholders."[39]

WHEREFORE, we **DENY** the petition. We **AFFIRM** the 20 September 2011 Decision of the Court of Appeals-Cebu in CA-G.R. SP No. 05546.

SO ORDERED.

Brion, del Castillo, Perez, and *Perlas-Bernabe, JJ.*, concur.

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[39] *Id.* at 590.