

## THIRD DIVISION

[ G.R. No. 212885, July 17, 2019 ]

**SPOUSES NOLASCO FERNANDEZ AND MARICRIS FERNANDEZ,  
PETITIONERS, V. SMART COMMUNICATIONS, INC.,  
RESPONDENT.**

### DECISION

#### A. REYES, JR., J.:

This is a Petition for Review on *Certiorari* under Rule 45 of the Rules of Court assailing the December 2, 2013 Decision<sup>[1]</sup> of the Court of Appeals (CA) in CA-G.R. SP No. 113832. The challenged ruling reversed the November 11, 2009 Order<sup>[2]</sup> of the Regional Trial Court (RTC) of Makati City, Branch 62, which dismissed the complaint against petitioners Nolasco Fernandez (Nolasco) and Maricris Fernandez (Maricris) as co-defendants in Civil Case No. 09-199.

#### The Facts

Everything Online, Inc. (EOL) is a corporation that offers internet services nationwide through franchisees.<sup>[3]</sup> Smart Communications, Inc. (SMART), on the other hand, is a mobile phone service provider.<sup>[4]</sup> Petitioners Nolasco and Maricris were the Chief Executive Officer (CEO) and Member of the Board of Directors of EOL, respectively.<sup>[5]</sup>

As alleged in the Amended Complaint,<sup>[6]</sup> EOL sought SMART sometime in 2006 to provide the mobile communication requirements for its expansion. Series of meetings ensued between the parties where it was determined that EOL would be needing approximately 2,000 post-paid lines with corresponding cell phone units. Nineteen (19) of these lines shall be under the corporate account of EOL while the rest of the lines and phones shall be distributed to EOL's franchisees.<sup>[7]</sup> In view of this, EOL's corporate president Salustiano G. Samaco III (Samaco III), signed on separate occasions, two (2) Corporate Service Applications (SAF) for the 2,000 post-paid lines with corresponding cell phone units. He also signed Letters of Undertaking<sup>[8]</sup> to cover for the 1,119 phone lines issued by SMART to EOL thus far. Paragraph 8 of these Letters of Undertaking read:

8. The President and each one of the directors and officers of the corporation shall be held solidarily liable in their personal capacity with the SUBSCRIBER for all charges for the use of the SMART Celfones (sic) units acquired by the said SUBSCRIBER.<sup>[9]</sup>

In September 2006, EOL demanded the release of the remaining phone lines to cover its initial order of 2,000 units. SMART informed EOL that before it approved further phone line applications, the parties should restate and clarify the agreements between them, to which EOL agreed.<sup>[10]</sup>

In a letter dated September 13, 2006 (Letter Agreement), SMART specified the terms of the agreement over the 1,119 phone lines it already issued in favor of EOL.<sup>[11]</sup> In addition to the Letter Agreement, EOL executed an Undertaking<sup>[12]</sup> (EOL Undertaking) where it affirmed its availment of 1,119 SMART cell phones and services. EOL also agreed to assume full responsibility for the charges incurred on the use of all these units. The pertinent portion of the EOL Undertaking signed by Samaco III and petitioner Nolasco provides:

x x x x

3. Everything Online, Inc. agrees that it shall be fully responsible for the settlement of whatever charges to be incurred under the above mobile numbers and shall fully comply with the terms and conditions pertaining to the Smart Corporate Service Application Form and other related Subscription Contracts. Likewise, Everything Online, Inc. shall bind itself to be continuously responsible regardless of assignment and movements of its designated users until such time that the units are validly transferred, after the expiration of the lock-in period, after twenty four (24) months for nineteen (19) lines at Plan 1200 and after thirty six (36) months for one thousand one hundred (1,100) lines at Plan 500, respectively.

x x x x

**9. The President and each one of the directors and officers of Everything Online, Inc. shall be held solidarity liable in their personal capacity with the franchisee or assignee for all charges for the use of the SMART cellphone units acquired by Everything Online, Inc.**<sup>[13]</sup> (Emphases supplied)

SMART averred that after the execution of the EOL Undertaking, its credit and collection department sent, by email, phone bills to EOL that had been previously returned to SMART. These bills were for the collection of the monthly payment due on the lines that were supposedly given to EOL's franchisees. However, EOL allegedly refused to receive the bills, stating that it was not liable for the payment of bills of phone lines assigned to franchisees.<sup>[14]</sup>

On October 13, 2006, SMART notified EOL that its collectibles already amounted to at least P18,000,000.00 representing the costs of cell phone units and the plans usage. EOL officers were also reminded that under the EOL Undertaking and the Letter Agreements, it is bound to pay the bills of the franchisees, whether the phones were in the possession of the franchisees or not.<sup>[15]</sup>

On July 27, 2007, a meeting was purportedly held between the parties where EOL proposed to update the payments for 304 accounts of its franchisees and it would update and amend the monthly plan for the other 765 accounts. EOL then issued Banco De Oro Check No. 1003473 dated August 3, 2007 for P394,064.62 in favor of SMART as partial payment and as a sign of good faith. However, the BDO check was dishonored upon presentment due to insufficiency of funds.<sup>[16]</sup>

On November 8, 2007, SMART sent EOL a notice of final demand for the payment of the outstanding amount of F17,506,740.55. Despite receipt of the demand letter, EOL failed to pay the amount due. On January 2, 2008, another demand letter for

P20,662,073.45<sup>[17]</sup> was sent by SMART to EOL. No payment was made by EOL. SMART claimed that the total due from EOL already amounted to P39,770,810.87 as of October 31, 2008.<sup>[18]</sup>

SMART failed to collect from EOL despite repeated demands. Thus, on April 1, 2009, an Amended Complaint<sup>[19]</sup> with an application for a writ of preliminary attachment was filed by SMART before the RTC of Makati, Branch 62 for Collection of Sum of Money docketed as Civil Case No. 09-199 against EOL and all its directors and officers including petitioners Nolasco and Maricris.

On April 20, 2009, the trial court gave due course to the application for the issuance of a writ of attachment and ordered the posting of an attachment bond in the amount of P39,770,810.87.<sup>[20]</sup>

On June 15, 2009, petitioners filed a Motion to Dismiss With a Very Urgent Motion to Lift and Discharge Writ of Preliminary Attachment issued against them.<sup>[21]</sup> Petitioners averred that they are not the real party in interest in the case.<sup>[22]</sup> Maricris claimed that the only allegation holding the directors and officers personally and solidarily liable with EOL was the alleged provisions in the Letter Agreements<sup>[23]</sup> and EOL Undertaking.<sup>[24]</sup> The Letter Agreements and EOL Undertaking failed to show that she expressly agreed to be bound by the provisions contained therein. Accordingly, the complaint against her must be dismissed.<sup>[25]</sup>

With respect to Nolasco, petitioners argued that while his signature appears in the EOL Undertaking, it is not a sufficient ground to implead him in the complaint together with EOL. It was SMART that drafted the EOL Undertaking and Nolasco's participation is limited to the affixing of his signature thereon after EOL's President has already signed it. Nolasco signed in good faith and without the opportunity to read the contents of the same. Be that as it may, Nolasco is not the real party in interest in this case because he was no longer an Officer/Director of EOL at the time the complaint was filed as their entire share was already assigned to one of EOL's directors.<sup>[26]</sup>

### **The RTC Ruling**

On November 11, 2009, the RTC issued an Order<sup>[27]</sup> granting the motions to dismiss. The dispositive portion of the Order reads:

**WHEREFORE**, finding the defendant individuals' separate Motion to Dismiss being impressed with merit, the Court **GRANTS** the same. The Complaint against the named individuals is hereby ordered **DISMISSED**. Defendant Everything Online, Inc., is ordered to file its responsive pleading within the non-extendible period of five (5) days from notice hereof. Consequently, the writs of attachment as well as collateral papers issued in pursuance to the writ in so far as they involve properties belonging to the named defendant individuals are hereby **RECALLED** and **SET ASIDE**.

**SO ORDERED.**<sup>[28]</sup> (Emphasis in the original)

EOL<sup>[29]</sup> and SMART<sup>[30]</sup> filed separate motions for partial reconsideration but these were denied by the trial court in its February 22, 2010 Order.<sup>[31]</sup>

Ascribing grave abuse of discretion amounting to lack or excess of jurisdiction on the part of the RTC, SMART elevated the case to the CA via a Petition for *Certiorari* under Rule 65 of the 1997 Rules of Civil Procedure.<sup>[32]</sup>

### **Ruling of the CA**

On December 2, 2013, the CA promulgated the assailed Decision<sup>[33]</sup> partly granting the respondent's petition for *certiorari*. The appellate court found grave abuse on the part of the trial court in dismissing the complaint against individual defendants. The CA ruled that there was overwhelming evidence indicating that Samaco III and Spouses Fernandez expressly bound themselves to be solidarity liable with EOL to SMART. The CA decreed as follows:

**WHEREFORE**, premises considered, the instant petition is **PARTLY GRANTED**. Accordingly, the assailed Orders are hereby **MODIFIED** to **REINSTATE** the complaint against private individual respondents Salustiano Samaco III and spouses Nolasco and Maricris Fernandez being corporate officers of private respondent Everything Online Inc.

**SO ORDERED.**<sup>[34]</sup> (Emphasis in the original)

Petitioners moved for reconsideration but, their Motion was denied by the CA in its Resolution<sup>[35]</sup> dated June 4, 2014, leading the petitioners to file the instant recourse anchored on the following grounds:

-A-

THE PETITION FOR *CERTIORARI* UNDER RULE 65 SHOULD NOT BE THE PROPER REMEDY AGAINST A FINAL ORDER OF DISMISSAL ISSUED BY THE REGIONAL TRIAL COURT OF MAKATI CITY, BRANCH 62.

-B-

THE REGIONAL TRIAL COURT OF MAKATI CITY, BRANCH 62 DID NOT COMMIT GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION IN DISMISSING THE COMPLAINT AGAINST PETITIONERS.<sup>[36]</sup>

The petition essentially presents the following issues for the Court's resolution: (1) whether or not an order of dismissal of the complaint should be assailed via a petition for *certiorari* under Rule 65; and (2) whether or not there was a ground to dismiss complaint for a collection of sum of money against petitioners as corporate officer and director.

### **Ruling of the Court**

Before going into the substance of the petition, the Court shall first resolve the procedural question the petitioners raised.

Petitioners' argument that the petition for *certiorari* under Rule 65 is a wrong remedy and should have been dismissed by the CA fails to persuade.

Under Section 1, Rule 65 of the Rules of Court, a petition for *certiorari* may be filed when any tribunal, board or officer exercising judicial or quasi-judicial functions has acted without or in excess of its or his jurisdiction, or with grave abuse of discretion

amounting to lack or excess of jurisdiction, and there is no appeal, or any plain, speedy, and adequate remedy in the ordinary course of law. An act of a court or tribunal is considered committed with grave abuse of discretion if it is whimsical, arbitrary, or capricious amounting to "an evasion of a positive duty or a virtual refusal to perform a duty enjoined by law or to act at all in contemplation of law, such as where the power is exercised in an arbitrary and despotic manner by reason of passion or hostility."<sup>[37]</sup>

An order of dismissal of the complaint is a final order that is subject to appeal.<sup>[38]</sup> Section 1, Rule 41 of the Rules of Court reads:

Section 1. - Subject of appeal. An appeal may be taken from a judgment or final order that completely disposes of the case, or of a particular matter therein when declared by these Rules to be appealable.

The same provision also provides that no appeal may be taken from the following:

- (a) An order denying a petition for relief or any similar motion seeking relief from judgment;
- (b) An interlocutory order;
- (c) An order disallowing or dismissing an appeal;
- (d) An order denying a motion to set aside a judgment by consent, confession or compromise on the ground of fraud, mistake or duress, or any other ground vitiating consent;
- (e) An order of execution;
- (f) A judgment or final order for or against one or more of several parties or in separate claims, counterclaims, cross-claims and third-party complaints, while the main case is pending, unless the court allows an appeal therefrom; or**
- (g) An order dismissing an action without prejudice. (Emphasis supplied)

In all the above instances where the judgment or final order is not appealable, the aggrieved party may file an appropriate special civil action for *certiorari* under Rule 65.<sup>[39]</sup>

Here, the RTC Order<sup>[40]</sup> granting the motion to dismiss filed by petitioners is a final order because it terminates the proceedings against them. However, the final order falls within exception (f) of the Rule since the case involves several defendants, and the complaint for sum of money against EOL is still pending. There being no appeal, "or any plain, speedy, and adequate remedy in law, the remedy of a special civil action for *certiorari* is proper as there is a need to promptly relieve the aggrieved party from the injurious effects of the acts of an inferior court or tribunal."<sup>[41]</sup>

Having settled procedural matters, for resolution is the substantive issue of whether or not there was a ground to dismiss complaint for a collection of sum of money against petitioners as corporate officer and director.

The Court finds the petition partly meritorious.

Petitioners asseverated in their motion to dismiss that the complaint fails to state a cause of action because it was brought against defendants who are not the real parties in interest.