CEBU CITY

SPECIAL EIGHTEENTH DIVISION

[CA-G.R. CV. NO. 81163, December 16, 2014]

DAVID LU*, ROSA GO, SILVANO LU DO AND CL CORPORATION, PLAINTIFFS-APPELLEES, VS. PATERNO LU YM, SR.,*, PATERNO LU YM, JR., VICTOR LU YM, JOHN LU YM, KELLY LU YM, AND LUDO & LUYM DEVELOPMENT CORPORATION, DEFENDANTS-APPELLANTS.

CA-G.R. SP. NO. 08034

DAVID LU, PETITIONER, VS. KELLY LU YM, VICTOR LU YM, AND PATERNO LU YM, JR., RESPONDENTS.

CONSOLIDATED DECISION

INGLES, G. T., J.:

Assailed in this appeal is the Decision[1] dated 1 March 2004 rendered by the Regional Trial Court, Branch 12, Cebu City in SRC Case No. 021-CEB (formerly docketed as Civil Case No. CEB-25502) in favor of David Lu.

THE FACTS

On 11 August 2000, David Lu, Rosa Go, Silvano Lu Do and CL Corporation (collectively plaintiffs hereinafter) filed a complaint for "Declaration of Nullity of Share Issue, Receivership and Dissolution" against Paterno Lu Ym, Sr., Paterno Lu Ym, Jr., Victor Lu Ym, John Lu Ym, Kelly Lu Ym, and Ludo & LuYm Development Corporation docketed as Civil Case No. CEB-25502.

The Complaint[2]

> The plaintiffs averred that Ludo & LuYm Development Corporation is a family corporation founded by the brothers Paterno Lu Ym, Sr, Cayetano Lu Do (deceased father of Rosa Go and Silvano Lu Do, and Cipriano Lu (deceased father of David Lu). That, prior to the acts complained of, Paterno Lu Ym, Sr., et. al. (collectively defendants hereinafter) owned 29.99% of the corporation valued at P749,750,000.00. But after the acts complained of, said defendants together with their spouses, children and holding companies already owned 73.48% of the corporation valued at P1,837,000,000.00, an increase of P1,087,250,000.00. Consequently, the increase gave the said defendants more voting power at the expense of all the other stockholders who in turn sustained a corresponding reduction in their voting power and value of their holdings amounting to P1,087,250,000.00. On the other hand, their shareholding in the said corporation was reduced, that is, from 27.83% down to 10.53%. To translate this decrease in numerical figures, from P695,750,000.00 down

to P263,250,000.00 or a drastic decrease of P432,500,000.00.

The plaintiffs continued that allegedly pursuant to a board resolution passed on November 18, 1997, the defendants Paterno Lu Ym, Sr. and his sons issued to themselves and their spouses, children and holding companies, 600,000 unsubscribed/unissued shares of Ludo & LuYm Corporation for a capital contribution in the amount of P60 million, the par value. Based, however, on underlying real estate value, the real value of these shares then was One Billion Eighty-Seven Million Fifty-Five Thousand One Hundred Five Pesos (P1,087,055,105.00). That, the shares were issued for one-eighteenth of their value. With these shares, the defendants obtained an instant profit of 1,800% of the amount put in, with the corresponding instant loss of the same amount sustained by the other stockholders. The plaintiffs posited that such a transaction has been struck down by the courts for being unconscionable as enunciated in the case of *Katzowitz v. Sidler* (24 NY2d 512, 301 NYS2d 470, 249 NE2d 359), wherein the New York Court of Appeals protected the minority stockholders against the issuance of stocks at less that its value. The plaintiffs added that by doing so, defendants Paterno Lu Ym, Sr. and his sons violated their fiduciary duties as directors as provided in Section 31 of the Corporation Code. Too, these defendants are guilty of abuse of their rights and unjust enrichment at the expense of their cousins.

Having sustained such injury, they seek to dissolve the corporation and to appoint receivers.

Motion to Dismiss[3]

The defendants filed a Motion to Dismiss. Therein, the defendants alleged that the complaint violated Section 5, Rule 7 of the Revised Rules of Court anent the requirement of a certification against forum shopping. That, there is nothing in the complaint, and in the certification itself, to show that plaintiff David Lu was authorized to sign for and in behalf of the other plaintiffs. On this ground alone, the complaint is outright dismissible.

For another, the complaint does not allege that earnest effort toward a compromise has been made by the parties who are members of the same family in order to reach a workable and peaceable settlement among themselves.

Still for another, under Section 412 of the Local Government Code this action should be first brought before the appropriate Lupon Tagapamayapa. Failing which, the instant complaint is outright dismissible under Section 1(j) of the Revised Rules of Court.

By its Resolution[4] dated December 4, 2000, the RTC denied the motion to dismiss; and the defendants were directed to file their Answer within ten (10) days from notice. On reconsideration,[5] the RTC denied the defendants' motion.

On 24 January 2001, the plaintiffs filed an urgent motion to appoint receiver[6] on the following grounds: (1) since the filing of the complaint, the defendants have

been distributing dividends in accordance with the questioned share issuances; (2) defendants plan to sell assets, the proceeds of which will be distributed in accordance with the questioned share issuances; (3) defendants have been entering or are about to enter into projects and contracts that would tie down a substantial proportion of the corporate assets, thus, burdening the corporation with indebtedness, which prior to the questioned realignment of shareholdings, it did not have; and (4) even before the questioned share issuances, defendants attempted to enter into self-dealing contracts with the corporation. To support this motion, the plaintiffs cite the case of *Financing Corporation of the Philippines, et. al. v. Jose Teodoro, et. al.,* (93 Phil 678, G.R. No. L-4900, August 31, 1953).

By its Resolution[7] dated 16 February 2001, the RTC granted the plaintiffs' urgent motion to appoint receiver.

In their motion for reconsideration[8] filed on March 7, 2001, the defendants alleged the following: (1) that, the resolution appointing a receiver violates Section 2, Rule 59 of the Revised Rules of Court, that is, for failure to require the applicant to file a bond in favor of the defendants; (2) that, the allegations of the complaint and its verification are insufficient/defective to warrant the appointment of a receiver, and in violation of Section 1 of Rule 59 of the Revised Rules of Court; (3) that, the urgent motion to appoint a receiver is unverified and in violation of Section 1, Rule 59 of the Revised Rules of Court; (4) that, the Honorable Court proceeded on the erroneous premise that defendants hypothetically admitted all allegations of facts in the complaint by filing a motion to dismiss; (5) that, the evidence presented by the plaintiffs in their memorandum show that Ludo & LuYm Development Corporation is profitable and managed well; (6) that, receivership is not a remedy provided for in the Corporation Code but "Appraisal Right"; (7) that, there is an unresolved issue on the matter of the insufficient certification of non-forum shopping in the complaint, which under the Revised Rules of Court is mandatory for the court to dismiss; and (8) that, the Honorable Court issued the resolution ordering the receivership without the benefit of a hearing.

By individual communication[9] dated March 2, 2001, the RTC directed the appointed receivers, Mr. Luis A. Cañete and Atty. Edward U. Du, to immediately discharge their duties and functions with the powers granted under Section 6, Rule 59 of the Rules of Court upon taking of their oath and posting a bond of One Hundred Thousand Pesos (P100,000.00) each.

In their opposition[10] to the defendants' motion for reconsideration, the plaintiffs countered that the Resolution appointing receivers was issued conformably with the pertinent Rules. Too, their complaint clearly discussed the acts and grounds to support the appointment of receivers. That, the verification does not need to repeat the grounds of the complaint as there is nothing in the Rules that require it. Moreover, what is required to be verified is the complaint or petition and not a motion subsequently filed in furtherance of the original prayer. Yet another thing to take into account is the "settled principle that a motion to dismiss is based on the ground that the complaint does not state a cause of action, and the averments in the complaint are deemed hypothetically admitted and the inquiry is limited to whether or not they make out a case on which reliefs can be granted." (*Acuña v. Batac Producers Cooperative Association,* June 30, 1967, G.R. No. L-20333). Anent the remedy for dissenting stockholders like them whose holdings stand to be diluted

by the malicious issuance of shares at less than fair value, the case of Katzowitz v. Sidler, supra, is the case in point. To stress, the reliefs they prayed for are based on equity. Finally, there is no basis for the dismissal of the complaint since the authority of plaintiff David Lu to sign on behalf of the other plaintiffs is a probative matter which should be raised as an affirmative defense by the defendants.

After seeking extension within which to file their Answer, the defendant-appellants finally filed one.

Answer with Compulsory Counterclaim[11]

> The defendants admitted with qualification that the plaintiffs only own about 10.51% and not 10.53% of the total subscribed shares of the said defendant corporation. That, the truth of the matter is that the corporation is being managed by a board of directors duly elected by the stockholders of the corporation and the plaintiffs are equally and duly represented in the board. They deny that they are the absolute majority shareholders because their aggregate stockholding as of March 26, 1999 is about 70.77% only. That, to be accurate, the corporation was founded not only by brothers Paterno Lu Ym, Sr., Cayetano Lu Do and Cipriano Lu but also by Rosita Lim Lu Ym, Victor S. Tan and Alfred C. Bates. That, the principal purpose of the corporation is to purchase, acquire, hold, sell, lease, mortgage, or deal in and with real estate and/or immovable property of any kind.
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> The defendants averred that paragraph 5 in the complaint does not state the acts complained of. As to the percentage of ownership they allegedly own, the truth is that as of March 31, 1997, they only owned 28.14% and not 29.99% of the defendant corporation and this was increased to about 70.77% by reason of lawful acquisition of additional shares in the said corporation and the failure of the plaintiffs to exercise their legal right or their abandonment thereof.
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> As to the plaintiffs' shareholding in the defendant corporation, their shareholding as of March 31, 1997 was 27.81%, and decreased to 10.51% after they failed to exercise and/or willfully abandoned their right of pre-emption and for being mere, baseless speculations and conclusions.
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> That, the issuance of the subject 600,000 shares was done pursuant to the authority and power of the Board of Directors of the defendant corporation and its stockholders, and were offered pro rata to all the registered stockholders vis-a-vis their respective subscription consonant to their pre-emptive rights under the the law.
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> That, the rest of the allegations are denied for being mere conclusions of law, without any basis in fact.
>
> By their Special and Affirmative Defenses, the defendants alleged that the complaint failed to comply with the mandatory requirement of Section 5, Rule 7 of the 1997 Rules of Civil Procedure because it was signed by plaintiff David Lu only, and he has not shown to have been

authorized by the rest of the plaintiffs.

That, the complaint does not state a cause of action against them, more specially against the private defendants, as to be entitled to the reliefs prayed for. Too, the complaint failed to specify the acts complained of.

That, the plaintiffs are guilty of forum-shopping because the subject matter of this case has already been brought to the attention of the Securities and Exchange Commission (SEC) before the filing of the case, which case was already considered closed by the SEC.

That, the plaintiffs were duly notified of the issuance of the unsubscribed and unissued shares of the defendant corporation and for them to exercise their pre-emptive rights to the said issuances but they failed to do so without any justifiable cause, within the given period to do so. For this, the plaintiffs have no reason to complain why they were not given dividends on the basis of the shares of stocks they own.

That, they acquired the subject shares thru legitimate means, and in accordance with law and pursuant to their right as stockholders of the defendant corporation which was actually accorded to the plaintiffs.

That, the complaint failed to join compulsory and indispensable parties because the reliefs prayed for by the plaintiffs would require joinder of parties who approved the corporate acts, aside from them.

That, the plaintiffs are estopped from raising questions on their present stockholdings with the defendant corporation because they knowingly and voluntarily received dividends and they willfully failed to exercise their right and they acquiesced to the ruling of the SEC. To add, plaintiff David Lu was a member of the board who unanimously passed and approved the corporate resolutions.

In their Compulsory Counterclaim, they prayed for moral damages, exemplary damages and attorney's fees.

The defendants filed a petition[12] for certiorari with the Court of Appeals impugning the Resolutions dated December 4, 2000 denying their motion to dismiss, the March 2, 2001 denying their motion for reconsideration of the December 4, 2000 resolution, the February 16, 2001 resolution granting the plaintiffs' urgent motion to appoint a receiver, and the twin Orders dated March 2, 2001 appointing two receivers for Ludo & LuYm Development Corporation. The petition was docketed as CA-G.R. CV. No. 64523.

On 20 December 2001, this Court promulgated a decision in CA-G.R. CV. No. 64523 .

CA-G.R. CV. NO. 64523[13]

The *fallo* of the December 20, 2001 decision reads,