

REPUBLIC OF THE PHILIPPINES
REGIONAL TRIAL COURT
NATIONAL CAPITAL JUDICIAL REGION
PASIG CITY, BRANCH 167

CHRISTOPHER G. BORJA,
Plaintiff,

Vs.

CIVIL CASE NO. 70883-PSG

BAN GOZA, INC. ET. AL.
Defendants.

OPPOSITION TO MOTION TO DISMISS

PLAINTIFF, through Counsel, states:

1. On October 2, 2006, defendants through Counsel filed a Motion to Dismiss based on the following grounds:
 - a. The Court has no jurisdiction over the persons of the defendants, there being improper service of summons;
 - b. The complaint does not state a cause of action.
2. Upon a thorough review of defendants' averments, plaintiff respectfully submits that said Motion to Dismiss is bereft of merit.

II.

Discussion

A. Lack of Jurisdiction over the persons of the defendants

3. Defendants anchor their first ground on Section 1(a) of Rule 16 of the Revised Rules of Civil Procedure, and contend that this Honorable Court has no jurisdiction over them, as the summons were improperly served.

4. It appears that defendants are not cognizant of Rule 15, Section 20 of said Rules which state that:

The defendant's voluntary appearance in the action shall be equivalent to service of summons. The inclusion in a motion to dismiss of other grounds aside from lack of jurisdiction over the person of the defendant shall not be deemed a voluntary appearance.

5. In the case of the Navale v. CA¹, the Supreme Court, quoting Carballo v. Encamacion, 49 O.G. 1383, held that, "Any form of appearance in court by the defendant, his authorized agent or attorney, is equivalent to service except where such appearance is precisely to object to the jurisdiction of the court over his person."
6. Attention is called to the fact that counsel for defendants filed a "Formal Entry of Appearance and Motion for Extension to File Pleading" on September 11, 2006. There is no indication whatsoever that such pleading contained an "ad cautelam" reservation. Said entry and motion have been entered into the records of the court and were duly acted upon in an Order dated September 11, 2006.
7. Aside from that, on October 13, 2006, or after they filed their Motion to Dismiss on the basis of lack of jurisdiction, defendants filed a Manifestation and Motion, also without appending the phrase "ad cautelam."
8. Plaintiff respectfully submits that by making such motions, defendants are deemed to have voluntarily submitted to the jurisdiction of the court, thereby waiving their right to invoke the defense improper service of summons.
9. To cite the ruling in La Naval Drug Corp. v. CA² When a defendant voluntarily appears, he is deemed to have submitted himself to the jurisdiction of the court. If he so wishes not to waive this defense, he

¹ G.R. No. 109957. February 20, 1996

² G.R. No. 103200. August 31, 1994.

must do so seasonably by motion for the purpose of objecting to the jurisdiction of the court; otherwise, he shall be deemed to have submitted himself to that jurisdiction.”

10. Moreover, plaintiffs are in clear bad faith when they allege that “Ground Floor, Metrowalk Commercial Complex, Meralco Avenue, Ortigas Center, Pasig City” is not their office or regular place of business. That is the registered business address of the corporation, as well as the address given by them to their clientele and callers. It is but reasonable to presume that such is the “place of business” contemplated in the Rules. To allow them to deny their own representations and to demand that the sheriff inquire further would be to absurdly burden this Honorable Court.
11. Defendants also suggest that Lendley Bastilaon is a “mere management trainee who is obviously not a person in charge.” The Sheriff’s Return dated August 15, 2006, which is part of the records of this case discloses that when the sheriff left the summons with her, she made a phone call to Jasper Chua, one of the incorporators, and after which, proceeded to receive the summons.
12. Defendants are now estopped from denying the validity of Bastilaon’s receipt or her competence, particularly since the Rules of Court allows summons upon individuals to be served by leaving a copy with “some competent person in charge.” It does not prohibit a management trainee from receiving the summons.
13. The Supreme Court has held that a presumption exists that a sheriff has regularly performed his official duty.³ To overcome the presumption arising from the sheriff’s certificate, the evidence must be

³ Claridad v. Santos, 120 SCRA 148 (1983); Edea v. IAC., 179 SCRA 344 (1989).

clear and convincing⁴. Defendants' self-serving averments do not meet this threshold.

B. No Cause of Action

14. Defendants allege that a cause of action must appear from the face of the complaint and that on this score, the complaint is wanting as “there is no law, rule, or a generally accepted principle of international law which prohibits or outlaws the imposition and implementation of a dress code.”

15. Defendants' misapprehension of the plaintiff's case is manifest. Plaintiff's cause of action is based on the Articles on Human Relations of the Civil Code, specifically Articles 19, 20, 21, 26 and 43 – duly captioned in Plaintiff's complaint. As the complaint should only contain ultimate facts⁵ and provisions of law are only necessary if a “defense relied on is based on law”⁶, plaintiff no longer lifted the wordings of the said Articles.

16. In the cases cited by the defendants themselves, the Supreme Court held that “to determine the sufficiency of a cause of action on a motion to dismiss, only the facts alleged on the complaint must be considered.”⁷ This is known as the “four-corner rule” – wherein scrutiny as to cause of action for purposes of filing a Rule 16 Section 1(g) Motion to Dismiss is limited to the four corners of the complaint.

17. In the complaint of plaintiff, the following are just some of the allegations that were made:

- a. That plaintiff was humiliated by the brazenly discriminating manner of defendant Tintin Aguilar;

⁴ Vargas and Company v. Chan Hang Chiu, 29 Phil. 446.

⁵ Section 1, Rule 8

⁶ Ibid.

⁷ i.e., Mindanao Realty Corp. v. Kintanar, L-17152, November 30, 1962.

- b. That plaintiff was prohibited from entering the premises by the defendants on the basis of his cross-dressing and that such prohibition is discriminatory and an abuse of right;
 - c. That as a result of the incident and defendants' conduct, plaintiff suffered from mental anguish, sleepless nights, and anxiety attacks.
18. Whether or not these averments are true should be determined only after a full-blown trial. Plaintiff submits that he has alleged facts sufficient to give rise to a cause of action under the articles on Human Relations.
19. While indeed the rest of defendants' contentions should properly be ventilated after a full-blown trial, so galling are some of these contentions and misrepresentations that they must be responded to at the first instance.
20. Defendants allege that "there is no law, rule or a generally accepted principle of international law which exempts homosexuals from the application of a validly and legally imposed dress code, such that violation of such an exemption would amount to illegal discrimination and would entitle them to damages."
21. Defendants comprehension of the issue at hand is severely wanting. While indeed there are no laws or rules prohibiting dress codes, it cannot be gainsaid that there are laws prohibiting discrimination on the basis of gender identity. Hence, when a particular dress code runs afoul of anti-discrimination laws, then it is susceptible to inquiry and judicial scrutiny. To say that the dress code is "validly and legally" imposed is therefore a conclusion of law that should be reached only after a trial on the merits.

22. It was also stated in their Motion to Dismiss that “plaintiff himself admits... that private establishments like Aruba Bar and Restaurant do have the right to impose a dress code” and argued that this statement is exculpatory. Verily, defendants must be taken to task for this misrepresentation. The complete statement in plaintiff’s complaint is: “Indeed, while private establishments do have the right to impose a dress code, it may not, in the guise of implementing such a dress code, discriminate against individuals on the basis of his or her personal condition, i.e., sexual orientation.”

23. Yet another misrepresentation of the defendants is that plaintiff allegedly admitted that he was told by defendant Tintin Aguilar “in a nice way.” No such admission was made. The phrase was a direct quotation from defendant Aguilar who told plaintiff “I’m saying it in a nice way.” In fact, the line in the complaint immediately preceding that quotation was “I was humiliated by Aguilar’s cold tone of voice and brazenly discriminating manner, so I told her that she had no right to drag me out of the establishment.” In another error, defendants also noted that paragraph 3 of the Complaint states that defendant incorporators are not the employer of defendant Aguilar. Perhaps a more careful rereading by the defendants is in order, as the Complaint categorically alleged in that very same paragraph that defendant incorporators ARE the employers of defendant Aguilar.

24. Defendants furthermore state:

Plaintiff likewise failed to make any specific allegation that defendants have adopted a dress code solely for the purpose of injuring or prejudicing another, or homosexuals for that matter. He likewise failed to make any specific allegation that homosexuals are being discriminated against at Aruba Bar and Restaurant as a matter of policy, regardless of how they are dressed.

25. Defendants miss the point entirely. While not all homosexuals are cross-dressers, cross-dressing is undeniably a form of articulation of gender identity prevalent among Filipino homosexuals. In an academic paper presented at the University of the Philippines in 1990, an anthropologist noted that “the term *bakla* has always meant a cross-dressing, effeminate man.”⁸
26. Another Filipino gender studies expert wrote:
- In anthropological literature, the term most commonly used in referring to the kind of cross-dressing traditional non-Western societies observe is “gender-crossing.”... Gender-crossing therefore signifies not merely a theatrical but more importantly a kind of “ontological” transformation: although characterized by transvetism, it is not reducible to it inasmuch as it also implies an almost complete “crossing over” of socially enforced gender roles.⁹
27. But the assertion that defendants are not discriminating against homosexuals, but only against cross-dressers, is not only culturally-insensitive and simplistic, it is also potentially dangerous.
28. To permit defendants’ contentions would be to create a policy environment wherein homosexuals are accepted -- *but only* if they conform to the arbitrarily-established social standards, *only* if they do not inconvenience, *only* if their behavior does not ruffle the sensibilities of the greater heterosexual population. That these standards appear to be unjustified and unexplained appears to be of no import. Defendants appear to suggest that they are there, and compliance is mandatory if one does not wish to incur censure or, in this case, be barred from restaurants.
29. Defendants wish to justify their prohibition on cross-dressing by saying that they are merely trying to protect female customers wishing to use the restroom. Such statement is speculative and conjectural.

⁸ Martin F. Manalansan IV, “Tolerance or Struggle: Male Homosexuality in the Philippines Today,” MS, 1990.

⁹ J. Neil Garcia. “Philippine Gay Culture: The Last Thirty Years.” University of the Philippines Press, 1996.

Weighed against the greater danger of discriminating against a class of people traditionally considered marginalized, where injury is certain and clear, plaintiff submits that defendants' conjectures should not be made to stand.

30. Defendants argue that "the true essence of democracy requires that such a dress code be implemented and applied to all persons, regardless of what one's race, status, sex or sexual preference may be." Plaintiff respectfully submit, as a final point, that the true essence of democracy is anchored on pluralism and diversity, the accommodation of divergent voices, and the aspiration of a world where everyone is truly equal and truly free.

PRAYER

WHEREFORE, it is respectfully prayed that defendants' Motion to Dismiss be denied and the case be set for trial. All other reliefs, just and equitable under the premises, are likewise prayed for.

Quezon City for Pasig City. November 10, 2006.

By:

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EXPLANATION:

Service and filing of this motion were done through registered mail with return card due to distance.

ROSSELYNN JAYE G. DE LA CRUZ