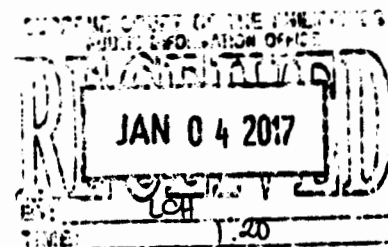




Republic of the Philippines  
 Supreme Court  
 Manila



FIRST DIVISION

**NANITO Z. EVANGELISTA\***  
 (substituted by his Heirs,  
 represented by the Surviving  
 Spouse, **LEOVIGILDA C.**  
**EVANGELISTA**),

**G.R. No. 221770**

Petitioners,

Present:

- versus -

**SERENO, C.J.**, Chairperson,  
**LEONARDO-DE CASTRO**,  
**BERSAMIN**,  
**PERLAS-BERNABE**, and  
**CAGUIOA,\*\*\* JJ.**

**SPOUSES NEREO V.**  
**ANDOLONG III and ERLINDA**  
**T. ANDOLONG\*\* and RINO**  
**AMUSEMENT INNOVATORS,**  
**INC.**,

Promulgated:

**NOV 16 2016**

Respondents.

X-----X

**DECISION**

**PERLAS-BERNABE, J.:**

Assailed in this petition for review on *certiorari*<sup>1</sup> are the Decision<sup>2</sup> dated May 22, 2015 and the Resolution<sup>3</sup> dated December 14, 2015 of the Court of Appeals (CA) in CA-G.R. CV No. 101120, which affirmed the Decision<sup>4</sup> dated October 25, 2012 and the Resolution<sup>5</sup> dated January 10, 2013 of the Regional Trial Court of Quezon City, Branch 99 (RTC) in Civil Case No. Q-95-25680, dismissing the complaint of Nanito Z. Evangelista (Nanito) for failure to establish his money claims against respondents Spouses Nereo V. Andolong III and Erlinda T. Andolong (Spouses

\* Deceased.

\*\* "Spouses Nereo Andolong and Erlina Andolong" in the petition (see *rollo*, pp. 3 and 4).

\*\*\* On leave.

<sup>1</sup> Id. at 3-55.

<sup>2</sup> Id. at 59-68. Penned by Associate Justice Danton Q. Bueser with Associate Justices Florito S. Macalino and Nina G. Antonio-Valenzuela concurring.

<sup>3</sup> Id. at 107-108.

<sup>4</sup> CA *rollo*, pp. 83-100. Penned by Acting Presiding Judge Maria Amifaith S. Fider-Reyes.

<sup>5</sup> Id. at 101-103.

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Andolong) and Rino Amusement Innovators, Inc. (RAII; collectively, respondents).

### The Facts

The instant petition stemmed from a complaint for sum of money, accounting and specific performance with prayer for issuance of writ of preliminary attachment and damages<sup>6</sup> filed on November 22, 1995 by Nanito against respondents before the RTC, docketed as Civil Case No. Q-95-25680. Nanito alleged that Spouses Andolong are the majority shareholders of RAI, a domestic corporation engaged in the business of operating amusement centers.<sup>7</sup> On various dates, Nanito and respondents entered into various memoranda of agreement (MOA),<sup>8</sup> as well as deeds of assignment/sale with right to repurchase over machines, equipment, and amenities, which were used in the operations of amusement centers in different malls, such as SM Centerpoint in Manila,<sup>9</sup> Sta. Lucia East Grand Mall in Cainta, Rizal,<sup>10</sup> and Gaisano Country Mall in Cebu<sup>11</sup> (subject contracts).<sup>12</sup> In the subject MOA, the parties agreed, *inter alia*, that they would equally share, *i.e.*, 50%-50%, from the net profits of said amusement centers and that respondents would remit Nanito's share on the 15<sup>th</sup> and 30<sup>th</sup> of the month.<sup>13</sup> Claiming that respondents failed to comply with their obligation to remit his share of the net profits, Nanito filed the instant complaint.<sup>14</sup> In support thereof, Nanito presented various computations of the revenues earned by the amusement centers.<sup>15</sup> In an Order<sup>16</sup> dated June 27, 1996, the RTC limited Nanito's money claim to ₱2,241,632.00, according to the stipulation of the parties in open court.<sup>17</sup>

After the presentation of Nanito's evidence, respondents filed a Demurrer to the Evidence,<sup>18</sup> which was, however, denied by the RTC.<sup>19</sup> Eventually, respondents failed to present their evidence despite the opportunity to do so; thus, they were deemed to have waived their right

<sup>6</sup> Dated November 16, 1995. Records, Vol. I, pp. 1-7. This was subsequently amended in a Second Amended Complaint dated April 22, 1996 (id. at 251-260).

<sup>7</sup> *Rollo*, p. 60.

<sup>8</sup> See MOA dated November 12, 1993 for SM Centerpoint (id. at 109-113) and MOA dated November 7, 1994 for Sta. Lucia East Grand Mall (id. at 114-119).

<sup>9</sup> See MOA; id. at 109-113 and Conditional Deed of Assignment dated November 8, 1994 (Conditional Deed); id. at 120-122.

<sup>10</sup> See MOA; id. at 114-119.

<sup>11</sup> See Deed of Sale with Right to Repurchase dated December 28, 1994 (Deed of Sale); id. at 123-125.

<sup>12</sup> See id. at 61.

<sup>13</sup> See id. at 110 (for SM Centerpoint) and 115 (for Sta. Lucia East Grand Mall).

<sup>14</sup> See id. at 60-62.

<sup>15</sup> See id. at 130, 137, 138, and 159.

<sup>16</sup> Records, Vol. I, p. 341. Issued by Judge Felix M. De Guzman.

<sup>17</sup> See also *CA rollo*, pp. 87 and 97.

<sup>18</sup> Dated May 22, 2007. Records, Vol. I, pp. 599-607.

<sup>19</sup> See Order dated June 27, 2008 issued by Presiding Judge Ma. Victoria Alba-Estoesta; id. at 641, including dorsal portion.

thereto. Thereafter, the RTC directed the parties to file their respective memoranda<sup>20</sup> to which they complied.<sup>21</sup>

During the pendency of the case, Nanito died and, consequently, was substituted by his heirs, represented by his surviving spouse, Leovigilda C. Evangelista<sup>22</sup> (petitioners).

### The RTC Ruling

In a Decision<sup>23</sup> dated October 25, 2012, the RTC dismissed petitioners' complaint for insufficiency of evidence. Essentially, the RTC found that Nanito failed to establish his claim against respondents in the stipulated amount of ₱2,241,632.00, as all the evidence he presented did not prove his entitlement thereto. Similarly, the RTC dismissed respondents' counterclaims<sup>24</sup> for lack of proof.<sup>25</sup>

Petitioners filed a motion for reconsideration,<sup>26</sup> but the same was denied in a Resolution<sup>27</sup> dated January 10, 2013. Aggrieved, petitioners appealed to the CA.<sup>28</sup>

### The CA Ruling

In a Decision<sup>29</sup> dated May 22, 2015, the CA affirmed the RTC Ruling *in toto*. It held that while Nanito's documentary exhibits were admissible in evidence as they were presumed to have been made in the ordinary course of business, such documents only disclosed the gross monthly revenue earned by the amusement centers in their operation and did not show the actual profit earned by said centers.<sup>30</sup> In this regard, the CA pointed out that the respective amounts of gross revenue were still subject to expenses incurred in relation to the centers' daily operations, as well as the re-infusion of any possible earnings as capital in order to sustain the maintenance of the machines and equipment therein.<sup>31</sup> Thus, in view of the inconclusiveness of the evidence presented in proving the existence of the net profits, the CA

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<sup>20</sup> See Order dated May 5, 2011; records, Vol. II, p. 812.

<sup>21</sup> See Memorandum of Nanito dated June 7, 2011 (records, Vol. II, pp. 821-864) and Memorandum for Defendants (herein respondents) dated June 13, 2011 (id. at 866-880). See also *rollo*, p. 62.

<sup>22</sup> See Manifestation and Ex-Parte Motion dated December 12, 2005 (records, Vol. I, pp. 569-572); and Manifestation with Urgent Motion dated October 19, 2006 (id. at 586-587).

<sup>23</sup> *CA rollo*, pp. 83-100.

<sup>24</sup> See Amended Answer of respondents dated August 12, 1996; records, Vol. I, pp. 349-350.

<sup>25</sup> See *CA rollo*, pp. 98-99.

<sup>26</sup> See motion for reconsideration dated December 4, 2012; records, Vol. II, pp. 903-953.

<sup>27</sup> *CA rollo*, pp. 101-103.

<sup>28</sup> See [Appellants'] Brief dated September 8, 2014; id. at 28-82.

<sup>29</sup> *Rollo*, pp. 59-68.

<sup>30</sup> See id. at 65-66.

<sup>31</sup> See id.

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concluded that petitioners failed to prove their cause of action by a preponderance of evidence, warranting the dismissal of the complaint.<sup>32</sup>

Petitioners moved for reconsideration,<sup>33</sup> which was, however, denied in a Resolution<sup>34</sup> dated December 14, 2015; hence, this petition.

### **The Issue Before the Court**

The essential issue for the Court's resolution is whether or not the CA correctly held that petitioners failed to prove their cause of action by a preponderance of evidence.

### **The Court's Ruling**

The petition is partly meritorious.

In civil cases, it is a basic rule that the party making allegations has the burden of proving them by a preponderance of evidence. Also, parties must rely on the strength of their own evidence, not upon the weakness of the defense offered by their opponent. This principle equally holds true, even if the defendant was not given the opportunity to present evidence because of a default order. The extent of the relief that may be granted can only be as much as has been alleged and proved with preponderant evidence required under Section 1, Rule 133<sup>35</sup> of the Rules of Court.<sup>36</sup>

“Preponderance of evidence is the weight, credit, and value of the aggregate evidence on either side and is usually considered to be synonymous with the term ‘greater weight of the evidence’ or ‘greater weight of the credible evidence.’ Preponderance of evidence is a phrase which, in the last analysis, means probability of the truth. It is evidence which is more convincing to the court as worthier of belief than that which is offered in opposition thereto.”<sup>37</sup>

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<sup>32</sup> See *id.* at 66-67.

<sup>33</sup> See motion for reconsideration dated June 17, 2015; *id.* at 69-103.

<sup>34</sup> *Id.* at 107-108.

<sup>35</sup> Section 1, Rule 133 of the Rules of Court reads:

Section 1. *Preponderance of evidence, how determined.* – In civil cases, the party having the burden of proof must establish his case by a preponderance of evidence. In determining where the preponderance or superior weight of evidence on the issues involved lies, the court may consider all the facts and circumstances of the case, the witnesses' manner of testifying, their intelligence, their means and opportunity of knowing the facts to which they are testifying, the nature of the facts to which they testify, the probability or improbability of their testimony, their interest or want of interest, and also their personal credibility so far as the same may legitimately appear upon the trial. The court may also consider the number of witnesses, though the preponderance is not necessarily with the greater number.

<sup>36</sup> *Spouses Ramos v. Obispo*, 705 Phil. 221, 229-230 (2013), citing *Heirs of De Guzman v. Perona*, 636 Phil. 663, 672 (2010).

<sup>37</sup> *Spouses Ramos v. Obispo*, *id.* at 230, citing *Chua v. Westmont Bank*, 683 Phil. 56, 68 (2012).

In the instant case, it is undisputed that under the subject contracts, Nanito had invested a grand total of ₱5,728,800.00.<sup>38</sup> Under the subject MOA, he is entitled to receive 50% of the **net profits** of the amusement centers and that such profits must be remitted to him on the 15<sup>th</sup> and the 30<sup>th</sup> of each month.<sup>39</sup> However and as correctly pointed out by the CA, the documents presented by Nanito only showed the gross monthly revenue of the amusement centers without taking into consideration their daily operational expenses, as well as the re-infusion of any possible earnings as capital in order to sustain the maintenance of the machines and equipment. As such, these documents are inconclusive in proving the existence of any net profits that respondents failed to remit to Nanito.

Be that as it may, the Court recognizes the fact that under the terms of the subject contracts, respondents have exclusive control over the operations of the amusement centers, with Nanito acting as a mere investor in the said ventures. Naturally, Nanito had no access to documents that would show the existence of net profits, considering that all documents pertaining to the operations of the covered amusement centers, including financial statements, are all in the possession of respondents. Given this circumstance, Nanito was constrained to rely on the various computations of the revenues earned by the amusement centers as certified by the mall-owners where they were situated.<sup>40</sup> Such computations are enough to establish the existence of gross revenue from which the net profits may be derived at by simply subtracting all the operational expenses, as well any other possible deductions thereto such as any re-infusion of possible earnings as capital.

For respondents' part, they could have easily rebutted petitioners' claim for Nanito's share of net profits by producing pertinent documents which would show that the aforesaid gross profits were just enough, or even inadequate, to cover the operational expenses and capital re-infusions to sustain the amusement centers. Unfortunately, respondents opted not to shed light on the issues at hand as they, unwittingly or otherwise, waived their right to present evidence in this case. In this light, the Court is thus left with no option but to rule that the respondents' failure to present the documents in their possession – whether such failure was intentional or not – raises the presumption that evidence willfully suppressed would be adverse if produced.<sup>41</sup>

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<sup>38</sup> ₱2,656,000.00 (See MOA and the Conditional Deed of SM Centerpoint) + ₱1,972,800.00 (See MOA of Sta. Lucia East Grand Mall) + ₱1,100,000.00 (See Deed of Sale of Gaisano Mall) = ₱5,728,800.00 (See *rollo*, pp. 61, 109, 115, and 124).

<sup>39</sup> See *id.* at 110 and 115.

<sup>40</sup> See *id.* at 130, 137, 138, and 159.

<sup>41</sup> See *Loon v. Power Master, Inc.*, 723 Phil. 515, 530 (2013), citing Section 3 (e), Rule 131 of the Rules of Court.

Under the foregoing circumstances, the Court is convinced that Nanito should have received remittances representing net profits from respondents, albeit he failed to prove the exact amount he should receive from the latter. In *Seven Brothers Shipping Corporation v. DMC-Construction Resources Inc.*,<sup>42</sup> the Court allowed the recovery of temperate damages in instances where it has been established that some pecuniary loss has been suffered, but its amount cannot be proven with certainty, *viz.*:

In contrast, **under Article 2224 [of the Civil Code], temperate or moderate damages may be recovered when the court finds that some pecuniary loss has been suffered but its amount cannot, from the nature of the case, be provided with certainty.** This principle was thoroughly explained in *Araneta v. Bank of America* [148-B Phil. 124 (1971)], which cited the Code Commission, to wit:

The Code Commission, in explaining the concept of temperate damages under Article 2224, makes the following comment:

In some States of the American Union, temperate damages are allowed. There are cases where from the nature of the case, definite proof of pecuniary loss cannot be offered, although the court is convinced that there has been such loss. For instance, injury to one's commercial credit or to the goodwill of a business firm is often hard to show with certainty in terms of money. Should damages be denied for that reason? The judge should be empowered to calculate moderate damages in such cases, rather than that the plaintiff should suffer, without redress from the defendant's wrongful act.

Thus, in *Tan v. OMC Carriers, Inc.* [654 Phil. 443 (2011)], temperate damages were rightly awarded because plaintiff suffered a loss, although definitive proof of its amount cannot be presented as the photographs produced as evidence were deemed insufficient. Established in that case, however, was the fact that respondent's truck was responsible for the damage to petitioner's property and that petitioner suffered some form of pecuniary loss. In *Canada v. All Commodities Marketing Corporation* [590 Phil. 342 (2008)], temperate damages were also awarded wherein respondent's goods did not reach the Pepsi Cola Plant at Muntinlupa City as a result of the negligence of petitioner in conducting its trucking and hauling services, even if the amount of the pecuniary loss had not been proven. In *Philtranco Service Enterprises, Inc. v. Paras* [686 Phil. 736 (2012)], the respondent was likewise awarded temperate damages in an action for breach of contract of carriage, even if his medical expenses had not been established with certainty. In *People v. Briones* [398 Phil. 31 (2000)], in which the accused was found guilty of murder, temperate damages were given even if the funeral expenses for the victim had not been sufficiently proven.

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<sup>42</sup> G.R. No. 193914, November 26, 2014, 743 SCRA 33.

**Given these findings, we are of the belief that temperate and not nominal damages should have been awarded, considering that it has been established that respondent herein suffered a loss, even if the amount thereof cannot be proven with certainty.**

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**Consequently, in computing the amount of temperate or moderate damages, it is usually left to the discretion of the courts, but the amount must be reasonable, bearing in mind that temperate damages should be more than nominal but less than compensatory.**

Here, we are convinced that respondent sustained damages to its conveyor facility due to petitioner's negligence. Nonetheless, for failure of respondent to establish by competent evidence the exact amount of damages it suffered, we are constrained to award temperate damages. Considering that the lower courts have factually established that the conveyor facility had a remaining life of only five of its estimated total life of ten years during the time of the collision, then the replacement cost of ₱7,046,351.84 should rightly be reduced to 50% or ₱3,523,175.92. This is a fair and reasonable valuation, having taking into account the remaining useful life of the facility.<sup>43</sup> (Emphases and underscoring supplied)

As already adverted to, respondents' failure to remit the net profits to Nanito pursuant to the subject MOA caused some pecuniary loss on the part of the latter, albeit he failed to prove the exact amount of such loss. In view of such circumstance, the Court deems it reasonable to award temperate damages to petitioners in the amount of ₱1,100,000.00, which is roughly half<sup>44</sup> of ₱2,241,632.00, or the amount of gross revenue claimed to have been earned by the amusement centers. Notably, the award of ₱1,100,000.00 shall earn legal interest at the rate of six percent (6%) per annum from the finality of this Decision until fully paid.

Finally, anent petitioners' other claims, *i.e.*, regarding the monetary value of the arcade machines that respondents allegedly pulled-out, suffice it to say that petitioners failed to prove their entitlement thereto since – as correctly pointed out by the CA – the identity of the machines they claim to have been pulled-out were not established by any competent proof.<sup>45</sup>

**WHEREFORE**, the petition is **PARTLY GRANTED**. The Decision dated May 22, 2015 and the Resolution dated December 14, 2015 of the Court of Appeals in CA-G.R. CV No. 101120 are hereby **AFFIRMED** with **MODIFICATION**, ordering respondents Spouses Nereo V. Andolong III and Erlinda T. Andolong and Rino Amusement Innovators, Inc. to jointly and solidarily pay petitioners heirs of Nanito Z. Evangelista, represented by

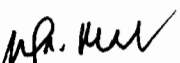
<sup>43</sup> Id. at 44-46, citations omitted.

<sup>44</sup> In the absence of contrary evidence, expenses shall be pegged at fifty percent (50%) of the gross revenue. (See *People v. Tambis*, 582 Phil. 339, 345 [2008] citing *People v. Catbagan*, 467 Phil. 1044, 1087 [2004].)


<sup>45</sup> See *rollo*, pp. 66-67.


his surviving spouse, Leovigilda C. Evangelista, temperate damages in the amount of ₱1,100,000.00 with legal interest at the rate of six percent (6%) per annum from finality of this Decision until fully paid.

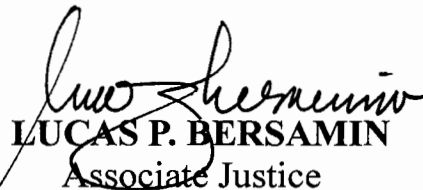
**SO ORDERED.**

  
**ESTELA M. PERLAS-BERNABE**  
Associate Justice

**WE CONCUR:**

  
**MARIA LOURDES P. A. SERENO**  
Chief Justice


  
**TERESITA J. LEONARDO-DE CASTRO**  
Associate Justice

  
**LUCAS P. BERSAMIN**  
Associate Justice

**On leave**  
**ALFREDO BENJAMIN S. CAGUIOA**  
Associate Justice

### **CERTIFICATION**

Pursuant to Section 13, Article VIII of the Constitution, I certify that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

  
**MARIA LOURDES P. A. SERENO**  
Chief Justice