SWIRE REALTY DEVELOPMENT CORPORATION, PLAINTIFF-APPELLANT, VS. SPECIALTY CONTRACTS GENERAL AND CONSTRUCTION SERVICES, INC., JOSE JAVELLANA, JR., PATRICK DOROMAL, AND FGU INSURAN...

Ponente: REYES, JR., J.C., J.

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REYES, JR., J.C., J.:

Assailed in the instant appeal filed under Rule 41 of the 1997 Rules of Civil Procedure is the Decision (Records, pp. 799-811) dated November 10, 2010 and the Order dated June 30, 2011 of the Regional Trial Court of Quezon City, Branch 99 in Civil Case No. Q-98-3317 which dismissed the Complaint for Damages arising from breach of contract.

The facts.

Swire Realty Development Corporation (Swire), herein plaintiff-appellant is engaged in real estate development with the Palace of Makati as its project. They solicited bids from various contractors to perform waterproofing works from Basement 7 up to the dome roof portion above the 36[th] floor where herein defendant-appellee, Specialty Contracts General and Construction Services (SpecServ), was awarded with the job. SpecServ was represented by Jose Javellana and Patrick Doromal who presented to Swire, a waterproofing membrane called Formak 629 Elastomeric.

SpecServ alleged that Formak 629 is manufactured by Hichins (FE) Pte. Ltd, and was described as an elastomeric waterproofing membrane which can be reinforced with fiberglass mat for extra strength in high stress areas such as pipes and upstands. Said membrane was to be applied with a fiberglass mat in previously mentioned areas based on the company brochures and product specifications.

An Offsetting Agreement was entered into by both parties dated August 21,1997 where SpecServ purchased a condominium unit (Unit 808) from Swire in exchange for their services. The total contract price of the waterproofing job was Six Million Five Hundred Forty-Five Thousand Pesos (P6,545,000.00) wherein the amount of P3,469,641.39 represents the net purchase price of the condominium unit and a parking lot which shall be offset as payment of SpecServ. Under their agreement, the net purchase price of the condominium will be deducted from all billings of SpecServ until such time that the waterproofing job would be fully paid.

Swire paid 20% of the contract price amounting to P1,309,000.00 but deducted a partial payment for the condominium unit and parking lot from said amount. Hence, the total downpayment paid by Swire for the waterproofing job was P904,400.00.

SpecServ obtained a performance/surety bond amounting to P1,309,000.00 from FGU Insurance Corporation (FGU). Under their Suretyship Agreement, FGU agreed to indemnify Swire for the said amount should SpecServ fail to fulfill their undertakings under the Offsetting Agreement.

A water tightness test was conducted to evaluate the resistance to the passage of water on a surface. Hence, on

October 29, 1997 SpecServ's first Statement of Account to Swire was P117,076.67 after all deductions. (Exh. "3", Records, p. 581) The succeeding Statements of Account were as follows: Statement of Account #2 dated November 11, 1997 after all deductions was P43,988.05 (Exh. "4", Records, p. 584); Statement of Account #3 dated November 22, 1997 after all deductions was P59,077.48 (Exh. "5", Records p. 587); and Statement Account #4 dated December 2, 1999 was P50,447.94 (Exh. "6", Records p. 590). Despite constant reminders, Swire failed to settle their obligation with SpecServ.

On November 3, 1997 SpecServ wrote a letter to Swire informing them of the adjustment in the contract price due to the substantial peso depreciation. Consequently, the Statement of Accounts (Exh. "16", Records, p. 604) were adjusted in this manner on December 23, 1997:

> Statement of Account No. 1 = P135,752.09
>
> Statement of Account No. 2 = P 63,231.30
>
> Statement of Account No. 3 = P 79,705.75

On November 20, 1997, Swire's representative, Ricardo Mallari complained about the wrong application of Formak 629 and demanded that a fiberglass mat be applied on all flat surfaces as well. They also requested additional manpower on December 12, 1997.

As a reply, Javellana sent a letter on November 22, 1997 saying that based on the description of Formak 629, it can be reinforced with a fiberglass mat on high stress areas only. He also attached a letter from the Laboratory Manager of Hichins, Lim Eng Kiat, who declared that as of July 1997, Formak 629's product specifications have been upgraded hence, it can be applied without any reinforcement on flat surfaces. High stress areas however do need fiberglass mats.

Despite said information, Swire insisted on placing fiberglass mats on all surfaces. As a result, SpecServ said that they will be constrained to add P200.00/sqm should Swire insist on placing fiberglass mats on all surfaces. Still, Swire did not compromise with SpecServ and insisted on their demands.

On December 16, 1997, a Demobilization Notice was sent to Swire. All the workers of SpecServ were withdrawn from the site due to the non-payment of the past progressive billings. Regardless of the demands of Swire and their agreement to apply fiberglass mats to high stress areas only, SpecServ still did not deploy their workers until they will be paid what is due to them.

Consequently, Swire contracted Esicor to complete the pending waterproofing job of SpecServ who allegedly barely completed 5% of the project. A civil action for breach of contract was filed on January 13, 1998 against SpecServ for abandonment of the waterproofing job and FGU for their refusal of issuing indemnity.

Pre-Trial was conducted in order for the parties to settle amicably but it remained futile.

Trial ensued with Ma. Luisa Eslava Bravo (Personnel Manager and member of the Executive Committee) and Architect Noel Almo as witnesses for plaintiff-appellant.

SpecServ presented three witnesses, Patrick Doromal (Project Manager of SpecServ), Jose Javellana, Jr. (Incorporator, President and General Manager of SpecServ) and Lony Delicana (payroll clerk at SpecServ).

FGU did not present any witness. It opted to adopt the documentary evidence presented by SpecServ.

The Court ruled that both parties substantially breached their obligations by not performing their undertakings in the contract. Each will then bear their own damages as a consequence.

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The RTC rendered its decision on November 10, 2010. The dispositive portion of which reads:

> "WHEREFORE, in view of the foregoing considerations, the complaint filed by SWIRE against SPECSERV is hereby DISMISSED for lack of merit. The counterclaim filed by SPECSERV is likewise DISMISSED for lack of evidence.
>
> SO ORDERED."

Dissatisfied, plaintiff-appellant filed a Motion for Reconsideration but was eventually denied on June 30, 2011. Hence, this appeal before Us with the following assignment of errors:

> THE LOWER COURT GRAVELY ERRED IN:
>
> I.
>
> RULING THAT THE OFFSETTING AGREEMENT DID NOT CONTAIN ANY SPECIFICATIONS ON HOW FORMAK 629 WOULD BE APPLIED.
>
> II.
>
> RULING THAT THE OFFSETTING AGREEMENT WAS MORE OF A PURCHASE AND WORK AGREEMENT, AND THUS SWIRE IS NOT ENTITLEDTO A RETURN OF THE AMOUNTS IT HAD PAID SPECSERVE.
>
> **III.**
>
> UNDULY SPECULATING ON LABOR EXPENSES WHICH SPECSERVE WOULD HAVE INCURRED.
>
> IV.
>
> IGNORING THE SANCTITY OF CONTRACTS WHEN IT HELD THAT SWIRE SHOULD HAVE AGREED TO AN UPWARD ADJUSTMENT OF THE CONTRACT PRICE.
>
> V.
>
> DISMISSING THE COMPLAINT. (Rollo, p. 55)

Swire argued that Specserv is guilty of breach of contract for unjustifiably abandoning the project. It claimed that the RTC's ruling in dismissing the complaint was based on mere conjectures and misapprehension of the facts. Stated simply, the primordial issue in this case is whether or not the RTC erred in dismissing the complaint and ruling that plaintiff-appellant Swire is not entitled to damages.

In the case at bench, Swire alleged that SpecServ did not follow the specifications in the application of Formak 629 which resulted to Swire's suspension of payments. SpecServ allegedly abandoned their job thus compelling, Swire to outsource another company (Esicor) who can continue the waterproofing job. Architect Almo revealed that they incurred expenses amounting to P2,330,000.00 in order to complete the waterproofing job with Esicor. While Ms. Bravo declared that the company incurred damages amounting to P1,309,000.00. Thus, Swire alleged that SpecServ is guilty of breach of contract for unjustifiably abandoning the project and for having unilaterally adjusted upward the contract price.

On the other hand, SpecServe alleged that they used the right process in applying Formak 629. The only thing that hindered the completion of their job was the non-payment of Swire which constrained them to send out a Demobilization Notice. Javellana also revealed that in the Offsetting Agreement, the provision against price escalation is no longer included hence it is but fair to increase or adjust their contract price depending on the

peso-dollar depreciation. SpecServ further claimed that the total work accomplished by them was in the amount of P669,757.14 and payment of VAT of P130,000.00 plus the incidental expense incurred during the period of September to December 16, 1997. (Exhibit “22”) They declared that SpecServ incurred losses when they maintained their workers even after the suspension of Swire by the Makati City Government to stop working at the Palace of Makati.

"Reciprocal obligations are those which arise from the same cause, and [in] which each party is a debtor and a creditor of the other, such that the obligation of one is dependent upon the obligation of the other. They are to be performed simultaneously, so that the performance of one is conditioned upon the simultaneous fulfillment of the other." In reciprocal obligations, neither party incurs in delay if the other does not comply or is not ready to comply in a proper manner with what is incumbent upon him. From the moment one of the parties fulfills his obligation, delay by the other begins. (Consolidated Industrial Gases Inc. v. Alabang Medical Center, G.R. No. 181983. November 13, 2013)

Also, Article 1306 of the Civil Code provides that, "The contracting parties may establish such stipulations, clauses, terms and conditions as they may deem convenient, provided they are not contrary to law, morals, good customs, public order, or public policy." Hence, if the stipulations in the contract are valid, the parties thereto are bound to comply with them, since such contract is the law between the parties. In the present case, we find no legal impediment on the terms and conditions of the contract between Swire and Specserv. As such, the said terms and conditions must be held to be the law between them and the parties are bound to fulfill what has been stipulated.

In this case, Swire solicited bids from various contractors to perform waterproofing works from Basement 7 up to the dome roof portion above 36th floor for a fee. SpecServ, bound itself to install a waterproofing membrane called Formak 629 Elastomeric for the said portions. Swire undertook to pay the contract price therefor in the manner prescribed in the Offsetting Agreement. Being reciprocal in nature, the respective obligations of Swire and SpecServ are dependent upon the performance of the other based on the Offsetting Agreement such that any claim of non-performance of its obligation can only prosper if the complaining party has faithfully complied with its own obligation.

Both parties substantially failed to perform their respective obligations. Swire breached its obligation when it refused to pay the progress billing on the ground that Specserve did not follow the specification in waterproofing in the application of FORMAK 629 and when it failed to pay the unadjusted billing of Specserve for the work done on September to December 1997.

The RTC correctly ruled that it did not find any specification in the Offsetting Agreement as to how Formak 629 should be applied. It declared that the witness presented by plaintiff-appellant had no personal knowledge as to what transpired during the presentation of SpecServ since Architect Almo was hired in January 1998 and the Offsetting Agreement took place in August 1997. The Decision states:

> “After a very careful and judicious circumspect of the evidence presented by the parties, the Court finds that the Offset Agreement executed between SWIRE and SPECSERV did not contain any specifications on how the application of FORMAK 629 waterproofing will be conducted. The testimonies of the witnesses of SWIRE cannot be given credence as they have no personal knowledge of what transpired during the presentation of SPECSERV of their waterproofing process before SWIRE as they were not present. Moreover, Hitchins, the distributor of FORMAK 629 has declared and confirmed that fiberglass matting before the application of FORMAK 629 is not necessary except in areas around pipes and upstands where high stress is expected. There is nothing in the contract which provides how the FORMAK 629 will be applied. In the literature of FORMAK 629, it identifies pipes, walls, and upstands for fiberglass matting before applying FORMAK 629. On this issue

> alone which is its cause of action, SWIRE miserably failed to prove that SPECSERV did not apply FORMAK 629 correctly in its waterproofing procedure." (Records, pp. 808-809)

On the other hand, Specserve breached its obligation when it did not continue the waterproofing work as well as when it unilaterally adjusted the contract price on the ground that there was inflation. According to SpecServ, the peso depreciated from Php28.00 at the time of the execution of the contract to as high as Php35.45 to one dollar.

However, extraordinary inflation exists when there is an unusual decrease in the purchasing power of currency (that is, beyond the common fluctuation in the value of currency) and such decrease could not be reasonably foreseen or was manifestly beyond the contemplation of the parties at the time of the obligation. Extraordinary deflation, on the other hand, involves an inverse situation. (Equitable PCI Bank v. Ng Sheung Ngor, G.R. No. 171545. December 19, 2007)

Article 1250 of the Civil Code provides:

> "Article 1250. In case an extraordinary inflation or deflation of the currency stipulated should intervene, the value of the currency at the time of the establishment of the obligation shall be the basis of payment, unless there is an agreement to the contrary.
>
> For extraordinary inflation (or deflation) to affect an obligation, the following requisites must be proven:
>
> 1. that there was an official declaration of extraordinary inflation or deflation from the Bangko Sentral ng Pilipinas (BSP);
>
> 2. that the obligation was contractual in nature; and
>
> 3. that the parties expressly agreed to consider the effects of the extraordinary inflation or deflation." (Equitable PCI Bank v. Ng Sheung Ngor, G.R. No. 171545. December 19, 2007)

The factual circumstances obtaining in the present case do not make out a case of extraordinary inflation or devaluation as would justify the application of the aforementioned article. While the Court may take judicial notice of the decline in the purchasing power of the Philippine currency during a given period, such downward trend of the peso cannot be considered as the extraordinary phenomenon contemplated by Article 1250 of the Civil Code. Absent an official pronouncement or declaration by competent authorities of the existence of extraordinary inflation during a given period, the effects of extraordinary inflation are not to be applied.

Moreover, although the obligation in this instance arose out of a contract, the parties did not agree to recognize the effects of extraordinary inflation. The Offsetting Agreement never mentioned that there was such a stipulation. Hence, there was no legal obligation for Swire to agree to an upward adjustment of the contract price as this would violate the principle of mutuality of contracts under Article 1308 of the Civil Code.

As discussed, both parties failed to comply with their respective obligations under their agreements. Hence, relevant is the provision of Article 1192 of the Civil Code which reads:

> "Art. 1192. In case both parties have committed a breach of the obligation, the liability of the first infractor shall be equitably tempered by the courts. If it cannot be determined which of the parties first violated the contract, the same shall be deemed extinguished, and each shall bear his own damages."

Since both parties were in default in the performance of their respective reciprocal obligations, they are both liable for damages. Hence, the last portion of Article 1192 finds application. Pursuant thereto, the parties' respective claims for damages are thus deemed extinguished and each of them shall bear its own damage.

WHEREFORE, in view of the foregoing, the appeal is DENIED. The Decision dated November 10, 2010 and the

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Order dated June 30, 2011 of the Regional Trial Court of Quezon City, Branch 99 in Civil Case No. Q-98-33171 are AFFIRMED.

SO ORDERED.

Inting and Galapate-Laguilles, JJ., concur.

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