

**THE CONSOLIDATED BANK AND TRUST CORPORATION,
PETITIONER, VS. COURT OF APPEALS AND L.C. DIAZ AND COMPANY,
CPA’S, RESPONDENTS.**

G.R. No. 138569. September 11, 2003

Ponente: CARPIO, J.

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CARPIO, J.:

The Case

Before us is a petition for review of the Decision[1] of the Court of Appeals dated 27 October 1998 and its Resolution dated 11 May 1999. The assailed decision reversed the Decision[2] of the Regional Trial Court of Manila, Branch 8, absolving petitioner Consolidated Bank and Trust Corporation, now known as Solidbank Corporation ("Solidbank"), of any liability. The questioned resolution of the appellate court denied the motion for reconsideration of Solidbank but modified the decision by deleting the award of exemplary damages, attorney's fees, expenses of litigation and cost of suit.

The Facts

Solidbank is a domestic banking corporation organized and existing under Philippine laws. Private respondent L.C. Diaz and Company, CPA's ("L.C. Diaz"), is a professional partnership engaged in the practice of accounting.

Sometime in March 1976, L.C. Diaz opened a savings account with Solidbank, designated as Savings Account No. S/A 200-16872-6.

On 14 August 1991, L.C. Diaz through its cashier, Mercedes Macaraya ("Macaraya"), filled up a savings (cash) deposit slip for P990 and a savings (checks) deposit slip for P50. Macaraya instructed the messenger of L.C. Diaz, Ismael Calapre ("Calapre"), to deposit the money with Solidbank. Macaraya also gave Calapre the Solidbank passbook.

Calapre went to Solidbank and presented to Teller No. 6 the two deposit slips and the passbook. The teller acknowledged receipt of the deposit by returning to Calapre the duplicate copies of the two deposit slips. Teller No. 6 stamped the deposit slips with the words "DUPLICATE" and "SAVING TELLER 6 SOLIDBANK HEAD OFFICE." Since the transaction took time and Calapre had to make another deposit for L.C. Diaz with Allied Bank, he left the passbook with Solidbank. Calapre then went to Allied Bank. When Calapre returned to Solidbank to retrieve the passbook, Teller No. 6 informed him that "somebody got the passbook." [3] Calapre went back to L.C. Diaz and reported the incident to Macaraya.

Macaraya immediately prepared a deposit slip in duplicate copies with a check of P200,000. Macaraya, together with Calapre, went to Solidbank and presented to Teller No. 6 the deposit slip and check. The teller stamped the words "DUPLICATE" and "SAVING TELLER 6 SOLIDBANK HEAD OFFICE" on the duplicate copy of the deposit slip. When Macaraya asked for the passbook, Teller No. 6 told Macaraya that someone got the passbook but she could not remember to whom she gave the passbook. When Macaraya asked Teller No. 6 if Calapre got

the passbook, Teller No. 6 answered that someone shorter than Calapre got the passbook. Calapre was then standing beside Macaraya.

Teller No. 6 handed to Macaraya a deposit slip dated 14 August 1991 for the deposit of a check for P90,000 drawn on Philippine Banking Corporation ("PBC"). This PBC check of L.C. Diaz was a check that it had "long closed." [4] PBC subsequently dishonored the check because of insufficient funds and because the signature in the check differed from PBC's specimen signature. Failing to get back the passbook, Macaraya went back to her office and reported the matter to the Personnel Manager of L.C. Diaz, Emmanuel Alvarez.

The following day, 15 August 1991, L.C. Diaz through its Chief Executive Officer, Luis C. Diaz ("Diaz"), called up Solidbank to stop any transaction using the same passbook until L.C. Diaz could open a new account. [5] On the same day, Diaz formally wrote Solidbank to make the same request. It was also on the same day that L.C. Diaz learned of the unauthorized withdrawal the day before, 14 August 1991, of P300,000 from its savings account. The withdrawal slip for the P300,000 bore the signatures of the authorized signatories of L.C. Diaz, namely Diaz and Rustico L. Murillo. The signatories, however, denied signing the withdrawal slip. A certain Noel Tamayo received the P300,000.

In an Information [6] dated 5 September 1991, L.C. Diaz charged its messenger, Emerano Ilagan ("Ilagan") and one Roscon Verdazola with Estafa through Falsification of Commercial Document. The Regional Trial Court of Manila dismissed the criminal case after the City Prosecutor filed a Motion to Dismiss on 4 August 1992.

On 24 August 1992, L.C. Diaz through its counsel demanded from Solidbank the return of its money. Solidbank refused.

On 25 August 1992, L.C. Diaz filed a Complaint [7] for Recovery of a Sum of Money against Solidbank with the Regional Trial Court of Manila, Branch 8. After trial, the trial court rendered on 28 December 1994 a decision absolving Solidbank and dismissing the complaint.

L.C. Diaz then appealed [8] to the Court of Appeals. On 27 October 1998, the Court of Appeals issued its Decision reversing the decision of the trial court.

On 11 May 1999, the Court of Appeals issued its Resolution denying the motion for reconsideration of Solidbank. The appellate court, however, modified its decision by deleting the award of exemplary damages and attorney's fees.

The Ruling of the Trial Court

In absolving Solidbank, the trial court applied the rules on savings account written on the passbook. The rules state that "possession of this book shall raise the presumption of ownership and any payment or payments made by the bank upon the production of the said book and entry therein of the withdrawal shall have the same effect as if made to the depositor personally." [9]

At the time of the withdrawal, a certain Noel Tamayo was not only in possession of the passbook, he also presented a withdrawal slip with the signatures of the authorized signatories of L.C. Diaz. The specimen signatures of these persons were in the signature cards. The teller stamped the withdrawal slip with the words "Saving Teller No. 5." The teller then passed on the withdrawal slip to Genere Manuel ("Manuel") for authentication. Manuel verified the signatures on the withdrawal slip. The withdrawal slip was then given to another officer who compared the signatures on the withdrawal slip with the specimen on the signature cards. The trial court concluded that Solidbank acted with care and observed the rules on savings account when it allowed the withdrawal of P300,000 from the savings account of L.C. Diaz.

The trial court pointed out that the burden of proof now shifted to L.C. Diaz to prove that the signatures on the withdrawal slip were forged. The trial court admonished L.C. Diaz for not offering in evidence the National Bureau of Investigation ("NBI") report on the authenticity of the signatures on the withdrawal slip for P300,000. The trial court believed that L.C. Diaz did not offer this evidence because it is derogatory to its action.

Another provision of the rules on savings account states that the depositor must keep the passbook "under lock and key." [10] When another person presents the passbook for withdrawal prior to Solidbank's receipt of the notice of loss of the passbook, that person is considered as the owner of the passbook. The trial court ruled that the passbook presented during the questioned transaction was "now out of the lock and key and presumptively ready for a business transaction." [11]

Solidbank did not have any participation in the custody and care of the passbook. The trial court believed that Solidbank's act of allowing the withdrawal of P300,000 was not the direct and proximate cause of the loss. The trial court held that L.C. Diaz's negligence caused the unauthorized withdrawal. Three facts establish L.C. Diaz's negligence: (1) the possession of the passbook by a person other than the depositor L.C. Diaz; (2) the presentation of a signed withdrawal receipt by an unauthorized person; and (3) the possession by an unauthorized person of a PBC check "long closed" by L.C. Diaz, which check was deposited on the day of the fraudulent withdrawal.

The trial court debunked L.C. Diaz's contention that Solidbank did not follow the precautionary procedures observed by the two parties whenever L.C. Diaz withdrew significant amounts from its account. L.C. Diaz claimed that a letter must accompany withdrawals of more than P20,000. The letter must request Solidbank to allow the withdrawal and convert the amount to a manager's check. The bearer must also have a letter authorizing him to withdraw the same amount. Another person driving a car must accompany the bearer so that he would not walk from Solidbank to the office in making the withdrawal. The trial court pointed out that L.C. Diaz disregarded these precautions in its past withdrawal. On 16 July 1991, L.C. Diaz withdrew P82,554 without any separate letter of authorization or any communication with Solidbank that the money be converted into a manager's check.

The trial court further justified the dismissal of the complaint by holding that the case was a last ditch effort of L.C. Diaz to recover P300,000 after the dismissal of the criminal case against Ilagan.

The dispositive portion of the decision of the trial court reads:

IN VIEW OF THE FOREGOING, judgment is hereby rendered DISMISSING the complaint.

The Court further renders judgment in favor of defendant bank pursuant to its counterclaim the amount of Thirty Thousand Pesos (P30,000.00) as attorney's fees.

With costs against plaintiff.

SO ORDERED. [12]

The Ruling of the Court of Appeals

The Court of Appeals ruled that Solidbank's negligence was the proximate cause of the unauthorized withdrawal of P300,000 from the savings account of L.C. Diaz. The appellate court reached this conclusion after applying the provision of the Civil Code on quasi-delict, to wit:

Article 2176. Whoever by act or omission causes damage to another, there being fault or negligence, is obliged to pay for the damage done. Such fault or negligence, if there is no pre-existing contractual relation between the parties, is called a quasi-delict and is governed by the provisions of this chapter.

The appellate court held that the three elements of a quasi-delict are present in this case, namely: (a) damages suffered by the plaintiff; (b) fault or negligence of the defendant, or some other person for whose acts he must respond; and (c) the connection of cause and effect between the fault or negligence of the defendant and the damage incurred by the plaintiff.

The Court of Appeals pointed out that the teller of Solidbank who received the withdrawal slip for P300,000 allowed the withdrawal without making the necessary inquiry. The appellate court stated that the teller, who was not presented by Solidbank during trial, should have called up the depositor because the money to be withdrawn was a significant amount. Had the teller called up L.C. Diaz, Solidbank would have known that the withdrawal was unauthorized. The teller did not even verify the identity of the impostor who made the withdrawal. Thus, the appellate court found Solidbank liable for its negligence in the selection and supervision of its employees.

The appellate court ruled that while L.C. Diaz was also negligent in entrusting its deposits to its messenger and its messenger in leaving the passbook with the teller, Solidbank could not escape liability because of the doctrine of "last clear chance." Solidbank could have averted the injury suffered by L.C. Diaz had it called up L.C. Diaz to verify the withdrawal.

The appellate court ruled that the degree of diligence required from Solidbank is more than that of a good father of a family. The business and functions of banks are affected with public interest. Banks are obligated to treat the accounts of their depositors with meticulous care, always having in mind the fiduciary nature of their relationship with their clients. The Court of Appeals found Solidbank remiss in its duty, violating its fiduciary relationship with L.C. Diaz.

The dispositive portion of the decision of the Court of Appeals reads:

WHEREFORE, premises considered, the decision appealed from is hereby REVERSED and a new one entered.

- Ordering defendant-appellee Consolidated Bank and Trust Corporation to pay plaintiff-appellant the sum of Three Hundred Thousand Pesos (P300,000.00), with interest thereon at the rate of 12% per annum from the date of filing of the complaint until paid, the sum of P20,000.00 as exemplary damages, and P20,000.00 as attorney's fees and expenses of litigation as well as the cost of suit; and

- Ordering the dismissal of defendant-appellee's counterclaim in the amount of P30,000.00 as attorney's fees.

SO ORDERED.[13]

Acting on the motion for reconsideration of Solidbank, the appellate court affirmed its decision but modified the award of damages. The appellate court deleted the award of exemplary damages and attorney's fees. Invoking Article 2231[14] of the Civil Code, the appellate court ruled that exemplary damages could be granted if the defendant acted with gross negligence. Since Solidbank was guilty of simple negligence only, the award of exemplary damages was not justified. Consequently, the award of attorney's fees was also disallowed pursuant to Article 2208 of the Civil Code. The expenses of litigation and cost of suit were also not imposed on Solidbank.

The dispositive portion of the Resolution reads as follows:

WHEREFORE, foregoing considered, our decision dated October 27, 1998 is affirmed with modification by deleting the award of exemplary damages and attorney's fees, expenses of litigation and cost of suit.

SO ORDERED.[15]

Hence, this petition.

The Issues

Solidbank seeks the review of the decision and resolution of the Court of Appeals on these grounds:

- THE COURT OF APPEALS ERRED IN HOLDING THAT PETITIONER BANK SHOULD SUFFER THE LOSS BECAUSE ITS TELLER SHOULD HAVE FIRST CALLED PRIVATE RESPONDENT BY TELEPHONE BEFORE IT ALLOWED THE WITHDRAWAL OF P300,000.00 TO RESPONDENT'S MESSENGER EMERANO ILAGAN, SINCE THERE IS NO AGREEMENT BETWEEN THE PARTIES IN THE OPERATION OF THE SAVINGS ACCOUNT, NOR IS THERE ANY BANKING LAW, WHICH MANDATES THAT A BANK TELLER SHOULD FIRST CALL UP THE DEPOSITOR BEFORE ALLOWING A WITHDRAWAL OF A BIG AMOUNT IN A SAVINGS ACCOUNT.
- THE COURT OF APPEALS ERRED IN APPLYING THE DOCTRINE OF LAST CLEAR CHANCE AND IN HOLDING THAT PETITIONER BANK'S TELLER HAD THE LAST OPPORTUNITY TO WITHHOLD THE WITHDRAWAL WHEN IT IS UNDISPUTED THAT THE TWO SIGNATURES OF RESPONDENT ON THE WITHDRAWAL SLIP ARE GENUINE AND PRIVATE RESPONDENT'S PASSBOOK WAS DULY PRESENTED, AND CONTRARIWISE RESPONDENT WAS NEGLIGENT IN THE SELECTION AND SUPERVISION OF ITS MESSENGER EMERANO ILAGAN, AND IN THE SAFEKEEPING OF ITS CHECKS AND OTHER FINANCIAL DOCUMENTS.
- THE COURT OF APPEALS ERRED IN NOT FINDING THAT THE INSTANT CASE IS A LAST DITCH EFFORT OF PRIVATE RESPONDENT TO RECOVER ITS P300,000.00 AFTER FAILING IN ITS EFFORTS TO RECOVER THE SAME FROM ITS EMPLOYEE EMERANO ILAGAN.
- THE COURT OF APPEALS ERRED IN NOT MITIGATING THE DAMAGES AWARDED AGAINST PETITIONER UNDER ARTICLE 2197 OF THE CIVIL CODE, NOTWITHSTANDING ITS FINDING THAT PETITIONER BANK'S NEGLIGENCE WAS ONLY CONTRIBUTORY.[16]

The Ruling of the Court

The petition is partly meritorious.

Solidbank's Fiduciary Duty under the Law

The rulings of the trial court and the Court of Appeals conflict on the application of the law. The trial court pinned the liability on L.C. Diaz based on the provisions of the rules on savings account, a recognition of the contractual relationship between Solidbank and L.C. Diaz, the latter being a depositor of the former. On the other hand, the Court of Appeals applied the law on quasi-delict to determine who between the two parties was ultimately negligent. The law on quasi-delict or culpa aquiliana is generally applicable when there is no pre-existing contractual relationship between the parties.

We hold that Solidbank is liable for breach of contract due to negligence, or culpa contractual.

The contract between the bank and its depositor is governed by the provisions of the Civil Code on simple loan.[17] Article 1980 of the Civil Code expressly provides that "x x x savings x x x deposits of money in banks and similar institutions shall be governed by the provisions concerning simple loan." There is a debtor-creditor relationship between the bank and its depositor. The bank is the debtor and the depositor is the creditor. The depositor lends the bank money and the bank agrees to pay the depositor on demand. The savings deposit agreement between the bank and the depositor is the contract that determines the rights and obligations of the parties.

The law imposes on banks high standards in view of the fiduciary nature of banking. Section 2 of Republic Act No. 8791 ("RA 8791"),[18] which took effect on 13 June 2000, declares that the State recognizes the "fiduciary

nature of banking that requires high standards of integrity and performance." [19] This new provision in the general banking law, introduced in 2000, is a statutory affirmation of Supreme Court decisions, starting with the 1990 case of *Simex International v. Court of Appeals*, [20] holding that "the bank is under obligation to treat the accounts of its depositors with meticulous care, always having in mind the fiduciary nature of their relationship." [21]

This fiduciary relationship means that the bank's obligation to observe "high standards of integrity and performance" is deemed written into every deposit agreement between a bank and its depositor. The fiduciary nature of banking requires banks to assume a degree of diligence higher than that of a good father of a family. Article 1172 of the Civil Code states that the degree of diligence required of an obligor is that prescribed by law or contract, and absent such stipulation then the diligence of a good father of a family. [22] Section 2 of RA 8791 prescribes the statutory diligence required from banks - that banks must observe "high standards of integrity and performance" in servicing their depositors. Although RA 8791 took effect almost nine years after the unauthorized withdrawal of the P300,000 from L.C. Diaz's savings account, jurisprudence [23] at the time of the withdrawal already imposed on banks the same high standard of diligence required under RA No. 8791.

However, the fiduciary nature of a bank-depositor relationship does not convert the contract between the bank and its depositors from a simple loan to a trust agreement, whether express or implied. Failure by the bank to pay the depositor is failure to pay a simple loan, and not a breach of trust. [24] The law simply imposes on the bank a higher standard of integrity and performance in complying with its obligations under the contract of simple loan, beyond those required of non-bank debtors under a similar contract of simple loan.

The fiduciary nature of banking does not convert a simple loan into a trust agreement because banks do not accept deposits to enrich depositors but to earn money for themselves. The law allows banks to offer the lowest possible interest rate to depositors while charging the highest possible interest rate on their own borrowers. The interest spread or differential belongs to the bank and not to the depositors who are not *cestui que trust* of banks. If depositors are *cestui que trust* of banks, then the interest spread or income belongs to the depositors, a situation that Congress certainly did not intend in enacting Section 2 of RA 8791.

Solidbank's Breach of its Contractual Obligation

Article 1172 of the Civil Code provides that "responsibility arising from negligence in the performance of every kind of obligation is demandable." For breach of the savings deposit agreement due to negligence, or culpa contractual, the bank is liable to its depositor.

Calapre left the passbook with Solidbank because the "transaction took time" and he had to go to Allied Bank for another transaction. The passbook was still in the hands of the employees of Solidbank for the processing of the deposit when Calapre left Solidbank. Solidbank's rules on savings account require that the "deposit book should be carefully guarded by the depositor and kept under lock and key, if possible." When the passbook is in the possession of Solidbank's tellers during withdrawals, the law imposes on Solidbank and its tellers an even higher degree of diligence in safeguarding the passbook.

Likewise, Solidbank's tellers must exercise a high degree of diligence in insuring that they return the passbook only to the depositor or his authorized representative. The tellers know, or should know, that the rules on savings account provide that any person in possession of the passbook is presumptively its owner. If the tellers give the passbook to the wrong person, they would be clothing that person presumptive ownership of the passbook, facilitating unauthorized withdrawals by that person. For failing to return the passbook to Calapre, the authorized representative of L.C. Diaz, Solidbank and Teller No. 6 presumptively failed to observe such high degree of diligence in safeguarding the passbook, and in insuring its return to the party authorized to receive the same.

In culpa contractual, once the plaintiff proves a breach of contract, there is a presumption that the defendant was at fault or negligent. The burden is on the defendant to prove that he was not at fault or negligent. In contrast, in culpa aquiliana the plaintiff has the burden of proving that the defendant was negligent. In the present case, L.C. Diaz has established that Solidbank breached its contractual obligation to return the passbook only to the authorized representative of L.C. Diaz. There is thus a presumption that Solidbank was at fault and its teller was negligent in not returning the passbook to Calapre. The burden was on Solidbank to prove that there was no negligence on its part or its employees.

Solidbank failed to discharge its burden. Solidbank did not present to the trial court Teller No. 6, the teller with whom Calapre left the passbook and who was supposed to return the passbook to him. The record does not indicate that Teller No. 6 verified the identity of the person who retrieved the passbook. Solidbank also failed to adduce in evidence its standard procedure in verifying the identity of the person retrieving the passbook, if there is such a procedure, and that Teller No. 6 implemented this procedure in the present case.

Solidbank is bound by the negligence of its employees under the principle of respondeat superior or command responsibility. The defense of exercising the required diligence in the selection and supervision of employees is not a complete defense in culpa contractual, unlike in culpa aquiliana.[25]

The bank must not only exercise "high standards of integrity and performance," it must also insure that its employees do likewise because this is the only way to insure that the bank will comply with its fiduciary duty. Solidbank failed to present the teller who had the duty to return to Calapre the passbook, and thus failed to prove that this teller exercised the "high standards of integrity and performance" required of Solidbank's employees.

Proximate Cause of the Unauthorized Withdrawal

Another point of disagreement between the trial and appellate courts is the proximate cause of the unauthorized withdrawal. The trial court believed that L.C. Diaz's negligence in not securing its passbook under lock and key was the proximate cause that allowed the impostor to withdraw the P300,000. For the appellate court, the proximate cause was the teller's negligence in processing the withdrawal without first verifying with L.C. Diaz. We do not agree with either court.

Proximate cause is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury and without which the result would not have occurred.[26] Proximate cause is determined by the facts of each case upon mixed considerations of logic, common sense, policy and precedent.[27]

L.C. Diaz was not at fault that the passbook landed in the hands of the impostor. Solidbank was in possession of the passbook while it was processing the deposit. After completion of the transaction, Solidbank had the contractual obligation to return the passbook only to Calapre, the authorized representative of L.C. Diaz. Solidbank failed to fulfill its contractual obligation because it gave the passbook to another person.

Solidbank's failure to return the passbook to Calapre made possible the withdrawal of the P300,000 by the impostor who took possession of the passbook. Under Solidbank's rules on savings account, mere possession of the passbook raises the presumption of ownership. It was the negligent act of Solidbank's Teller No. 6 that gave the impostor presumptive ownership of the passbook. Had the passbook not fallen into the hands of the impostor, the loss of P300,000 would not have happened. Thus, the proximate cause of the unauthorized withdrawal was Solidbank's negligence in not returning the passbook to Calapre.

We do not subscribe to the appellate court's theory that the proximate cause of the unauthorized withdrawal was the teller's failure to call up L.C. Diaz to verify the withdrawal. Solidbank did not have the duty to call up L.C.

Diaz to confirm the withdrawal. There is no arrangement between Solidbank and L.C. Diaz to this effect. Even the agreement between Solidbank and L.C. Diaz pertaining to measures that the parties must observe whenever withdrawals of large amounts are made does not direct Solidbank to call up L.C. Diaz.

There is no law mandating banks to call up their clients whenever their representatives withdraw significant amounts from their accounts. L.C. Diaz therefore had the burden to prove that it is the usual practice of Solidbank to call up its clients to verify a withdrawal of a large amount of money. L.C. Diaz failed to do so.

Teller No. 5 who processed the withdrawal could not have been put on guard to verify the withdrawal. Prior to the withdrawal of P300,000, the impostor deposited with Teller No. 6 the P90,000 PBC check, which later bounced. The impostor apparently deposited a large amount of money to deflect suspicion from the withdrawal of a much bigger amount of money. The appellate court thus erred when it imposed on Solidbank the duty to call up L.C. Diaz to confirm the withdrawal when no law requires this from banks and when the teller had no reason to be suspicious of the transaction.

Solidbank continues to foist the defense that Ilagan made the withdrawal. Solidbank claims that since Ilagan was also a messenger of L.C. Diaz, he was familiar with its teller so that there was no more need for the teller to verify the withdrawal. Solidbank relies on the following statements in the Booking and Information Sheet of Emerano Ilagan:

xxx Ilagan also had with him (before the withdrawal) a forged check of PBC and indicated the amount of P90,000 which he deposited in favor of L.C. Diaz and Company. After successfully withdrawing this large sum of money, accused Ilagan gave alias Rey (Noel Tamayo) his share of the loot. Ilagan then hired a taxicab in the amount of P1,000 to transport him (Ilagan) to his home province at Bauan, Batangas. Ilagan extravagantly and lavishly spent his money but a big part of his loot was wasted in cockfight and horse racing. Ilagan was apprehended and meekly admitted his guilt.[28] (Emphasis supplied.)

L.C. Diaz refutes Solidbank's contention by pointing out that the person who withdrew the P300,000 was a certain Noel Tamayo. Both the trial and appellate courts stated that this Noel Tamayo presented the passbook with the withdrawal slip.

We uphold the finding of the trial and appellate courts that a certain Noel Tamayo withdrew the P300,000. The Court is not a trier of facts. We find no justifiable reason to reverse the factual finding of the trial court and the Court of Appeals. The tellers who processed the deposit of the P90,000 check and the withdrawal of the P300,000 were not presented during trial to substantiate Solidbank's claim that Ilagan deposited the check and made the questioned withdrawal. Moreover, the entry quoted by Solidbank does not categorically state that Ilagan presented the withdrawal slip and the passbook.

Doctrine of Last Clear Chance

The doctrine of last clear chance states that where both parties are negligent but the negligent act of one is appreciably later than that of the other, or where it is impossible to determine whose fault or negligence caused the loss, the one who had the last clear opportunity to avoid the loss but failed to do so, is chargeable with the loss.[29] Stated differently, the antecedent negligence of the plaintiff does not preclude him from recovering damages caused by the supervening negligence of the defendant, who had the last fair chance to prevent the impending harm by the exercise of due diligence.[30]

We do not apply the doctrine of last clear chance to the present case. Solidbank is liable for breach of contract due to negligence in the performance of its contractual obligation to L.C. Diaz. This is a case of culpa contractual, where neither the contributory negligence of the plaintiff nor his last clear chance to avoid the loss, would

exonerate the defendant from liability.[31] Such contributory negligence or last clear chance by the plaintiff merely serves to reduce the recovery of damages by the plaintiff but does not exculpate the defendant from his breach of contract.[32]

Mitigated Damages

Under Article 1172, "liability (for culpa contractual) may be regulated by the courts, according to the circumstances." This means that if the defendant exercised the proper diligence in the selection and supervision of its employee, or if the plaintiff was guilty of contributory negligence, then the courts may reduce the award of damages. In this case, L.C. Diaz was guilty of contributory negligence in allowing a withdrawal slip signed by its authorized signatories to fall into the hands of an impostor. Thus, the liability of Solidbank should be reduced.

In *Philippine Bank of Commerce v. Court of Appeals*,[33] where the Court held the depositor guilty of contributory negligence, we allocated the damages between the depositor and the bank on a 40-60 ratio. Applying the same ruling to this case, we hold that L.C. Diaz must shoulder 40% of the actual damages awarded by the appellate court. Solidbank must pay the other 60% of the actual damages.

WHEREFORE, the decision of the Court of Appeals is AFFIRMED with MODIFICATION. Petitioner Solidbank Corporation shall pay private respondent L.C. Diaz and Company, CPA's only 60% of the actual damages awarded by the Court of Appeals. The remaining 40% of the actual damages shall be borne by private respondent L.C. Diaz and Company, CPA's. Proportionate costs. SO ORDERED.

Davide, Jr., C.J., (Chairman), Vitug, and Ynares-Santiago, JJ., concur.
Azcuna, J., on official leave.

[1] Penned by Associate Justice Eugenio S. Labitoria with Associate Justices Jesus M. Elbinias, Marina L. Buzon, Godardo A. Jacinto and Candido V. Rivera, concurring, Fourth Division (Special Division of Five Justices).

[2] Penned by Judge Felixberto T. Olalia, Jr.

[3] Rollo, p. 119.

[4] Ibid., p. 229. The account must have been long dormant.

[5] Records, p. 9.

[6] Ibid., p. 34.

[7] Docketed as Civil Case No. 92-62384.

[8] Docketed as CA-G.R. CV No. 49243.

[9] Rollo, p. 231.

[10] Ibid., p. 233.

[11] Ibid., p. 60.

[12] Ibid., p. 66.

[13] Rollo, pp. 49-50.

[14] Art. 2231. In quasi-delicts, exemplary damages may be granted if the defendant acted with gross negligence.

[15] Rollo, p. 43.

[16] Ibid., pp. 33-34.

[17] Article 1953 of the Civil Code provides: "A person who receives a loan of money or any other fungible thing acquires the ownership thereof, and is bound to pay the creditor an equal amount of the same kind and quality."

[18] The General Banking Law of 2000.

[19] In the United States, the prevailing rule, as enunciated by the U.S. Supreme Court in *Bank of Marin v. England*, 385 U.S. 99 (1966), is that the bank-depositor relationship is governed by contract, and the bankruptcy of the depositor does not alter the relationship unless the bank receives notice of the bankruptcy. However, the Supreme Court of some states, like Arizona, have held that banks have more than a contractual duty to depositors, and that a special relationship may create a fiduciary obligation on banks outside of their contract with depositors. See *Stewart v. Phoenix National Bank*, 49 Ariz. 34, 64 P. 2d 101 (1937); *Klein v. First Edina National Bank*, 293 Minn. 418, 196 N.W. 2d 619 (1972).

[20] G.R. No. 88013, 19 March 1990, 183 SCRA 360.

[21] The ruling in *Simex International* was followed in the following cases: *Bank of the Philippine Islands v. Intermediate Appellate Court*, G.R. No. 69162, 21 February 1992, 206 SCRA 408; *Citytrust Banking Corporation v. Intermediate Appellate Court*, G.R. No. 84281, 27 May 1994, 232 SCRA 559; *Tan v. Court of Appeals*, G.R. No. 108555, 20 December 1994, 239 SCRA 310; *Metropolitan Bank & Trust Co. v. Court of Appeals*, G.R. No. 112576, 26 October 1994, 237 SCRA 761; *Philippine Bank of Commerce v. Court of Appeals*, 336 Phil. 667 (1997); *Firestone v. Court of Appeals*, G.R. No. 113236, 5 March 2001, 353 SCRA 601.

[22] The second paragraph of Article 1172 of the Civil Code provides: "If the law or contract does not state the diligence which is to be observed in the performance, that which is expected of a good father of a family shall be required."

[23] See notes 20 and 21.

[24] *Serrano v. Central Bank*, G.R. L-30511, 14 February 1980, 96 SCRA 96.

[25] *Cangco v. Manila Railroad Co.*, 38 Phil. 769 (1918); *De Guia v. Meralco*, 40 Phil. 706 (1920).

[26] *Philippine Bank of Commerce v. Court of Appeals*, supra note 21, citing *Vda. de Bataclan v. Medina*, 102 Phil. 181 (1957).

[27] Ibid.

[28] *Rollo*, p. 35.

[29] *Philippine Bank of Commerce v. Court of Appeals*, supra note 21.

[30] Ibid.

[31] See note 23.

[32] *Del Prado v. Manila Electric Co.*, 52 Phil. 900 (1928-1929).

[33] See note 21.

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