MONDRAGON LEISURE AND RESORTS CORPORATION, PETITIONER, VS.COURT OF APPEALS, ASIAN BANK CORPORATION, FAR EAST BANK AND TRUST COMPANY, AND UNITED COCONUT PLANTERS BANK, RESPONDENTS.

G.R. NO. 154188. June 15, 2005

Ponente: QUISUMBING, J.

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QUISUMBING, J.:

In its Decision[1] dated March 12, 2002, the Court of Appeals in CA-G.R. SP No. 61047 dismissed the petition for certiorari filed by Mondragon Leisure and Resorts Corporation against the Order[2] dated March 9, 2000, of the Regional Trial Court of Angeles City, Branch 61, in Civil Case No. 9527. Likewise, in its Resolution dated July 3, 2002, the CA denied the motion for reconsideration.

The facts of the case are undisputed.

On February 28, 1994, Mondragon International Philippines, Inc. (MIPI), Mondragon Securities Corporation (MSC) and herein petitioner entered into a lease agreement with the Clark Development Corporation (CDC) for the development of what is now known as the Mimosa Leisure Estate.

To help finance the project, petitioner, on June 30, 1997, entered into an Omnibus Loan and Security Agreement[3] (hereafter Omnibus Agreement) with respondent banks for a syndicated term loan in the aggregate principal amount of US$20M. Under the agreement, as amended on January 19, 1999,[4] the proceeds of the loan were to be released through advances evidenced by promissory notes to be executed by petitioner in favor of each lender-bank, and to be paid within a six-year period from the date of initial advance inclusive of a one year and two quarters grace period.

To secure the repayment of the loan, petitioner pledged in favor of respondents US$20M worth of MIPI shares of stocks; assigned, transferred and delivered all rights, title to and interest in the pledged shares; and assigned by way of security its leasehold rights over the project and all the rights, title, interests and benefits in, to and under any and all agreements in connection with the project.

On July 3, 1997, petitioner fully availed of and received the full amount of the syndicated loan agreement. Petitioner, which had regularly paid the monthly interests due on the promissory notes until October 1998, thereafter failed to make payments. Consequently, on January 6 and February 5, 1999, written notices of default, acceleration of payment and demand letters were sent by the lenders to the petitioner. Then on August 27, 1999, respondents filed a complaint, docketed as Civil Case No. 9527, for the foreclosure of leasehold rights against petitioner.

Petitioner moved for the dismissal of the complaint on the following grounds: (1) a condition precedent for the filing of the complaint has not been complied with and/or the instant complaint failed to state a cause of action, or otherwise the filing was premature; (2) the certification of non-forum shopping appended to the complaint was

fatally defective since one of the plaintiffs, UCPB, deliberately failed to mention that it had previously filed another complaint; and (3) plaintiffs had engaged in forum shopping in filing the instant complaint.

The trial court denied the motion and ruled as follows:

> . . .
>
> After a careful study of the arguments of the parties, this court finds that the motion to dismiss is without merit. As correctly pointed out by the plaintiffs under par. 6.01, the borrower defaults when interests due at stated maturity are not paid and the lenders are authorized to accelerate any amount payable under the loan agreements. One of the consequences of such default is the foreclosure of collaterals. This is the action taken by the herein plaintiffs-lenders.
>
> This court also finds the alleged force majeure baseless. The same are not those provided for under Sec. 1, Article 41 of the loan agreement.
>
> As to the allegation of forum shopping, the herein parties Asian Bank Corporation and Far East Bank and Trust Company are not parties to this case in 9510 (sic). The subject matter of Civil Case No. 9527 is not the same with the subject matter in Civil Case No. 9510.
>
> Wherefore, premises considered, the motion to dismiss is denied. The defendant is given 15 days from receipt hereof within which to file its answer and/or responsive pleading.
>
> SO ORDERED.[5]

Petitioner moved for the reconsideration of the order and argued that the complaint is premature, since it had not been validly declared in default.[6] The trial court denied the motion for reconsideration. Seasonably, petitioner filed a special civil action for certiorari with the Court of Appeals.

Before the appellate court, petitioner reiterated its arguments in its motion to dismiss before the trial court, including the failure of the respondents to attach the board resolutions authorizing them to file the complaint.[7]

The Court of Appeals dismissed the petition and denied the subsequent motion for reconsideration. Hence, this appeal by certiorari[8] imputing the following errors:

> I
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> THE RESPONDENT-APPELLEE COURT OF APPEALS COMMITTED A SERIOUS ERROR OF LAW AND ACTED WITH GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION IN RULING THAT THE COMPLAINT IN CIVIL CASE NO. 9527 COMPLIED WITH THE MANDATORY REQUIREMENTS OF CERTIFICATION OF NON-FORUM SHOPPING.
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> II
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> THE RESPONDENT-APPELLEE COURT OF APPEALS COMMITTED A SERIOUS ERROR OF LAW AND ACTED WITH GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION IN NOT RULING THAT A CONDITION PRECEDENT FOR THE FILING OF THE COMPLAINT IN CIVIL CASE NO. 9527 HAS NOT BEEN COMPLIED WITH, OR THAT IT IS OTHERWISE PREMATURE, AND/OR THAT IT FAILS TO STATE A CAUSE OF ACTION AGAINST PETITIONER-APPELLANT.
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> III
>
> THE RESPONDENT-APPELLEE COURT OF APPEALS COMMITTED A SERIOUS ERROR OF LAW AND ACTED WITH GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF

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JURISDICTION IN NOT RULING THAT RESPONDENT-APPELLEE BANKS, IN FILING THE COMPLAINT IN CIVIL CASE NO. 9527, DELIBERATELY ENGAGED IN FORUM SHOPPING.[9]

In brief, three issues are presented for resolution, namely, (1) Was the certificate of non-forum shopping defective? (2) Did respondents engage in forum shopping? and (3) Do respondents have a cause of action against the petitioner?

On the first issue, petitioner asserts that the verification and certificate of forum shopping were defective because there was no proof as to the authority of the signatories to file the complaint. Petitioner avers that UCPB Resolution 48-87, which was only presented in the Court of Appeals, merely authorized the signatory to "appear, act for, or otherwise represent the bank in all judicial, quasi-judicial or administrative hearings or incidents, including pre-trial conference, and in connection therewith, to do any and all of the following acts and deeds..." and clearly pertains to a pending proceeding.

Respondents, on the other hand, contend that the lack of authority of the persons who verified and certified the complaint was neither raised in the motion to dismiss nor in the motion for reconsideration of the petitioner. They aver that the verification and certification of non-forum shopping contained a statement by the persons who signed it that they had been so authorized by the board of directors of their respective corporations.

Considering the submissions of the parties, we are constrained to agree with the respondents' contention. The trial court did not err in denying the motion to dismiss. The issue concerning the signatories' authorization was never raised before it. Likewise, the appellate court did not err in refusing to take cognizance of the issue, since the parties did not raise it beforehand. Issues not raised in the trial court cannot be raised for the first time on appeal.[10]

On the second issue, petitioner claims that respondent UCPB engaged in forum shopping since it earlier instituted an action for foreclosure of mortgage and/or collection, docketed as Civil Case No. 9510.[11] This claim, in our view, is untenable. A comparison of the two complaints would show its utter lack of merit.

Civil Case No. 9510 pertains to an Omnibus Credit and Security Agreement executed by and between the petitioner and respondent UCPB on November 23, 1995. This is separate and distinct from the Omnibus Agreement involved in Civil Case No. 9527. Moreover, respondents Asian Bank and Far East Bank are not among the parties to Civil Case No. 9510.

As pointed out by the Court of Appeals, forum shopping exists when both actions involve the same transactions, with the same essential facts and circumstances; and where identical causes of actions, subject matter and issues are raised. The test to determine the existence of forum shopping is whether the elements of litis pendentia are present, or whether a final judgment in one case will amount to res judicata in another.[12] The requisites in order that an action may be dismissed on the ground of litis pendentia are (a) the identity of parties, or at least such as representing the same interest in both actions; (b) the identity of rights asserted and relief prayed for, the relief being founded on the same facts; and (c) the identity of the two cases such that judgment in one, regardless of which party is successful, would amount to res judicata in the other.[13] Such requisites are not present in this controversy.

Apropos the third issue, petitioner contends the subject obligation of the instant case is not yet due and demandable because the Omnibus Agreement allows a full six-year term of payment. Even if it failed to pay some installments, petitioner insists it is not in default because respondents merely sent collection and demand letters, but failed to give the written notice of default required under their agreement. Moreover, petitioner avers that the provisions on default in the Omnibus Agreement have been rendered inapplicable and unenforceable by fortuitous events, namely the Asian economic crisis and the closure of the Mimosa Regency Casino, which was petitioner's

primary source of revenues.

Respondents counter that the Omnibus Agreement defines, as an event of default, the failure of petitioner to pay when due at stated maturity, by acceleration or otherwise, any amount payable under the loan documents. Since petitioner is also required to pay interest, respondents posit that non-payment thereof constituted a clear and unmistakable case of default. Respondents add that they had properly advised the petitioner that it had been declared in default, referring to the January 6 and February 5, 1999 letters as their compliance with the notice requirement.

On this issue, we are unable to agree with the petitioner.

Section 2.06 (a) of Part B of the Omnibus Agreement provides that the borrower shall pay interest on the advances outstanding from time to time on each interest payment date, while Section 6 of Part A reads

> 6.01 Events of Default
>
> Each of the following events shall constitute an Event of Default under this Omnibus Agreement:
>
> (a) Payment Default – The BORROWER defaults in the payment when due at stated maturity, by acceleration or otherwise, of any amount payable under the Loan Documents.[14]

. . .

Clearly, under the foregoing provisions of the Agreement, petitioner may be validly declared in default for failure to pay the interest. As a consequence of default, the unpaid amount shall earn default interest,[15] and the respondent-banks have four alternative remedies without prejudice to the application of the provisions on collaterals and any other steps or action which may be adopted by the majority lender.[16]

The four remedies are alternative, with the right of choice given to the lenders, in this case the respondents. Under Article 1201 of the Civil Code, the choice shall produce no effect except from the time it has been communicated. This is the reason why a written notice is required under Section 6.02 of the Omnibus Agreement.

In the present case, we find that written notices were sent to the petitioner by the respondents. The notices clearly indicate respondents' choice of remedy: to accelerate all payments payable under the loan agreement. On January 6, 1999, respondents notified petitioner that it was in default, and demanded payment of the stated amount within five days from receipt of the letter, otherwise all outstanding availments of the US$20M term loan together with interests and other sum payable shall be declared due and demandable.[17] The letter clearly indicated the choice of remedy by the respondents, pursuant to the Omnibus Agreement.

Even though subsequent demand is waived by the petitioner in Section 6.02 of Part B of the Omnibus Agreement, on February 5, 1999, the respondents nevertheless actually made their demand in writing for the payment of the principal plus interest and penalty charges due on or before February 28, 1999, with express notice that they would take all legal remedies available to protect the interests of their clients.[18] Clearly, respondents have more than complied with the requirement concerning notice to the petitioner.

It should be noted that the agreement also provides that the choice of remedy is without prejudice to the action on the collaterals. Thus, respondents could properly file an action for foreclosure of the leasehold rights to obtain payment for the amount demanded.

Petitioner's claim, that the respondents could not be held in default because of a fortuitous event, is untenable. Said event, the Asian financial crisis of 1997, is not among the fortuitous events contemplated under Article 1174[19] of the Civil Code. To exempt the obligor from liability for a breach of an obligation by reason of a

fortuitous event, the following requisites must concur: (a) the cause of the breach of the obligation must be independent of the will of the debtor; (b) the event must be either unforeseeable or unavoidable; (c) the event must be such as to render it impossible for the debtor to fulfill his obligation in a normal manner; and (d) the debtor must be free from any participation in, or aggravation of the injury to the creditor.[20]

As pointed out by the respondents, the loan agreement was entered into on June 30, 1997, or when the Asian economic crisis had already started. Petitioner, as a long established corporation, should have been well aware of the economic environment at that time, yet it still took the risk to expand operations. Likewise, the closure of the Mimosa Regency Casino was not an unforeseeable or unavoidable event, in the context of the contract of lease between petitioner and CDC. Every business venture involves risks. Risks are not unforeseeable; they are inherent in business.

Worthy of note, risk is an exception to the general rule on fortuitous events. Under the law, these exceptions are: (1) when the law expressly so specifies; (2) when it is otherwise declared by the parties; and (3) when the nature of the obligation requires the assumption of risks.[21] We find that in the Omnibus Agreement, the parties expressly agreed that any enactment, official action, act of war, act of nature or other force majeure or other similar circumstances shall in no way affect the obligation of the borrowers to make payments.[22]

In sum, the appellate court did not err in dismissing petitioner's action for certiorari and in denying the motion for reconsideration. It committed no reversible error, much less any grave abuse of discretion amounting to lack or excess of jurisdiction, contrary to petitioner's contentions.

WHEREFORE, the appeal is DENIED for lack of merit. The Decision dated March 12, 2002 and the Resolution dated July 3, 2002 of the Court of Appeals in CA-G.R. SP No. 61047 are hereby AFFIRMED.

Costs against petitioner.

SO ORDERED.

Davide, Jr., C.J., (Chairman), Ynares-Santiago, Carpio, and Azcuna, JJ., concur.

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[1] Rollo, pp. 59-64. Penned by Associate Justice Juan Q. Enriquez, Jr., with Associate Justices Delilah Vidallon-Magtolis, and Candido V. Rivera concurring.

[2] Id. at 275-278.

[3] Id. at 104-205, 500-601.

[4] Id. at 206-213.

[5] Id. at 277-278.

[6] Id. at 288-290.

[7] Id. at 291-328.

[8] Id. at 11-58.

[9] Id. at 32-33.

[10] Lim v. Queensland Tokyo Commodities, Inc., G.R. No. 136031, 4 January 2002, 373 SCRA 31, 41.

[11] Rollo, pp. 241-250.

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[12] Tirona v. Alejo, G.R. No. 129313, 10 October 2001, 367 SCRA 17, 33.

[13] Republic v. Carmel Development, Inc., G.R. No. 142572, 20 February 2002, 377 SCRA 459, 470-471.

[14] Rollo, p. 525.

[15] Id. at 550.
(Part B) 6.03 Default Interest
Notwithstanding anything in this Omnibus Agreement to the contrary, if the BORROWER fails to make payment when due of any sum hereunder (whether at stated maturity, by acceleration or otherwise), the BORROWER shall, in addition to the interest then applicable as determined pursuant to Section 2.06(b) of Part B, pay to the LENDERS default interest on such past due and unpaid amount from due date until date of full payment (both before as well as after judgment) to be computed at the rate of two percent (2%) per month.

[16] Ibid.
(Part B) 6.02 Consequences of Default
If an event of Default shall have occurred then at any time thereafter, if any such event shall then be continuing, the Majority Lenders, upon written notice to the Borrower, may [i] declare all Commitments to be terminated whereupon the obligation of the LENDERS to make or maintain the Advances hereunder shall forthwith terminate, [ii] accelerate payment and declare the Loan, all interest accrued and unpaid thereon and all other amounts payable hereunder, and default interest hereunder, to be forthwith due and payable, whereupon the same shall become immediately due and payable, without demand, protest or further notice of any kind, all of which are hereby expressly waived by the BORROWER, [iii] foreclose on the Collaterals or take such other necessary steps conformably with the Collaterals, or [iv] immediately, without notice to the BORROWER, apply and compensate or set-off toward the partial or full liquidation of such amount or amounts, any funds, securities, or other property of the BORROWER held by the LENDERS in deposit or under any other concept without prejudice to the adoption by the Majority Lenders of any other steps or action, which, in the Majority Lender's sole discretion, is needed to protect the LENDERS' rights and interests, and without prejudice to the application of the provisions of the Collaterals, as provided in Section 3 of Part A. For purposes of this provision, the BORROWER hereby appoints each LENDER as its attorney-in-fact with full power and authority to do any and all acts required to give full force and effect to this provision. [Emphasis supplied]

[17] Id. at 614-615.

[18] Id. at 616-617.

[19] Art. 1174. Except in cases expressly specified by the law, or when it is otherwise declared by stipulation, or when the nature of the obligation requires the assumption of risk, no person shall be responsible for those events which could not be foreseen, or which, though foreseen, were inevitable.

[20] Huibonhoa v. Court of Appeals, G.R. Nos. 95897 and 102604, 14 December 1999, 320 SCRA 625, 651-652.

[21] Art. 1174, Civil Code, supra, note 19.

[22] Rollo, p. 533.
(Part A) 7.13 Force Majeure
The LENDERS shall not be responsible for any damage resulting from any enactment, official action, act of war, strike, lockout, boycott, blockade, act of nature or other force majeure or other similar occurrence beyond the control of the LENDERS. Any such circumstances shall in no way affect the obligations of the BORROWER to make payments which are or may become due under this Omnibus Agreement.

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