FINANCIAL BUILDING CORPORATION, PETITIONER, VS. RUDLIN INTERNATIONAL CORPORATION, BLOOMFIELD EDUCATIONAL FOUNDATION, INC., RODOLFO J. LAGERA, MA. ERLINDA J. LAGERA AND JOSAPHAT ...

G.R. No. 164186. October 04, 2010

Ponente: VILLARAMA, JR., J.

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VILLARAMA, JR., J.:

The present consolidated petitions for review under Rule 45 assail the Decision [1] dated December 12, 2003 of the Court of Appeals (CA) in CA-G.R. CV No. 41224 which affirmed with modification the Decision [2] dated January 12, 1993 of the Regional Trial Court (RTC) of Makati City, Branch 65 in Civil Case No. 16266.

The Facts

Sometime in October 1985, Rudlin International Corporation (Rudlin) invited proposals from several contractors to undertake the construction of a three-storey school building and other appurtenances thereto at Vista Grande, BF Resort Village, Las Piñas, Metro Manila. The contract was eventually awarded to Financial Building Corporation (FBC), with a bid of P6,933,268.00 as total project cost. On November 22, 1985, Rudlin represented by its Chairman of the Board and President Rodolfo J. Lagera, and FBC represented by its Vice-President and Treasurer Jaime B. Lo, executed a Construction Agreement [3] which, among others, provided for the total consideration and liability for delay as follows:

> SECTION FOUR
> CONTRACT PRICE
>
> The OWNER agrees to pay the CONTRACTOR, for the work stated in Section Two hereof, the total price of SIX MILLION NINE HUNDRED THIRTY THREE THOUSAND TWO HUNDRED SIXTY EIGHT PESOS (P6,933,268.00) in accordance with Section five et seq. Payment of this amount is subject to additions or deductions in accordance with the provisions of this Agreement and of the other documents to which this Agreement is made subject to. [4]
>
> x x x x
>
> SECTION TWELVE
> TIME OF ESSENCE; EXTENSION OF TIME
>
> Time is of the essence in this Agreement and any delay not due to force majeure will result in injury and damage to the OWNER in view of which it is hereby stipulated that, in the completion of the work, the CONTRACTOR shall be liable to the OWNER in the sum equivalent to 1/10 of 1% of the total contract price for every calendar day of delay (Sundays and Legal Holidays included). Any sums accruing in favor of the OWNER under this provision shall be deductible from the stipulated Contract Price or any balance thereof due to the CONTRACTOR. [5]

The contract also provided for completion date not later than April 30, 1986 unless an extension of time has been "authorized and approved by the OWNER and the ARCHITECT in writing." [6] It appears that the construction was not finished on said date as Rudlin wrote FBC to complete the project not later than May 31, 1986, except for the administration wing which Rudlin expected to be turned over to it "100% complete by June 10, 1986." [7]

On June 5, 1986, Rudlin and FBC made amendments to their Construction Agreement dated November 22, 1985 through a Letter-Agreement [8] signed by Rodolfo J. Lagera and Jaime B. Lo, as follows:

> 1. Financial Building Corporation ("FBC") shall complete and deliver the Project to Rudlin International, Inc. ("RII") on or before 10 June 1986.
>
> 2. Payment of the balance due on the contract price shall be made after the parties have reconciled their accounts with regard to the upgrading and downgrading of the work done on the Project, which reconciliation shall be settled not later than 30 June 1986.
>
> 3. RII shall pay FBC the unpaid balance as determined under paragraph 2 hereof, under the following terms and conditions:
>
> (a) RII shall pay FBC an additional payment of Two Hundred Fifty Thousand Pesos (P250,000.00) upon signing hereof, receipt of which is hereby acknowledged. This is in addition to the Two Hundred Fifty Thousand Pesos (P250,000.00) paid on 29 May 1986.
>
> (b) The rest of the unpaid balance shall be payable within a period of ninety (90) days from the date the said balance is determined in accordance with paragraph 2 hereof, adequately secured by post dated checks and the same to earn interest at the prevailing bank rates. There shall be a moratorium of thirty (30) days, the payments to be made in accordance with the following schedule:
>
> On or before 15 July 1986 - 25%
> On or before 31 July 1986 - 25%
> On or before 15 August 1986 - 25%
> On or before 31 August 1986 - 25%
> TOTAL PAYMENTS DUE - 100%

This Letter-Agreement amends the corresponding provisions of the Construction Agreement dated 22 November 1985, except that Section 12 thereof is hereby waived. [9] (Emphasis supplied.)

On June 15, 1986, the subject school building, "Bloomfield Academy," was inaugurated and utilized by Rudlin upon the start of the school year. From the exchange of correspondence between FBC and Rudlin, it can be gleaned that no reconciliation of accounts took place pursuant to the Letter-Agreement dated June 5, 1986. FBC demanded payment of the balance of the adjusted contract price per its computation, but it was not heeded by Rudlin.

On March 10, 1987, FBC filed in the RTC a suit for a sum of money with prayer for preliminary attachment against Rudlin, Bloomfield Educational Foundation, Inc. (Bloomfield) and their officers, directors or stockholders, namely: Rodolfo J. Lagera, Ma. Erlinda J. Lagera and Josaphat R. Bravante. FBC alleged that the total and final contract price, inclusive of additives and deductives which are covered by valid documents, is P7,324,128.44; that Rudlin paid FBC only P4,874,920.14, thus leaving a balance of P2,449,208.30; and that despite repeated demands by FBC, Rudlin refused to pay its obligations. FBC further prayed for legal interest on the amount of P2,449,208.30 from the time it became due and demandable, attorney's fees equivalent to 25% of the total amount due, moral and exemplary damages and the cost of suit. [10]

The trial court granted the prayer for preliminary attachment but before the sheriff could implement the writ

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issued by the court, Rudlin filed the proper counter bond.

In their Answer with Counterclaim, [11] defendants denied the allegations of the complaint. Rudlin averred that the Construction Agreement did not reflect the true contract price agreed upon, which is P6,006,965.00. The amount of P6,933,268.00, which is FBC's bid price, was indicated in the Construction Agreement solely for the purpose of obtaining a higher amount of loan from the Bank of Philippine Islands (BPI). The execution of said document was made with the understanding between FBC and Rudlin that the contract price stated therein would be decreased to a mutually acceptable contract price. However, due to inadvertence, the parties forgot to sign an agreement fixing the true contract price.

Rudlin also denied that the construction of the project was completed by FBC. The original completion date, April 30, 1986, was later moved to June 10, 1986. But despite the extension given by Rudlin, FBC still has not completed the project. Neither did FBC deliver to Rudlin a complete release of all liens arising out of the Construction Agreement or receipts in full in lieu thereof, as well as an affidavit that the releases and receipts include all the labor, interests and equipment for which a claim or action can be filed, as required under Section Eight of the Construction Agreement. In fact, for non-payment by FBC of one of its sub-contractors, Rudlin was sued as a co-defendant with FBC in Civil Case No. 15734 pending before the RTC of Makati, Branch 138.

Rudlin likewise claimed that many portions of the work performed by FBC are incomplete and/or faulty, defective and deficient (valued at P1,180,127.35), for which reason Architect Eduardo R. Quezon has not certified on the full performance and completion of the project. The work done by FBC was thus not accepted by Rudlin for valid reasons. Rudlin had already paid FBC the total amount of P5,564,219.58. After considering the 10% retention money and the value of additives and deductives, Rudlin had actually overpaid FBC by P415,701.34. Clearly, Rudlin does not owe FBC the amount stated in its Complaint; FBC likewise had sent a final demand letter dated March 2, 1987 to Rudlin which mentioned only the amount of P115,000.00 as Rudlin's outstanding accountability.

As to Bloomfield and the individual defendants, they contended that not being parties to the Construction Agreement, FBC has no cause of action against them. Moreover, in their dealings with FBC, they acted with justice, honesty and good faith.

Under its counterclaim, Rudlin invoked the provision in the Construction Agreement granting the Owner the right to terminate the contract and take over the construction works upon default of the Contractor who abandons or fails to complete the project, or fails to carry out the work in accordance with the provisions of the Contract Documents, and to deduct the costs from whatever payment is due or to become due to the Contractor. Rudlin asserted that despite demands it made upon FBC, the latter still failed and refused to complete and make good its obligations under the Construction Agreement and to correct faulty and defective works.

In its Reply, [12] FBC asserted that the demand letter dated March 2, 1987 pertains to another account of Rudlin. FBC asserted that its failure to deliver releases of some liens was due to Rudlin's failure to pay the amount claimed in the complaint. At any rate, by the very fact that Rudlin is actually making use of the school building constructed by FBC, it is deemed to have accepted the work.

By agreement of the parties, the trial court appointed three Commissioners to resolve factual issues pertaining to the construction of the subject building, specifically the following:

1) Adherence or non-adherence to the plan and specifications;

2) Additives, deductives, defects and faults in the construction; [and]

3) Completion or non-completion of the project. [13]

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The Commissioners conducted ocular inspection of the subject school building on February 23, 1988, March 6, 1988, March 12, 1988, April 25, 1988, April 26, 1988 and May 12, 1988. [14] On September 28, 1989, they submitted a detailed report on their findings and conclusions, including the additives (modifications and additional works, the value of which are to be reimbursed by the Owner) and deductives (deficiencies and cost of repairs done by the Owner and other expenses which shall be deducted from the contract price due to the Contractor). [15] FBC submitted its comments on the said report denying any responsibility for the alleged defects and deficiencies found by the commissioners and insisting that it had fully performed all the works in accordance with the plans, specifications and modifications as approved by Rudlin.

During the trial, the following witnesses testified: Jaime Beltran Lo, Alexander E. Reyes, Gregorio P. Pineda, Rodolfo J. Lagera, Teresita L. Ngan Tian, Carolina F. Bodoy, and the court-appointed commissioners Engr. Alberto R. Payumo, Architect Agaton R. Sabino and Edmundo B. Flores.

Ruling of the RTC

In its decision, [16] the trial court concluded that as shown by the Commissioners' Report, the subject school building had several defects. It found untenable FBC's denial of any responsibility for the defects caused by the inferior quality of waterproofing material used by its subcontractor, INDESCO, citing Section Eleven of the Construction Agreement whereby the Contractor assumes full responsibility for the acts, negligence or omissions of all its employees, as well as for those of its subcontractor and the latter's employees. Moreover, the modifications to the original plans and specifications, which gave rise to the deductives and additives, were not shown to have been approved by Rudlin nor concurred in by the project Architect, contrary to FBC's allegation.

The trial court thus decreed:

> In view of the foregoing, the complaint against defendant Rudlin is dismissed. Considering that defendant Bloomfield Educational Foundation was not a party to the Construction Agreement, the complaint against the latter is dismissed. Plaintiff having failed to prove that defendants Rodolfo Lagera, Ma. Erlinda Lagera and Josaphat Bravante acted in their personal capacities, the complaint against them is likewise dismissed.
>
> There being bad faith on the part of defendant Rudlin in that it deliberately failed to disclose the true contract price, defendants' counterclaim is dismissed.
>
> No pronouncement as to costs.
>
> SO ORDERED. [17]

Both FBC and Rudlin filed notices of appeal.

Ruling of the CA

While the CA upheld the dismissal of the complaint as against the individual defendants and Bloomfield, it found that FBC was able to substantiate its claim against Rudlin for the unpaid balance of the contract price of P6,933,268.00 (not P6,006,965.00), which after considering the additives and deductives, the direct payment made by Rudlin, cost of chargeable materials and rebates, would still leave the amount of P1,508,464.84 due to FBC based on the Summary of Contract Revisions and Unpaid Balances on which Gregorio P. Pineda testified. [18]

According to the CA, if not for the alleged construction defects and supposed additives and deductives, Rudlin could have considered the building "complete", as in fact the school building is already being used as such by Rudlin. In resolving the issues pertinent to said construction defects, the CA declared that it cannot rely solely on

the Commissioners' Report considering that the commissioners who tried to explain their "conclusions" contained in the said report testified that these were made "not exactly what they actually intended to report." The CA then grouped the defects noted by the commissioners during the ocular inspection as follows: (1) the defect in the waterproofing of the gutter and the water stains and delamination of plywood and tiles reasonably presumed as caused by the water seepage; (2) the hairline cracks on walls, beams and floors; (3) the cracks which extend to the outer portion of the walls; (4) cracks on the floors; (5) the gap between the inner wall and the beams at the conference room; (6) missing components such as tiles, door locksets and cold water knob. Based on the testimonies of Commissioners Sabino and Payumo, the CA observed that the causes of the foregoing defects were not fully established; that these may be considered as either ordinary defects due to wear and tear or construction defects, depending on the interpretation that a party would like to adopt; and the commissioners who testified had admitted that they themselves were not certain of the "causes" and were merely stating their respective opinions on the possible causes of the noted defects.

Analyzing the evidence on record, the CA concluded that FBC was not liable for the defect in waterproofing and delay in the completion of the works for the following reasons: (1) the changing of the brand of the waterproofing used in the gutter was fully discussed during the regular meeting between the representatives of FBC and Architect Quezon; it was in fact Josaphat Bravante who selected the subcontractor and the brand of the waterproofing to be used; (2) there was no convincing proof that FBC failed to supervise the performance of said subcontractor chosen by Rudlin; (3) Gregorio P. Pineda who was present during the aforesaid meetings was competent to testify on the preparation of the minutes of the meetings (Exhibits "EE" and "GG" to "WW"), pursuant to which the additives and deductives were made, and that Rudlin's silence on this matter only supports such a conclusion; (4) Rudlin's claim that it undertook repairs on the defects in the construction for which the amount of P350,000.00 was supposedly spent, was not supported by any receipt or concrete evidence other than the self-serving testimony of Rodolfo J. Lagera; (5) there was no formal walk-through made and certification by the architect because Architect Quezon ignored FBC's letter requesting the said final walk-through, the relationship between the parties at that time having turned sour; and (6) Rudlin's reliance on Section Twelve of the Construction Agreement is misplaced, the Letter-Agreement dated June 5, 1986 shows that the parties agreed for a new date of completion of the school building and the schedule of payment of the remaining construction price.

The CA thus ordered Rudlin to pay FBC the remaining balance of P1,508,464.84. [19]

Rudlin filed a motion for reconsideration while FBC moved for partial reconsideration of the CA decision. The CA denied both motions under its Resolution dated June 23, 2004. [20]

The Cases

Petitioner FBC in G.R. No. 164186 seeks modification of the CA Decision insofar as it failed to include legal interest on the amount which Rudlin was adjudged still liable to pay FBC (P1,508,464.84) and attorney's fees and litigation expenses equivalent to 25% of the total award. FBC likewise prays that the individual defendants and Bloomfield be declared solidarily liable with Rudlin. [21]

In G.R. No. 164347, petitioner Rudlin contends that the CA resolved the issues of the case in a way that is not in accord with the law and applicable jurisprudence and contradicted by the evidence on record. In particular, Rudlin assails the CA in perfunctorily denying its Motion for Reconsideration dated January 7, 2004; in not finding that petitioners fully substantiated their assertion that the Construction Agreement is not reflective of the true intent of the parties; in not finding that Bloomfield Academy Building was not actually completed as scheduled in violation of the Construction Agreement and causing Rudlin to spend P350,000.00 for the same; in not declaring -- as

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correctly found by the trial court - that FBC is liable for the defects in the waterproofing since the change in waterproofing specifications was not approved by Rudlin nor concurred in by the Project Engineer, and that some modifications to the original plans and specifications which gave rise to the additives and deductive were not approved by Rudlin nor concurred in by the Project Engineer; and in not holding that Rudlin's claim for damages by reason of delay is with legal and factual basis. [22]

From the foregoing, the issues to be resolved are: (1) whether FBC is liable for the defects in the construction of the subject school building and delay in the completion of the works; (2) after considering the payments, deductives and additives and other charges admitted, whether Rudlin is still liable for the balance of the contract price and the amount thereof; and (3) whether Rudlin is entitled to its counterclaim.

Our Ruling

The resolution of these cases calls for a reexamination of facts. While generally, the Court is not a trier of facts, a recognized exception thereto is a situation where the findings of fact of the CA and the trial court are conflicting. [23]

Contrary to the findings of the appellate court, we hold that the facts on record clearly established FBC's liability for the defects and deficiencies so numerous that it took several days for the court-appointed commissioners to complete the ocular inspection. The CA tried to minimize the impact of such findings by declaring that the Commissioners' Report cannot be the sole basis for determining whether FBC faithfully complied with all its undertakings and obligations under the Construction Agreement. However, the glaring fact remains that there were construction defects which have been described in detail under each inspection date. While it is true that the commissioners who testified gave different opinions as to whether the noted defects and deficiencies were due to substandard materials and poor workmanship or the same was just the result of ordinary wear and tear and even lack of maintenance, the court can properly evaluate the common findings and conclusions reflected in the Commissioners' Report based on the totality of evidence.

Perusing the records, we are unable to agree with the appellate court's view that the testimonies given in court by the commissioners had left uncertain the determination of the nature of the defects and deficiencies, i.e., whether these are construction defects or merely due to improper maintenance.

First, it stands undisputed that the damage wrought by water seepage causing water stains, leaking roofs, peeling off of paint, cracks on walls and delamination of plywood, among others, was so pervasive on many portions of the building that even after the same was inaugurated in time for the school opening on June 15, 1986, most of the classrooms and administrative offices, as well as other common areas such as the lobby and comfort rooms, could not be properly utilized as their defective condition posed danger to the teachers and students. It must be noted that at the time of ocular inspection in 1988, it was barely two years from the time the building was actually used and yet the overall structure of the building was severely impaired by the defective waterproofing and other deficiencies. Prior to the court-authorized inspection, those visible defects had been photographed under the supervision of Rodolfo J. Lagera, which further confirmed the findings of the commissioners. [24] The CA thus erred in giving weight to FBC's claim that the seepage of water into the beams, walls and floor can be attributed to lack of proper maintenance, citing the declarations of FBC's Alexander E. Reyes and Commissioner Payumo who allegedly found "piles of dirt collected on the gutter and when the dirt was removed, the water flowed down to the spout." Given the extent of the defects and deficiencies found in the school building, this simplistic explanation from FBC is unacceptable.

Although Commissioner Sabino testified that it was possible that the water seepage was caused by the clogging of the downspout due to lack of maintenance in clearing the gutter of dirt, Commissioner Payumo, an engineer,

testified that whether the building is properly maintained on that aspect does not really matter because good waterproofing should always hold and prevent seepage whenever there is accumulation of rainwater in the gutter of the roof. Engr. Payumo stated that waterproofing should hold for a period of at least five years:

> ATTY. FERNANDEZ (continuing)
>
> Q
>
> In other words, Mr. Witness, from what you saw, the water proofing there was for poor maintenance, the owner did not remove the dirt.
>
> A
>
> No sir, because if the water proofing is good, it should not fade [sic, should read as fail].
>
> x x x x
>
> ATTY. AUTEA: (TO WITNESS)
>
> Q
>
> Based on the standard of practice on the construction industry, how long should a water proofing pool [sic, should read as hold]?
>
> x x x x
>
> WITNESS
>
> A
>
> The practice is about five (5) years.
>
> COURT:
>
> Before the water proofing fail?
>
> A
>
> Yes, your Honor. [25] (Emphasis supplied.)

We thus cannot agree with the CA's stance that in view of the disagreement expressed by the commissioners in their testimonies, it would be unjust to hold FBC responsible for the substandard waterproofing. The following conclusions set forth in the Commissioners' Report are categorical in declaring the omissions, deviations and negligence of the Contractor (FBC) in the execution of the construction project, to wit:

> - The subject construction project, i.e., Bloomfield Academy located at Wilfredo Tecson Avenue, Vista Grande, BF Resort Village, Las Pinas, Metro Manila, has been completed with a lot of deficiencies and defects in the work.
>
> - There were additives and deductives done without proper and formal approval from any of the parties.
>
> - There was no formal approved cost adjustments nor contract time for the additive and deductive works.
>
> - There were portions of the subject construction project that [were] not in accordance [with] the agreed plans and specifications.
>
> - There were no formal request nor approval for some deviations from the plans and specifications from the owners nor from the Architect.

> - There were several portions of the subject construction project that we found defective and below standards which were found during the ocular inspection done by the Commissioners and [were] reflected in the stenographic report.
>
> - Some deficiencies and defects in the works and the punchlist of Architect [were] not acted upon nor any repairs made to date as required under the contract prior to acceptance.
>
> - Some items in the Architect's punchlist although repaired and acted on [were] never formally turned over nor accepted.
>
> - There was no contract time adjustment on the lapsed contract time for the original contract and for the additional works done.
>
> - There was no formal turn-over made by the contractor nor acceptance on the part of the owner of the project.
>
> - There are provisions in the contract that were violated or have not been followed by the contractor in his performance of the project like the non-submittal of the various bonds (Section 16, M and N) and other contract documents needed in the execution of the contract as some of the findings of the commissioner in the investigation. [26] (Emphasis supplied.)

The CA, however, declared that notwithstanding the damage caused by water seepage, Rudlin cannot claim that the building was not completed and that the only reason which could have justified Rudlin's refusal to pay the balance is the liability of FBC for changing the specified waterproofing brand from John Mans Ville to Neo-pren Elastomeric. The CA thus ruled:

> ... it appears beyond cavil that the changing of the brand of the waterproofing used in the gutter was fully discussed during the regular meeting between the representatives of plaintiff-appellant FBC and Architect Quezon. In fact, it was the defendant-appellant Rudlin through defendant-appellant Josaphat Bravante who selected the sub-contractor and the brand of waterproofing to be used in the gutter. As the general contractor, plaintiff-appellant FBC was only duty bound to supervise the performance of the sub-contractor and see to it that the proper procedure was properly followed. In the absence of any convincing proof that plaintiff-appellant FBC failed to supervise the performance of the sub-contractor, it is highly unjust on the part of plaintiff-appellant FBC to be held liable and even be required to re-do the whole work using the original specified brand at its own expense. A contrary ruling would lead to a scenario where the owner of the subject building would start imposing the use of cheaper materials to save money because after all when the substituted materials fail, the contractor can nevertheless be held liable. [27] (Italics supplied.)

We do not agree. The purported minutes of meetings, wherein the modifications to the original plans and specifications, particularly the change of waterproofing were allegedly discussed and approved by Rudlin's representative in the person of Josaphat Bravante (Exhibits "EE" and "GG" to "WW" [28]), were not given credence by the trial court as these actually showed that not all such modifications have been approved. Moreover, the trial court held that FBC failed to prove their due execution and authenticity. But the CA reversed the trial court and held that witness Gregorio P. Pineda who was present in the said meetings was competent to testify on the contents and due execution of the aforesaid Exhibits "EE" and "GG" to "WW".

Even assuming arguendo that the change in waterproofing brand was indeed taken up during a meeting in the presence of Rudlin's representative, we cannot agree with the CA's position that the alleged verbal assent by Josaphat Bravante in the purported minutes of meetings [29] was sufficient evidence of the Owner's approval of the modifications in the original plans and specifications. Likewise, the letter dated July 7, 1986 [30] of FBC's project engineer Alexander E. Reyes informing Architect Quezon that the change in waterproofing brand was approved by Bravante is at best, self-serving, and the same does not bind Rudlin.

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Under Section Nine of the Construction Agreement, Architect Quezon, as representative of the Owner, is the one vested with the general supervision and direction of the work and who is authorized to "reject work which does not conform to the Contract Documents" and to formally stop such work or a portion thereof when necessary. [31] More explicitly, Section Ten of the same agreement provides that the Owner shall give all instructions to the Contractor through the Architect.

FBC therefore cannot escape liability for the poor quality of waterproofing on the ground that Rudlin's representative was present during the meeting when the change in brand to be used was allegedly discussed with his concurrence. The requirements for a valid change or modification in the original plans and specifications were clearly set out in Section Fifteen of the Construction Agreement, which provides:

> SECTION FIFTEEN
> WORK CHANGES
>
> The OWNER reserves the right to order work changes in the nature of additions, deletions, or modifications, without invalidating this Agreement. All changes shall be authorized by a written change order signed by the OWNER and by the ARCHITECT.
>
> Work shall be changed, and the completion time shall be modified only as set out in the written change order. Any adjustment in the Contract Price resulting in a credit or a charge to the OWNER shall be determined by written agreement of the parties, before starting the work involved in the change. [32]

As it is, the modification effected by FBC on waterproofing work was never approved in writing by Architect Quezon and Rudlin. Contrary to the appellate court's declaration that Rudlin by its silence impliedly approved the change in waterproofing brand, the letter dated September 1, 1986 of Architect Quezon to Jimmy Lo deplored the unauthorized change in the specified brand exacerbated by defective application, and required FBC to re-do such work. Said letter reads:

> DEAR JIMMY,
>
> SOMETIME IN JUNE 1986, OUR GROUP DISCUSSED IN ADVANCE WITH MS. LINDA LAGERA, THE POSSIBILITY OF LEAKS IN THE PROJECT, DUE TO CHANGE IN OUR SPECIFICATIONS. WE ALSO ASKED ENGR. ALEX REYES TO WRITE US OFFICIALLY REGARDING CHANGE ON WATERPROOFING SPECIFICATIONS AND SUBSTITUTION OF ANOTHER BRAND WITHOUT OUR APPROVAL. THE SPECIFIED BRAND IS BIRD & SONS OR JOHNS MANVILLE AGAINST NEOPRENE AS SUBSTITUTE, A PRODUCT WHICH WE ARE NOT USE TO.
>
> YOUR ENGINEER CLAIMS THAT THEY WERE ASKED TO MADE CHANGES BY MR. PAT BRAVANTE AS PART OF THE DOWNGRADING OF THE PROJECT, BUT SOMEHOW ERRORS WERE MADE IN THE EXECUTION OF THE WORK. THE SITUATION IS NOW HOPELESSLY SNARLED. DUE TO MANY LEAKS IN THE PROJECT, ESPECIALLY AT THE ADMINISTRATION AREA AND LEAVING US WITHOUT ASSURANCE ON YOUR PART ON THE CORRECTIVE MEASURE OF THIS PROBLEM.
>
> THIS REQUIRE URGENT ACTION ON YOUR SIDE TO RE-DO ALL WATERPROOFING WORKS, USING OUR SPECIFICATIONS WITHOUT ANY EXPENSE TO THE OWNER AS PART OF THE GENERAL CONDITIONS OF THE CONTRACT DOCUMENT. ANYTHING YOU CAN DO TO EXPIDITE (sic) CORRECTION OF THE ERROR ON THE PROJECT WILL BE GREATLY APPRECIATED. [33] (Emphasis supplied.)

At this point, it bears to stress that the June 5, 1986 Letter-Agreement signed by both FBC and Rudlin, which extended the completion time to June 10, 1986 expressly amended only the corresponding provisions of the

Construction Agreement pertaining to completion date and schedule of payment of the balance due to FBC, which was conditioned on the reconciliation of the upgrading and downgrading of the work done by the contractor. Said Letter-Agreement did not relieve FBC as contractor of responsibility for defects under its warranties under the Construction Agreement, which include those works performed by its subcontractor. The pertinent provisions of the Construction Agreement showed that FBC was obligated to correct and/or re-execute defective work before and after final payment, pursuant to its general warranties as contractor, thus:

> SECTION FOURTEEN
> CORRECTING WORK
>
> 1. BEFORE FINAL PAYMENT
>
> The CONTRACTOR shall promptly remove from the premises all works and materials condemned by the ARCHITECT as failing to conform with the Contract Documents, whether incorporated in the work or not, and the CONTRACTOR shall promptly replace and reexecute the work in accordance with the Contract Documents and without expense to the OWNER.
>
> If the CONTRACTOR does not remove such condemned work and materials within a reasonable time fixed by the written notice, the OWNER may remove them and may store the materials at the expense of the CONTRACTOR. If the CONTRACTOR does not pay the expenses for such removal within ten (10) days, the OWNER may, after written notice to the CONTRACTOR, sell such materials at auction or at a private sale and shall account for the net proceeds thereof, after deducting all the costs and expenses that should have been borne by the CONTRACTOR. This does not preclude other actions or remedies which the OWNER may have against the CONTRACTOR.
>
> 2. AFTER FINAL PAYMENT
>
> Neither the final certificate for payment nor any provision in the Contract Documents shall relieve the CONTRACTOR of responsibility for faulty materials or workmanship. It shall remedy any defects due thereto and pay for any damage to other work resulting therefrom, which shall appear within the specified guaranty period. All questions arising under this provision shall be subject to arbitration in case of failure of the parties to arrive at an agreement.
>
> x x x x
>
> SECTION SIXTEEN
> GUARANTY-WARRANTY
>
> The CONTRACTOR shall, in case of work performed by its subcontractors, secure warranties from said subcontractors and deliver copies of the same to the ARCHITECT or OWNER upon completion of the work.
>
> The CONTRACTOR shall and does hereby warrant and guarantee the following:
>
> (a) All works, for a period of one (1) year from the date of completion as evidenced by the date of final acceptance in writing of the entire work by the OWNER.
>
> (b) All work performed by it directly or performed by its sub-contractors, shall be free from any defects of materials and workmanship.
>
> (c) The CONTRACTOR further agrees that it will, at its own expense, repair and/or replace all such defective materials or work, and all other work damaged thereby which becomes defective during the term of this Guaranty-Warranty. (Emphasis supplied.)

The above-stipulated period of warranty has not even commenced considering that even if Bloomfield proceeded with the inauguration in time for the opening of classes, there was no formal turn over of the building to Rudlin

and no final acceptance in writing was made by Rudlin. FBC faulted Architect Quezon whose alleged absence and refusal to meet with their officers and to conduct the final walk-through, prevented it from having the building formally turned over to the Owner. Such contention is unfounded because the evidence on record reveals that it was FBC which defaulted on its obligations under the Construction Agreement. FBC is bound by its undertaking under Section Fourteen (1) to replace and re-execute defective waterproofing and correct the damage such had caused to the structure and finishing of the building.

In a letter dated September 17, 1986 addressed to FBC's lawyer, Rudlin's lawyer responded to FBC's demands for payment, as follows:

> We write in behalf of our client, RUDLIN INTERNATIONAL, INC., in reply to your letter dated 20 August 1986 and the letter of your client, Financial Building Corporation (FBC) dated 12 August 1986, regarding your client's alleged remaining balance with our client under the above-captioned Agreement.
>
> We would like to remind your client that our client has not yet accepted the Project nor has Architect Eduardo R. Quezon certified that FBC has fully performed and completed the Project. Neither has your client delivered to our client a complete release of all liens arising out of the Agreement or receipts in full in lieu thereof, and an affidavit that the releases and receipts include all the labor, interests and equipment for which a claim or action can be filed, as required under Section Eight of said Agreement. We would also like to call your attention to the letter of Architect Quezon to our client dated 10 September 1986, a copy of which is attached as Annex "A", enumerating therein what your client has to submit/furnish, and pay our client before any final payment is made by our client to your client.
>
> Further, we would like to inform you that the uncompleted and/on faulty work, defects and deficiencies in the Project which were enumerated in the Punch List dated 27 June 1986 and received by FBC on 30 June 1986, have not been completed and/or corrected by FBC. Our client requested said Architect Quezon to update the same. We are forwarding to you a copy of the updated Punch List dated 10 September 1986 which is attached hereto as Annex "B". Moreover, your client should visit the Project to see, among other things, how the administrative offices, library, chapel and classrooms get flooded when it rains. This situation poses a hazard to the health and life of the students, teachers and staff of Bloomfield Academy.
>
> Moreover, based on the Updated Tabulation Report of Architect Eduardo R. Quezon in relation to his Additive and Deductive Evaluation Report, a copy of which is attached as Annex "C", it appears that whatever minimum balance which FBC may have against our client will not even be sufficient to complete the Project, to undertake correction of its faulty and defective work, and to cover the 10% cash retention. It appears further that our client has overpaid your client by Four Hundred Fifteen Thousand Seven Hundred One and 34/100 Pesos (P415,701.34).
>
> We are, therefore, giving your client fifteen (15) days from your receipt of this letter to complete and make good its undertakings/obligations under the Agreement. Failure on the part of your client to do so will leave our client no other alternative but to invoke the provisions of said Agreement declaring your client in default, and cause the Project to be completed and the deficiencies corrected, deducting the costs from whatever payment which may be due to your client, and collecting from your client the difference.
>
> Further, please advise your client that there will be legal constraints for our Atty. Avelino J. Cruz, Jr. to mediate between your client and our client under the circumstances. Please be assured, however, that like you, we are advising our client to opt for a reasonable resolution of the problem. [34]

In its letter-reply dated September 24, 1986 of FBC's counsel, FBC insisted that Rudlin still owed it the sum of P2.4 million, more or less; that it cannot turn over the project because Architect Quezon refused to meet with FBC's engineers to discuss the additives and deductives work summary; that Architect Quezon's letter cannot be made the basis of FBC's obligations under the Construction Agreement; and that the punch list dated June 27,

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1986 is only a dilatory document as certain items being purely additional works should be excluded. FBC protested the leaks and flooding mentioned by Rudlin's counsel, which FBC said are minor items which can be easily corrected as in fact it was corrected by the waterproofing subcontractor INDESCO which was referred by Rudlin. To solve the problem, FBC proposed that the corrective works be done by Rudlin provided the price thereof be approved by FBC and Rudlin will not spend more than P50,000.00 therefor. As to the 10% retention fund, FBC advised that per understanding with Rudlin, this was waived in view of the commitment of FBC to finish the project to the best of its funding ability. [35]

FBC then suggested that Rudlin release the sum of P500,000.00 so that FBC can pay its suppliers and to enable it to submit the required affidavit of complete payment of labor and material men; that Rudlin's retained architect complete the reconciliation of the additive and deductive works with FBC; and thereafter, to arrange payment backed up by sufficient collaterals. [36]

In its subsequent letter dated October 3, 1986, FBC again pressed for payment and further distanced itself from INDESCO, claiming that negotiations for the waterproofing works with INDESCO was handled by Rudlin's Mr. Bravante. FBC informed Rudlin that it was advised by INDESCO that the waterproofing complaints have been attended to. [37] But since the roof leaks and flooding of the corridor and classrooms persisted despite the repairs supposedly done by the subcontractor, Rudlin formally notified its lawyer that it was invoking the contractor's warranty under the Construction Agreement and sought assistance to have the said defects and deficiencies corrected by the Contractor. [38] Consequently, Rudlin through a letter dated October 14, 1986 signed by its Vice-President and Chief Operating Officer, Teresita L. Ngan Tian, advised FBC that the latter's request for payment "has been held in abeyance until the waterproofing job is completed to the satisfaction of the Owners." [39]

We find that in withholding payment of the balance of the contract price, Rudlin properly exercised its rights under the Construction Agreement. The CA thus erred in ordering Rudlin to pay FBC the balance of the contract price which was computed as follows:

1. Contract Price

P 6,933,268.00

2. Additives

P 1,074,385.53

Total Additive Cost

P 8,007,653.53

3. Deductives

P 886,706.45

4. Direct Payment

P 4,874,920.14

5. Chargeable Materials

P 727,688.90

6. Rebates

P 9,793.22

Total Payments

P 6,499,188.71

TOTAL UNPAID BALANCE

P 1,508,464.84 [40]

The above computation was based solely on the Summary of Contract Revisions and Unpaid Balances submitted by FBC's witness Gregorio P. Pineda. Rudlin submitted its own computation based on what it claims as the true contract price of P6,006,965.00 and asserting that the following should be deducted: P4,878,920.14 as payments to FBC which the latter admitted; P727,688.90 direct payments to suppliers also admitted by FBC; deductives of P1,180,127.35 representing the cost of modifications in the original plans and specifications which were not

approved by Rudlin and its architect; and P350,000.00 for the repairs undertaken by Rudlin.

Considering that FBC had not completed the corrective/repair works in accordance with the Contract Documents and as approved or certified in writing by the Architect as to its completion, its demand for the payment of the final balance was premature. Under the Letter-Agreement dated June 5, 1986, final payment was subject to reconciliation of their accounts regarding the upgrading and downgrading done on the project. Obviously, this cannot be complied with unless FBC as the defaulting party completes the repair/corrective works for only then can the actual cost of additives and deductives be determined. 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. [41] When the substandard waterproofing caused extensive damage to the school building, it was incumbent upon FBC to institute at its own expense the proper repairs in accordance with the guaranty-warranty stated in the Construction Agreement. Thus, Rudlin cannot be said to have incurred delay in the reconciliation of accounts, as a precondition for final payment; instead, it is FBC who was guilty of delay by its stubborn refusal to replace or re-execute the defective waterproofing of the subject school building.

On the issue of the correct total contract price, we hold that Rudlin failed to substantiate its claim that the contract price stated in the Construction Agreement (P6,933,268.00) was not the true contract price because it had an understanding with FBC's Jaime B. Lo that they would decrease said amount to a mutually acceptable amount.

Under the general rule in Section 9 of Rule 130 of the Rules of Court, when the terms of an agreement were reduced in writing, as in this case, it is deemed to contain all the terms agreed upon and no evidence of such terms can be admitted other than the contents thereof. Rudlin argues that under Section 9, Rule 130, a party may present evidence to modify, explain or add to the terms of the written agreement if it is put in issue in the pleading, "[t]he failure of the written agreement to express the true intent and the agreement of the parties thereto." Assuming as true Rudlin's claim that Exhibit "7" failed to accurately reflect an intent of the parties to fix the total contract price at P6,006,965.00, Rudlin failed to avail of its right to seek the reformation of the instrument to the end that such true intention may be expressed.

Evidence of a prior or contemporaneous verbal agreement is generally not admissible to vary, contradict or defeat the operation of a valid contract. [42] Section 9 of Rule 130 of the Rules of Court states:

> SEC. 9. Evidence of written agreements.--When the terms of an agreement have been reduced to writing, it is considered as containing all the terms agreed upon and there can be, between the parties and their successors-in-interest, no evidence of such terms other than the contents of the written agreement.
>
> However, a party may present evidence to modify, explain or add to the terms of the written agreement if he puts in issue in his pleading:
>
> (a) An intrinsic ambiguity, mistake or imperfection in the written agreement;
>
> (b) The failure of the written agreement to express the true intent and agreement of the parties thereto;
>
> (c) The validity of the written agreement; or
>
> (d) The existence of other terms agreed to by the parties or their successors-in-interest after the execution of the written agreement.
>
> The term "agreement" includes wills.

Rudlin cannot invoke the exception under (a) or (b) of the above provision. Such exception obtains only where "the written contract is so ambiguous or obscure in terms that the contractual intention of the parties cannot be understood from a mere reading of the instrument. In such a case, extrinsic evidence of the subject matter of the

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contract, of the relations of the parties to each other, and of the facts and circumstances surrounding them when they entered into the contract may be received to enable the court to make a proper interpretation of the instrument." [43]

Under the fourth exception, however, Rudlin's evidence is admissible to show the existence of such other terms agreed to by the parties after the execution of the contract. But apart from the Bar Chart and Cash Flow Chart prepared by FBC, and the testimony of Rodolfo J. Lagera, no competent evidence was adduced by Rudlin to prove that the amount of P6,006,965.00 stated therein as contract price was the actual decreased amount that FBC and Rudlin found mutually acceptable. As to the affidavits executed by Architect Quezon and his associate Roberto R. Antonio, [44] the same do not serve as competent proof of the purported actual contract price as they did not testify thereon. Significantly, the June 5, 1986 Letter-Agreement did not at all mention the total contract price. Likewise, there is nothing in the various letters sent by Rudlin to FBC while construction was in progress and even subsequent to the execution of the said Letter-Agreement indicating that Rudlin corrected the contract price of P6,933,268.00 which FBC had repeatedly mentioned in its letters and documents. [45]

As to Rudlin's counterclaim for reimbursement of its expenses in repairing the defective waterproofing, not a single receipt was presented by Rudlin to prove that such expense was actually incurred by it. Under the Civil Code, one is entitled to an adequate compensation only for such pecuniary loss suffered by him as he has duly proved. The award of actual damages must be based on the evidence presented, not on the personal knowledge of the court; and certainly not on flimsy, remote, speculative and nonsubstantial proof. [46][ ]

The testimony of Rodolfo J. Lagera on the total cost allegedly spent by Rudlin in repairing the waterproofing works does not suffice. A court cannot rely on speculations, conjectures or guesswork as to the fact of damage but must depend upon competent proof that they have indeed been suffered by the injured party and on the basis of the best evidence obtainable as to the actual amount thereof. It must point out specific facts that could provide the gauge for measuring whatever compensatory or actual damages were borne. [47]

The counterclaim for attorney's fees must likewise be denied. We have stressed that the award of attorney's fees is the exception rather than the rule, as they are not always awarded every time a party prevails in a suit because of the policy that no premium should be placed on the right to litigate. Attorney's fees as part of damages is awarded only in the instances specified in Article 2208 of the Civil Code. [48]

> ART. 2208. In the absence of stipulation, attorney's fees and expenses of litigation, other than judicial costs, cannot be recovered, except:
>
> (1) When exemplary damages are awarded;
>
> (2) When the defendant's act or omission has compelled the plaintiff to litigate with third persons or to incur expenses to protect his interest;
>
> (3) In criminal cases of malicious prosecution against the plaintiff;
>
> (4) In case of a clearly unfounded civil action or proceeding against the plaintiff;
>
> (5) Where the defendant acted in gross and evident bad faith in refusing to satisfy the plaintiff's plainly valid, just and demandable claim;
>
> (6) In actions for legal support;
>
> (7) In actions for the recovery of wages of household helpers, laborers and skilled workers;
>
> (8) In actions for indemnity under workmen's compensation and employer's liability laws;

(9) In a separate civil action to recover civil liability arising from a crime;

(10) When at least double judicial costs are awarded;

(11) In any other case where the court deems it just and equitable that attorney's fees and expenses of litigation should be recovered.

In all cases, the attorney's fees and expenses of litigation must be reasonable.

None of the foregoing situations obtains in the case at bar.

WHEREFORE, the petition in G.R. No. 164186 is DENIED while the petition in G.R. No. 164347 is PARTLY GRANTED. The Decision dated December 12, 2003 of the Court of Appeals in CA-G.R. CV No. 41224 is REVERSED and SET ASIDE, and the Decision dated January 12, 1993 of the Regional Trial Court of Makati City, Branch 65 in Civil Case No. 16266 is REINSTATED.

No costs.

SO ORDERED.

Carpio Morales, (Chairperson), Brion, Bersamin, and Sereno, JJ., concur.

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[1] CA rollo, pp. 831-854. Penned by Associate Justice Remedios A. Salazar-Fernando and concurred in by Associate Justices Eubulo G. Verzola and Edgardo F. Sundiam (now deceased).

[2] Records, pp. 1135-1139. Penned by Judge Salvador S. Abad Santos.

[3] Id. at 578-598.

[4] Id. at 581.

[5] Id. at 592.

[6] Id. at 580.

[7] Id. at 622.

[8] Id. at 602-603.

[9] Id.

[10] Id. at 1-5.

[11] Id. at 96-110.

[12] Id. at 113-114.

[13] Id. at 392.

[14] Id. at 290-371.

[15] Id. at 392-418.

[16] Id. at 1135-1139.

[17] Id. at 1139.

[18] CA rollo, pp. 831-854.

[19] Id. at 853.

[20] Id. at 1090-1093.

[21] Rollo (G.R. No. 164186), pp. 22-40.

[22] Rollo (G.R. No. 164347), pp. 36-38.

[23] Continental Cement Corp. v. Filipinas (PREFAB) Systems, Inc., G.R. Nos. 176917 & 176919, August 4, 2009, 595 SCRA 215, 224-225, citing Santos v. Lumbao, G.R. No. 169129, March 28, 2007, 519 SCRA 408.

[24] Records, pp. 1259-1280.

[25] TSN, August 1, 1991, p. 40; TSN, June 27, 1991, pp. 19-20.

[26] Id. at 417.

[27] CA rollo, pp. 848-849.

[28] Records, pp. 710-711, 714-739.

[29] Except for Exhibit "EE", all the rest (Exhibits "GG" to "WW") were unsigned by Architect Quezon and Rudlin.

[30] Records, p. 660.

[31] Section Nine (a) and (f), records, pp. 1228-1229.

[32] Records, p. 1238.

[33] Id. at 1281.

[34] Id. at 680-682.

[35] Id. at 687-689.

[36] Id. at 690.

[37] Id. at 696-697.

[38] Id. at 1283.

[39] Id. at 1282.

[40] CA rollo, pp. 852-853.

[41] Tanguilig v. Court of Appeals, G.R. No. 117190, January 2, 1997, 266 SCRA 78, 87.

[42] Lapulapu Foundation, Inc. v. Court of Appeals, 466 Phil. 53, 62 (2004), citing MC Engineering, Inc. v. Court of Appeals, G.R. No. 104047, April 3, 2002, 380 SCRA 116, 137.

[43] Seaoil Petroleum Corporation v. Autocorp Group, G.R. No. 164326, October 17, 2008, 569 SCRA 387, 396-397, citing Ortañez v. CA, 334 Phil. 514, 519-520 (1997) & Heirs of Amparo del Rosario v. Aurora Santos, et al., 194 Phil. 670, 687 (1981).

[44] Records, pp. 1184-1185, 1202-1203.

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[45] Id. at 602-603, 623, 629, 741.

[46] Adrian Wilson International Associates, Inc. v. TMX Philippines, Inc., G.R. No. 162608, July 26, 2010, p. 16, citing Spouses Ong v. Court of Appeals, 361 Phil. 338, 353 (1999) and Civil Code, Art. 2199.

[47] Tan v. G.V.T. Engineering Services, G.R. No. 153057, August 7, 2006, 498 SCRA 93, 110-111, citing Lagon v. Hooven Comalco Industries, Inc., 402 Phil. 404, 424-425 (2001).

[48] Padillo v. Court of Appeals, G.R. No. 119707, November 29, 2001, 371 SCRA 27, 46-47.

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