

NGO SIN SING AND TICIA DY NGO, PETITIONERS, VS. LI SENG GIAP & SONS, INC., AND CONTECH CONSTRUCTION TECHNOLOGY DEVELOPMENT CORPORATION, RESPONDENTS.

G.R. No. 170596. November 28, 2008

Ponente: NACHURA, J.

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NACHURA, J.:

This is a petition for review on certiorari of the Decision[1] of the Court of Appeals (CA) dated May 11, 2005 and the resolution denying the motion for reconsideration thereof in CA-G.R. CV No. 65553.

The facts are as follows:

Petitioner spouses Ngo Sin Sing and Ticia Dy Ngo owned a lot at 745 Caballero St., Binondo. In 1978, they decided to construct a 5-storey concrete building thereon, the NSS Building, and for this project, they contracted the services of Contech Construction Technology Development Corporation (Contech) as their General Contractor. Adjacent to their lot is a semi-concrete building known as the Li Seng Giap Building (LSG Building), owned by Li Seng Giap & Sons, Inc. (respondent). During the construction of the NSS Building, the respondent, through its general manager, John T. Lee, received complaints from their tenants about defects in the building. There were cracks appearing on the floors, the steel door was bent, and concrete slabs of the walls were falling apart.[2] An inspection of the premises revealed that the excavation made by Contech on petitioners' land was close to the common boundary, exposing the foundation of the LSG Building. As a gesture of goodwill to their neighbors, the petitioners assured the respondent that repairs would be undertaken by their contractor. In December 1979, Contech announced that it had completed repairs on the LSG Building. Notwithstanding this assurance, more defects in the LSG Building appeared, i.e., tilted floors, cracks in the columns and beams, distorted window frames. Apparently, the LSG Building was continuously sagging and the respondent felt that it was no longer safe to occupy the building.

In 1981, the respondent was constrained to consult engineers, E.S. de Castro Ph.D. and Associates, through Control Builders Corporation, to investigate the cause of the damages in the LSG Building and to determine its present structural integrity. It was immediately noticed that the LSG Building underwent differential settlement.[3] Based on their ocular inspection on the building measurement of the actual differential settlement, structural analysis of the building and determination of the sub-surface soil conditions, the consultants concluded that the structural failure of the LSG Building resulted from the differential settlement caused by the excavation during the construction of the NSS Building. Since the building had undergone large differential settlements beyond safe tolerable limits, the consultants recommended the complete demolition of the LSG Building. The demolition and reconstruction of the building was estimated to cost the respondents about P8,021,687.00.[4] The respondents demanded that the petitioners rebuild the LSG Building or pay the cost of the same, which the petitioners refused.

Thus, a complaint for sum of money was filed against Ngo Sin Sing, Ticia Dy Ngo and Contech Construction

Technology Development Corporation with the Regional Trial Court of Manila, docketed as Civil Case No. 83-19367, praying that the petitioners and Contech be ordered to, jointly and severally, pay the following sums:

- 1) P8,021,687.00, representing the actual cost of demolition and reconstruction of the LSG Building;
- 2) P154,800.00 which plaintiff contracted to pay the E.S. de Castro, Ph.D. and Associates, and Control Builders Corporation to determine the extent of the damages and the structural integrity of the LSG Building;
- 3) P543,672.00, representing the income that the plaintiff will lose from the rentals during the reconstruction of the building;
- 4) P10,000.00 as attorney's fees.[5]

In their Answer,[6] spouses Ngo Sin Sing and Ticia Dy Ngo moved to dismiss the complaint alleging that: (1) the respondent's building had been structurally unstable and deficient since incipency, having been constructed in 1966 without the appropriate provision to vouchsafe its structural integrity including differential settlements during its economic life; and (2) the structural defects and failure were traceable not necessarily due to soil erosion but to a number of external forces constantly working upon the building including earthquakes and improper maintenance. Petitioners filed a cross-claim against Contech averring that pursuant to their construction contract, all claims of third parties should be answered by said corporation.[7]

For its part, Contech alleged that the excavation did not reach the common boundary and was eight (8) inches, more or less, away from the common boundary. Adequate and necessary precautions were undertaken which included the putting of wood sheet piles along the boundaries to prevent soil erosion and all phases of work were done according to the approved plan. Assuming it was liable on the cross-claim, such liability was deemed waived or abandoned for failure of Ngo Sin Sing to notify Contech of such claim.[8]

After due hearing, the trial court ruled that the defendants were negligent. It found that the excavation made on defendant's lot was near the common boundary, and that soil erosion would not have taken place if wood sheet piles were properly put in place along the common boundary. However, the trial court also stated that the plaintiff was likewise not without fault. The trial court noted that the LSG Building was originally a 2-storey building and the plaintiff added two more floors without providing the necessary foundation and reinforcement causing the building to sag. The trial court held that it was but fair for the plaintiff to assume its share of the faults and defects of its property in this case.

Thus, the trial court rendered judgment as follows:

WHEREFORE, premises considered, judgment is hereby rendered ordering defendants Ngo Sin Sing, Ticia Dy Ngo and [Contech] Construction Technology Development Corp. jointly and severally, liable to pay plaintiff Li Seng Giap & Sons, Inc. the sum of P4,010,843.50. The claim for other damages cannot be awarded for lack of sufficient basis. Defendant Contech Technology & Development Corp. shall reimburse defendants Spouses Ngo Sin Sing & Ticia Dy Ngo for whatever amount the latter will pay to plaintiff. The counterclaims of defendants are DISMISSED.[9]

Dissatisfied with the trial court's ruling, Li Seng Giap & Sons, Inc. and the spouses Ngo Sin Sing and Ticia Dy Ngo filed their respective appeals. Contech no longer appealed.

The respondent disagreed with the trial court's finding that it was guilty of contributory negligence and that it must share in the cost of the reconstruction of the LSG Building. It claimed that the LSG Building never exhibited any sign of structural distress from the time it was completely constructed in 1968, despite the fact that Manila was rocked by several earthquakes, the most violent of which was in 1969. The defects were experienced only when excavation and construction of the NSS Building started. Respondent reiterated its prayer in the complaint.

The petitioners, on the other hand, averred that there was no basis for holding them jointly and severally liable with Contech for the payment of the amount of damages to the respondent. The trial court correctly pointed out that as owner of the property, it was their right to construct on their land and have it excavated. More importantly, they had a contract with Contech wherein it was provided that all claims of third persons would be answered by the company.

On May 11, 2005, the CA affirmed the trial court's decision with modification. The appellate court ruled that the respondent had a proven cause of action against the petitioners; that respondent's right to property was invaded or disturbed when excavation was done without sufficient lateral or subjacent support. As such, the petitioners' liability as project owner should be shared with the contractor, applying the provisions of Article 2194 of the Civil Code which states that "the responsibility of two or more persons for a quasi-delict is solidary."^[10] The CA refuted the findings of the trial court imputing contributory negligence to the respondents Li Seng Giap & Sons, Inc., and ruled that the spouses Ngo Sin Sing and Ticia Dy Ngo together with Contech, were solidarily liable for the whole amount. Thus:

IN VIEW OF THE FOREGOING, the decision appealed from is MODIFIED in that the defendants shall jointly and severally pay the plaintiff the sum of P8,021,687.[00] with interest at 6 percent per annum from the date of the filing of the complaint until paid, plus ten percent of the principal award as attorney's fees and costs. The rest of the decision is AFFIRMED.

Aggrieved, the spouses Ngo Sin Sing and Ticia Dy Ngo now come to this Court raising the following assignment of errors:

I.

RESPONDENT COURT OF APPEALS COMMITTED GRAVE REVERSIBLE ERROR IN RENDERING THE ASSAILED DECISION AND RESOLUTION WHICH IGNORED AND DISREGARDED CLEAR EVIDENCE ON RECORD THAT RESPONDENT LSG'S OWN NEGLIGENCE WAS THE PROXIMATE CAUSE OF THE DAMAGE TO ITS BUILDING, OR AT LEAST, AMOUNTED TO CONTRIBUTORY NEGLIGENCE WARRANTING REDUCTION OF THE AWARD.

II.

RESPONDENT COURT OF APPEALS COMMITTED GRAVE REVERSIBLE ERROR IN RENDERING THE ASSAILED DECISION AND RESOLUTION WHEN DESPITE THE FACT THAT NO ACT OR OMISSION CONSTITUTING NEGLIGENCE HAD BEEN SUCCESSFULLY IMPUTED AGAINST PETITIONERS, IT HELD PETITIONERS JOINTLY AND SEVERALLY LIABLE WITH RESPONDENT CONTECH FOR RECONSTRUCTION COSTS.

III.

RESPONDENT COURT OF APPEALS COMMITTED GRAVE REVERSIBLE ERROR IN RENDERING THE ASSAILED DECISION AND RESOLUTION WHEN, WITHOUT ANY LEGAL AND FACTUAL BASIS, IT ORDERED PETITIONER TO PAY RESPONDENT LSG ATTORNEY'S FEES IN THE AMOUNT OF TEN (10%) [PERCENT] OF THE PRINCIPAL AMOUNT.^[11]

We resolve to grant the petition.

In petitions for review, the Court does not normally review the factual findings of the courts below, but when the findings of the CA differ from those of the trial court, the Court will not hesitate to scrutinize the evidence on record. As between these two courts, it cannot be denied that the trial court is in a better position to ascertain the facts of the case considering its peculiar opportunity to be in direct contact with the witnesses and the evidence

presented. As such, this Court is inclined to uphold the findings of the trial court in this case which we find to be more conformable to the evidence on record.

The records reveal that the LSG Building was constructed as early as 1956. Originally, the building permit dated June 27, 1956[12] was for the construction of a 3-storey building. Apparently, this was amended when another building permit was issued on August 20, 1956,[13] for the construction of a 2-storey building only. The City Engineer testified that the Certificate of Occupancy was issued for the August 20, 1956 permit which was for the 2-storey building.[14] In 1966, the building was burned. Thereafter, it was rebuilt with two floors added to the original 2-storey building. The CA stressed that, according to John T. Lee, Manager of LSG Building, the present building was an entirely new edifice and not one built on the ashes of the old.[15] However, on cross-examination, John T. Lee admitted that:

WITNESS:

May I recall sometime in 1940, the property was purchased with an existing building apartment wooden in 1940. Sometime in 1956, the wooden apartment was destroyed by fire. So in 1956, a permit was requested and granted to construct a three storey reinforce concrete building. Now on the later part of 1956 it was amended. The permit was amended. It was changed to a two storey concrete building. It is called semi-concrete. So the building was finished in 1957. Then in 1966 that semi-concrete building was burned. So we requested for a building permit to reconstruct and include a 3[rd] and 4[th] storey building.

COURT:

Q

So the 3[rd] and 4[th] storey will be built on the skeleton?

A

According to my brother that is exactly the ...

Q

Skeleton on the ground floor and second floor and what was added was the 3[rd] and 4[th] floor? Storey?

A

Yes, sir.

Q

And it was finished when?

A

It was finished in 1968.

Q

And it was semi-concrete?

A

No reinforce concrete in 1968.

Q

So the 3[rd] and 4[th] storey was added to the shell of the ground and 2[nd] floor which was burned?

A

Yes, your honor.[16]

Whether or not the building is a new edifice or built on the old ashes is really of no moment. Verily, the foundation of the LSG Building which was good to support only two floors remained the same and could not support the weight of the present 4-storey building. Edgardo Soriano, Civil Engineer from the Office of the City Engineers Manila, testified that there was a great possibility that the settlement may be progressive,[17] and that the damages may be due to the defect in the foundation and not due to the excavation.[18] More intriguing is the statement in the report of E.S de Castro which reads:

In terms of purely engineering considerations, it would be best to demolish the existing building and then rebuild using present data as design guides. Economic feasibility is, of course, beyond the scope of this study.

If the owners wish to salvage whatever they can of the present building, it is suggested that the 3[rd] and 4[th] floors be removed and retain use of the ground and second floors only. To leave the building in its present condition would be unsafe.[19]

This only goes to show that the additional two floors put up on the LSG Building could have overburdened the foundation's load-bearing capacity and contributed to the sagging of the building. The possibility of settlement due to weak foundation cannot, therefore, be discounted. As the trial court correctly ruled: "adding more floors without touching or reinforcing the building's bottom line or foundation are already manifestive of some negligence or ignorance on the part of said building owner. x x x Had plaintiff stuck to his original building 2-storey with its kind of foundation, the excavation by its adjacent neighbor would not matter much or affect the building in question at the outset." [20]

Contributory negligence is conduct on the part of the injured party, contributing as a legal cause to the harm he has suffered, which falls below the standard to which he is required to conform for his own protection.[21] In this case, considering that respondent's negligence must have necessarily contributed to the sagging of the LSG Building, a reduction of the award is warranted. We, therefore, agree with the trial court that respondent should likewise share in the cost of the restructuring of its building. This is more in keeping with justice and equity. As the trial court ratiocinated:

After going over the records of the case, the Court believes and so holds that plaintiff is equally negligent in not providing the necessary foundation and reinforcement to accommodate/support the additional floors and this finding is supported by plaintiff's evidence more particularly the declaration of John Lee that the 3[rd] and 4[th] floors were built on the skeleton of the ground and 2[nd] floor which was burned (tsn pp. 8-9, July 9, 1985). To be adding additional floors to the original 2-storey of plaintiff's building and depending merely on the skeleton of the ground and second floors for its third and fourth floors without touching or reinforcing that building's bottom line or foundation are already manifestive of some negligence or ignorance on the part of said building owner (plaintiff). To put all the blame and responsibility for the defects, cracks and tilting or sagging of the building in question on the shoulders of the defendants is not proper. Plaintiff must realize his share of the faults and defects of his property in the situation.[22]

x x x x

In view of this and considering that the plaintiff's building is still occupied by tenants and has not been condemned nor condemnation proceedings accordingly instituted, the Court believes that demands of substantial justice are satisfied by allocating the damages on 50-50 ratio. Thus, 50% of the damages sustained by the building is to be borne by the plaintiff and the other 50% by the defendants jointly and severally upon reconstruction of the former's building. The amount of P154,000.00 for the services rendered by Contech (sic) Builders should be shouldered by the plaintiff alone. Defendant Contech shall reimburse defendants Spouses

Ngo Sin Sing and Ticia Dy Ngo for whatever amount the latter will pay to the plaintiff.[23]

The lower courts also found that there was insufficient lateral or subjacent support provided on the adjoining lot when excavation was done on petitioners' land. While there were wood sheet piles placed along the sides of the excavation, they were not properly braced to prevent a failure wedge.[24] Such failure can only be accounted to the contractor, which is no other than Contech. In the Proposal[25] submitted to the petitioners, Contech committed to undertake the construction of the NSS Building, providing labor and equipment for the project. Work included excavation for foundation, formworks, steel works, etc. Construction would be completed after 365 days. It was also provided that the petitioners were "released and relieved of any and all liabilities and responsibilities for any injury to the workers and laborers employed in the work contracted for, as well as for third-party liabilities." [26] As it turned out in the course of the construction of the NSS Building, Contech failed to observe the proper procedure prior to excavation. We quote the trial court:

Clearly, defendant Contech failed to observe his procedure of providing lateral and subjacent support prior to excavation. Under the doctrine of "supervening negligence" which states that where both parties are negligent but the negligence of one is appreciably later in time than of the other, or when it is impossible to determine whose fault or negligence should be attributed to the incident, the one who had the last clear opportunity to avoid the impending harm and failed to do so is chargeable with the consequences thereof. Stated differently, the rule would also mean that an antecedent negligence of a person does not preclude the recovery of damages for the supervening negligence of or bar a defense against the liability sought by another, if the latter, who had the last fair chance, could have avoided the impending harm by the exercise of due diligence.

In the case at bench, the negligence of Contech caused the damages sustained by the building, which did not discharge its duty of excavating eight (8) inches away from the boundary line from the lot of plaintiff with insufficient lateral and subjacent support.[27]

Article 176 of the New Civil Code provides:

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 requisites of quasi-delict are the following:

- (a) There must be an act or omission;
- (b) Such act or omission causes damage to another;
- (c) Such act or omission is caused by fault or negligence; and
- (d) There is no pre-existing contractual relation between the parties.[28]

These requisites are attendant in the instant case. The tortious act was the excavation done without observing the proper safeguards. Although the trial court stated that petitioner as land owner had every right to excavate on his own land, such right is not absolute as to deprive the adjacent owner sufficient lateral support pursuant to Article 684, New Civil Code, which states that:

No proprietor shall make such excavation upon his land as to deprive any adjacent land or building of sufficient lateral or subjacent support.

For the damage caused to the respondent, petitioners and Contech are jointly liable as they are joint tort-feasors. Conformably with Article 2194, the responsibility of two or more persons who are liable for the quasi-delict is solidary.[29] In *Lafarge Cement Philippines, Inc. v. Continental Cement Corporation*, [30] the Court had the

occasion to explain:

[O]bligations arising from tort are, by their nature, always solidary. We have assiduously maintained this legal principle as early as 1912 in *Worcester v. Ocampo*, in which we held:

x x x The difficulty in the contention of the appellants is that they fail to recognize that the basis of the present action is tort. They fail to recognize the universal doctrine that each joint tortfeasor is not only individually liable for the tort in which he participates, but is also jointly liable with his tortfeasors. x x x

It may be stated as a general rule that joint tortfeasors are all the persons who command, instigate, promote, encourage, advise, countenance, cooperate in, aid or abet the commission of a tort, or who approve of it after it is done, if done for their benefit. They are each liable as principals, to the same extent and in the same manner as if they had performed the wrongful act themselves. x x x

Joint tortfeasors are jointly and severally liable for the tort which they commit. The persons injured may sue all of them or any number less than all. Each is liable for the whole damages caused by all, and all together are jointly liable for the whole damage. It is no defense for one sued alone, that the others who participated in the wrongful act are not joined with him as defendants; nor is it any excuse for him that his participation in the tort was insignificant as compared to that of the others. x x x

Joint tortfeasors are not liable pro rata. The damages can not be apportioned among them, except among themselves. They cannot insist upon an apportionment, for the purpose of each paying an aliquot part. They are jointly and severally liable for the whole amount. x x x

A payment in full for the damage done, by one of the joint tortfeasors, of course satisfies any claim which might exist against the others. There can be but satisfaction. The release of one of the joint tortfeasors by agreement generally operates to discharge all. x x x

Of course, the court during trial may find that some of the alleged tortfeasors are liable and that others are not liable. The courts may release some for lack of evidence while condemning others of the alleged tortfeasors. And this is true even though they are charged jointly and severally.[31]

Prescinding from the above, there is basis to re-examine the court's disposition in this case as to the liability of the petitioner in the light of the judgment rendered (1) holding the petitioner and Contech jointly and severally liable, and (2) giving the right to the petitioner to be reimbursed for whatever amount it shall pay the respondent.[32]

In *Citytrust Banking Corporation v. Court of Appeals*,[33] the Court stated that a judgment may determine the ultimate rights of the parties on the same side as between themselves, such that questions of primary and secondary liability between joint tortfeasors may be determined. Such judgment does not make the "co-defendants" adversaries. It permits only the determination of questions of primary and secondary liability between joint tortfeasors.[34]

In *Weiner v. Mager & Throne, Inc., et al.*,[35] it was held that -

In order to avoid a multiplicity of suits, and to place it in the power of the defendant to get a determination of an entire controversy in a single action, statutory provision is made whereby, if the rights of the defendants as between themselves are determinable in an action, the whole matter may be disposed of in the judgment of such action, instead of leaving the defendants to litigate independently after the judgment has been entered in the main action.

From the foregoing, it is clear that this Court is not precluded from rendering a judgment that determines the liabilities of the "co-defendants" (petitioners and Contech) in this case. Rather than invite the definite prospect of the petitioners filing or instituting an action later on seeking reimbursement from the party primarily liable, which in this case is Contech, it would be more in keeping with the principles of expediency and the policy against

multiplicity of suits to make a direct adjudication in this regard. Considering that there was no proffered evidence of negligence on the part of the petitioners, the inescapable conclusion is that Contech is ultimately liable and should answer for the cost of the damage.

Indeed, the facts show that Contech's negligence was the proximate cause of the damage. Construction is a field requiring technical expertise. The petitioners, as ordinary laymen, would understandably have no knowledge at all about the technical aspect of constructing a building. This was precisely the reason why they contracted the services of a reputable construction firm to undertake the project. Petitioners had every right to rely on the warranties and representations of their contractor.

We note that Contech has remained silent, as if accepting its fate of liability in this case. The trial court observed that Contech did not present evidence to controvert the parties' assertions or prove their allegations in the answer, despite an order to do so.^[36] From the trial court's decision, both the petitioner and respondent filed their respective appeals while Contech no longer challenged said decision. Thus, the decision holding it liable has become final and executory.

Moreover, the trial court pointed out that Contech fell short of its responsibility as contractor in this valuable project. It failed to insure its work against possible risks. We quote:

Defendant Contech as the contractor should have been prudent enough as to have sought and acquired a Contractor All Risk (CAR) insurance policy and/or Erection All Risk (EAR) insurance policy in the course of such a construction that it had contracted with co-defendant Spouses. Had CAR & EAR insurance policies been availed of before any excavation was undertaken the plaintiff could have run after the insurance companies that could have covered those risks. Contractors of building should have taken the roles of the wise and prudent father to their customers or clients as they are specialists in themselves as their field of know-how in technology would always be demanded and extracted of them by all their patrons.^[37]

As to the award for attorney's fees in the CA decision, the same should be deleted, as the appellate court did not provide any basis whatsoever to justify the award.

WHEREFORE, the petition is GRANTED. The Decision of the Court of Appeals is SET ASIDE. The decision of the Regional Trial Court is REINSTATED with the modification that Contech Construction Technology Development Corporation, alone, is ORDERED to pay respondent Li Seng Giap & Sons, Inc., the sum of P4,010,843.50.

SO ORDERED.

Ynares-Santiago, (Chairperson), Austria-Martinez, Chico-Nazario, and Reyes, JJ., concur.

[1] Penned by Associate Justice Mario L. Guariña III, with Associate Justices Rebecca de Guia-Salvador and Santiago Javier Ranada, concurring; rollo, pp. 35-43.

[2] TSN, February 8, 1985, p. 6.

[3] CA Decision, p. 2, rollo, p. 36.

[4] Complaint, p. 5; records, p. 5.

[5] Rollo, pp. 52-53.

[6] Records, pp. 10-13.

- [7] Rollo, pp. 101-102.
- [8] Records, pp. 14-16.
- [9] Rollo, p. 110.
- [10] Id. at 42.
- [11] Id. at 18-19.
- [12] Exhibit "2," records, p. 577.
- [13] Exhibit "1," id. at 576, with notation "Amendment."
- [14] Rollo, p. 105.
- [15] CA Decision, p. 6; id. at 40.
- [16] TSN, July 9, 1985, pp. 8-9.
- [17] TSN, August 25, 1991, p. 35.
- [18] TSN, August 10, 1995, p. 46.
- [19] Exhibit "P," p. 9. (Underlining ours.)
- [20] Rollo, p. 108.
- [21] Valenzuela v. Court of Appeals, 323 Phil. 374, 388 (1996).
- [22] Rollo, p. 108.
- [23] Id. at 110.
- [24] TSN, August 9, 1991.
- [25] Records, pp. 671-672.
- [26] Id. at 672.
- [27] Rollo, pp. 107-108.
- [28] Chan, Jr. v. Iglesia ni Cristo, Inc., G.R. No. 160283, October 14, 2005, 473 SCRA 177, 186-187.
- [29] Id. at 186.
- [30] G.R. No. 155173, November 23, 2004, 443 SCRA 522.
- [31] Id. at 544-545. (Underlining ours.)
- [32] Citytrust Banking Corporation v. Court of Appeals, G.R. No. 92592, April 30, 1991, 196 SCRA 553.
- [33] Id. at 561.
- [34] 49 C.J.S. Judgments §42.
- [35] 167 Misc. 338, 3 N.Y.S.2d 918.
- [36] Rollo, p. 106.
- [37] Id. at 109.

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