

RIZAL COMMERCIAL BANKING CORPORATION, PETITIONER, VS. MARCOPPER MINING CORPORATION, RESPONDENT.

G.R. No. 170738. October 30, 2009

Ponente: QUISUMBING, J.

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QUISUMBING, J.:

For resolution is the Motion for Reconsideration[1] filed by respondent Marcopper Mining Corporation (Marcopper) seeking to set aside the Court's Decision[2] dated September 12, 2008 in favor of petitioner Rizal Commercial Banking Corporation (RCBC). The dispositive portion of the Decision reads:

WHEREFORE, the petition is GRANTED. The assailed Decision dated June 6, 2005 and the Resolution dated December 8, 2005 of the Court of Appeals in CA-G.R. CV No. 77594 are REVERSED and SET ASIDE. Marcopper is directed to pay RCBC the following amounts expressly stipulated in the Non-Negotiable Promissory Note Nos. 21-3697 and 21-3797:

1. US\$5,425,485.00 as the total principal amount due under Non-Negotiable Promissory Note Nos. 21-3697 and 21-3797, including the interest due on US\$2,698,845.00 under Non-Negotiable Promissory Note No. 21-3697 at the rate of 9% per annum until fully paid;
2. Penalty equivalent to 36% per annum of the amount due and unpaid under Non-Negotiable Promissory Note Nos. 21-3697 and 21-3797 until fully paid; and
3. Attorney's fees equivalent to 20% of the total amount due.

RCBC's claims for moral and exemplary damages are denied. It may, however, exercise its rights, in accordance with law, to foreclose on the properties covered. No pronouncement as to costs.

SO ORDERED.[3]

The antecedent facts as summarized in the decision sought to be reconsidered, are as follows:

To finance its acquisition of 12 Rig Haul Trucks and one Demag Hydraulic Excavator Shovel, Marcopper obtained a loan from RCBC in the amount of US\$13.7 Million. As security for the loan, Marcopper executed in favor of RCBC a Deed of Chattel Mortgage dated April 23, 1996 of the 12 Rig Haul Trucks and one Demag Hydraulic Excavator Shovel and a Deed of Pledge dated August 29, 1996 covering shares of stock of the Baguio Country Club, Canlubang Golf and Country Club, Philippine Columbian Association, and Puerto Azul Beach and Country Club. Later, Marcopper likewise delivered to RCBC an additional Deed of Pledge dated September 9, 1997, covering one share of stock in the Philippine Columbian Association.

Sometime in 1996, a restructuring of the loan was agreed upon by RCBC and Marcopper. In view of its inability to pay the loan, Marcopper, in a letter dated July 1, 1997 proposed two options to RCBC: (1) to initiate foreclosure of the mortgaged assets and treat the deficiency as an unsecured creditor's claim against Marcopper's remaining assets; or (2) to accept the assignment of a Forbes Park property owned by Marcopper comprising 2,437 square meters and covered by TCT No. 321269 (Forbes Park property) as partial payment of the loan and restructure the payment of the balance over a period of two years. x x x x.[4]

On July 3, 1997, representatives from both parties met to discuss Marcopper's proposal.

In a letter[5] dated July 8, 1997 Marcopper laid down its repayment scheme under Option 2, as follows:

x x x x

1)

The principal amount was to be revised, from the original principal of \$13.7 million to \$14.327 million, which includes interest that has been capitalized;

2.)

Implementation of the assignment of the Forbes Park property for the agreed amount of P235 million, equivalent to about \$8,901,515;

3.)

Payment of the amount of \$2,698,485 over a period of one (1) year payable quarterly plus interest; and

4.)

Payment of the balance of \$2,727,000 over a period of two (2) years, payable quarterly, without interest.

x x x x

RCBC Director/Senior Vice-President Susanne Y. Santos and Senior Vice President Filadelfo S. Rojas, Jr. signed their conformity to the above repayment plan.

On July 31, 1997 Marcopper transmitted several documents to be signed by RCBC, among which, were the Deed of Assignment of its Forbes Park property and the Deed of Release from Mortgage of six (6) units Rig Trucks and one (1) unit Demag Shovel. RCBC signed the Deed of Assignment of the Forbes Park property but returned the Deed of Release from Mortgage, unsigned.

On August 22, 1997, Marcopper sent RCBC another letter transmitting two Promissory Notes for US\$2,698,485 and US\$2,727,000 which amounts correspond to the restructured balance of its outstanding loan with RCBC after the partial payment through the assignment of the Forbes Park property. In addition, Marcopper also sent the Surety Agreements duly executed by Mr. Teodoro G. Bernardino. Marcopper also delivered to RCBC an additional Deed of Pledge dated September 9, 1997 over one share of the Philippine Columbian Association.

On September 12, 1997, Ma. Felisa R. Banzon, RCBC Vice President wrote a letter to Marcopper saying:

September 12, 1997

MARCOPPER MINING CORP.

6[th]Floor, V. Madrigal Bldg.

6793 Ayala Avenue

Makati City

Attention: MR. NICANOR L. ESCALANTE

Treasurer

Gentlemen:

As you are aware, we have effected the transfer of ownership of the Forbes property which you used to partially settle your past due obligations with the bank. You have previously requested the release of six (6)

Units Rig trucks and one (1) Demag Shovel. However, as I have previously informed you, we first need to work on some details in relation to the dacion. We still need to get approval for your request thus no commitment can be made at this time.

Very truly yours,

(Sgd.)

MA. FELISA R. BANZON

Vice-President[6]

On November 24, 1997, Marcopper's Chairman of the Board, Joost Pekelharing, wrote RCBC saying that MR Holdings, Ltd. agreed to release its lien on the Forbes Park property upon Marcopper's assurance that RCBC will release from mortgage the six Rig Haul Trucks and one Demag Hydraulic Excavator Shovel. Likewise, Marcopper had committed to MR Holdings that it will mortgage some club shares, which have been pledged to RCBC and are expected to be released, after the restructuring of the loan obligation.

On December 15, 1997, RCBC informed Marcopper that its Executive Committee had approved the release of the five Rig Haul Trucks subject to the condition that Marcopper pays the first amortization which fell due on November 24, 1997. In a subsequent letter dated December 17, 1997, RCBC informed Marcopper that it has approved the release from mortgage of the six Rig Haul Trucks and one Demag Hydraulic Excavator Shovel as well as the release from pledge of the club shares, also subject to the same condition. When Marcopper failed to settle its obligations, RCBC sent a letter to Marcopper and Mr. Bernardino declaring the whole obligation under the non-negotiable promissory notes due and payable. However, Marcopper and its surety refused to pay.

On July 16, 1998, Marcopper filed a complaint[7] before the RTC of Makati for Specific Performance with Damages and with Prayer for the Issuance of a Writ of Preliminary Injunction against RCBC. Marcopper alleged that it agreed to assign the Forbes Park property to RCBC to be credited to Marcopper's account in the amount of US\$8,909,515 on the condition that RCBC will execute a Deed of Release from Mortgage of the six Rig Haul Trucks, one Demag Hydraulic Excavator Shovel and the club shares of the Baguio Country Club, Canlubang Golf and Country Club, Puerto Azul Beach and Country Club and Philippine Columbian Association, but RCBC failed to do so. Marcopper prayed that RCBC be ordered to execute a deed of partial release of mortgage and pledge, desist from declaring Marcopper's promissory notes as due and demandable, and pay damages.

The Regional Trial Court (RTC) rendered a decision in favor of Marcopper. On appeal, the Court of Appeals affirmed with modification the decision of the RTC. From the decision of the Court of Appeals, petitioner RCBC filed a petition for review on certiorari. This Court found the petition to be impressed with merit, and reversed the decision of the appellate court. We ruled in this wise:

A review of the written exchanges between the parties shows no written agreement was ever executed by RCBC and Marcopper for RCBC to execute a partial release of mortgage and pledge upon assignment to it of the Forbes Park property. The July 1, 1997 letter from Marcopper Treasurer Nicanor L. Escalante to RCBC merely listed two options of payment of Marcopper's loan to RCBC while the July 8, 1997 letter from Marcopper to RCBC modified the terms of payment as to the second option listed in the July 1, 1997 letter. The next written communication between the parties was the July 31, 1997 where Marcopper forwarded the Deed of Release of Mortgage which it requested RCBC to sign.

Even the letter dated November 24, 1997 from Marcopper Chairperson of the Board Joost Pekelharing to RCBC makes no allusion to a written contract. The letter merely stated MR Holdings agreed to release the Forbes Park property upon Marcopper's assurance that RCBC will release from mortgage six units Rig Haul Trucks and one unit Demag Hydraulic Excavator Shovel.

The existence of the alleged condition asserted by Marcopper was therefore to be gleaned primarily from the testimonies of its witnesses who asserted that Marcopper and RCBC had agreed on July 3, 1997 to the release of the mortgage and pledge as a condition to the assignment of the Forbes Park property and ultimately the payment of the promissory notes. However, we note that the first time that Marcopper ever mentioned the release of the pledges of club shares was in its letter dated November 24, 1997. Before that, Marcopper requested the release of the mortgage on the Rig Haul Trucks and one unit Demag Hydraulic Excavator Shovel only. Marcopper's letter to RCBC dated July 8, 1997, which confirmed the agreements between the parties during their July 3, 1997 meeting, did not state that RCBC committed to release the mortgage and pledge, a condition which Marcopper alleged to be a material condition and which would ordinarily be included in the written confirmation had it been agreed upon. Also, on September 9, 1997, Marcopper executed a deed of pledge of one additional share of stock of the Philippine Columbian Association.[8] x x x

Unfazed, Marcopper filed the instant motion for reconsideration alleging that:

I.

The decision reversed and set aside the factual findings of the trial court and appellate [court] primarily on the basis of a deed of pledge allegedly executed on 9 September 1997;[9]

II.

The deed of chattel mortgage executed on the mining trucks and demag shovel was for another transaction, the opening by RCBC of a foreign standby letter of credit in favor of the U.S. Eximbank to guarantee a loan that did not push through;[10]

III.

The 1 July 1997 letter and 8 July 1997 agreement involved the restructuring of the original bridge loan, which led to the tender of MMC's North Forbes Park property in the amount of \$8.9 Million.[11]

Respondent Marcopper's grounds for reconsideration lack merit. Noticeably, the issues raised by Marcopper in its motion for reconsideration are new matters which have not been raised in the proceedings below and are not proper to be raised for the first time in a motion for reconsideration.

In the main, Marcopper contends that the Court reversed and set aside the factual findings of the trial court and the Court of Appeals primarily on the basis of a falsified Deed of Pledge dated September 9, 1997. A perusal of the Decision sought to be reconsidered would readily show that it was not based mainly on the deed of pledge executed on September 9, 1997, as Marcopper alleged in its motion. The Decision was reached after careful review of the written exchanges between RCBC and Marcopper, as well as other documentary and testimonial evidence presented by the parties. We found that no explicit written agreement was reached for RCBC to execute a partial release of mortgage and pledge upon assignment to it by Marcopper of the Forbes Park property.

Marcopper harps on that portion of the decision which states:

x x x x Also, on September 9, 1997, Marcopper executed a deed of pledge on one additional share of stock of the Philippine Columbian Association. If it were true, as asserted by Marcopper's witnesses, that RCBC had committed to release the mortgage and pledge during the July 3, 1997 meeting, Marcopper would not have delivered the additional pledge after the Forbes Park property had been assigned to RCBC. That it did so proves that the assignment of the Forbes Park property was not made on the condition Marcopper claims.[12]

Marcopper assails the authenticity of the deed of pledge[13] claiming that the signatory to the deed, Mr. Jose E. Reyes, was no longer connected with and cannot sign on behalf of Marcopper as he had resigned in September 1996, a year before the deed was executed. In support thereof, Marcopper filed a Supplement to the Motion for

Reconsideration[14] attaching the certification of Mr. Reyes that he resigned from Marcopper effective sometime in September 1996. Additionally, Marcopper averred that the September 7, 1997 deed of pledge for one (1) Philippine Columbian Association share was for an Export Loan Line which had already been "shelved."

Marcopper, however, raised the issue of the alleged falsity of the deed of pledge only in its motion for reconsideration of the Court's Decision. But in its Memorandum filed before the Court, it clearly admitted as undisputed the following facts:

x x x x

2. Marcopper Mining Corp. through its President and Chief Executive Officer John E. Loney and [T]reasurer Jose E. Reyes obtained a bridge loan from petitioner Rizal Commercial Banking Corporation in the amount of US\$13.7 Million to finance the acquisition of twelve (12) Unit Rig trucks.

x x x x

5. Apprehensive of the unsecured bridge loan extended to MMC, RCBC's First Senior Vice President, Mr. Filadelfo Rojas approached Mr. Teodoro Bernardino, a member of the Board of Directors of MMC, for the possible settlement of MMC's bridge loan.

6. Through the assistance of Mr. Bernardino, RCBC was able to acquire collateral for the bridge loan it extended to MMC. A Deed of Chattel Mortgage dated April 23, 1996 was executed between the parties, with the following properties as collateral:

a. 12 units - Unit Rig Haul Trucks Model ET-3700 with Detroit Diesel 16V149TIB, 2000 HP Engine, GTA 22 Alternators and GE 88 Wheel Motors; SN #121-126 Truck No. 8-41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52 complete with accessories and front headboard and Lip Extension;

x x x x

Another Deed of Pledge was executed covering One (1) Philippine Columbian Association Share with Cert. No. 1486 on September 9, 1997.[15] (Emphasis supplied.)

In fact, we note that respondent has offered as evidence, Exh. "B", the same deed of pledge, as a further security to the loan agreement obtained by Marcopper from RCBC. With respondent's own admission in its pleading of the execution of the subject Deed of Pledge, it cannot now be allowed to contradict its statement and claim that the same document had been falsified without violating the rules on fair play and due process. An admission made in the pleading cannot be controverted by the party making such admission and is conclusive as to him, and all proofs submitted by him contrary thereto or inconsistent therewith should be ignored.[16] Moreover, issues and arguments which are not adequately brought to the attention of the trial court ordinarily will not be considered by a reviewing court as they cannot be raised for the first time on appeal. If an issue is raised only in the motion for reconsideration of the appellate court's decision, it is as if it was never raised in that court at all.[17] Respondent by its own previous admission is bound as to the due execution of the deed of pledge.

Furthermore, Marcopper, in a last ditch effort to reverse the Court's Decision averred that the deed of chattel mortgage executed on the mining trucks and Demag shovel was for another transaction, the opening by RCBC of a foreign standby letter of credit in favor of the U.S. Eximbank to guarantee a loan that did not push through. Marcopper further claims that a restructured loan or a new loan is being agreed upon for the balance of the original bridge loan after payment of about \$8.9 million through a Forbes Park property.

As aptly pointed out by petitioner RCBC in its Comment, not once did Marcopper question the validity of the chattel mortgage on the Rig Haul Trucks and the Demag Shovel. But now, Marcopper is asserting that the deed of

chattel mortgage on these equipment was executed for a consideration that did not materialize and RCBC should have released the mortgage. It is now too late for respondent to contradict its previous judicial admissions in the prior proceedings of the case. It would appear that in Marcopper's attempt to seek reversal of the Court's Decision, it is in effect changing its theory of the case. Well-settled is the rule that a party is not allowed to change the theory of the case or the cause of action on appeal.[18] We have consistently rejected the pernicious practice of shifting to a new theory on appeal in the hope of a favorable result.[19] Issues not raised in the court a quo cannot be raised for the first time on appeal because to do so would be offensive to the basic rules of justice and fair play.[20] Matters, theories or arguments not brought out in the proceedings below will not ordinarily be considered by a reviewing court as they cannot be raised for the first time on appeal.[21]

We have thoroughly reviewed the records of the case and we find no reason to change our previous ruling that there was no agreement for RCBC to execute a partial release of mortgage and pledge. It bears stressing that even the Court of Appeals observed that "details as to the partial release of the collaterals were not indicated in the letters exchanged between the parties." Nevertheless, the appellate court gave credence to the testimony of Marcopper's President, Atty. Teodulo Gabor, to show that RCBC agreed to such release through Mr. Jun Rojas. Our own review of the testimonies of the officers of Marcopper does not convince us that the RCBC acceded to the partial release of mortgage and pledge. Thus, we quote the portion of Atty. Gabor's testimony on cross-examination:

x x x x

Q

Now, you made mention in your testimony of an agreement on the part of the defendant to release an alleged agreement to release the pledge on the shares?

A

Yes, sir.

Q

When was this agreement made?

x x x x

A:

More or less around July 1997.

Q:

Who made this commitment to release the mortgage and the pledge on the part of RCBC?

A:

It was RCBC according to our chairman of the board.

Q:

And in other words you don't know who in RCBC made this supposed commitment?

A:

A certain Filadelfo Rojas something like that. A Senior Vice President of RCBC.

Q:

Were you present when this supposed commitment was made?

A:

No, sir.

x x x x

Q:

[And you] confirm that you were not present when this supposed commitment was made?

A:

Yes, sir.

Q:

And you will admit that this supposed commitment is not in writing?

A:

Yes, sir.

x x x x

Q:

And you described this letter as the letter [(referring to the letter dated July 1, 1997)] confirming the agreement between the plaintiff and the defendant regarding the restructuring of the loan?

A:

No. It was a proposal presented by Marcopper to RCBC on how our obligation with the bank will be paid.

Q:

Yes and you will agree that this Exh. "E" does not contain the supposed commitment to release the mortgage and the pledge?

A:

Yes, sir. This letter ha.

x x x x

Q:

And you will agree with me that again there is no mention of the supposed commitment to release the deed of mortgage and the pledge?

A:

In this particular letter, Exh. "F" yes.

Q:

There is none?

A:

None.

Q:

In fact, there is no, as you said there is no written document confirming your testimony that there was a commitment on the part of RCBC to release the securities?

A:

In the subsequent letters sent by RCBC to Marcopper they actually agreed to release the trucks, demag shovel, the club shares but now with new conditions.[22] (Emphasis supplied.)

The foregoing fail to convince us that RCBC made a commitment to release Marcopper's mortgage on the six Rig Trucks, the Excavator Shovel, and the pledge on the club shares. On cross-examination, Atty. Gabor admitted that he was not present when the alleged commitment from RCBC on the release of the mortgage was made and he learned of said agreement only from the report of Marcopper Treasurer Nicanor Escalante. We also note that the July 8, 1997 letter bearing the conformity of RCBC officials refers to the repayment scheme proposed by Marcopper; that is, the assignment to RCBC of the Forbes Park property and the execution of two Promissory Notes. However, no mention was made of the partial release of the mortgage. There is nothing to indicate with certainty that the assignment of the Forbes Park property was conditioned upon the partial release of the mortgage. On the contrary, when RCBC signed the deed of assignment, it expressly agreed to release the mortgage and pledge on the express condition that Marcopper would pay the Promissory Notes which have become due. Needless to say, Marcopper can legally compel RCBC to execute a partial release of the mortgage only if it can present any evidence that RCBC had, indeed, acceded to a partial release of the mortgage and pledge upon Marcopper's assignment of the Forbes Park property in its favor.

Yet, Joost Pekelharing, the Chairman of Marcopper, cannot identify exactly who, among the representatives of RCBC, made the alleged commitment to release the mortgage and pledge. He testified in this manner:

Q:

Who from RCBC made a commitment to release the equipment?

x x x x

A:

I think, 3 or 4 people from RCBC present there. I'm not sure who it was, but I think, the lawyer. But, I am not sure.

Q:

The lawyer?

A:

I am not sure.

Q:

It wasn't Mr. Roxas who made a commitment?

A:

I believe he was definitely one who was very active during that time.

Q:

Yes, but it was him who made the commitment from RCBC?

A:

I really don't recall. I only know for sure that June Roxas was very active in the discussion. So most likely it was June Roxas.

x x x x

Q:

...[A]lright, yes. Now, as Chairman, you sign the Deed of Assignment over the Forbes Park property, [right]?

A:

Yes.

Q:

Do you recall the, more or less, ...no. In this Deed of Assignment, does it contain the supposed condition to release the equipment?

A:

No.

Q:

In fact, this alleged agreement to release is not in writing?

A:

Right.[23]

Notwithstanding, another witness for Marcopper, Mr. Bernardino, also claims that RCBC preferred to acquire the Forbes Park property in exchange for the release of the mortgage on the six Rig Trucks and the Demag Shovel.

The testimonies of Marcopper's officers do not suffice to support respondent's claim that RCBC agreed to partially release the mortgage on the subject properties. While the records show that Marcopper offered to assign its property in favor of RCBC by way of dacion, there appears to be no arrangement for the partial release of mortgage on the six (6) Rig Haul Trucks as a consequence of such dacion. In this case, RCBC accepted the assignment of the Forbes Park property as partial payment of Marcopper's loan but RCBC also made it clear that the subject mortgage shall be released only after Marcopper pays the non-negotiable promissory notes which have become due. For an offer to be binding, the acceptance must be absolute, and if qualified, the acceptance would merely constitute a counter-offer. Where there is only a proposal and a counter-proposal that did not add up to a final arrangement, there is no meeting of the minds between the parties. Thus, absent any clear right on the part of Marcopper to compel RCBC to execute the partial release of mortgage and pledge, its action must fail.

WHEREFORE, respondent's Motion for Reconsideration of the Court's Decision dated September 12, 2008 is DENIED for lack of merit.

SO ORDERED.

Carpio,[*]Chico-Nazario,**] Brion, and Abad, JJ., concur.

[*] Additional member per Special Order No. 757.

**] Additional member per Special Order No. 759.

[1] Rollo, pp. 321-389.

[2] Id. at 304-320.

[3] Id. at 319.

[4] Id. at 305.

[5] Records, pp. 76-77.

[6] Id. at 83.

[7] Id. at 1-9.

[8] Rollo, pp. 316-317.

[9] Id. at 322.

[10] Id. at 324.

[11] Id. at 326.

[12] Id. at 317.

[13] Records, pp. 336-337.

[14] Rollo, pp. 397-400.

[15] Id. at 251-253.

[16] Tan v. Rodil Enterprises, G.R. No. 168071, December 18, 2006, 511 SCRA 162, 183.

[17] Pascual v. Ramos, G.R. No. 144712, July 4, 2002, 384 SCRA 105, 113.

[18] Tokuda v. Gonzales, G.R. No. 139628, May 5, 2006, 489 SCRA 549,554-555.

[19] Big AA Manufacturer v. Antonio, G.R. No. 160854, March 3, 2006, 484 SCRA 33, 43.

[20] Silva v. Mationg, G.R. No. 160174, August 28, 2006, 499 SCRA 724, 737.

[21] City of Baguio v. Niño, G.R. No. 161811, April 12, 2006, 487 SCRA 216, 226-227.

[22] TSN, January 18, 2000, pp. 794-798.

[23] TSN, June 20, 2000, pp. 838-841.

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