

R.S. TOMAS, INC., PETITIONER, VS. RIZAL CEMENT COMPANY, INC., RESPONDENT.

G.R. No. 173155. March 21, 2012

Ponente: PERALTA, J.

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PERALTA, J.:

This is a petition for review on certiorari under Rule 45 of the Rules of Court filed by petitioner R.S. Tomas, Inc. against respondent Rizal Cement Company, Inc. assailing the Court of Appeals (CA) Decision[1] dated December 19, 2005 and Resolution[2] dated June 6, 2006 in CA-G.R. CV No. 61049. The assailed decision reversed and set aside the Regional Trial Court[3] (RTC) Decision[4] dated June 5, 1998 in Civil Case No. 92-1562.

The facts of the case, as culled from the records, are as follows:

On December 28, 1990, respondent and petitioner entered into a Contract[5] for the supply of labor, materials, and technical supervision of the following projects:

- J.O. #P-90-212 – Wiring and installation of primary and secondary lines system.
- J.O. #P-90-213 – Supply and installation of primary protection and disconnecting switch.
- J.O. #P-90-214 – Rewinding and conversion of one (1) unit 3125 KVA, 34.5 KV/2.4 KV, 3ø Transformer to 4000 KVA, 34.5 KV/480V, 3ø Delta Primary, Wye with neutral secondary.[6]

Petitioner agreed to perform the above-mentioned job orders. Specifically, it undertook to supply the labor, equipment, supervision, and materials as specified in the detailed scope of work.[7] For its part, respondent agreed to pay the total sum of P2,944,000.00 in consideration of the performance of the job orders. Petitioner undertook to complete the projects within one hundred twenty (120) days from the effectivity of the contract.[8] It was agreed upon that petitioner would be liable to respondent for liquidated damages in the amount of P29,440.00 per day of delay in the completion of the projects which shall be limited to 10% of the project cost.[9] To secure the full and faithful performance of all its obligations and responsibilities under the contract, petitioner obtained from Times Surety & Insurance Co. Inc. (Times Insurance) a performance bond[10] in an amount equivalent to fifty percent (50%) of the contract price or P1,458,618.18. Pursuant to the terms of the contract, respondent made an initial payment of P1,458,618.18 on January 8, 1991.[11]

In a letter[12] dated March 9, 1991, petitioner requested for an extension of seventy-five (75) days within which to complete the projects because of the need to import some of the materials needed. In the same letter, it also asked for a price adjustment of P255,000.00 to cover the higher cost of materials.[13] In another letter[14] dated March 27, 1991, petitioner requested for another 75 days extension for the completion of the transformer portion of the projects for failure of its supplier to deliver the materials.

On June 14, 1991,[15] petitioner manifested its desire to complete the project as soon as possible to prevent further losses and maintain goodwill between the companies. Petitioner requested for respondent's assistance by

facilitating the acquisition of materials and supplies needed to complete J.O. #P-90-212 and J.O. #P-90-213 by directly paying the suppliers. It further sought that it be allowed to back out from J.O. #P-90-214 covering the rewinding and conversion of the damaged transformer.

In response[16] to petitioner's requests, respondent, through counsel, manifested its observation that petitioner's financial status showed that it could no longer complete the projects as agreed upon. Respondent also informed petitioner that it was already in default having failed to complete the projects within 120 days from the effectivity of the contract. Respondent further notified petitioner that the former was terminating the contract. It also demanded for the refund of the amount already paid to petitioner, otherwise, the necessary action would be instituted. Respondent sent another demand letter[17] to Times Insurance for the payment of P1,472,000.00 pursuant to the performance bond it issued.

On November 14, 1991,[18] respondent entered into two contracts with Geostar Philippines, Inc. (Geostar) for the completion of the projects commenced but not completed by petitioner for a total consideration of P3,435,000.00.

On December 14, 1991, petitioner reiterated its desire to complete J.O. #P-90-212 and J.O. #P-90-213 and to exclude J.O. #P-90-214,[19] but the same was denied by respondent in a letter[20] dated January 14, 1992. In the same letter, respondent pointed out that amicable settlement is impossible. Hence, the Complaint for Sum of Money[21] filed by respondent against petitioner and Times Surety & Insurance Co., Inc. praying for the payment of the following: P493,695.00 representing the amount which they owed respondent from the downpayment and advances made by the latter vis-à-vis the work accomplishment; P2,550,945.87 representing the amount incurred in excess of the cost of the projects as agreed upon; P294,000.00 as liquidated damages; plus interest and attorney's fees.[22]

Times Insurance did not file any pleading nor appeared in court. For its part, petitioner denied[23] liability and claimed instead that it failed to complete the projects due to respondent's fault. It explained that it relied in good faith on respondent's representation that the transformer subject of the contract could still be rewound and converted but upon dismantling the core-coil assembly, it discovered that the coils were already badly damaged and the primary bushing broken. This discovery allegedly entailed price adjustment. Petitioner thus requested respondent for additional time within which to complete the project and additional amount to finance the same. Petitioner also insisted that the proximate cause of the delay is the misrepresentation of the respondent on the extent of the defect of the transformer.

After the presentation of the parties' respective evidence, the RTC rendered a decision on June 5, 1998 in favor of petitioner, the dispositive portion of which reads:

Wherefore, finding defendant-contractor's evidence more preponderant than that of the plaintiff, judgment is hereby rendered in favor of the defendant-contractor against the plaintiff and hereby orders:

- (1) that the instant case be DISMISSED;
- (2) that plaintiff pays defendant the amount of P4,000,000.00; for moral and exemplary & other damages;
- (3) P100,000.00 for attorney's fees and cost of suit.

SO ORDERED.[24]

The RTC held that the failure of petitioner to complete the projects was not solely due to its fault but more on respondent's misrepresentation and bad faith.[25] Therefore, the Court dismissed respondent's complaint. Since respondent was found to have committed deceit in its dealings with petitioner, the court awarded damages in favor of the latter.[26]

Respondent, however, successfully obtained a favorable decision when its appeal was granted by the CA. The appellate court reversed and set aside the RTC decision and awarded respondent P493,695.34 for the excess payment made to petitioner, P508,510.00 for the amount spent in contracting Geostar and P294,400.00 as liquidated damages.[27] Contrary to the conclusion of the RTC, the CA found that petitioner failed to prove that respondent made fraudulent misrepresentation to induce the former to enter into the contract. It further held that petitioner was given the opportunity to inspect the transformer before offering its bid. [28] This being so, the CA added that petitioner's failure to avail of such opportunity is inexcusable, considering that it is a company engaged in the electrical business and the contract involved a sizable amount of money.[29] As to the condition of the subject transformer unit, the appellate court found the testimony of petitioner's president insufficient to prove that the same could no longer be rewound or converted.[30] Considering that advance payments had been made to petitioner, the court deemed it necessary to require it to return to respondent the excess amounts, vis-à-vis its actual accomplishment.[31] In addition to the refund of the excess payment, the CA also ordered the reimbursement of what respondent paid to Geostar for the unfinished projects of petitioner as well as the payment of liquidated damages as stipulated in the contract.[32]

Aggrieved, petitioner comes before the Court in this petition for review on certiorari under Rule 45 of the Rules of Court raising the following issues: (1) whether or not respondent was guilty of fraud or misrepresentation as to the actual condition of the transformer subject of the contract;[33] (2) whether or not the evidence presented by petitioner adequately established the true nature and condition of the subject transformer;[34] (3) whether or not petitioner is guilty of inexcusable delay in the completion of the projects;[35] (4) whether or not petitioner is liable for liquidated damages;[36] and (5) whether or not petitioner is liable for the cost of the contract between respondent and Geostar.[37]

The petition is without merit.

The case stemmed from an action for sum of money or damages arising from breach of contract. The contract involved in this case refers to the rewinding and conversion of one unit of transformer to be installed and energized to supply respondent's power requirements.[38] This project was embodied in three (3) job orders, all of which were awarded to petitioner who represented itself to be capable, competent, and duly licensed to handle the projects.[39] Petitioner, however, failed to complete the projects within the agreed period allegedly because of misrepresentation and fraud committed by respondent as to the true nature of the subject transformer. The trial court found that respondent indeed failed to inform petitioner of the true condition of the transformer which amounted to fraud thereby justifying the latter's failure to complete the projects. The CA, however, had a different conclusion and decided in favor of respondent. Ultimately, the issue before us is whether or not there was breach of contract which essentially is a factual matter not usually reviewable in a petition filed under Rule 45.[40]

In resolving the issues, the Court inquires into the probative value of the evidence presented before the trial court.[41] Petitioner, indeed, endeavors to convince us to determine once again the weight, credence, and probative value of the evidence presented before the trial court.[42] While in general, the findings of fact of the CA are final and conclusive and cannot be reviewed on appeal to the Court because it is not a trier of facts,[43] there are recognized exceptions[44] as when the findings of fact are conflicting, which is obtaining in this case. The conflicting conclusions of the trial and appellate courts impel us to re-examine the evidence presented.

After a thorough review of the records of the case, we find no reason to depart from the conclusions of the CA.

It is undisputed that petitioner and respondent entered into a contract for the supply of labor, materials, and technical supervision primarily for the rewinding and conversion of one (1) unit of transformer and related works

aimed at providing the power needs of respondent. As agreed upon by the parties, the projects were to be completed within 120 days from the effectivity of the contract. Admittedly, however, respondent failed, not only to perform its part of the contract on time but, in fact, to complete the projects. Petitioner tried to exempt itself from the consequences of said breach by passing the fault to respondent. It explained that its failure to complete the project was due to the misrepresentation of the respondent. It claimed that more time and money were needed, because the condition of the subject transformer was worse than the representations of respondent. Is this defense tenable?

We answer in the negative.

Records show that petitioner indeed asked for price adjustment and extension of time within which to complete the projects. In its letter[45] dated March 9, 1991, petitioner anchored its request for extension on the following grounds:

1. To maximize the existing 3125 KVA to 4000 KVA capacity using the same core, we will replace the secondary windings from rectangular type to copper sheet which is more accurate in winding to the required number of turns than using parallel rectangular or circular type of copper magnet wires. However, these copper sheets are not readily available locally in volume quantities, and therefore, we will be importing this material and it will take 60 days minimum time for its delivery.
2. We also find it difficult to source locally the replacement for the damaged high voltage bushing.
3. The delivery of power cable no. 2/0 will also be delayed. This will take 90 days to deliver from January 1991.[46]

Also in its letter[47] dated March 27, 1991, petitioner informed respondent that the projects would be completed within the contract time table but explained that the delivery of the transformer would only be delayed. The reasons advanced by petitioner to justify the delay are as follows:

1. Our supplier for copper sheets cannot complete the delivery until April 30, 1991.
2. Importation of HV Bushing will take approximately 45 days delivery per advice of our supplier. x x x[48]

Clearly, in the above letters, petitioner justified its inability to complete the projects within the stipulated period on the alleged unavailability of the materials to be used to perform the projects as stated in the job orders. Nowhere in said letters did petitioner claim that it could not finish the projects, particularly the conversion of the transformer unit because the defects were worse than the representation of respondent. In other words, there was no allegation of fraud, bad faith, concealment or misrepresentation on the part of respondent as to the true condition of the subject transformer. Even in its letter[49] dated May 25, 1991, petitioner only requested respondent that payment to the first progress billing be released as soon as possible and without deduction. It further proposed that respondent make a direct payment to petitioner's suppliers.

It was only in its June 14, 1991 letter[50] when petitioner raised its observations that the subject transformer needed more repairs than what it knew during the bidding. [51] In the same letter, however, petitioner repeated its request that direct payment be made by respondent to petitioner's suppliers.[52] More importantly, petitioner admitted that it made a judgment error when it quoted for only P440,770.00 for the contract relating to J.O. #P-90-214 based on limited information.

It can be inferred from the foregoing facts that there was not only a delay but a failure to complete the projects as stated in the contract; that petitioner could not complete the projects because it did not have the materials needed; and that it is in need of financial assistance.

As the Court sees it, the bid submitted by petitioner may have been sufficient to be declared the winner but it failed to anticipate all expenses necessary to complete the projects. [53] When it incurred expenses it failed to foresee, it began requesting for price adjustment to cover the cost of high voltage bushing and difference in cost of copper sheet and rectangular wire.[54] However, the scope of work presented by respondent specifically stated that the wires to be used shall be pure copper and that there was a need to supply new bushings for the complete rewinding and conversion of 3125 KVA to 4 MVA Transformer.[55] In other words, petitioner was aware that there was a need for complete replacement of windings to copper and of secondary bushings. [56] It is, therefore, improper for petitioner to ask for additional amount to answer for the expenses that were already part and parcel of the undertaking it was bound to perform. For petitioner, the contract entered into may have turned out to be an unwise investment, but there is no one to blame but petitioner for plunging into an undertaking without fully studying it in its entirety.[57]

The Court likewise notes that petitioner repeatedly asked for extension allegedly because it needed to import the materials and that the same could not be delivered on time. Petitioner also repeatedly requested that respondent make a direct payment to the suppliers notwithstanding the fact that it contracted with respondent for the supply of labor, materials, and technical supervision. It is, therefore, expected that petitioner would be responsible in paying its suppliers because respondent is not privy to their (petitioner and its suppliers) contract. This is especially true in this case since respondent had already made advance payments to petitioner. It appears, therefore, that in offering its bid, the source and cost of materials were not seriously taken into consideration. It appears, further, that petitioner had a hard time in fulfilling its obligations under the contract that is why it asked for financial assistance from respondent. This is contrary to petitioner's representation that it was capable, competent, and duly licensed to handle the projects.

As to the alleged damaged condition of the subject transformer, we quote with approval the CA conclusion in this wise:

In the same vein, We cannot readily accept the testimony of Tomas that the transformer unit was severely damaged and was beyond repair as it was not substantiated with any other evidence. R.S. Tomas could have presented an independent expert witness whose opinion may corroborate its stance that the transformer unit was indeed incapable of being restored. To our mind, the testimony of Tomas is self-serving as it is easy to concoct, yet difficult to verify.[58]

This lack of evidence, coupled with petitioner's failure to raise the same at the earliest opportunity, belies petitioner's claim that it could not complete the projects because the subject transformer could no longer be repaired.

Assuming for the sake of argument that the subject transformer was indeed in a damaged condition even before the bidding which makes it impossible for petitioner to perform its obligations under the contract, we also agree with the CA that petitioner failed to prove that respondent was guilty of bad faith, fraud, deceit or misrepresentation.

Bad faith does not simply connote bad judgment or negligence; it imports a dishonest purpose or some moral obliquity and conscious doing of a wrong, a breach of a known duty through some motive or interest or ill will that partakes of the nature of fraud.[59] Fraud has been defined to include an inducement through insidious machination. Insidious machination refers to a deceitful scheme or plot with an evil or devious purpose. Deceit exists where the party, with intent to deceive, conceals or omits to state material facts and, by reason of such omission or concealment, the other party was induced to give consent that would not otherwise have been given.[60] These are allegations of fact that demand clear and convincing proof. They are serious accusations that can be so conveniently and casually invoked, and that is why they are never presumed.[61] In this case, the

evidence presented is insufficient to prove that respondent acted in bad faith or fraudulently in dealing with petitioner.

Petitioner in fact admitted that its representatives were given the opportunity to inspect the subject transformer before it offered its bid. If indeed the transformer was completely sealed, it should have demanded that the same be opened if it found it necessary before it offered its bid. As contractor, petitioner had been remiss in its obligation to obtain as much information as possible on the actual condition of the subject transformer or at least it should have provided a qualification in its bid so as to make clear its right to claim contract price and time adjustment.[62] As aptly held by the CA, considering that petitioner is a company engaged in the electrical business and the contract it had entered into involved a sizable amount of money, its failure to conduct an inspection of the subject transformer is inexcusable.[63]

In sum, the evidence presented by the parties lead to the following conclusions: (1) that the projects were not completed by petitioner; (2) that petitioner was given the opportunity to inspect the subject transformer; (3) that petitioner failed to thoroughly study the entirety of the projects before it offered its bid; (4) that petitioner failed to complete the projects because of the unavailability of the required materials and that petitioner needed financial assistance; (5) that the evidence presented by petitioner were inadequate to prove that the subject transformer could no longer be repaired; and (6) that there was no evidence to show that respondent was in bad faith, acted fraudulently, or guilty of deceit and misrepresentation in dealing with petitioner.

In view of the foregoing disquisitions, we find that there was not only delay but non-completion of the projects undertaken by petitioner without justifiable ground. Undoubtedly, petitioner is guilty of breach of contract. Breach of contract is defined as the failure without legal reason to comply with the terms of a contract. It is also defined as the failure, without legal excuse, to perform any promise which forms the whole or part of the contract.[64] In the present case, petitioner did not complete the projects. This gives respondent the right to terminate the contract by serving petitioner a written notice. The contract specifically stated that it may be terminated for any of the following causes:

1. Violation by Contractor of the terms and conditions of this Contract;
2. Non-completion of the Work within the time agreed upon, or upon the expiration of extension agreed upon;
3. Institution of insolvency or receivership proceedings involving Contractor; and
4. Other causes provided by law applicable to this contract.[65]

Consequently, and pursuant to the agreement of the parties,[66] petitioner is liable for liquidated damages in the amount of P29,440.00 per day of delay, which shall be limited to a maximum of 10% of the project cost or P294,400.00. In this case, petitioner bound itself to complete the projects within 120 days from December 29, 1990. However, petitioner failed to fulfill the same prompting respondent to engage the services of another contractor on November 14, 1991. Thus, despite the lapse of eleven months from the time of the effectivity of the contract entered into between respondent and petitioner, the latter had not completed the projects. Undoubtedly, petitioner may be held to answer for liquidated damages in its maximum amount which is 10% of the contract price. While we have reduced the amount of liquidated damages in some cases,[67] because of partial fulfillment of the contract and/or the amount is unconscionable, we do not find the same to be applicable in this case. It must be recalled that the contract entered into by petitioner consists of three projects, all of which were not completed by petitioner. Moreover, the percentage of work accomplishment was not adequately shown by petitioner. Hence, we apply the general rule not to ignore the freedom of the parties to agree on such terms and conditions as they see fit as long as they are not contrary to law, morals, good customs, public order or public policy.[68] Thus, as agreed upon by the parties, we apply the 10% liquidated damages.

Considering that petitioner was already in delay and in breach of contract, it is liable for damages that are the natural and probable consequences of its breach of obligation.[69] Since advanced payments had been made by respondent, petitioner is bound to return the excess vis-à-vis its work accomplishments. In order to finish the projects, respondent had to contract the services of another contractor. We, therefore, find no reason to depart from the CA conclusion requiring the return of the excess payments as well as the payment of the cost of contracting Geostar, in addition to liquidated damages.[70]

WHEREFORE, premises considered, the petition is hereby DENIED. The Court of Appeals Decision dated December 19, 2005 and Resolution dated June 6, 2006 in CA-G.R. CV No. 61049 are AFFIRMED.

SO ORDERED.

Velasco, Jr., (Chairperson), Abad, Mendoza, and Perlas-Bernabe, JJ., concur.

[1] Penned by Associate Justice Japar B. Dimaampao, with Associate Justices Martin S. Villarama, Jr. (now a member of this Court) and Edgardo F. Sundiam, concurring, rollo, pp. 57-68.

[2] CA rollo, pp. 110-111.

[3] Branch 150, City of Makati.

[4] Penned by Judge Zeus C. Abrogar; records, pp. 611-625.

[5] Exhibit “A,” Exhibits for the Plaintiff, pp. 1-8.

[6] Id. at 1.

[7] Id. at 2.

[8] Id. at 3.

[9] Id. at 4.

[10] Exhibit “C,” Exhibits for the Plaintiff, pp. 20-21.

[11] Exhibits for the Plaintiff, pp. 22-23.

[12] Exhibit “2,” records, pp. 447-449.

[13] Records, p. 447.

[14] Exhibit “3,” id. at 448-449.

[15] Exhibit “7,” id. at 461-463.

[16] Embodied in a letter dated June 25, 1991, Exhibit “G,” Exhibits for the Plaintiff, p. 26.

[17] Exhibit “H,” id. at 27.

[18] Exhibits “M” and “N,” id. at 35-50.

[19] Exhibit “J,” id. at 31-32.

[20] Exhibit “K,” id. at 33.

[21] Records, pp. 1-6.

[22] Id. at 5.

[23] Embodied in its Answer dated November 23, 1992, id. at 59-65.

[24] Records, p. 620.

[25] Id.

[26] Id.

[27] Rollo, p. 67.

[28] Id. at 64-65.

[29] Id. at 65.

[30] Id.

[31] Id. at 66.

[32] Id. at 66-67.

[33] Id. at 19-20.

[34] Id. at 30-34.

[35] Id. at 19.

[36] Id. at 34.

[37] Id. at 37.

[38] Exhibit "A," Exhibits for the Plaintiff, pp. 1-2.

[39] Id. at 2.

[40] Dueñas v. Guce-Africa, G.R. No. 165679, October 5, 2009, 603 SCRA 11, 20.

[41] Heirs of Jose Marcial K. Ochoa namely: Ruby B. Ochoa, Micaela B. Ochoa and Jomar B. Ochoa v. G & S Transport Corporation, G.R. No. 170071, March 9, 2011.

[42] Dueñas v. Guce-Africa, *supra* note 40, at 19.

[43] Japan Airlines v. Simangan, G.R. No. 170141, April 22, 2008, 552 SCRA 341, 357.

[44] Among the recognized exceptions are: (a) when the conclusion is a finding grounded entirely on speculations, surmises or conjectures; (b) when the inference made is manifestly mistaken, absurd or impossible; (c) where there is grave abuse of discretion; (d) when the judgment is based on a misapprehension of facts; (e) when the findings of facts are conflicting; and (f) when the CA, in making its findings, went beyond the issues of the case and the same is contrary to the admissions of both appellant and appellee. (Id. at 357-358.)

[45] Exhibit "2," records, p. 447.

[46] Id.

[47] Exhibit "3," records, pp. 448-449.

[48] Id. at 448.

[49] Exhibit “4,” records, p. 450.

[50] Exhibit “7,” id. at 461-463.

[51] Records, p. 462.

[52] Id. at 463.

[53] See *National Power Corporation v. Premier Shipping Lines, Inc.*, G.R. Nos. 179103 and 180209, September 17, 2009, 600 SCRA 153, 176.

[54] Records, p. 447.

[55] Exhibit “A-3,” Exhibits for the Plaintiff, p. 12.

[56] Exhibit “A-5,” id. at 16.

[57] *National Power Corporation v. Premier Shipping Lines, Inc.*, supra note 53.

[58] Rollo, p. 65.

[59] *Cathay Pacific Airways, Ltd. v. Vasquez*, G.R. No. 150843, March 14, 2003, 399 SCRA 207, 220.

[60] Id.

[61] Id.

[62] But see *Advanced Foundation Construction Systems Corporation v. New World Properties and Ventures, Inc.*, G.R. Nos. 143154 and 143177, June 21, 2006, 491 SCRA 557, 564.

[63] Rollo, p. 65.

[64] *Cathay Pacific Airways, Ltd. v. Vasquez*, supra note 59, at 219.

[65] Exhibit “A,” Exhibits for the Plaintiff, p. 5.

[66] Id. at 4.

[67] *Urban Consolidated Constructors Philippines, Inc. v. Insular Life Assurance Co., Inc.*, G.R. No. 180824, August 28, 2009, 597 SCRA 450; *Filinvest Land, Inc. v. Court of Appeals*, G.R. No. 138980, September 20, 2005, 470 SCRA 260.

[68] *Urban Consolidated Constructors Philippines, Inc. v. Insular Life Assurance Co., Inc.*, G.R. No. supra, at 461; *Filinvest Land, Inc. v. Court of Appeals*, supra, at 269.

[69] *H.L. Carlos Construction, Inc. v. Marina Properties Corp.*, 466 Phil. 182, 204 (2004).

[70] Id.

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