

**STRONGHOLD INSURANCE COMPANY, INCORPORATED,
PETITIONER, VS. TOKYU CONSTRUCTION COMPANY, LTD.,
RESPONDENT.**

G.R. Nos. 158820-21. June 05, 2009

Ponente: NACHURA, J.

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NACHURA, J.:

Assailed in this Petition for Review on Certiorari under Rule 45 of the Rules of Court is the Court of Appeals (CA) Decision[1] dated January 21, 2003 and its Resolution[2] dated June 25, 2003.

The factual and procedural antecedents follow:

Respondent Tokyu Construction Company, Ltd., a member of a consortium of four (4) companies, was awarded by the Manila International Airport Authority a contract for the construction of the Ninoy Aquino International Airport (NAIA) Terminal 2 (also referred to as "the project"). On July 2, 1996, respondent entered into a Subcontract Agreement[3] with G.A. Gabriel Enterprises, owned and managed by Remedios P. Gabriel (Gabriel), for the construction of the project's Storm Drainage System (SDS) for P33,007,752.00 and Sewage Treatment Plant (STP) for P23,500,000.00, or a total contract price of P56,507,752.00. The parties agreed that the construction of the SDS and STP would be completed on August 10, 1997 and May 31, 1997, respectively.[4]

In accordance with the terms of the agreement, respondent paid Gabriel 15% of the contract price, as advance payment, for which the latter obtained from petitioner Stronghold Insurance Company, Inc. Surety Bonds[5] dated February 26, 1996[6] and April 15, 1996,[7] to guarantee its repayment to respondent. Gabriel also obtained from petitioner Performance Bonds[8] to guarantee to respondent due and timely performance of the work.[9] Both bonds were valid for a period of one year from date of issue.

In utter defiance of the parties' agreements, Gabriel defaulted in the performance of her obligations. On February 10, 1997, in a letter[10] sent to Gabriel, respondent manifested its intention to terminate the subcontract agreement. Respondent also demanded that petitioner comply with its undertaking under its bonds.

On February 26, 1997, both parties (respondent and Gabriel) agreed to revise the scope of work, reducing the contract price for the SDS phase from P33,007,752.00 to P1,175,175.00[11] and the STP from P23,500,000.00 to P11,095,930.50,[12] fixing the completion time on May 31, 1997.

Gabriel thereafter obtained from Tico Insurance Company, Inc. (Tico) Surety[13] and Performance[14] Bonds to guarantee the repayment of the advance payment given by respondent to Gabriel and the completion of the work for the SDS, respectively.

Still, Gabriel failed to accomplish the works within the agreed completion period. Eventually, on April 26, 1997, Gabriel abandoned the project. On August 8, 1997, respondent served a letter[15] upon Gabriel terminating their agreement since the latter had only completed 63.48% of the SDS project, valued at P744,965.00; and 46.60% of the STP, valued at P5,171,032.48. Respondent thereafter demanded from Gabriel the return of the balance of the

advance payment. Respondent, likewise, demanded the payment of the additional amount that it incurred in completing the project.[16] Finally, respondent made formal demands against petitioner and Tico to make good their obligations under their respective performance and surety bonds. However, all of them failed to heed respondent's demand. Hence, respondent filed a complaint[17] against petitioner, Tico, and Gabriel, before the Construction Industry Arbitration Commission (CIAC).

In the complaint, respondent prayed that Gabriel, Tico, and petitioner be held jointly and severally liable for the payment of the additional costs it incurred in completing the project covered by the subcontract agreement; for liquidated damages; for the excess downpayment paid to Gabriel; for exemplary damages; and for attorney's fees.[18]

Gabriel denied liability and argued that the delay in the completion of the project was caused by respondent. She also contended that the original subcontract agreement was novated by the revised scope of work and completion schedule. To counter respondent's monetary demands, she claimed that it was, in fact, respondent who had an unpaid balance.

For its part, Tico averred that it actually treated respondent's demand as a claim on the performance and surety bonds it issued; but it could not make payment since the claim was still subject to determination, findings, and recommendation of its assigned independent adjuster.[19]

On the other hand, petitioner interposed the following special and affirmative defenses: 1) the surety and performance bonds had expired; 2) the premium on the bonds had not been paid by Gabriel; 3) the contract for which the bonds were issued was set aside/novated; 4) the requisite notices were not made which thus barred respondent's claims against it; and 5) the damages claimed were not arbitrable.[20]

On February 5, 1999, the parties signed the Terms of Reference[21] (TOR) wherein their admission of facts, their respective positions and claims, the issues to be determined, and the amount of arbitration fees were summarized and set forth.

On August 24, 1999, the CIAC rendered a decision,[22] the dispositive portion of which reads:

WHEREFORE, award is hereby made as follows:

- On Tokyu's claims for cost overrun and cost of materials, equipment, manpower contributed prior to alleged takeover, Gabriel is found liable to pay Tokyu the amount of P1,588,527.00.
- On Tokyu's claim of liquidated damages, Gabriel is found liable to pay Tokyu the amount of P662,666.44.
- On Tokyu's claim against Tico, we find Tico to be jointly and severally liable with Gabriel on its Performance Bond for the payment of the amounts stated in numbers [1] and [2] above but its liability to Tokyu shall not exceed the amount of P238,401.39 on its performance bond. The claim against Tico on its Surety Bond is hereby dismissed.
- With regard to the claim for the return of the unrecouped down payment, we find that Gabriel is liable to pay Tokyu the amount [of] P7,588,613.18.
- With regard to Tokyu's claim against Stronghold on its Surety Bonds, we find Stronghold liable jointly and severally with Gabriel for the payment of the unrecouped down payment but only up to the amount of P6,701,063.60. The claim against Stronghold on its Performance Bonds is hereby dismissed.
- The counterclaim of Gabriel against Tokyu is not contested. Tokyu is held liable to pay Gabriel on her counterclaim of P1,007,515.78.

- The net amount due Gabriel for its unpaid progress billing is P1,190,108.41. Tokyu is held liable to pay this amount to Gabriel.

The amount adjudged in favor of Tokyu against Gabriel is P9,642,182.43. The amount adjudged in favor of Gabriel against Tokyu is P2,197,624.19. Offsetting these two amounts, there is a net award in favor of Tokyu of P7,444,558.24. Payment of this amount or any portion thereof shall inure to the benefit of and reduce pro tanto the liability of the respondents sureties. (Art. 1217, Civil Code)

All other claims or counterclaims not included in the foregoing disposition are hereby denied. The costs of arbitration shall be shared by the parties pro rata on the basis of their claims and counterclaims as reflected in the TOR.

SO ORDERED.[23]

The CIAC refused to resolve the issue of novation since respondent had already terminated the agreement by sending a letter to Gabriel. It further held that petitioner's liabilities under the surety and performance bonds were not affected by the revision of the scope of work, contract price, and completion time.

Petitioner and respondent separately appealed the CIAC decision to the CA via a petition for review under Rule 43 of the Rules of Court. The appeals were docketed as CA-G.R. SP Nos. 54920 (petitioner) and 55167 (respondent) which were later consolidated. On January 21, 2003, the CA rendered a decision[24] modifying the awards made by the Arbitral Tribunal, thus:

WHEREFORE, the appealed decision/award of the Arbitral Tribunal is hereby MODIFIED in that:

- On TOKYU's claim for liquidated damages, GABRIEL is found liable to pay TOKYU the amount of P1,699,843.95.

- STRONGHOLD and TICO are ordered to pay TOKYU from their respective performance bonds, jointly and severally with GABRIEL the cost of overrun and liquidated damages in the amount of P1,588,570.00 and P1,699,843.95 or the total amount of P3,288,413.95 but TICO's liability for liquidated damages shall be limited only to those accruing from the SDS phase of the Project and only in the amount of P70,992.77.

- STRONGHOLD is further ordered to pay TOKYU from its surety bonds, jointly and severally with GABRIEL, the total unrecouped downpayments in the amount of P7,588,613.18.

- The aggregate amount adjudged in favor of TOKYU against GABRIEL is P10,876,984.13 while the total amount adjudged in favor of Gabriel is P2,197,624.19. Offsetting these two (2) amounts against each other, there is a net award in favor of TOKYU in the amount of P8,679,359.94. Payment of this net amount or any portion thereof by GABRIEL shall in (sic) inure to the benefit and reduce pro tanto the liability of the sureties STRONGHOLD and TICO.

In all other respects, the same appealed decision/award is AFFIRMED.

No pronouncement as to costs.

SO ORDERED.[25]

Hence, the instant petition, anchored on the following grounds:

5.1. THE COURT OF APPEALS ERRED IN HOLDING STRONGHOLD LIABLE ON ITS BONDS AFTER THE BONDS HAVE BEEN INVALIDATED, LAPSED AND EXPIRED.

5.2. THE COURT OF APPEALS ERRED IN HOLDING STRONGHOLD LIABLE ON ITS BONDS WHICH WERE ISSUED WITHOUT THE EXISTENCE OF ANY PRINCIPAL CONTRACT.

5.3. THE COURT OF APPEALS ERRED IN HOLDING STRONGHOLD LIABLE ON ITS BONDS AND CONFUSED THE LEGAL EFFECTS, IMPORT AND SIGNIFICANCE BETWEEN A GUARANTY (UNDER THE CIVIL CODE) AND SURETY UNDER THE INSURANCE CODE.

5.4. THE COURT OF APPEALS ERRED IN HOLDING STRONGHOLD LIABLE ON ITS BONDS WHERE THE PRINCIPAL CONTRACT UNDER WHICH THE BONDS WERE ISSUED HAD BEEN NOVATED.[26]

Apart from the errors specifically assigned in its petition and memorandum, petitioner asks this Court to address the issue of whether the CIAC had jurisdiction to take cognizance of insurance claims. Petitioner insists that respondent's claim against it is not related to the construction dispute, hence, it should have been lodged with the regular courts.

The argument is misplaced.

Section 4 of Executive Order (E.O.) No. 1008, or the Construction Industry Arbitration Law, provides:

SEC. 4. Jurisdiction. - The CIAC shall have original and exclusive jurisdiction over disputes arising from, or connected with, contracts entered into by parties involved in construction in the Philippines, whether the dispute arises before or after the completion of the contract, or after the abandonment or breach thereof. These disputes may involve government or private contracts. For the Board to acquire jurisdiction, the parties to a dispute must agree to submit the same to voluntary arbitration.

The jurisdiction of the CIAC may include but is not limited to violation of specifications for materials and workmanship, violation of the terms of agreement, interpretation and/or application of contractual time and delays, maintenance and defects, payment, default of employer or contractor, and changes in contract cost.

Excluded from the coverage of the law are disputes arising from employer-employee relationships which shall continue to be covered by the Labor Code of the Philippines.

Clearly, E.O. 1008 expressly vests in the CIAC original and exclusive jurisdiction over disputes arising from or connected with construction contracts entered into by parties that have agreed to submit their dispute to voluntary arbitration.[27]

In this case, the CIAC validly acquired jurisdiction over the dispute. Petitioner submitted itself to the jurisdiction of the Arbitral Tribunal when it signed the TOR.[28] The TOR states:

II. STIPULATION/ADMISSION OF FACTS

x x x x

- The Construction Industry Arbitration Commission has jurisdiction over the instant case by virtue of Section 12.10 (Arbitration Clause) of the Subcontract Agreement.[29]

After recognizing the CIAC's jurisdiction, petitioner cannot be permitted to now question that same authority it earlier accepted, only because it failed to obtain a favorable decision. This is especially true in the instant case since petitioner is challenging the tribunal's jurisdiction for the first time before this Court.

With the issue of jurisdiction resolved, we proceed to the merits of the case.

It is well to note that Gabriel did not appeal the CIAC decision and Tico's petition before this Court has been denied with finality.[30] Hence, the CIAC and CA decisions have become final and executory as to Gabriel and Tico, and in that respect, they shall not be disturbed by this Court.

Thus, the sole issue that confronts us is whether or not petitioner is liable under its bonds. To resolve the same, we

need to inquire into the following corollary issues:

- 1) whether the bonds (surety and performance) are null and void having been secured without a valid and existing principal contract;
- 2) whether the bonds were invalidated by the modification of the subcontract agreement without notice to the surety; and
- 3) whether the bonds for which petitioner was being made liable already expired.

Initially, petitioner argued that the surety and performance bonds (which were accessory contracts) were of no force and effect since they were issued ahead of the execution of the principal contract. To support this contention, it now adds that the bonds were actually secured through misrepresentation, as petitioner was made to believe that the principal contract was already in existence when the bonds were issued, but it was, in fact, yet to be executed.[31]

We are not persuaded.

In the first place, as correctly observed by respondent, the claim of misrepresentation was never raised by petitioner as a defense in its Answer. Settled is the rule that points of law, theories, issues, and arguments not adequately brought to the attention of the trial court need not be, and ordinarily will not be, considered by a reviewing court. They cannot be raised for the first time on appeal. To allow this would be offensive to the basic rules of fair play, justice, and due process.[32]

Besides, even if we look into the merit of such contention, the CA is correct in holding that there was no evidentiary support of petitioner's claim of misrepresentation.[33] This being a factual issue, we respect the finding made in the assailed decision. We have repeatedly held that we are not a trier of facts. We generally rely upon, and are bound by, the conclusions on factual matters made by the lower courts, which are better equipped and have better opportunity to assess the evidence first-hand, including the testimony of the witnesses.[34]

Petitioner also contends that the principal contract (original subcontract agreement) was novated by the revised scope of work and contract schedule, without notice to the surety, thereby rendering the bonds invalid and ineffective. Finally, it avers that no liability could attach because the subject bonds expired and were replaced by the Tico bonds.

Again, we do not agree.

Petitioner's liability was not affected by the revision of the contract price, scope of work, and contract schedule. Neither was it extinguished because of the issuance of new bonds procured from Tico.

As early as February 10, 1997, respondent already sent a letter[35] to Gabriel informing the latter of the delay incurred in the performance of the work, and of the former's intention to terminate the subcontract agreement to prevent further losses. Apparently, Gabriel had already been in default even prior to the aforesaid letter; and demands had been previously made but to no avail. By reason of said default, Gabriel's liability had arisen; as a consequence, so also did the liability of petitioner as a surety arise.

A contract of suretyship is an agreement whereby a party, called the surety, guarantees the performance by another party, called the principal or obligor, of an obligation or undertaking in favor of another party, called the obligee.[36] By its very nature, under the laws regulating suretyship, the liability of the surety is joint and several but is limited to the amount of the bond, and its terms are determined strictly by the terms of the contract of suretyship in relation to the principal contract between the obligor and the obligee.[37]

By the language of the bonds issued by petitioner, it guaranteed the full and faithful compliance by Gabriel of its obligations in the construction of the SDS and STP specifically set forth in the subcontract agreement, and the repayment of the 15% advance payment given by respondent. These guarantees made by petitioner gave respondent the right to proceed against the former following Gabriel's non-compliance with her obligation.

Confusion, however, transpired when Gabriel and respondent agreed, on February 26, 1997, to reduce the scope of work and, consequently, the contract price. Petitioner viewed such revision as novation of the original subcontract agreement; and since no notice was given to it as a surety, it resulted in the extinguishment of its obligation.

We wish to stress herein the nature of suretyship, which actually involves two types of relationship --- the underlying principal relationship between the creditor (respondent) and the debtor (Gabriel), and the accessory surety relationship between the principal (Gabriel) and the surety (petitioner). The creditor accepts the surety's solidary undertaking to pay if the debtor does not pay. Such acceptance, however, does not change in any material way the creditor's relationship with the principal debtor nor does it make the surety an active party to the principal creditor-debtor relationship. In other words, the acceptance does not give the surety the right to intervene in the principal contract. The surety's role arises only upon the debtor's default, at which time, it can be directly held liable by the creditor for payment as a solidary obligor.[38]

The surety is considered in law as possessed of the identity of the debtor in relation to whatever is adjudged touching upon the obligation of the latter. Their liabilities are so interwoven as to be inseparable. Although the contract of a surety is, in essence, secondary only to a valid principal obligation, the surety's liability to the creditor is direct, primary, and absolute; he becomes liable for the debt and duty of another although he possesses no direct or personal interest over the obligations nor does he receive any benefit therefrom.[39]

Indeed, a surety is released from its obligation when there is a material alteration of the principal contract in connection with which the bond is given, such as a change which imposes a new obligation on the promising party, or which takes away some obligation already imposed, or one which changes the legal effect of the original contract and not merely its form. However, a surety is not released by a change in the contract, which does not have the effect of making its obligation more onerous.[40]

In the instant case, the revision of the subcontract agreement did not in any way make the obligations of both the principal and the surety more onerous. To be sure, petitioner never assumed added obligations, nor were there any additional obligations imposed, due to the modification of the terms of the contract. Failure to receive any notice of such change did not, therefore, exonerate petitioner from its liabilities as surety.

Neither can petitioner be exonerated from liability simply because the bonds it issued were replaced by those issued by Tico.

The Court notes that petitioner issued four bonds, namely: 1) Performance Bond No. 43601 which guaranteed the full and faithful compliance of Gabriel's obligations for the construction of the SDS; 2) Performance Bond No. 13608 for the construction of the STP; 3) Surety Bond No. 065493 which guaranteed the repayment of the 15% advance payment for the SDS project; and 4) Surety Bond No. 068189 for the STP project. Under the surety agreements, the first and third bonds were to expire on February 25, 1997 or one year from date of issue of the bonds, while the second and fourth bonds were to expire one year from April 15, 1996.

The impending expiration of the first and third bonds prompted respondent to require Gabriel to arrange for their (the bonds) immediate revalidation. Thus, in a letter dated February 21, 1997, respondent asked that the performance bond for the SDS phase be extended until May 31, 1998; and for the surety bond, until June 30,

1997.[41] Contrary to petitioner's contention, this should not be construed as a recognition on the part of respondent that the bonds were no longer valid by reason of the modification of the subcontract agreement. There was indeed a need for the renewal of petitioner's bonds because they were about to expire, pursuant to the terms of the surety agreements. Since petitioner refused to revalidate the aforesaid bonds, Gabriel was constrained to secure the required bonds from Tico which issued, on February 25, 1997, the new performance and surety bonds (for the SDS phase) replacing those of petitioner's. The performance bond was coterminous with the final acceptance of the project, while the surety bond was to expire on February 26, 1998.

Notwithstanding the issuance of the new bonds, the fact remains that the event insured against, which is the default in the performance of Gabriel's obligations set forth in the subcontract agreement, already took place. By such default, petitioner's liability set in. Thus, petitioner remains solidarily liable with Gabriel, subject only to the limitations on the amount of its liability as provided for in the Bonds themselves.

Considering that the performance bonds issued by petitioner were valid only for a period of one year, its liabilities should further be limited to the period prior to the expiration date of said bonds. As to Performance Bond No. 43601 for the SDS project, the same was valid only for one year from February 26, 1996; while Performance Bond No. 13608 was valid only for one year from April 15, 1996. Logically, petitioner can be held solidarily liable with Gabriel only for the cost overrun and liquidated damages accruing during the above periods. The assailed CA decision is, therefore, modified in this respect.

WHEREFORE, premises considered, the petition is DENIED. The Decision of the Court of Appeals dated January 21, 2003 and its Resolution dated June 25, 2003 are AFFIRMED with the MODIFICATION that petitioner Stronghold Insurance, Company, Inc. is jointly and severally liable with Remedios P. Gabriel only for the cost overrun and liquidated damages accruing during the effectivity of its bonds.

All other aspects of the assailed decision STAND.

SO ORDERED.

Ynares-Santiago, Carpio*, Corona**, and Peralta, JJ., concur.

[*] Additional member in lieu of Associate Justice Conchita Carpio Morales per Special Order No. 646 dated May 15, 2009.

[**] Additional member in lieu of Associate Justice Minita V. Chico-Nazario per Special Order No. 631 dated April 29, 2009.

[1] Penned by Associate Justice Salvador J. Valdez, Jr., with Associate Justices Edgardo P. Cruz and Mario L. Guariña III, concurring; rollo, pp. 75-112.

[2] Id. at 114-115.

[3] CA rollo (CA-G.R. SP No. 55167), pp. 116-138.

[4] Id. at 134.

[5] Surety Bond Nos. 065493 and 068189; id. at 140, 142.

[6] For P4,951,162.80.

[7] For P3,525,000.00.

- [8] Performance Bond No. 43601 dated February 26, 1996 for P3,300,775.20; and Performance Bond No. 43608 dated April 15, 1996 for P2,350,000.00.
- [9] CA rollo (CA-G.R. SP No. 55167), pp. 139, 141.
- [10] Exh. "BB."
- [11] CA rollo (CA-G.R. SP No. 55167), pp. 145-147.
- [12] Id. at 148-154.
- [13] For P4,951,162.80; id. at 144.
- [14] For P3,300,775.20; CA rollo (CA-G.R. SP No. 55167), p. 143.
- [15] Annex "J" of the Complaint.
- [16] CA rollo (CA-G.R. SP No. 54920), p. 19.
- [17] CA rollo (CA-G.R. SP No. 55167), pp. 155-168.
- [18] Id. at 166-167.
- [19] Id. at 174-175.
- [20] Id. at 691.
- [21] CA rollo (CA-G.R. No. 54920), pp. 106-111.
- [22] Id. at 17-40.
- [23] Id. at 38-39.
- [24] Supra note 1.
- [25] CA rollo (CA-G.R. SP No. 54920), pp. 195-196.
- [26] Rollo, pp. 61-62.
- [27] Prudential Guarantee and Assurance, Inc. v. Equinox Land Corporation, G.R. Nos. 152505-06, September 13, 2007, 533 SCRA 257, 266; Gammon Philippines, Inc. v. Metro Rail Transit Development Corporation, G.R. No. 144792, January 31, 2006, 481 SCRA 209, 219-220.
- [28] Philrock, Inc. v. Construction Industry Arbitration Commission, 412 Phil. 236, 246 (2001).
- [29] CA rollo (CA-G.R. SP No. 54920), pp. 107-108.
- [30] Denied with finality on May 16, 2003.
- [31] Rollo, pp. 297-298.
- [32] Eastern Assurance and Surety Corporation v. Con-Field Construction and Development Corporation, G.R. No. 159731, April 22, 2008, 552 SCRA 271, 279-280.
- [33] Rollo, p. 107.
- [34] Japan Airlines v. Simangan, G.R. No. 170141, April 22, 2008, 552 SCRA 341, 357.
- [35] Exh. "BB."

[36] *Intra-Strata Assurance Corporation v. Republic*, G.R. No. 156571, July 9, 2008, 557 SCRA 363, 368-369; *Prudential Guarantee and Assurance, Inc. v. Equinox Land Corporation*, *supra* note 27, at 267.

[37] *Intra-Strata Assurance Corporation v. Republic*, *supra*, at 368-369.

[38] *Id.* at 375-376.

[39] *Trade and Investment Development Corporation of the Philippines v. Roblett Industrial Construction Corp.*, G.R. No. 139290, November 11, 2005, 474 SCRA 510, 531.

[40] *Intra-Strata Assurance Corporation v. Republic*, *supra* note 36, at 374.

[41] CA rollo (CA-G.R. SP No. 54920), p. 44.

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