

FIRST DIVISION

[G.R. Nos. 152505-06, September 13, 2007]

**PRUDENTIAL GUARANTEE AND ASSURANCE, INC., PETITIONER,
VS. EQUINOX LAND CORPORATION, RESPONDENT.**

D E C I S I O N

SANDOVAL-GUTIERREZ, J.:

Before us for resolution is the instant Petition for Review on *Certiorari* assailing the Decision^[1] of the Court of Appeals (Third Division) dated November 23, 2001 in CA-G.R. SP No. 56491 and CA-G.R. SP No. 57335.

The undisputed facts of the case, as established by the Construction Industry Arbitration Commission (CIAC) and affirmed by the Court of Appeals, are:

Sometime in 1996, Equinox Land Corporation (Equinox), respondent, decided to construct five (5) additional floors to its existing building, the Eastgate Centre, located at 169 EDSA, Mandaluyong City. It then sent invitations to bid to various building contractors. Four (4) building contractors, including J'Marc Construction & Development Corporation (J'Marc), responded.

Finding the bid of J'Marc to be the most advantageous, Equinox offered the construction project to it. On February 22, 1997, J'Marc accepted the offer. Two days later, Equinox formally awarded to J'Marc the contract to build the extension for a consideration of P37,000,000.00.

On February 24, 1997, J'Marc submitted to Equinox two (2) bonds, namely: (1) a surety bond issued by Prudential Guarantee and Assurance, Inc. (Prudential), herein petitioner, in the amount of P9,250,000.00 to guarantee the unliquidated portion of the advance payment payable to J'Marc; and (2) a performance bond likewise issued by Prudential in the amount of P7,400,000.00 to guarantee J'Marc's faithful performance of its obligations under the construction agreement.

On March 17, 1997, Equinox and J'Marc signed the contract and related documents. Under the terms of the contract, J'Marc would supply all the labor, materials, tools, equipment, and supervision required to complete the project.

In accordance with the terms of the contract, Equinox paid J'Marc a downpayment of P9,250,000.00 equivalent to 25% of the contract price.

J'Marc did not adhere to the terms of the contract. It failed to submit the required monthly progress billings for the months of March and April 1997. Its workers neglected to cover the drainpipes, hence, they were clogged by wet cement. This delayed the work on the project.

On May 23, 1997, J'Marc requested an unscheduled cash advance of P300,000.00 from Equinox, explaining it had encountered cash problems. Equinox granted J'Marc's request to prevent delay.

On May 31, 1997, J'Marc submitted its first progress billing showing that it had accomplished only 7.3825% of the construction work estimated at P2,731,535.00. After deducting the advanced payments, the net amount payable to J'Marc was only P1,285,959.12. Of this amount, Equinox paid J'Marc only P697,005.12 because the former paid EXAN P588,954.00 for concrete mix.

Shortly after Equinox paid J'Marc based on its first progress billing, the latter again requested an advanced payment of P150,000.00. Again Equinox paid J'Marc this amount. Eventually, Equinox found that the amount owing to J'Marc's laborers was only P121,000.00, not P150,000.00.

In June 1997, EXAN refused to deliver concrete mix to the project site due to J'Marc's recurring failure to pay on time. Faced with a looming delay in the project schedule, Equinox acceded to EXAN's request that payments for the concrete mix should be remitted to it directly.

On June 30, 1997, J'Marc submitted its second progress billing showing that it accomplished only 16.0435% of the project after 4 months of construction work. Based on the contract and its own schedule, J'Marc should have accomplished at least 37.70%.

Faced with the problem of delay, Equinox formally gave J'Marc one final chance to take remedial steps in order to finish the project on time. However, J'Marc failed to undertake any corrective measure. Consequently, on July 10, 1997, Equinox terminated its contract with J'Marc and took over the project. On the same date, Equinox sent Prudential a letter claiming relief from J'Marc's violations of the contract.

On July 11, 1997, the work on the project stopped. The personnel of both Equinox and J'Marc jointly conducted an inventory of all materials, tools, equipment, and supplies at the construction site. They also measured and recorded the amount of work actually accomplished. As of July 11, 1997, J'Marc accomplished only 19.0573% of the work or a shortage of 21.565% in violation of the contract.

The cost of J'Marc's accomplishment was only P7,051,201.00. In other words, Equinox overpaid J'Marc in the sum of P3,974,300.25 inclusive of the 10% retention on the first progress billing amounting to P273,152.50. In addition, Equinox also paid the wages of J'Marc's laborers, the billings for unpaid supplies, and the amounts owing to subcontractors of J'Marc in the total sum of P664,998.09.

On August 25, 1997, Equinox filed with the Regional Trial Court (RTC), Branch 214, Mandaluyong City a complaint for sum of money and damages against J'Marc and Prudential. Equinox prayed that J'Marc be ordered to reimburse the amounts corresponding to its (Equinox) advanced payments and unliquidated portion of its downpayment; and to pay damages. Equinox also prayed that Prudential be ordered to pay its liability under the bonds.

In its answer, J'Marc alleged that Equinox has no valid ground for terminating their

contract. For its part, Prudential denied Equinox's claims and instituted a cross-claim against J'Marc for any judgment that might be rendered against its bonds.

During the hearing, Prudential filed a motion to dismiss the complaint on the ground that pursuant to Executive Order No. 1008, it is the CIAC which has jurisdiction over it.

On February 12, 1999, the trial court granted Prudential's motion and dismissed the case.

On May 19, 1999, Equinox filed with the CIAC a request for arbitration, docketed as CIAC Case No. 17-99. Prudential submitted a position paper contending that the CIAC has no jurisdiction over it since it is not a privy to the construction contract between Equinox and J'Marc; and that its surety and performance bonds are not construction agreements, thus, any action thereon lies exclusively with the proper court.

On December 21, 1999, the CIAC rendered its Decision in favor of Equinox and against J'Marc and Prudential, thus:

AWARD

After considering the evidence and the arguments of the parties, we find that:

1. J'Marc has been duly notified of the filing and pendency of the arbitration proceeding commenced by Equinox against J'Marc and that CIAC has acquired jurisdiction over J'Marc;
2. The construction Contract was validly terminated by Equinox due to J'Marc's failure to provide a timely supply of adequate labor, materials, tools, equipment, and technical services and to remedy its inability to comply with the construction schedule;
3. Equinox is not entitled to claim liquidated damages, although under the circumstances, in the absence of adequate proof of actual and compensatory damages, we award to Equinox nominal or temperate damages in the amount of P500,000.00;
4. The percentage of accomplishment of J'Marc at the time of the termination of the Contract was 19.0573% of the work valued at P7,051,201.00. This amount should be credited to J'Marc. On the other hand, Equinox [i] had paid J'Marc 25% of the contract price as down or advance payment, [ii] had paid J'Marc its first progress billing, [iii] had made advances for payroll of the workers, and for unpaid supplies and the works of J'Marc's subcontractors, all in the total sum of P11,690,483.34. Deducting the value of J'Marc's accomplishment from these advances and payment, there is due from J'Marc to Equinox the amount of P4,639,285.34. We hold J'Marc liable to pay Equinox this amount of P4,639,285.34.