

## **SPECIAL EIGHTH DIVISION**

**[ CA-G.R. CV NO. 98637, May 08, 2014 ]**

**SWIRE REALTY DEVELOPMENT CORPORATION, PLAINTIFF-  
APPELLANT, VS. SPECIALTY CONTRACTS GENERAL AND  
CONSTRUCTION SERVICES, INC., JOSE JAVELLANA, JR., PATRICK  
DROMAL, AND FGU INSURANCE CORPORATION, DEFENDANTS-  
APPELLEES.**

### **D E C I S I O N**

**REYES, JR., J.C., J.:**

Assailed in the instant appeal filed under Rule 41 of the 1997 Rules of Civil Procedure is the Decision (Records, pp. 799-811) dated November 10, 2010 and the Order dated June 30, 2011 of the Regional Trial Court of Quezon City, Branch 99 in Civil Case No. Q-98-3317 which dismissed the Complaint for Damages arising from breach of contract.

The facts.

Swire Realty Development Corporation (Swire), herein plaintiff-appellant is engaged in real estate development with the Palace of Makati as its project. They solicited bids from various contractors to perform waterproofing works from Basement 7 up to the dome roof portion above the 36<sup>th</sup> floor where herein defendant-appellee, Specialty Contracts General and Construction Services (SpecServ), was awarded with the job. SpecServ was represented by Jose Javellana and Patrick Doromal who presented to Swire, a waterproofing membrane called Formak 629 Elastomeric.

SpecServ alleged that Formak 629 is manufactured by Hichins (FE) Pte. Ltd, and was described as an elastomeric waterproofing membrane which can be reinforced with fiberglass mat for extra strength in high stress areas such as pipes and upstands. Said membrane was to be applied with a fiberglass mat in previously mentioned areas based on the company brochures and product specifications.

An Offsetting Agreement was entered into by both parties dated August 21, 1997 where SpecServ purchased a condominium unit (Unit 808) from Swire in exchange for their services. The total contract price of the waterproofing job was Six Million Five Hundred Forty-Five Thousand Pesos (P6,545,000.00) wherein the amount of P3,469,641.39 represents the net purchase price of the condominium unit and a parking lot which shall be offset as payment of SpecServ. Under their agreement, the net purchase price of the condominium will be deducted from all billings of SpecServ until such time that the waterproofing job would be fully paid.

Swire paid 20% of the contract price amounting to P1,309,000.00 but deducted a partial payment for the condominium unit and parking lot from said amount. Hence, the total downpayment paid by Swire for the waterproofing job was P904,400.00.

SpecServ obtained a performance/surety bond amounting to P1,309,000.00 from FGU Insurance Corporation (FGU). Under their Suretyship Agreement, FGU agreed to indemnify Swire for the said amount should SpecServ fail to fulfill their undertakings under the Offsetting Agreement.

A water tightness test was conducted to evaluate the resistance to the passage of water on a surface. Hence, on October 29, 1997 SpecServ's first Statement of Account to Swire was P117,076.67 after all deductions. (Exh. "3", Records, p. 581) The succeeding Statements of Account were as follows: Statement of Account #2 dated November 11, 1997 after all deductions was P43,988.05 (Exh. "4", Records, p. 584); Statement of Account #3 dated November 22, 1997 after all deductions was P59,077.48 (Exh. "5", Records p. 587); and Statement Account #4 dated December 2, 1999 was P50,447.94 (Exh. "6", Records p. 590). Despite constant reminders, Swire failed to settle their obligation with SpecServ.

On November 3, 1997 SpecServ wrote a letter to Swire informing them of the adjustment in the contract price due to the substantial peso depreciation. Consequently, the Statement of Accounts (Exh. "16", Records, p. 604) were adjusted in this manner on December 23, 1997:

Statement of Account No. 1	= P135,752.09
Statement of Account No. 2	= P 63,231.30
Statement of Account No. 3	= P 79,705.75

On November 20, 1997, Swire's representative, Ricardo Mallari complained about the wrong application of Formak 629 and demanded that a fiberglass mat be applied on all flat surfaces as well. They also requested additional manpower on December 12, 1997.

As a reply, Javellana sent a letter on November 22, 1997 saying that based on the description of Formak 629, it can be reinforced with a fiberglass mat on high stress areas only. He also attached a letter from the Laboratory Manager of Hichins, Lim Eng Kiat, who declared that as of July 1997, Formak 629's product specifications have been upgraded hence, it can be applied without any reinforcement on flat surfaces. High stress areas however do need fiberglass mats.

Despite said information, Swire insisted on placing fiberglass mats on all surfaces. As a result, SpecServ said that they will be constrained to add P200.00/sqm should Swire insist on placing fiberglass mats on all surfaces. Still, Swire did not compromise with SpecServ and insisted on their demands.

On December 16, 1997, a Demobilization Notice was sent to Swire. All the workers of SpecServ were withdrawn from the site due to the non-payment of the past progressive billings. Regardless of the demands of Swire and their agreement to apply fiberglass mats to high stress areas only, SpecServ still did not deploy their workers until they will be paid what is due to them.

Consequently, Swire contracted Esicor to complete the pending waterproofing job of SpecServ who allegedly barely completed 5% of the project. A civil action for breach of contract was filed on January 13, 1998 against SpecServ for abandonment of the waterproofing job and FGU for their refusal of issuing indemnity.

Pre-Trial was conducted in order for the parties to settle amicably but it remained futile.

Trial ensued with Ma. Luisa Eslava Bravo (Personnel Manager and member of the Executive Committee) and Architect Noel Almo as witnesses for plaintiff-appellant.

SpecServ presented three witnesses, Patrick Doromal (Project Manager of SpecServ), Jose Javellana, Jr. (Incorporator, President and General Manager of SpecServ) and Lony Delicana (payroll clerk at SpecServ).

FGU did not present any witness. It opted to adopt the documentary evidence presented by SpecServ.

The Court ruled that both parties substantially breached their obligations by not performing their undertakings in the contract. Each will then bear their own damages as a consequence.

The RTC rendered its decision on November 10, 2010. The dispositive portion of which reads:

“WHEREFORE, in view of the foregoing considerations, the complaint filed by SWIRE against SPECSERV is hereby DISMISSED for lack of merit. The counterclaim filed by SPECSERV is likewise DISMISSED for lack of evidence.

SO ORDERED.”

Dissatisfied, plaintiff-appellant filed a Motion for Reconsideration but was eventually denied on June 30, 2011. Hence, this appeal before Us with the following assignment of errors:

THE LOWER COURT GRAVELY ERRED IN:

I.

RULING THAT THE OFFSETTING AGREEMENT DID NOT CONTAIN ANY SPECIFICATIONS ON HOW FORMAK 629 WOULD BE APPLIED.

II.

RULING THAT THE OFFSETTING AGREEMENT WAS MORE OF A PURCHASE AND WORK AGREEMENT, AND THUS SWIRE IS NOT ENTITLED TO A RETURN OF THE AMOUNTS IT HAD PAID SPECSERVE.

III.

UNDULY SPECULATING ON LABOR EXPENSES WHICH SPECSERVE WOULD HAVE INCURRED.

IV.