

## SIXTEENTH DIVISION

[ CA-G.R. CV NO. 83951, August 04, 2006 ]

**BAN KEE TRADING, INC., PLAINTIFF-APPELLEE, VS. DIVERSION FOODS, INC., DEFENDANT-APPELLANT.**

### DECISION

**DE LOS SANTOS, J.:**

On appeal to Us is the decision dated September 17, 2004 of the Regional Trial Court, Branch 100 of Quezon City in Civil Case No. Q-02-47990, the dispositive portion of which is as follows:

"WHEREFORE, premises considered, judgment is hereby rendered for the plaintiff and against the defendant. The latter is ordered:

1. to comply with its obligation by accepting delivery by the plaintiff of the remaining Twelve Thousand Five Hundred (12,500) pieces of pokemon toys:
2. to pay the following:
  - a. P500,000.00 for the unpaid balance of the contract price, plus interest at 6% per annum counted from 25 June 2002 until full payment; and
  - b. P60,000.00 as attorney's fees.

SO ORDERED." (*Record, p. 143*)

On October 14, 2002, plaintiff filed a complaint for specific performance, collection of sum of money and damages against defendant corporation. In particular, plaintiff asked that defendant be ordered to accept delivery by plaintiff of the balance of 12,500 units of its order of Pokemon toys, and to pay the plaintiff the unpaid balance of the agreed contract price, plus interest thereon and damages.

Defendant in its answer filed on January 13, 2003 admitted that it issued a purchase order for 50,0000 pieces of *Pokemon* toys from plaintiff at P20.00 each; that the toys would be delivered over a period of 6 months in 4 batches of 12,500 pieces each; that after the first 2 deliveries, defendant wrote to cancel all further deliveries and to ask that its order be deemed already fully served at the reduced quantity of 25,000. Plaintiff, however, refused defendant's request and managed to serve the third delivery of 12,500 pieces despite contrary advise from the defendant, although it was unable to serve the fourth and final batch.

The issues having been joined with the filing of the answer, both parties filed their pre-trial briefs, and the pre-trail conference was set on February 27, 2004. For

failure of the defendant's representative and counsel to appear thereat, the court granted plaintiff's motion to present its evidence *ex parte*. Defendant moved twice for reconsideration of the said order, but the court was unmoved.

At the *ex parte* hearing held on 30 March 2004, plaintiff presented Marvie Samala, its marketing manager, who testified and identified its documentary proofs marked Exhibits "A" to "M", including sub-markings. Plaintiff's evidence is summarized in the appealed decision, as follows:

"Through a letter under date of 2 February 2001, plaintiff offered to sell Pokemon toys as premium items for giveaways or merchandise items of Carl's Jr., a chain of restaurants owned by the defendant. To this, Mr. Efren M. Sevilla, the marketing manager of the defendant, sent a counter-proposal with the following order scheme: defendant shall issue a P.O. for 50,000.00 pieces at P20.00 each; delivery shall be staggered, at minimum increments of P10,000 pieces per delivery; payment shall be made on actual delivery, COD 7 days; and total P.O. quantity shall be drawn within 6 months. On 2 May 2001, the defendant issued a Purchase Order No. 1011 for 50,000 pieces of assorted Pokemon toys at P20.00 each payable in fifteen (15) days after delivery. Plaintiff made two deliveries of 12,500 pieces sometime in June of 2001 which the defendant paid. After the two deliveries, Mr. Silva sent a letter to the plaintiff requesting for a reduction of its pokemon order to 50% of the volume ordered in the P.O. 1011 for the reason that the sale of the toys as promotional merchandise remained below defendant's targets. However, the plaintiff replied that it cannot agree to said request. Plaintiff countered that it agreed to a lower price of P20.00 per piece only because of the volume of 50,000 pieces which the defendant committed to purchase. Furthermore, the toys cannot be sold by the plaintiff anymore on retail because the toys were all repacked based on defendant's specifications. Sometime in October 2001, plaintiff delivered the third batch of Pokemon toys to the defendant consisting of 12,500 pieces. After the delivery of the third batch of toys, Ms. Samala had a telephone conversation with Ms. Gigi Lucas, the purchasing officer of Carl's Jr. and the latter said that defendant will not be accepting delivery of the fourth and last batch of toys. Plaintiff and the defendant had a series of correspondence reiterating the latter's request to which plaintiff disagreed. On 25 June 2002, plaintiff, through counsel, set a letter to the defendant demanding the payment of the unpaid balance of P500,000.00 plus interest. However, despite demand, the defendant did not comply with its obligation to the plaintiff. By reason of such refusal, the plaintiff engaged the services of a law firm to recover the unpaid obligation of the defendant and thereby incurred expenses relative thereto.

*(Decision, pp. 2-3, Records, pp. 140-141)*

The trial court defined the issue as "whether or not the defendant can unilaterally reduce the volume and refuse delivery of the ordered toys despite a specific agreement on the quantity of toys to be delivered." It then ruled that defendant could not, since the parties had a valid contract of sale, wherein the plaintiff was obliged to deliver 50,000 pieces of Pokemon toys over a period of six (6) months in several batches. Reciprocally, defendant had the obligation to accept delivery and pay plaintiff P20.00 per toy delivered within fifteen (15) days from delivery.

In holding that defendant was bound to comply in good faith with its obligation under the contract, the trial court cited Article 1159 of the Civil Code which provides that a contract once perfected has the force of law between the contracting parties, which they are bound to comply with in good faith. "This means that neither party may unilaterally and upon his own exclusive volition escape his obligation under the contract," and the fact that there remains a sizable unsold inventory of toys from the previous deliveries does not justify defendant's refusal to accept full delivery and to pay the complete price thereof.

The court quoted the case of *LTB Company vs. Manabat*, 58 SCRA 650, 659-660), which states that:

"Where a person by his contract charges himself with an obligation possible to be performed, he must perform it, unless the performance is rendered impossible by the act of God, by the law, or by the other party, it being the rule that in case the party desires to be excused from the performance in the event of contingencies arising, it is his duty to provide therefor in his contract. Hence, performance is not excused by subsequent inability to perform, by unforeseen difficulties, by unusual or unexpected expenses, by danger, by inevitable accident, by the breaking of machinery, by strikes, by sickness, by failure of a party to avail himself of the benefits to be and under the contract by weather conditions, by financial stringency or by stagnation of business. Neither is performance excused by the fact that the contract turns out to be hard and improvident, unprofitable or impracticable ill-advised, or even foolish, or less profitable or unexpectedly burdensome."

On appeal to us, defendant faults the trial court for committing the following errors, to wit:

#### **"I**

**WHEN DEFENDANT-APPELLANT'S MOTION FOR RECONSIDERATION AND SECOND MOTION FOR RECONSIDERATION WERE DENIED BY THE COURT A QUO, THE DEFENDANT-APPELLANT WAS DEPRIVED OF ITS DAY IN COURT EQUIVALENT TO DENIAL OF DUE PROCESS.**

#### **"II**

**THE PURCHASE ORDER UPON WHICH PLAINTIFF-APPELLEE BASED ITS CLAIM CONSTITUTES A MERE OFFER WHICH IS UNACCEPTED UNTIL PLAINTIFF-APPELLEE'S ACTUAL AND COMPLETE DELIVERY OF THE ITEMS." (Rollo, p. 18)**

The appeal is devoid of merit.

Defendant-appellant argues that the trial court's denial of its motions for reconsideration of its order allowing the plaintiff to present its evidence *ex-parte* deprived it of its day in court and denied it due process, which is a fundamental right enshrined in our judicial system. "Due process enjoins courts to afford every party litigant ample opportunity to adduce evidence for his defense, by every and all