

THIRD DIVISION

[G.R. No. 191353, April 17, 2017]

**ULTRA MAR AQUA RESOURCE, INC., REPRESENTED BY ITS
PRESIDENT VICTOR B. PRIETO, PETITIONER, VS. FERMIDA
CONSTRUCTION SERVICES, REPRESENTED BY ITS GENERAL
MANAGER MYRNA T. RAMOS, RESPONDENT.**

D E C I S I O N

TIJAM, J.:

Assailed in this Petition for Review^[1] under Rule 45 is the Decision^[2] dated July 28, 2009 and Resolution^[3] dated February 9, 2010 of the Court of Appeals^[4] (CA) in CA G.R. CV No. 86540 which affirmed with modification the Regional Trial Court's (RTC) Decision^[5] dated October 7, 2004 and ordered Petitioner Ultra Mar Aqua Resource, Inc., (Ultra Mar) to pay Respondent Fermida Construction Services (Fermida) the construction costs of a warehouse pursuant to the parties' agreement.

The Facts of the Case

On December 8, 2003, Fermida entered into a Contract Agreement^[6] with Ultra Mar for the construction of a warehouse in Wawandue, Subic, Zambales (Project) with a contract price of PhP1,734,740. In the course of construction, variations as to roof coverage, drainage canal, painting and electrical work were made by Fermida upon Ultra Mar's request and instructions.^[7]

After completing the Project on January 17, 2004, Fermida sent to Ultra Mar a Billing Statement exclusive of the cost of variation orders and extra work orders made. Pursuant to the parties' agreement, Fermida secured a Surety Bond to satisfy the 10 percent retention to cover any defect in materials and workmanship. A Contractor's Affidavit stating that all claims and obligations for labor services, materials supplied, equipment and tools have been fully settled was likewise executed.^[8]

However, Fermida received a letter from Ultra Mar expressing discontentment on some of the former's work. Resultantly, Fermida undertook repairs and another Billing Statement was thereafter sent to Ultra Mar.^[9]

Just the same, Ultra Mar refused to pay because of Fermida's alleged failure to submit the FDT Report and Building Permits, and substandard work and delay in the completion of the Project.

Because of Ultra Mar's failure to comply with its obligations, Fermida demanded payment not only of the contract price but for the cost of the variation orders as well. In response, Ultra Mar stated that it did not ask for variations on the Project

but only rectifications as the work done by Fermida was below standard.^[10]

Consequently, Fermida commenced the Complaint for Collection of Sum of Money with Prayer for Injunction^[11] before the RTC.

The RTC ordered^[12] an ocular inspection of the subject premises and an ocular inspection by an independent engineer was conducted. The case was then set for pre-trial conference.

However, the scheduled pre-trial conference on August 9, 2004 was postponed upon motion of Ultra Mar's counsel and was then re-scheduled to August 17, 2004. This was again reset to September 7, 2004. Despite several resettings, counsel for Ultra Mar failed to attend the pre-trial conference and failed to file the required pre-trial brief. As a result, the RTC declared Ultra Mar in default and allowed Fermida to present its evidence *ex parte*.^[13]

On September 8, 2004, Ultra Mar, through counsel, filed an Omnibus Motion to Lift Order of Default, Admit Attached Pre-Trial Brief and Set the Case for Pre-Trial Conference^[14] (Omnibus Motion) alleging that his failure to file the Pre-Trial Brief was due to the intermittent nausea he was experiencing as a result of a sudden drop in his blood sugar level. Affording leniency, the RTC required a supporting Medical Certificate upon submission of which Ultra Mar's Omnibus Motion shall be resolved.

Ultra Mar's counsel failed to comply with the said Order thus the RTC denied Ultra Mar's Omnibus Motion and, on October 7, 2004, issued a Decision^[15] the *fallo* portion of which states:

"WHEREFORE, in view of the foregoing, judgment is hereby rendered in favor of [Fermida] and against [Ultra Mar] as follows: ordering the [Ultra Mar] to pay [Fermida] the amount of P1,106[,]000.38; with interest thereon at the legal rate from the date of the filing of this complaint. The amount of P50,000.00 as attorney's fees and P10,000.00 as litigation expenses; P100,000.00 as nominal damages and to pay the costs of suit.

SO ORDERED."^[16]

Ultra Mar moved for reconsideration and attached thereto its counsel's Medical Certificate.^[17] The RTC denied the same for being a second motion for reconsideration.^[18] Similarly, the RTC denied Ultra Mar's motion for reconsideration of its main Decision dated October 7, 2004.

Ultra Mar then elevated the case to the CA. The CA, however, found no error on the part of the RTC when it denied Ultra Mar's Omnibus Motion. The CA noted that Ultra Mar's counsel failed to provide a plausible justification why he failed to submit the required pre-trial brief.

On the merits, the CA found that Fermida was able to preponderantly establish that it entered into a construction agreement with Ultra Mar and that despite demands, the latter failed to pay. To resolve which between Fermida on one hand, claiming

that the Project has been completed, and Ultra Mar on the other, claiming that the Project was not yet complete and the work done was defective, the CA made reference to the Report and Supplemental Report of the court-appointed independent engineer who made the following findings:

"8. Since there were variations made construction does not conform with the approved plan and specifications. It appears there were items of works completed which are not included from the scope of work indicated in the contract documents.

9. No variation order approved and issued by the owner to contractor regarding the additional works performed by the contractor, but no written notice from ULTRA MAR AQUA RESOURCES INC., that they opposed the alteration or variation during the construction. It is apparent that PERMIDA [sic] CONSTRUCTION had received a verbal instruction regarding the supposed additional works.

CONCLUSIONS AND RECOMMENDATIONS

(a) Under GC-12 Completion and Acceptance of General Conditions of Contract which states that: 'Upon completion of the Work, written notice thereof shall be served by the Contractor to the Owner. Upon receipt of the said notice, the Owner shall inspect the Work to determine if it has been satisfactorily performed and completed in accordance with the Contract. xxx'

Based on the result of my ocular inspection, the contractor have [sic] to repair all defected [sic] works, and this project cannot be considered substantially completed and final billing should be withheld pending completion of repair and uncompleted item.

x x x x x x x x x"[19]

Supplementing the foregoing, the independent engineer stated:

"Considering that there are minor repair works noted in my July 1, 2004 report, I have recommended that the contractor have [sic] to repair all defected [sic] works and the final billing should be withheld pending completion of repair of defected [sic] works. I wish to be corrected that I just based that withholding of final billing on the usual way of collection being done by most private contractor that is 30% down payment followed by progress billing and a 10% final retention. Ultra Mar should withheld the payment of Fermida Construction for the 10% retention and not based on the final billing which includes the whole of contract amount and the supposed variation works. However, in this case, a surety bond was already posted by Fermida Construction, hence, the bond should be liable in this case to Ultra Mar if in case the contractor refuses to repair any of alleged defected [sic] works." [20]

As such, the CA held that the construction works are not without defects. Be that as it may, the CA noted that such defective work is covered by the 10 percent retention that Ultra Mar is allowed to withhold from Fermida. Hence, the CA ruled that Ultra Mar is indeed liable to pay Fermida the construction cost of P1,106,038.82 but subject to the 10 percent retention. Finally, the CA deleted the awards of nominal damages, attorney's fees and litigation expenses for being unsubstantiated.

The CA, in its *fallo* portion, disposed as such:

"WHEREFORE, the Appeal is PARTIALLY GRANTED. The Decision dated 7 October 2004 of the Regional Trial Court, Third Judicial Region, Olongapo City, Branch 72, in Civil Case No. 199-0-2004 is MODIFIED as follows:

1. Appellant Ultra Mar Aqua Resources, Inc. is directed to pay appellee Fermida Construction Services the amount of P1,106,038.82 with legal interest thereon from the date of the filing of the Complaint subject to the 10% retention.
2. The awards of nominal damages, attorney[']s fees and litigation expenses are DELETED.

SO ORDERED."^[21]

Ultra Mar partially moved for reconsideration essentially arguing that it was denied the right to present evidence due to the gross negligence of its former counsel.^[22] The CA denied Ultra Mar's partial motion for reconsideration.^[23]

The Issues

Unperturbed, Ultra Mar filed the instant Petition on the following grounds^[24]:

"(1) The Court of Appeals erred in holding that the Trial Court did not commit any reversible error in denying the Omnibus Motion to Lift Order of Default, Admit Attached Pre-trial Brief and Set the Case for Pre-trial Conference filed by Atty. Mas and in denying Atty. Mas' Motion for Reconsideration [of the Order dated September 17, 2004] with Compliance pursuant to Section 2, Rule 52 of the Rules of Court.

(2) The Court of Appeals erred in not relieving the petitioner from the effects of gross negligence of its counsel Atty. Leonuel Mas who despite receipt of the Decision of the Trial Court on October 15, 2004 did not inform the petitioner albeit deceptively sent the petitioner a report dated November 26, 2004 that he moved the case be set for pre-trial."^[25]

The Ruling of the Court

Ultra Mar essentially argues that it should have been allowed to present its evidence because its non-appearance at the pre-trial conference and failure to file pre-trial brief were attributable to its counsel's gross negligence for which it should not be made to suffer the consequences. Ultra Mar further postulates that it has a meritorious defense which could lead the RTC to rule otherwise had it been presented.

The petition is devoid of merit.

At the heart of this case is the propriety of the RTC's Order declaring Ultra Mar in default, allowing Fermida to present its evidence *ex parte* and thereafter, rendering judgment on the basis thereof.

Prefatorily, it bears to emphasize that as the Rules of Civil Procedure presently stand, if the defendant fails to appear for pre-trial, a default order is no longer issued. Initially, the phrase "as in default" was included in Rule 20 of the old rules.

[26] With the amended provision, the phrase "as in default" was deleted, the purpose of which is "one of semantical propriety or terminological accuracy as there were criticisms on the use of the word default in the former provision since that term is identified with the failure to file a required answer, not appearance in court."

[27] While the order of default no longer obtains, its effects were nevertheless retained.

Thus, Section 4, Rule 18 requires the parties and their counsel to appear at the pre-trial conference. The effect of their failure to appear is spelled under Section 5 of the same rule, as follows:

Section 4. Appearance of parties. – It shall be the duty of the parties and their counsel to appear at the pre-trial. The non-appearance of a party may be excused only if a valid cause is shown therefor or if a representative shall appear in his behalf fully authorized in writing to enter into an amicable settlement, to submit to alternative modes of dispute resolution, and to enter into stipulations or admissions of facts and of documents.

Section 5. Effect of failure to appear. – The failure of the plaintiff to appear when so required pursuant to the next preceding section shall be cause for dismissal of the action. The dismissal shall be with prejudice, unless otherwise ordered by the court. A similar failure on the part of the defendant shall be cause to allow the plaintiff to present his evidence *ex parte* and the court to render judgment on the basis thereof.

Further, Section 6 of the same rule provides:

Section 6. Pre-trial brief. – The parties shall file with the court and serve on the adverse party, in such manner as shall ensure their receipt thereof at least three (3) days before the date of the pre-trial, their respective