613 Phil. 303

FIRST DIVISION

[G.R. No. 170674, August 24, 2009]

FOUNDATION SPECIALISTS, INC., PETITIONER, VS. BETONVAL READY CONCRETE, INC. AND STRONGHOLD INSURANCE CO., INC., RESPONDENTS.

D E C I S I O N

CORONA, J.:

On separate dates, petitioner Foundation Specialists, Inc. (FSI) and respondent Betonval Ready Concrete, Inc. (Betonval) executed three contracts[1] for the delivery of ready mixed concrete by Betonval to FSI. The basic stipulations were: (a) for FSI to supply the cement to be made into ready mixed concrete; (b) for FSI to pay Betonval within seven days after presentation of the invoices plus 30% interest p.a. in case of overdue payments and (c) a credit limit of P600,000 for FSI.

Betonval delivered the ready mixed concrete pursuant to the contracts but FSI failed to pay its outstanding balances starting January 1992. As an accommodation to FSI, Betonval extended the seven day credit period to 45 days.[2]

On September 1, 1992, Betonval demanded from FSI its balance of P2,349,460.[3] Betonval informed FSI that further defaults would leave it no other choice but to impose the stipulated interest for late payments and take appropriate legal action to protect its interest.[4] While maintaining that it was still verifying the correctness of Betonval's claims, FSI sent Betonval a proposed schedule of payments devised with a liability for late payments fixed at 24% p.a.[5]

Thereafter, FSI paid Betonval according to the terms of its proposed schedule of payments. It was able to reduce its debt to P1,114,203.34 as of July 1993, inclusive of the 24% annual interest computed from the due date of the invoices.[6] Nevertheless, it failed to fully settle its obligation.

Betonval thereafter filed an action for sum of money and damages in the Regional Trial Court (RTC).[7] It also applied for the issuance of a writ of preliminary attachment alleging that FSI employed fraud when it contracted with Betonval and that it was disposing of its assets in fraud of its creditors.

FSI denied Betonval's allegations and moved for the dismissal of the complaint. The amount claimed was allegedly not due and demandable because they were still reconciling their respective records. FSI also filed a counterclaim and prayed for actual damages, alleging that its other projects were delayed when Betonval attached its properties and garnished its bank accounts. It likewise prayed for moral and exemplary damages and attorney's fees.

The RTC issued a writ of preliminary attachment and approved the P500,000 bond of respondent Stronghold Insurance Co., Inc. (Stronghold). FSI filed a counterbond of P500,000 thereby discharging the writ of preliminary attachment, except with respect to FSI's excavator, crawler crane and Isuzu pick-up truck, which remained in *custodia legis.*[8] An additional counterbond of P350,000 lifted the garnishment of FSI's receivables from the Department of Public Works and Highways.

On January 29, 1999, the RTC ruled for Betonval.[9] However, it awarded P200,000 compensatory damages to FSI on the ground that the attachment of its properties was improper.[10]

FSI and Stronghold separately filed motions for reconsideration while Betonval filed a motion for clarification and reconsideration. In an order dated May 19, 1999, the RTC denied the motions for reconsideration of Betonval and Stronghold. However, the January 29, 1999 decision was modified in that the award of actual or compensatory damages to FSI was increased to P1.5 million.[11]

All parties appealed to the Court of Appeals (CA). However, only the respective appeals of Betonval and Stronghold were given due course because FSI's appeal was dismissed for nonpayment of the appellate docket fees.[12]

In its appeal, Betonval assailed the award of actual damages as well as the imposition of legal interest at only 12%, instead of 24% as agreed on. Stronghold, on the other hand, averred that the attachment was proper.

In its decision[13] dated January 20, 2005, the CA upheld the May 19, 1999 RTC order with modification. The CA held that FSI should pay Betonval the value of unpaid ready mixed concrete at 24% p.a. interest plus legal interest at 12%. The CA, however, reduced the award to FSI of actual and compensatory damages, thus:

> **WHEREFORE,** premises considered, the appealed Order dated May 19, 1999 is **MODIFIED** as follows: (a) to increase the rate of interest imposable on the P1,114,203.34 awarded to appellant Betonval from 12% to 24% per annum, with the aggregate sum to further earn an annual interest rate of 12% from the finality of this decision, until full payment; (b) to reduce the award of actual damages in favor of appellee from P1,500,000.00 to P200,000.00; (c) to hold both appellants jointly and severally liable to pay said amount; and (d) to hold appellant Betonval liable for whatever appellant surety may be held liable under the attachment bond. The rest is **AFFIRMED *in toto***.

FSI's motion for reconsideration was denied.[14]

In this petition for review on certiorari,[15] FSI prays for the following:

> (a) decrease the rate of imposable interest on the P1,114,203.34 award to Betonval, from 12% to 6% p.a. from date of judicial demand or filing of the complaint until the full amount is paid;

(b) deduct [from the award to Betonval] the cost or value of unused cement based on [its] invoice stating 1,307.45 bags computed at the prevailing price;

(c) award actual and compensatory damages at P3,242,771.29;

(d) hold Betonval and Stronghold jointly and severally liable to pay such actual and compensatory damages;

(e) hold Betonval liable for whatever Stronghold may be held liable under the attachment bond and

(f) affirm *in toto* the rest of the order.[16]

The petition has no merit.

Betonval's Complaint was not Premature

FSI argues that Betonval's complaint was prematurely filed. There was allegedly a need to reconcile accounts, particularly with respect to the value of the unused cement supplied by FSI, totaling 2,801.2 bags[17] which supposedly should have been deducted from FSI's outstanding obligation. FSI's repeated requests for reconciliation of accounts were allegedly not heeded by Betonval's representatives.

FSI's contention is untenable. It neither alleged any discrepancies in nor objected to the accounts within a reasonable time.[18] As held by the RTC, FSI was deemed to have admitted the truth and correctness of the entries in the invoices since:

> **[N]o attempts were made to reconcile [FSI's] own record with [Betonval] until after the filing of the complaint**, inspite of claims in [FSI's] Answer about its significance, **and despite having had plenty of opportunity to do so from the time of receipt of the invoices or demand letters from [Betonval]. [FSI's] excuse that it was impractical to reconcile accounts during the middle of transactions is defeated by the absence of any showing on record that a formal request to reconcile was issued to [Betonval] despite the completion of deliveries or [FSI's] discovery of the alleged discrepancies, as well as its failure to initiate any meeting with [Betonval], including one which the parties were directed to hold for that purpose by the Court.** Since [FSI] failed to prove the correctness of its entries against those in [Betonval's] invoices, its record is self-serving. xxx (emphasis supplied)

In view of FSI's failure to dispute this finding of the RTC because of its failure to perfect its appeal, FSI is now estopped from raising this issue. There is no cogent reason to depart from the RTC's finding.

Undaunted, FSI retracts. Instead of claiming the balance of the unused cement **as reflected in its records,** it now bases its claim on the **invoices of Betonval.** FSI

relies on the RTC's statement in the May 19, 1999 order:

> Still it can claim the cost of the balance of unused cement based on [Betonval's] invoices, notwithstanding its admission of the obligation in the letter, as it neither expressed nor implied any intent to waive that claim by said admission.

FSI contends that this declaration has become final and executory and must be implemented in the name of substantial justice. Betonval, however, avers that that the issue on the alleged unused cement was never raised as an affirmative defense in its answer or in its motion for reconsideration to the January 29, 1999 decision. Neither was this issue raised in the CA. Hence, FSI must not be allowed to broach it for the first time in this Court. Betonval is correct.

It is well-settled that issues not raised in the trial court may not be raised for the first time on appeal. Furthermore, defenses and objections not pleaded either in a motion to dismiss or in the answer are deemed waived.[19]

More importantly, the portion of a decision that becomes the subject of an execution is that ordained or decreed in the dispositive portion.[20] In this case, there was no award in favor of FSI of the value of the balance of the unused cement as reflected in the invoices.

The Applicable Interest Rate is 24% p.a.

There is no dispute that FSI and Betonval stipulated the payment of a 30% p.a. interest in case of overdue payments. There is likewise no doubt that FSI failed to pay Betonval on time.

FSI acknowledged its indebtedness to Betonval in the principal amount of P1,114,203.34. However, FSI opposed the CA's imposition of a 24% p.a. interest on the award to Betonval allegedly because: (a) the grant to FSI of a 45-day credit extension novated the contracts insofar as FSI's obligation to pay any interest was concerned; (b) Betonval waived its right to enforce the payment of the 30% p.a. interest when it granted FSI a new credit term and (c) Betonval's prayer for a 24% p.a. interest instead of 30%, resulted in a situation where, in effect, no interest rate was supposedly stipulated, thus necessitating the imposition only of the legal interest rate of 6% p.a. from judicial demand.

FSI's contentions have no merit.

Novation is one of the modes of extinguishing an obligation.[21] It is done by the substitution or change of the obligation by a subsequent one which extinguishes the first, either by changing the object or principal conditions, or by substituting the person of the debtor, or by subrogating a third person in the rights of the creditor.[22] Novation may:

> [E]ither be extinctive or modificatory, much being dependent on the nature of the change and the intention of the parties. **Extinctive novation is never presumed; there must be an express intention to novate**; **in cases where it is implied, the acts of the parties must clearly demonstrate their intent to dissolve the old obligation as the moving consideration for the emergence of the new one**. Implied novation necessitates that the incompatibility between the old and new obligation be total on every point such that the old obligation is completely superceded by the new one. The test of incompatibility is whether they can stand together, each one having an independent existence; if they cannot and are irreconcilable, the subsequent obligation would also extinguish the first.
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> An extinctive novation would thus have the twin effects of, *first*, extinguishing an existing obligation and, *second*, creating a new one in its stead. This kind of novation presupposes a confluence of four essential requisites: (1) a previous valid obligation, (2) an agreement of all parties concerned to a new contract, (3) the extinguishment of the old obligation, and (4) the birth of a valid new obligation. Novation is merely modificatory where the change brought about by any subsequent agreement is merely incidental to the main obligation (*e.g.*, a change in interest rates or an extension of time to pay; in this instance, the new agreement will not have the effect of extinguishing the first but would merely supplement it or supplant some but not all of its provisions.)[23]

The obligation to pay a sum of money is not novated by an instrument that expressly recognizes the old, changes only the terms of payment, adds other obligations not incompatible with the old ones or the new contract merely supplements the old one.[24]

The grant by Betonval to FSI of a 45-day credit extension did not novate the contracts so as to extinguish the latter. There was no incompatibility between them. There was no intention by the parties to supersede the obligations under the contracts. In fact, the intention of the 45-day credit extension was precisely to revive the old obligation after the original period expired with the obligation unfulfilled. The grant of a 45-day credit period merely modified the contracts by extending the period within which FSI was allowed to settle its obligation. Since the contracts remained the source of FSI's obligation to Betonval, the stipulation to pay 30% p.a. interest likewise remained.

Obviously, the extension given to FSI was triggered by its own request, to help it through its financial difficulties. FSI would now want to take advantage of that generous accommodation by claiming that its liability for interest was extinguished by its creditor's benevolence.

Neither did Betonval waive the stipulated interest rate of 30% p.a., as FSI erroneously claims. A waiver is a voluntary and intentional relinquishment or abandonment of a known legal right or privilege.[25] A waiver must be couched in clear and unequivocal terms which leave no doubt as to the intention of a party to give up a right or benefit which legally pertains to him.[26] FSI did not adduce proof