

## THIRD DIVISION

[ G.R. No. 170479, February 18, 2008 ]

**ANDRE T. ALMOCERA, Petitioner, vs. JOHNNY ONG, Respondent.**

### D E C I S I O N

**CHICO-NAZARIO, J.:**

Before Us is a Petition for Review on *Certiorari* under Rule 45 of the 1997 Rules of Civil Procedure which seeks to set aside the Decision<sup>[1]</sup> of the Court of Appeals dated 18 July 2005 in CA-G.R. CV No. 75610 affirming *in toto* the Decision<sup>[2]</sup> of Branch 11 of the Regional Trial Court (RTC) of Cebu City in Civil Case No. CEB-23687 and its Resolution<sup>[3]</sup> dated 16 November 2005 denying petitioner's motion for reconsideration. The RTC decision found petitioner Andre T. Almocera, Chairman and Chief Executive Officer of First Builder Multi-Purpose Cooperative (FBMC), solidarily liable with FMBC for damages.

Stripped of non-essentials, the respective versions of the parties have been summarized by the Court of Appeals as follows:

Plaintiff Johnny Ong tried to acquire from the defendants a "townhome" described as Unit No. 4 of Atrium Townhomes in Cebu City. As reflected in a Contract to Sell, the selling price of the unit was P3,400,000.00 pesos, for a lot area of eighty-eight (88) square meters with a three-storey building. Out of the purchase price, plaintiff was able to pay the amount of P1,060,000.00. Prior to the full payment of this amount, plaintiff claims that defendants Andre Almocera and First Builders fraudulently concealed the fact that before and at the time of the perfection of the aforesaid contract to sell, the property was already mortgaged to and encumbered with the Land Bank of the Philippines (LBP). In addition, the construction of the house has long been delayed and remains unfinished. On March 13, 1999, Lot 4-a covered by TCT No. 148818, covering the unit was advertised in a local tabloid for public auction for foreclosure of mortgage. It is the assertion of the plaintiff that had it not for the fraudulent concealment of the mortgage and encumbrance by defendants, he would have not entered into the contract to sell.

On the other hand, defendants assert that on March 20, 1995, First Builders Multi-purpose Coop. Inc., borrowed money in the amount of P500,000.00 from Tommy Ong, plaintiff's brother. This amount was used to finance the documentation requirements of the LBP for the funding of the Atrium Town Homes. This loan will be applied in payment of one (1) town house unit which Tommy Ong may eventually purchase from the project. When the project was under way, Tommy Ong wanted to buy another townhouse for his brother, Johnny Ong, plaintiff herein, which then, the amount of P150,000.00 was given as additional partial

payment. However, the particular unit was not yet identified. It was only on January 10, 1997 that Tommy Ong identified Unit No. 4 plaintiff's chosen unit and again tendered P350,000.00 as his third partial payment. When the contract to sell for Unit 4 was being drafted, Tommy Ong requested that another contract to sell covering Unit 5 be made so as to give Johnny Ong another option to choose whichever unit he might decide to have. When the construction was already in full blast, defendants were informed by Tommy Ong that their final choice was Unit 5. It was only upon knowing that the defendants will be selling Unit 4 to some other persons for P4million that plaintiff changed his choice from Unit 5 to Unit 4.<sup>[4]</sup>

In trying to recover the amount he paid as down payment for the townhouse unit, respondent Johnny Ong filed a complaint for Damages before the RTC of Cebu City, docketed as Civil Case No. CEB-23687, against defendants Andre T. Almocera and FBMC alleging that defendants were guilty of fraudulent concealment and breach of contract when they sold to him a townhouse unit without divulging that the same, at the time of the perfection of their contract, was already mortgaged with the Land Bank of the Philippines (LBP), with the latter causing the foreclosure of the mortgage and the eventual sale of the townhouse unit to a third person.

In their Answer, defendants denied liability claiming that the foreclosure of the mortgage on the townhouse unit was caused by the failure of complainant Johnny Ong to pay the balance of the price of said townhouse unit.

After the pre-trial conference was terminated, trial on the merits ensued. Respondent and his brother, Thomas Y. Ong, took the witness stand. For defendants, petitioner testified.

In a Decision dated 20 May 2002, the RTC disposed of the case in this manner:

WHEREFORE, in view of all the foregoing premises, judgment is hereby rendered in this case in favor of the plaintiff and against the defendants:

(a) Ordering the defendants to solidarily pay to the plaintiff the sum of P1,060,000.00, together with a legal interest thereon at 6% per annum from April 21, 1999 until its full payment before finality of the judgment. Thereafter, if the amount adjudged remains unpaid, the interest rate shall be 12% per annum computed from the time when the judgment becomes final and executory until fully satisfied;

(b) Ordering the defendants to solidarily pay to the plaintiff the sum of P100,000.00 as moral damages, the sum of P50,000.00 as attorney's fee and the sum of P15,619.80 as expenses of litigation; and

(c) Ordering the defendants to pay the cost of this suit.<sup>[5]</sup>

The trial court ruled against defendants for not acting in good faith and for not complying with their obligations under their contract with respondent. In the Contract to Sell<sup>[6]</sup> involving Unit 4 of the Atrium Townhomes, defendants agreed to sell said townhouse to respondent for P3,400,000.00. The down payment was P1,000,000.00, while the balance of P2,400,000.00 was to be paid in full upon

completion, delivery and acceptance of the townhouse. Under the contract which was signed on 10 January 1997, defendants agreed to complete and convey to respondent the unit within six months from the signing thereof.

The trial court found that respondent was able to make a down payment or partial payment of P1,060,000.00 and that the defendants failed to complete the construction of, as well as deliver to respondent, the townhouse within six months from the signing of the contract. Moreover, respondent was not informed by the defendants at the time of the perfection of their contract that the subject townhouse was already mortgaged to LBP. The mortgage was foreclosed by the LBP and the townhouse was eventually sold at public auction. It said that defendants were guilty of fraud in their dealing with respondent because the mortgage was not disclosed to respondent when the contract was perfected. There was also non-compliance with their obligations under the contract when they failed to complete and deliver the townhouse unit at the agreed time. On the part of respondent, the trial court declared he was justified in suspending further payments to the defendants and was entitled to the return of the down payment.

Aggrieved, defendants appealed the decision to the Court of Appeals assigning the following as errors:

1. THE LOWER COURT ERRED IN HOLDING THAT PLAINTIFF HAS A VALID CAUSE OF ACTION FOR DAMAGES AGAINST DEFENDANT(S).
2. THE LOWER COURT ERRED IN HOLDING THAT DEFENDANT ANDRE T. ALMOCERA IS SOLIDARILY LIABLE WITH THE COOPERATIVE FOR THE DAMAGES TO THE PLAINTIFF.<sup>[7]</sup>

The Court of Appeals ruled that the defendants incurred delay when they failed to deliver the townhouse unit to the respondent within six months from the signing of the contract to sell. It agreed with the finding of the trial court that the nonpayment of the balance of P2.4M by respondent to defendants was proper in light of such delay and the fact that the property subject of the case was foreclosed and auctioned. It added that the trial court did not err in giving credence to respondent's assertion that had he known beforehand that the unit was used as collateral with the LBP, he would not have proceeded in buying the townhouse. Like the trial court, the Court of Appeals gave no weight to defendants' argument that had respondent paid the balance of the purchase price of the townhouse, the mortgage could have been released. It explained:

We cannot find fault with the choice of plaintiff not to further dole out money for a property that in all events, would never be his. Moreover, defendants could, if they were really desirous of satisfying their obligation, demanded that plaintiff pay the outstanding balance based on their contract. This they had not done. We can fairly surmise that defendants could not comply with their obligation themselves, because as testified to by Mr. Almocera, they already signified to LBP that they cannot pay their outstanding loan obligations resulting to the foreclosure of the townhouse.<sup>[8]</sup>

Moreover, as to the issue of petitioner's solidary liability, it said that this issue was belatedly raised and cannot be treated for the first time on appeal.

On 18 July 2005, the Court of Appeals denied the appeal and affirmed *in toto* the decision of the trial court. The dispositive portion of the decision reads:

**IN LIGHT OF ALL THE FOREGOING**, this appeal is **DENIED**. The assailed decision of the Regional Trial Court, Branch 11, Cebu City in Civil Case No. CEB-23687 is **AFFIRMED in toto**.<sup>[9]</sup>

In a Resolution dated 16 November 2005, the Court of Appeals denied defendants' motion for reconsideration.

Petitioner is now before us pleading his case via a Petition for Review on *Certiorari* under Rule 45 of the 1997 Rules of Civil Procedure. The petition raises the following issues:

- I. THE HONORABLE COURT OF APPEALS GRAVELY ERRED IN HOLDING THAT DEFENDANT HAS INCURRED DELAY.
- II. THE HONORABLE COURT OF APPEALS GRAVELY ERRED IN SUSTAINING RESPONDENT'S REFUSAL TO PAY THE BALANCE OF THE PURCHASE PRICE.
- III. THE HONORABLE COURT OF APPEALS GRAVELY ERRED IN HOLDING THAT DEFENDANT ANDRE T. ALMOCERA IS SOLIDARILY LIABLE WITH THE DEFENDANT COOPERATIVE FOR DAMAGES TO PLAINTIFF.<sup>[10]</sup>

It cannot be disputed that the contract entered into by the parties was a contract to sell. The contract was denominated as such and it contained the provision that the unit shall be conveyed by way of an Absolute Deed of Sale, together with the attendant documents of Ownership – the Transfer Certificate of Title and Certificate of Occupancy – and that the balance of the contract price shall be paid upon the completion and delivery of the unit, as well as the acceptance thereof by respondent. All these clearly indicate that ownership of the townhouse has not passed to respondent.

In *Serrano v. Caguiat*, <sup>[11]</sup> we explained:

A contract to sell is akin to a conditional sale where the efficacy or obligatory force of the vendor's obligation to transfer title is subordinated to the happening of a future and uncertain event, so that if the suspensive condition does not take place, the parties would stand as if the conditional obligation had never existed. The suspensive condition is commonly full payment of the purchase price.

The differences between a contract to sell and a contract of sale are well-settled in jurisprudence. As early as 1951, in *Sing Yee v. Santos* [47 O.G. 6372 (1951)], we held that:

"x x x [a] distinction must be made between a contract of sale in which title passes to the buyer upon delivery of the thing sold and a contract to sell x x x where by agreement the ownership is reserved in the seller and is not to pass until the