

SECOND DIVISION

[G.R. NO. 152471, August 18, 2006]

**FIESTA WORLD MALL CORPORATION, PETITIONER, VS. LINBERG
PHILIPPINES, INC., RESPONDENT.**

DECISION

SANDOVAL-GUTIERREZ, J.:

For our resolution is the instant Petition for Review on Certiorari^[1] assailing the Decision^[2] dated December 12, 2001 and Resolution^[3] dated February 28, 2002 rendered by the Court of Appeals in CA-G.R. SP No. 63671, entitled "Fiesta World Mall Corporation, *petitioner*, versus Hon. Florito S. Macalino, Presiding Judge of the Regional Trial Court (RTC), Branch 267, Pasig City, and Linberg Philippines, *Inc., respondents.*"

The facts of this case are:

Fiesta World Mall Corporation, petitioner, owns and operates Fiesta World Mall located at Barangay Maraouy, Lipa City; while Linberg Philippines, Inc., respondent, is a corporation that builds and operates power plants.

On January 19, 2000, respondent filed with the Regional Trial Court (RTC), Branch 267, Pasig City, a Complaint for Sum of Money against petitioner, docketed as Civil Case No. 67755. The complaint alleges that on November 12, 1997, petitioner and respondent executed a build-own-operate agreement, entitled "Contract Agreement for Power Supply Services, 3.8 MW Base Load Power Plant"^[4] (the Contract). Under this Contract, respondent will construct, at its own cost, and operate as owner a power plant, and to supply petitioner power/electricity at its shopping mall in Lipa City. Petitioner, on the other hand, will pay respondent "energy fees" to be computed in accordance with the Seventh Schedule of the Contract, the pertinent portions of which provide:

2.1 x x x

E1 - 988,888 kw-hr x BER

Where:

E1 & E2 – Energy fees in pesos for the billing period. Where E1 is based on the minimum energy off-take of 988,888 kw-hrs. per month and E2 is based on the actual meter reading less the minimum off-take.

- BER – Base energy rate at Ps 2.30/Kw-Hr billing rate based on the exchange rate of Ps 26.20 to the US dollar, and **with fuel oil to be supplied by LINBERG at its own cost.** The base energy rate is subject to exchange rate adjustment accordingly to the formula as follows:
- BER – $0.6426 + 0.3224 \frac{P_n}{26.40} + \frac{F_n}{4.00} + 1.345$

Where:

- P_n – is defined as the average of the Bangko Sentral ng Pilipinas' published dealing rates for thirty (30) trading days immediately prior to the new billing rate.
- F_n – Weighted average of fuel price per liter based on the average of the last three (3) purchases made by LINBERG as evidenced by purchase invoices.
- ED – Energy delivered in kw-hrs per meter reading.

3. Minimum Energy Off-Take

The energy fees payable to LINBERG shall be on the basis of actual KWH generated by the plant. However, if the actual KWH generated is less than the minimum energy off-take level, the calculation of the energy fees shall be made as if LINBERG has generated the minimum energy off-take level of 988,888 KW-HR per month.

The complaint further alleges that respondent constructed the power plant in Lipa City at a cost of about P130,000,000.00. In November 1997, the power plant became operational and started supplying power/electricity to petitioner's shopping mall in Lipa City. In December 1997, respondent started billing petitioner. As of May 21, 1999, petitioner's unpaid obligation amounted to P15,241,747.58, exclusive of interest. However, petitioner questioned the said amount and refused to pay despite respondent's repeated demands.

In its Answer with Compulsory Counterclaim, petitioner specifically denied the allegations in the complaint, claiming that respondent failed to fulfill its obligations under the Contract by failing to supply all its power/fuel needs. From November 10, 1998 until May 21, 1999, petitioner personally shouldered the cost of fuel. Petitioner also disputed the amount of energy fees specified in the billings made by

respondent because the latter **failed to monitor, measure, and record the quantities of electricity delivered by taking photographs of the electricity meter reading prior to the issuance of its invoices and billings**, also in violation of the Contract.^[5] Moreover, in the computation of the electrical billings, the **minimum off-take of energy (E2) was based solely on the projected consumption as computed by respondent**. However, based on petitioner's actual experience, it could **not consume the energy pursuant to the minimum off-take even if it kept open all its lights and operated all its machinery and equipment for twenty-four hours a day for a month. This fact was admitted by respondent**. While both parties had discussions on the questioned billings, however, "there were no earnest efforts to resolve the differences in accordance with the arbitration clause provided for in the Contract."

Finally, as a special affirmative defense in its answer, petitioner alleged that respondent's filing of the complaint is **premature** and should be dismissed on the ground of non-compliance with paragraph 7.4 of the Contract which provides:

7.4 Disputes

If FIESTA WORLD **disputes the amount specified by any invoice**, it shall pay the undisputed amount on or before such date(s), and **the disputed amount shall be resolved by arbitration of three (3) persons, one (1) by mutual choice, while the other two (2) to be each chosen by the parties themselves**, within fourteen (14) days after the due date for such invoice and all or any part of the disputed amount paid to LINBERG shall be paid together with interest pursuant to Article XXV from the due date of the invoice. It is agreed, however, that both parties must resolve the disputes within thirty (30) days, otherwise any delay in payment resulting to loss to LINBERG when converted to \$US as a result of depreciation of the Pesos shall be for the account of FIESTA WORLD. Corollarily, in case of erroneous billings, however, LINBERG shall be liable to pay FIESTA WORLD for the cost of such deterioration, plus interest computed pursuant to Art. XXV from the date FIESTA WORLD paid for the erroneous billing. (Underscoring supplied)

Thereafter, petitioner filed a Motion to Set Case for Preliminary Hearing on the ground that respondent violated the arbitration clause provided in the Contract, thereby rendering its cause of action premature.

This was opposed by respondent, claiming that paragraph 7.4 of the Contract on arbitration is not the provision applicable to this case; and that since the parties failed to settle their dispute, then respondent may resort to court action pursuant to paragraph 17.2 of the same Contract which provides:

17.2 Amicable Settlement

The parties hereto agree that **in the event there is any dispute or difference between them arising out of this Agreement or in the interpretation of any of the provisions hereto, they shall endeavor to meet together in an effort to resolve such dispute by discussion between them but failing such resolution the Chief Executives of LINBERG and FIESTA WORLD shall meet to resolve**