

THIRD DIVISION

[G.R. No. 170732, October 11, 2012]

**ATLANTIC ERECTORS, INC., PETITIONER, VS. COURT OF
APPEALS AND HERBAL COVE REALTY CORPORATION,
RESPONDENTS.**

D E C I S I O N

PERALTA, J.:

This is a petition for review on *certiorari* under Rule 45 of the Rules of Court assailing the Court of Appeals (CA) Decision^[1] dated February 28, 2005 and Resolutions dated September 7, 2005^[2] and December 5, 2005^[3] in CA-G.R. SP No. 52070. The assailed decision affirmed with modification the Decision^[4] of the Construction Industry Arbitration Commission (CIAC), dated March 11, 1999, in CIAC Case No. 13-98; while the assailed resolutions denied petitioner Atlantic Erectors, Inc.'s Motion for Partial Reconsideration.

The facts of the case, as culled from the records, are as follows:

Respondent Herbal Cove Realty Corporation (*respondent*) engaged DP Architects Philippines to prepare architectural designs and RA&A Associates to provide engineering designs for its subdivision project known as "The Herbal Cove" located at Iruhin West, Tagaytay City. It likewise hired Building Energy Systems, Inc. (BESI) to provide management services for the construction and development of the project. On June 20, 1996, respondent and Atlantic Erectors, Inc. (*petitioner*) entered into a Construction Contract^[5] whereby the latter agreed to undertake, accomplish and complete the entire works for the implementation of Construction Package A consisting of four (4) units of Townhouse B and 1 unit of Single Detached A1 of the project^[6] for a total contract price of P15,726,745.19^[7] which was later adjusted to P16,726,745.19 as a result of additional works.^[8] Petitioner further agreed to finish and complete the works and deliver the same to respondent within a period of one hundred eighty (180) consecutive calendar days reckoned from the date indicated in the Notice to Proceed^[9] to be issued to petitioner.^[10] To secure the completion of the works within the time stipulated, petitioner agreed to pay respondent liquidated damages equivalent to one-tenth of one percent (1/10 of 1%) of the contract price per calendar day of delay until completion, delivery and acceptance of the said works by respondent to a maximum amount not to exceed ten percent (10%).^[11]

Petitioner was instructed to commence construction on July 8, 1996.^[12] In a letter^[13] dated January 6, 1997, petitioner requested for extension of time equivalent to the number of days of delay in the start of the works brought about by the belated turnover of the sites of the building. Additional extension was requested

due to bad weather condition that prevailed during the implementation of the projects, again causing excusable delay. In a letter^[14] dated January 11, 1997, respondent allowed the requested schedule adjustments with a reminder that liquidated damages shall be applied beyond the extended periods. Petitioner was allowed to complete and deliver the housing units until the following dates:

SDA-15	15 March 1997 or an extension of 67 calendar days
TH 16-A and TH 16-B	7 March 1997 or an extension of 59 calendar days
TH 17-A and TH 17-B	7 April 1997 or an extension of 90 calendar days ^[15]

Petitioner, however, still failed to complete and deliver the units within the extended period.

On September 22, 1997, respondent required petitioner to submit a formal written commitment to finish and complete the contracted works, otherwise, the contract would be deemed terminated and respondent would take over the project on October 1, 1997 with the corresponding charges for the excess cost occasioned thereby, plus liquidated damages.^[16] On October 3, 1997, respondent informed petitioner that the former's management had unanimously agreed to terminate the subject construction contract for the following reasons:

1. After a review and evaluation by the management group of the works done in the Project, we found blatant defects in the workmanship of the houses;
2. Delayed completion of the project; and
3. Lack of interest to make a firm commitment to finish the project.

^[17]

Respondent, thereafter, entered into a Construction Administration Agreement^[18] with Benedict O. Manalo and Associates, Engineers and Construction Managers to finish, complete and deliver the housing units started by petitioner.

On June 3, 1998, respondent filed with the CIAC a Request for Arbitration^[19] against petitioner praying for the payment of liquidated damages, cost to remedy defective workmanship, excess costs incurred to complete the work, attorney's fees and litigation expenses. The case was docketed as CIAC Case No. 13-98.

Prior thereto, or on November 21, 1997, petitioner instituted with the Regional Trial Court (RTC) a civil case against respondent where it sought to recover the sum representing unpaid construction service already rendered, unpaid construction materials, equipment and tools, and cost of income by way of rental from equipment of petitioner held by respondent.^[20] The case was, however, dismissed on motion of respondent invoking the arbitration clause, which dismissal was affirmed by the Court.^[21]

In answer to respondent's request for arbitration, petitioner alleged that the delay was attributable to: (1) delayed turnover of the site; (2) cause of two typhoons; 3) change orders and additional works; (4) late approval of shop drawings; (5) non-arrival of chimney expert; (6) delayed payments; and (7) non-payment of the last two billings.^[22] It also argued that respondent suspended the construction works depriving it of the opportunity to complete the works on or before November 15, 1997.^[23] It also insisted that there was unlawful termination of the construction contract.

After the reception of the parties' evidence and the submission of their respective memoranda, the CIAC ordered respondent to pay petitioner P1,087,187.80, with 6% interest per annum from the time the award becomes executory.^[24] The CIAC summarized the awards as follows:

A. FOR THE CLAIMANT [Respondent herein]

	Claim	Award
Liquidated Damages	P 1,572,674.51	P 0.00
Cost to Remedy Defective Workmanship	1,600,000.00	0.00
Excess Cost to Complete	2,592,806.00	506,069.94
Attorney's Fees and Cost of Litigation Excluding Arbitration Fees	2,000,000.00	0.00
Total Claims	P 7,765,480.51	P 506,069.94

B. RESPONDENT'S [PETITIONER'S] CLAIM

	Claim	Award
Retention Amount	P 899,718.50	P 1,012,139.89
Work Accomplishment Collectible	4,854,229.94	821,556.09
Deduct Unliquidated Downpayment (P3,145,349.04 - P1,968,044.89)		1,177,304.15
Materials, tools and equipment left at jobsite	1,595,551.00	936,866.00
Rental cost of tools and equipment left at jobsite	800,000.00	0.00
Attorney's Fees and Cost of Litigation excluding Arbitration Fees	1,000,000.00	0.00
Total Counterclaim	P 8,149,499.95	P 1,593,257.74

C. NET AWARD FOR [PETITIONER]

The CIAC found that petitioner incurred delay in the completion of the project. While it did file a request for extension which was granted until April 7, 1997, the project remained incomplete and no further extension was asked.^[26] Notwithstanding the delay, the CIAC found the termination of the contract illegal for respondent's failure to comply with the requirements of termination, as the contract specifically provides that petitioner be given 15-day notice prior to such termination.^[27] It added that petitioner's delay was overridden by the unlawful termination of the contract.^[28] Consequently, respondent was not awarded liquidated damages.^[29] For failure to submit sufficient evidence, the CIAC also found respondent not entitled to the additional cost to complete the project.^[30] As to the cost of correcting the defects, it concluded that although respondent failed to prove the cost of correcting the defects, reasonable cost should be awarded in view of the admitted and proven defects.^[31] Finally, the CIAC found petitioner entitled to the 10% retention which is P1,012,139.89 from which respondent's claims should be deducted.^[32] In effect, both petitioner's and respondent's claims and counterclaims were partly granted.

Petitioner elevated the matter to the CA docketed as CA-G.R. SP No. 52200, but the same was denied due course in a Resolution dated July 26, 1999. When the resolution was assailed before the Court in a petition for review on *certiorari* in G.R. No. 141697, the petition was denied for petitioner's failure to submit a valid affidavit of service of copies of the petition to respondent.^[33] Petitioner's motion for reconsideration was likewise denied in a Resolution dated June 26, 2000, which became final and executory on August 31, 2000 and, accordingly, recorded in the Book of Entries of Judgment.

Respondent interposed a separate appeal assailing the same CIAC decision, docketed as CA-G.R. SP No. 52070. Respondent questioned the CIAC's failure to dismiss petitioner's counterclaims on the ground of forum shopping. More importantly, respondent insisted that the CIAC erred in concluding: that the termination of the construction contract was illegal; that it is not entitled to liquidated damages and the excess cost to complete the project; that it is entitled to a reduced amount for the correction of petitioner's defective work; and, that petitioner is entitled to the value of the materials, equipment and tools left at the jobsite.^[34]

On February 28, 2005, the CA rendered the assailed decision affirming with modification the CIAC decision by awarding respondent liquidated damages of P1,572,674.51. The CA agreed with the CIAC that petitioner's counterclaims could not be dismissed on the ground of forum shopping, because the civil case before the RTC was dismissed for lack of jurisdiction. Thus, petitioner aptly set up its counterclaims before the CIAC.^[35] The CA also sustained the CIAC's conclusion on the illegality of the termination of the construction contract for failure of respondent to comply with the 15-day notice.^[36] It, however, could not agree with the CIAC as to respondent's claim for liquidated damages. Notwithstanding the declaration of the illegality of the termination of the contract, petitioner could still be charged with

liquidated damages by reason of the delay in the completion of the project. The CA explained that the right to liquidated damages is available to respondent whether or not it terminated the contract because delay alone is decisive.^[37]

Aggrieved, petitioner moved for reconsideration of the decision. On September 7, 2005, the CA issued a Resolution denying the motion, followed by another Resolution dated December 5, 2005 correcting the earlier resolution, which inadvertently referred to respondent as the party who filed the motion where in fact it was filed by petitioner.

Petitioner now comes before the Court in this petition for review on *certiorari* with this sole issue:

WHETHER OR NOT THE COURT OF APPEALS HAS DECIDED A QUESTION OF SUBSTANCE OR HAS DECIDED IT IN A WAY NOT IN ACCORD WITH LAW OR WITH APPLICABLE DECISIONS OF THE SUPREME COURT WHEN IT RULED AND MODIFIED THE DECISION OF THE CIAC FINDING PETITIONER LIABLE TO PAY RESPONDENT LIQUIDATED DAMAGES.^[38]

The petition is without merit.

At the outset, the Court notes that the case involved various claims and counterclaims separately set up by petitioner and respondent. The CIAC thus awarded petitioner the retention pay; the unpaid value of its work accomplishment; and the value of the materials, tools and equipment left at jobsite. On the other hand, it awarded respondent only with the excess cost to complete the unfinished project. Petitioner elevated the matter to the CA, but the same was dismissed, which dismissal was affirmed by the Court. In the separate appeal filed by respondent, the CA modified the CIAC decision by making petitioner liable for liquidated damages. It is on this issue that petitioner comes before the Court raising in particular the propriety of making it liable for liquidated damages.

The resolution of the issue of respondent's entitlement to liquidated damages hinges on whether petitioner was in default in the performance of its obligation.^[39]

The liability for liquidated damages is governed by Articles 2226-2228 of the Civil Code which provide:

Article 2226. Liquidated damages are those agreed upon by the parties to a contract, to be paid in case of breach thereof.

Article 2227. Liquidated damages, whether intended as an indemnity or a penalty, shall be equitably reduced if they are iniquitous or unconscionable.

Article 2228. When the breach of the contract committed by the defendant is not the one contemplated by the parties in agreeing upon the liquidated damages, the law shall determine the measure of damages, and not the stipulation.