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SECOND DIVISION

[G.R. No. 168433, February 10, 2009]

UCPB GENERAL INSURANCE CO., INC., PETITIONER, VS. ABOITIZ SHIPPING CORP. EAGLE EXPRESS LINES, DAMCO INTERMODAL SERVICES, INC., AND PIMENTEL CUSTOMS BROKERAGE CO., RESPONDENTS.

D E C I S I O N

TINGA, J.:

UCPB General Insurance Co., Inc. (UCPB) assails the Decision[1] of the Court of Appeals dated October 29, 2004, which reversed the Decision[2] dated November 29, 1999 of the Regional Trial Court of Makati City, Branch 146, and its Resolution[3] dated June 14, 2005, which denied UCPB's motion for reconsideration.

The undisputed facts, culled from the assailed Decision, are as follows:

> On June 18, 1991, three (3) units of waste water treatment plant with accessories were purchased by San Miguel Corporation (SMC for brevity) from Super Max Engineering Enterprises, Co., Ltd. of Taipei, Taiwan. The goods came from Charleston, U.S.A. and arrived at the port of Manila on board MV "SCANDUTCH STAR". The same were then transported to Cebu on board MV "ABOITIZ SUPERCON II". After its arrival at the port of Cebu and clearance from the Bureau of Customs, the goods were delivered to and received by SMC at its plant site on August 2, 1991. It was then discovered that one electrical motor of DBS Drive Unit Model DE-30-7 was damaged.
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> Pursuant to an insurance agreement, plaintiff-appellee paid SMC the amount of P1,703,381.40 representing the value of the damaged unit. In turn, SMC executed a Subrogation Form dated March 31, 1992 in favor of plaintiff-appellee.
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> Consequently, plaintiff-appellee filed a Complaint on July 21, 1992 as subrogee of SMC seeking to recover from defendants the amount it had paid SMC.
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> On September 20, 1994, plaintiff-appellee moved to admit its Amended Complaint whereby it impleaded East Asiatic Co. Ltd. (EAST for brevity) as among the defendants for being the "general agent" of DAMCO. In its Order dated September 23, 1994, the lower court admitted the said amended complaint.
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> Upon plaintiff-appellee's motion, defendant DAMCO was declared in default by the lower court in its Order dated January 6, 1995.

In the meantime, on January 25, 1995, defendant EAST filed a Motion for Preliminary Hearing on its affirmative defenses seeking the dismissal of the complaint against it on the ground of prescription, which motion was however denied by the court *a quo* in its Order dated September 1, 1995. Such denial was elevated by defendant EAST to this Court through a Petition for Certiorari on October 30, 1995 in CA G.R. SP No. 38840. Eventually, this Court issued its Decision dated February 14, 1996 setting aside the lower court's assailed order of denial and further ordering the dismissal of the complaint against defendant EAST. Plaintiff-appellee moved for reconsideration thereof but the same was denied by this Court in its Resolution dated November 8, 1996. As per Entry of Judgment, this Court's decision ordering the dismissal of the complaint against defendant EAST became final and executory on December 5, 1996.

Accordingly, the court *a quo* noted the dismissal of the complaint against defendant EAST in its Order dated December 5, 1997. Thus, trial ensued with respect to the remaining defendants.

On November 29, 1999, the lower court rendered its assailed Decision, the dispositive portion of which reads:

> WHEREFORE, all the foregoing premises considered, judgment is hereby rendered declaring DAMCO Intermodal Systems, Inc., Eagle Express Lines, Inc. and defendant Aboitiz Shipping solidarily liable to plaintiff-subrogee for the damaged shipment and orders them to pay plaintiff jointly and severally the sum of P1,703,381.40.
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> No costs.
>
> SO ORDERED.

Not convinced, defendants-appellants EAGLE and ABOITIZ now come to this Court through their respective appeals x x x[4]

The appellate court, as previously mentioned, reversed the decision of the trial court and ruled that UCPB's right of action against respondents did not accrue because UCPB failed to file a formal notice of claim within 24 hours from (SMC's) receipt of the damaged merchandise as required under Art. 366 of the Code of Commerce. According to the Court of Appeals, the filing of a claim within the time limitation in Art. 366 is a condition precedent to the accrual of a right of action against the carrier for the damages caused to the merchandise.

In its Memorandum[5] dated February 8, 2007, UCPB asserts that the claim requirement under Art. 366 of the Code of Commerce does not apply to this case because the damage to the merchandise had already been known to the carrier. Interestingly, UCPB makes this revelation: "x x x damage to the cargo was found upon discharge from the foreign carrier onto the International Container Terminal Services, Inc. (ICTSI) in the presence of the carrier's representative who signed the *Request for Bad Order Survey*[6] and the *Turn Over of Bad Order Cargoes*.[7] On transshipment, the cargo was already damaged when loaded on board the inter-

island carrier."[8] This knowledge, UCPB argues, dispenses with the need to give the carrier a formal notice of claim. Incidentally, the carrier's representative mentioned by UCPB as present at the time the merchandise was unloaded was in fact a representative of respondent Eagle Express Lines (Eagle Express).

UCPB claims that under the Carriage of Goods by Sea Act (COGSA), notice of loss need not be given if the condition of the cargo has been the subject of joint inspection such as, in this case, the inspection in the presence of the Eagle Express representative at the time the cargo was opened at the ICTSI.

UCPB further claims that the issue of the applicability of Art. 366 of the Code of Commerce was never raised before the trial court and should, therefore, not have been considered by the Court of Appeals.

Eagle Express, in its Memorandum[9] dated February 7, 2007, asserts that it cannot be held liable for the damage to the merchandise as it acted merely as a freight forwarder's agent in the transaction. It allegedly facilitated the transshipment of the cargo from Manila to Cebu but represented the interest of the cargo owner, and not the carrier's. The only reason why the name of the Eagle Express representative appeared on the *Permit to Deliver Imported Goods* was that the form did not have a space for the freight forwarder's agent, but only for the agent of the shipping line. Moreover, UCPB had previously judicially admitted that upon verification from the Bureau of Customs, it was East Asiatic Co., Ltd. (East Asiatic), regarding whom the original complaint was dismissed on the ground of prescription, which was the real agent of DAMCO Intermodal Services, Inc. (DAMCO), the ship owner.

Eagle Express argues that the applicability of Art. 366 of the Code of Commerce was properly raised as an issue before the trial court as it mentioned this issue as a defense in its Answer to UCPB's Amended Complaint. Hence, UCPB's contention that the question was raised for the first time on appeal is incorrect.

Aboitiz Shipping Corporation (Aboitiz), on the other hand, points out, in its Memorandum[10] dated March 29, 2007, that it obviously cannot be held liable for the damage to the cargo which, by UCPB's admission, was incurred not during transshipment to Cebu on

board one of Aboitiz's vessels, but was already existent at the time of unloading in Manila. Aboitiz also argues that Art. 366 of the Code of Commerce is applicable and serves as a condition precedent to the accrual of UCPB's cause of action against it.

The Memorandum[11] dated June 3, 2008, filed by Pimentel Customs Brokerage Co. (Pimentel Customs), is also a reiteration of the applicability of Art. 366 of the Code of Commerce.

It should be stated at the outset that the issue of whether a claim should have been made by SMC, or UCPB as SMC's subrogee, within the 24-hour period prescribed by Art. 366 of the Code of Commerce was squarely raised before the trial court.

In its Answer to Amended Complaint[12] dated May 10, 1993, Eagle Express averred, thus:

> The amended complaint states no cause of action under the provisions of the Code of Commerce and the terms of the bill of lading; consignee made no claim against herein defendant within twenty four (24) hours following the receipt of the alleged cargo regarding the condition in which said cargo was delivered; however, assuming arguendo that the damage or loss, if any, could not be ascertained from the outside part of the shipment, consignee never made any claim against herein defendant at the time of receipt of said cargo; herein defendant learned of the alleged claim only upon receipt of the complaint.[13]

Likewise, in its Answer[14] dated September 21, 1992, Aboitiz raised the defense that UCPB did not file a claim with it and that the complaint states no cause of action.

UCPB obviously made a gross misrepresentation to the Court when it claimed that the issue regarding the applicability of the Code of Commerce, particularly the 24-hour formal claim rule, was not raised as an issue before the trial court. The appellate court, therefore, correctly looked into the validity of the arguments raised by Eagle Express, Aboitiz and Pimentel Customs on this point after the trial court had so ill-advisedly centered its decision merely on the matter of extraordinary diligence.

Interestingly enough, UCPB itself has revealed that when the shipment was discharged and opened at the ICTSI in Manila in the presence of an Eagle Express representative, the cargo *had already been found damaged*. In fact, a request for bad order survey was then made and a turnover survey of bad order cargoes was issued, pursuant to the procedure in the discharge of bad order cargo. The shipment was then repacked and transshipped from Manila to Cebu on board MV Aboitiz Supercon II. When the cargo was finally received by SMC at its Mandaue City warehouse, it was found in bad order, thereby *confirming* the damage already uncovered in Manila.[15]

In charging Aboitiz with liability for the damaged cargo, the trial court condoned UCPB's wrongful suit against Aboitiz to whom the damage could not have been attributable since there was no evidence presented that the cargo was further damaged during its transshipment to Cebu. Even by the exercise of extraordinary diligence, Aboitiz could not have undone the damage to the cargo that had already been there when the same was shipped on board its vessel.

That said, it is nonetheless necessary to ascertain whether any of the remaining parties may still be held liable by UCPB. The provisions of the Code of Commerce, which apply to overland, river and maritime transportation, come into play.

Art. 366 of the Code of Commerce states:

> Art. 366. Within twenty-four hours following the receipt of the merchandise, the claim against the carrier for damage or average which may be found therein upon opening the packages, may be made, provided that the indications of the damage or average which gives rise to the claim cannot be ascertained from the outside part of such packages, in which case the claim shall be admitted only at the time of receipt.