605 Phil. 507

SECOND DIVISION

[G.R. No. 162467, May 08, 2009]

MINDANAO TERMINAL AND BROKERAGE SERVICE, INC. PETITIONER, VS. PHOENIX ASSURANCE COMPANY OF NEW YORK/ MCGEE & CO., INC., RESPONDENT.

D E C I S I O N

TINGA, J.:

Before us is a petition for review on certiorari[1] under Rule 45 of the 1997 Rules of Civil Procedure of the 29 October 2003[2] Decision of the Court of Appeals and the 26 February 2004 Resolution[3] of the same court denying petitioner's motion for reconsideration.

The facts of the case are not disputed.

Del Monte Philippines, Inc. (Del Monte) contracted petitioner Mindanao Terminal and Brokerage Service, Inc. (Mindanao Terminal), a stevedoring company, to load and stow a shipment of 146,288 cartons of fresh green Philippine bananas and 15,202 cartons of fresh pineapples belonging to Del Monte Fresh Produce International, Inc. (Del Monte Produce) into the cargo hold of the vessel *M/V Mistrau*. The vessel was docked at the port of Davao City and the goods were to be transported by it to the port of Inchon, Korea in favor of consignee Taegu Industries, Inc. Del Monte Produce insured the shipment under an "open cargo policy" with private respondent Phoenix Assurance Company of New York (Phoenix), a non-life insurance company, and private respondent McGee & Co. Inc. (McGee), the underwriting manager/agent of Phoenix.[4]

Mindanao Terminal loaded and stowed the cargoes aboard the *M/V Mistrau*. The vessel set sail from the port of Davao City and arrived at the port of Inchon, Korea. It was then discovered upon discharge that some of the cargo was in bad condition. The Marine Cargo Damage Surveyor of Incok Loss and Average Adjuster of Korea, through its representative Byeong Yong Ahn (Byeong), surveyed the extent of the damage of the shipment. In a survey report, it was stated that 16,069 cartons of the banana shipment and 2,185 cartons of the pineapple shipment were so damaged that they no longer had commercial value.[5]

Del Monte Produce filed a claim under the open cargo policy for the damages to its shipment. McGee's Marine Claims Insurance Adjuster evaluated the claim and recommended that payment in the amount of $210,266.43 be made. A check for the recommended amount was sent to Del Monte Produce; the latter then issued a subrogation receipt[6] to Phoenix and McGee.

Phoenix and McGee instituted an action for damages[7] against Mindanao Terminal

in the Regional Trial Court (RTC) of Davao City, Branch 12. After trial, the RTC,[8] in a decision dated 20 October 1999, held that the only participation of Mindanao Terminal was to load the cargoes on board the *M/V Mistrau* under the direction and supervision of the ship's officers, who would not have accepted the cargoes on board the vessel and signed the foreman's report unless they were properly arranged and tightly secured to withstand voyage across the open seas. Accordingly, Mindanao Terminal cannot be held liable for whatever happened to the cargoes after it had loaded and stowed them. Moreover, citing the survey report, it was found by the RTC that the cargoes were damaged on account of a typhoon which *M/V Mistrau* had encountered during the voyage. It was further held that Phoenix and McGee had no cause of action against Mindanao Terminal because the latter, whose services were contracted by Del Monte, a distinct corporation from Del Monte Produce, had no contract with the assured Del Monte Produce. The RTC dismissed the complaint and awarded the counterclaim of Mindanao Terminal in the amount of P83,945.80 as actual damages and P100,000.00 as attorney's fees.[9] The actual damages were awarded as reimbursement for the expenses incurred by Mindanao Terminal's lawyer in attending the hearings in the case wherein he had to travel all the way from Metro Manila to Davao City.

Phoenix and McGee appealed to the Court of Appeals. The appellate court reversed and set aside[10] the decision of the RTC in its 29 October 2003 decision. The same court ordered Mindanao Terminal to pay Phoenix and McGee "the total amount of $210,265.45 plus legal interest from the filing of the complaint until fully paid and attorney's fees of 20% of the claim."[11] It sustained Phoenix's and McGee's argument that the damage in the cargoes was the result of improper stowage by Mindanao Terminal. It imposed on Mindanao Terminal, as the stevedore of the cargo, the duty to exercise extraordinary diligence in loading and stowing the cargoes. It further held that even with the absence of a contractual relationship between Mindanao Terminal and Del Monte Produce, the cause of action of Phoenix and McGee could be based on quasi-delict under Article 2176 of the Civil Code.[12]

Mindanao Terminal filed a motion for reconsideration,[13] which the Court of Appeals denied in its 26 February 2004[14] resolution. Hence, the present petition for review.

Mindanao Terminal raises two issues in the case at bar, namely: whether it was careless and negligent in the loading and stowage of the cargoes onboard *M/V Mistrau* making it liable for damages; and, whether Phoenix and McGee has a cause of action against Mindanao Terminal under Article 2176 of the Civil Code on quasi-delict. To resolve the petition, three questions have to be answered: first, whether Phoenix and McGee have a cause of action against Mindanao Terminal; second, whether Mindanao Terminal, as a stevedoring company, is under obligation to observe the same extraordinary degree of diligence in the conduct of its business as required by law for common carriers[15] and warehousemen;[16] and third, whether Mindanao Terminal observed the degree of diligence required by law of a stevedoring company.

We agree with the Court of Appeals that the complaint filed by Phoenix and McGee against Mindanao Terminal, from which the present case has arisen, states a cause of action. The present action is based on quasi-delict, arising from the negligent and careless loading and stowing of the cargoes belonging to Del Monte Produce. Even

assuming that both Phoenix and McGee have only been subrogated in the rights of Del Monte Produce, who is not a party to the contract of service between Mindanao Terminal and Del Monte, still the insurance carriers may have a cause of action in light of the Court's consistent ruling that the act that breaks the contract may be also a tort.[17] In fine, a liability for tort may arise even under a contract, where tort is that which breaches the contract[18]. In the present case, Phoenix and McGee are not suing for damages for injuries arising from the breach of the contract of service but from the alleged negligent manner by which Mindanao Terminal handled the cargoes belonging to Del Monte Produce. Despite the absence of contractual relationship between Del Monte Produce and Mindanao Terminal, the allegation of negligence on the part of the defendant should be sufficient to establish a cause of action arising from quasi-delict.[19]

The resolution of the two remaining issues is determinative of the ultimate result of this case.

Article 1173 of the Civil Code is very clear that if the law or contract does not state the degree of diligence which is to be observed in the performance of an obligation then that which is expected of a good father of a family or ordinary diligence shall be required. Mindanao Terminal, a stevedoring company which was charged with the loading and stowing the cargoes of Del Monte Produce aboard *M/V Mistrau*, had acted merely as a labor provider in the case at bar. There is no specific provision of law that imposes a higher degree of diligence than ordinary diligence for a stevedoring company or one who is charged only with the loading and stowing of cargoes. It was neither alleged nor proven by Phoenix and McGee that Mindanao Terminal was bound by contractual stipulation to observe a higher degree of diligence than that required of a good father of a family. We therefore conclude that following Article 1173, Mindanao Terminal was required to observe ordinary diligence only in loading and stowing the cargoes of Del Monte Produce aboard *M/V Mistrau*.

The Court of Appeals erred when it cited the case of *Summa Insurance Corporation v. CA and Port Service Inc.*[20] in imposing a higher degree of diligence,[21] on Mindanao Terminal in loading and stowing the cargoes. The case of *Summa Insurance Corporation v. CA*, which involved the issue of whether an arrastre operator is legally liable for the loss of a shipment in its custody and the extent of its liability, is inapplicable to the factual circumstances of the case at bar. Therein, a vessel owned by the National Galleon Shipping Corporation (NGSC) arrived at Pier 3, South Harbor, Manila, carrying a shipment consigned to the order of Caterpillar Far East Ltd. with Semirara Coal Corporation (Semirara) as "notify party." The shipment, including a bundle of PC 8 U blades, was discharged from the vessel to the custody of the private respondent, the exclusive arrastre operator at the South Harbor. Accordingly, three good-order cargo receipts were issued by NGSC, duly signed by the ship's checker and a representative of private respondent. When Semirara inspected the shipment at house, it discovered that the bundle of PC8U blades was missing. From those facts, the Court observed:

> x x x The relationship therefore between the **consignee and the arrastre operator** must be examined. This relationship is much akin to that existing between the consignee or owner of shipped goods and the common carrier, or that between a depositor and a warehouseman[[22]]. In the performance of its obligations, **an arrastre operator should**

> **observe the same degree of diligence as that required of a common carrier and a warehouseman** as enunciated under Article 1733 of the Civil Code and Section 3(b) of the Warehouse Receipts Law, respectively. **Being the custodian of the goods discharged from a vessel, an arrastre operator's duty is to take good care of the goods and to turn them over to the party entitled to their possession**. (Emphasis supplied)[23]

There is a distinction between an arrastre and a stevedore.[24] Arrastre, a Spanish word which refers to hauling of cargo, comprehends the handling of cargo on the wharf or between the establishment of the consignee or shipper and the ship's tackle. The responsibility of the arrastre operator lasts until the delivery of the cargo to the consignee. The service is usually performed by longshoremen. On the other hand, stevedoring refers to the handling of the cargo in the holds of the vessel or between the ship's tackle and the holds of the vessel. The responsibility of the stevedore ends upon the loading and stowing of the cargo in the vessel.

It is not disputed that Mindanao Terminal was performing purely stevedoring function while the private respondent in the *Summa* case was performing arrastre function. In the present case, Mindanao Terminal, as a stevedore, was only charged with the loading and stowing of the cargoes from the pier to the ship's cargo hold; it was never the custodian of the shipment of Del Monte Produce. A stevedore is not a common carrier for it does not transport goods or passengers; it is not akin to a warehouseman for it does not store goods for profit. The loading and stowing of cargoes would not have a far reaching public ramification as that of a common carrier and a warehouseman; the public is adequately protected by our laws on contract and on quasi-delict. The public policy considerations in legally imposing upon a common carrier or a warehouseman a higher degree of diligence is not present in a stevedoring outfit which mainly provides labor in loading and stowing of cargoes for its clients.

In the third issue, Phoenix and McGee failed to prove by preponderance of evidence[25] that Mindanao Terminal had acted negligently. Where the evidence on an issue of fact is in equipoise or there is any doubt on which side the evidence preponderates the party having the burden of proof fails upon that issue. That is to say, if the evidence touching a disputed fact is equally balanced, or if it does not produce a just, rational belief of its existence, or if it leaves the mind in a state of perplexity, the party holding the affirmative as to such fact must fail.[26]

We adopt the findings[27] of the RTC,[28] which are not disputed by Phoenix and McGee. The Court of Appeals did not make any new findings of fact when it reversed the decision of the trial court. The only participation of Mindanao Terminal was to load the cargoes on board *M/V Mistrau.*[29] It was not disputed by Phoenix and McGee that the materials, such as ropes, pallets, and cardboards, used in lashing and rigging the cargoes were all provided by *M/V Mistrau* and these materials meets industry standard.[30]

It was further established that Mindanao Terminal loaded and stowed the cargoes of Del Monte Produce aboard the *M/V Mistrau* in accordance with the stowage plan, a guide for the area assignments of the goods in the vessel's hold, prepared by Del