Republic of the Philippines
Supreme Court
Manila

SECOND DIVISION

LICOMCEN, INC., Petitioner,	**G.R. No. 199781**
	Present:
- versus -	CARPIO, *J.*, Chairperson, BRION, DEL CASTILLO, PEREZ, and PERLAS-BERNABE, *JJ.*
ENGR. SALVADOR ABAINZA, doing business under the name and style "ADS INDUSTRIAL EQUIPMENT," Respondent.	Promulgated: FEB 18 2013

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DECISION

CARPIO, *J.*:

The Case

This petition for review[1] assails the 21 September 2011 Decision[2] and the 6 December 2011 Resolution[3] of the Court of Appeals in CA-G.R. CV No. 86296. The Court of Appeals affirmed the 7 November 2005 Decision[4] of the Regional Trial Court, Branch 8, Legazpi City, in Civil Case No. 9919, which ordered petitioner LICOMCEN, Inc. (petitioner) to pay respondent Engr. Salvador Abainza (respondent) the sum of ₱1,777,202.80 plus 12% interest per annum, ₱50,000 attorney's fees, and ₱20,000 litigation and incidental expenses.

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1 Under Rule 45 of the 1997 Rules of Civil Procedure.

2 *Rollo*, pp. 27-36. Penned by Associate Justice Agnes Reyes-Carpio, with Associate Justices Fernanda Lampas Peralta and Priscilla J. Baltazar-Padilla, concurring.

3 Id. at 38-39.

4 CA *rollo*, pp. 41-59.

The Facts

Respondent filed an action for sum of money and damages against Liberty Commercial Center, Inc. (Liberty). Respondent alleged that in 1997 and 1998, he was hired by Liberty to do various projects in their commercial centers, mainly at the LCC Central Mall, Naga City, for the supply, fabrication, and installation of air-conditioning ductworks. Respondent completed the project, which included some changes and revisions of the original plan at the behest of Liberty. However, despite several demands by respondent, Liberty failed to pay the remaining balance due on the project in the sum of ₱1,777,202.80.

Liberty denied the material allegations of the complaint and countered that the collection suit was not filed against the real party-in-interest. Thus, respondent amended his complaint to include petitioner as defendant.[5] The HRD Administrative Manager of Liberty testified that petitioner LICOMCEN, Inc. is a sister company of Liberty and that the incorporators and directors of both companies are the same.

The Ruling of the Trial Court

The trial court found that petitioner's claim that it has fully paid respondent the total cost of the project in the sum of ₱6,700,000 pertains only to the cost of the original plan of the project. However, the additional costs of ₱1,777,202.80 incurred for labor, materials, and equipment on the revised plan were not paid by petitioner.

As found by the trial court, petitioner (then defendant) ordered and approved the revisions in the original plan, thus:

> During the awarding of the work, defendants wanted the aircon duct[s] changed from rectangular to round ducts because Ronald Tan, one of the LCC owners who came from abroad, suggested round aircon ducts he saw abroad were preferable. Plaintiff prepared a plan corresponding to the changes desired by the defendants *(Exhibits "D", "D-1", "D-2")*.
>
> The changing of the rectangular ducts to round ducts entailed additional cost in labor and materials. Plaintiff had to remove the rectangular ducts installed, resize it to round ducts and re-install again. More G.I. Sheets were needed and new fittings as well, because the

[5] It appears that the confusion in identifying the real defendants in the collection case arose because the previous payments to respondent totaling ₱6,700,000, although billed to petitioner LICOMCEN, Inc., were all paid by the accounting department of Liberty Commercial Center, Inc. Thus, the inclusion of Liberty as the defendant in the original complaint. CA *rollo*, p. 58.

> fittings for the rectangular ducts cannot be used in the round duct. There were movements of the equipment. In the original plan, the air handling unit (AHU) was [o]n the ground floor. It was relocated to the second floor. There were additional air ducting in the two big comfort rooms for customers, an exhaust blower to the dondon and discaminos, fresh air blower and lock machine at the food court were installed.
>
> Because of the changes, defendants wanted the tonnage of the refrigeration (TR) to be increased to cool up the space. The 855 tons capacity was increased to 900 [sic] tons. These changes entailed additional expense for labor and materials in the sum of Php1,805,355.62 *(Exhibits "F" to "F-26")*.
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> Plaintiff's work was being monitored by Es De Castro and Associates (ESCA), defendant's engineering consultant. Paper works for the approval of ESCA are signed by Michal Cruz, an electrical engineer, and Jake Ozaeta, mechanical engineer, both employees of the defendants and a certain Mr. Tan, a representative of defendants who actually supervises the construction. Plaintiff presented the cost changes on the rework and change to 960 ton capacity. The total balance payable to plaintiff by defendant is Php 1,777.202.80 *(Exhibit "G-42")*. Accomplishment report had been submitted by plaintiff and approved by ESCA, project was turned over in 1988 but plaintiff was not paid the balance corresponding to the changed plan of work and additional work performed by plaintiff. Series of communications demanding payment *(Exhibits "G-3" to "G-11", "G-13", "G-17" to "G-18", "G-23", "G-24", "G-25", "G-26", "G-35 to 42")* were made but plaintiff [sic] refused to pay.[6]

On 7 November 2005, the trial court rendered its Decision, the dispositive portion of which reads:

> WHEREFORE, PREMISES CONSIDERED, decision is hereby rendered in favor of the plaintiff and against defendant LICOMCEN, Inc. ordering the latter to pay the plaintiff the sum of Php1,777,202.80 as its principal obligation with interest at 12% per annum until the amount is fully paid, the sum of Php50,000.00 as attorney's fess [sic] and Php20,000.00 as litigation and incidental expenses. Costs against defendant LICOMCEN, Inc.
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> The case against Liberty Commercial Center, Inc. is hereby ordered DISMISSED.
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> SO ORDERED.[7]

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6 Id. at 54-55.

7 Id. at 58-59.

The Ruling of the Court of Appeals

Petitioner appealed the trial court's Decision to the Court of Appeals, invoking Article 1724 of the Civil Code which provides:

> Art. 1724. The contractor who undertakes to build a structure or any other work for a stipulated price, in conformity with plans and specifications agreed upon with the landowner, can neither withdraw from the contract nor demand an increase in the price on account of the higher cost of labor or materials, save when there has been a change in the plans and specifications, provided:
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> (1) Such change has been authorized by the proprietor in writing; and
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> (2) The additional price to be paid to the contractor has been determined in writing by both parties.

The Court of Appeals stated that petitioner never raised Article 1724 of the Civil Code as a defense in the trial court. Citing Section 1, Rule 9 of the Rules of Court[8] and the case of *Bank of the Philippine Islands v. Leobrera*,[9] the Court of Appeals ruled that petitioner cannot be allowed to change its theory on appeal since the adverse party would then be deprived of the opportunity to present further evidence on the new theory. Besides, the Court of Appeals held that Article 1724 of the Civil Code is not even applicable to the case because the Contract of Agreement was never signed by the parties considering that there were substantial changes to the original plan as the work progressed. Thus, the Court of Appeals affirmed the trial court's Decision, finding petitioner liable to respondent for the additional costs in labor and materials due to the revisions in the original project.

Petitioner filed a Motion for Reconsideration, which the Court of Appeals denied in its Resolution dated 6 December 2011. Hence, this petition.

The Issue

The issue in this case is whether petitioner is liable for the additional costs incurred for labor, materials, and equipment on the revised project.

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[8] Section 1. *Defenses and objections not pleaded*. – Defenses and objections not pleaded either in a motion to dismiss or in the answer are deemed waived. However, when it appears from the pleadings of the evidence on record that the court has no jurisdiction over the subject matter, that there is another action pending between the same parties for the same cause, or that the action is barred by a prior judgment or by statute of limitations, the court shall dismiss the claim.

[9] 461 Phil. 461 (2003).

The Ruling of the Court

We find the petition without merit.

In this case, petitioner invoked Article 1724 of the Civil Code as a defense against respondent's claim. Petitioner alleged that respondent cannot recover additional costs since the agreement in the change of plans and specifications of the project, the pricing and cost of materials and labor was not in writing.

The Court of Appeals mistakenly stated that petitioner only raised Article 1724 of the Civil Code as a defense on appeal. A perusal of the records reveals that, although petitioner did not invoke Article 1724 of the Civil Code as a defense in its answer[10] or in its pre-trial brief,[11] petitioner belatedly asserted such defense in its Memorandum[12] filed before the trial court. Thus, from its previous defense that it has fully paid its obligations to respondent, petitioner changed its theory by adding that since the additional work done by respondent was not authorized in writing, then respondent cannot recover additional costs. In effect, petitioner does not deny that additional costs were incurred due to the change of plans in the original project, but justifies not paying for such expense by invoking Article 1724 of the Civil Code.

Under Section 1, Rule 9 of the Rules of Court, defenses and objections not pleaded either in a motion to dismiss or in the answer are deemed waived, with the following exceptions: (1) lack of jurisdiction over the subject matter; (2) *litis pendentia*; (3) *res judicata*; and (4) prescription of the action. Clearly, petitioner cannot change its defense after the termination of the period of testimony and after the exhibits of both parties have already been admitted by the court. The non-inclusion of this belated defense in the pre-trial order barred its consideration during the trial. To rule otherwise would put the adverse party at a disadvantage since he could no longer offer evidence to rebut the new theory. Indeed, parties are bound by the delimitation of issues during the pre-trial.[13] As held in *Villanueva v.*

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10 Records, pp. 82-83.

11 Id. at 87-89.

12 Id. at 225-232.

13 Sections 6 and 7, Rule 18 of the Rules of Court provide:

> Sec. 6. *Pre-trial brief.* – The parties shall file with the court and serve on the adverse party, in such manner as shall insure their receipt thereof at least three (3) days before the date of the pre-trial, their respective pre-trial briefs which shall contain, among others:
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> (a) A statement of their willingness to enter into amicable settlement or alternative modes of dispute resolution, indicating the desired terms thereof;
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> (b) A summary of admitted facts and proposed stipulation of facts;
>
> (c) **The issues to be tried or resolved**;

Court of Appeals:[14]

> Pre-trial is primarily intended to insure that the parties properly raise all issues necessary to dispose of a case. The parties must disclose during pre-trial all issues they intend to raise during the trial, except those involving privileged or impeaching matters. Although a pre-trial order is not meant to catalogue each issue that the parties may take up during the trial, issues not included in the pre-trial order may be considered only if they are impliedly included in the issues raised or inferable from the issues raised by necessary implication. The basis of the rule is simple. Petitioners are bound by the delimitation of the issues during the pre-trial because they themselves agreed to the same.[15]

Besides, Article 1724 of the Civil Code is not even applicable to this case. It is evident from the records that the original contract agreement,[16] submitted by respondent as evidence, which stated a total contract price of ₱5,300,000, was never signed by the parties considering that there were substantial changes in the plan imposed by petitioner in the course of the work on the project.[17] Petitioner admitted paying ₱6,700,000 to respondent which was allegedly the agreed cost of the project. However, petitioner did not submit any written contract signed by both parties which would substantiate its claim that the agreed cost of the project was only ₱6,700,000. Clearly, petitioner cannot invoke Article 1724 of the Civil Code to avoid paying its obligation considering that the alleged original contract was never even signed by both parties because of the various changes imposed by petitioner on the original plan. The fact that petitioner paid ₱1,400,000[18] more than the amount stated in the unsigned contract agreement clearly indicates that there were indeed additional costs during

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> (d) The documents or exhibits to be presented, stating the purpose thereof;
> (e) A manifestation of their having availed or their intention to avail themselves of discovery procedures or referral to commissioners; and
> (f) The number and names of the witnesses, and the substance of their respective testimonies.
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> Failure to file the pre-trial brief shall have the same effect as failure to appear at the pre-trial.
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> Sec. 7. *Record of pre-trial*. – The proceedings in the pre-trial shall be recorded. Upon the termination thereof, the court shall issue an order which shall recite in detail the matters taken up in the conference, the action taken thereon, the amendments allowed to the pleadings, and the agreements or admissions made by the parties as to any of the matters considered. **Should the action proceed to trial, the order shall explicitly define and limit the issues to be tried. The contents of the order shall control the subsequent course of the action, unless modified before trial to prevent manifest injustice**. (Emphasis supplied)

14 471 Phil. 394 (2004).
15 Id. at 407.
16 Exhibit "A."
17 *Rollo*, p. 33.
18 ₱6,700,000 – ₱5,300,000 = ₱1,400,000.

the course of the work on the project. It is just unfortunate that petitioner is now invoking Article 1724 of the Civil Cide to avoid further payment of the additional costs incurred on the project.

What was established in the trial court was that petitioner ordered the changes in the original plan which entailed additional costs in labor and materials. The work done by respondent was closely monitored and supervised by petitioner's engineering consultant and all the paperworks relating to the project were approved by petitioner through its representatives. We find no justifiable reason to deviate from the findings and ruling of the trial court, which were also upheld by the Court of Appeals. Thus, petitioner should be held liable for the additional costs incurred for labor, materials, and equipment on the revised project.

WHEREFORE, we **DENY** the petition. We **AFFIRM** the 21 September 2011 Decision and the 6 December 2011 Resolution of the Court of Appeals in CA-G.R. CV No. 86296.

SO ORDERED.

ANTONIO T. CARPIO
Associate Justice

WE CONCUR:

ARTURO D. BRION
Associate Justice

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SO ORDERED.

ANTONIO T. CARPIO
Associate Justice

WE CONCUR:

ARTURO D. BRION
Associate Justice

MARIANO C. DEL CASTILLO
Associate Justice

JOSE PORTUGAL PEREZ
Associate Justice

ESTELA M. PERLAS-BERNABE
Associate Justice

ATTESTATION

I attest that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

ANTONIO T. CARPIO
Associate Justice
Chairperson

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, and the Division Chairperson's Attestation, I certify that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

MARIA LOURDES P. A. SERENO
Chief Justice