**Republic of the Philippines**
**Supreme Court**
**Baguio City**

## THIRD DIVISION

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| **ULTRA MAR AQUA RESOURCE, INC., represented by its President VICTOR B. PRIETO,** | **G.R. No. 191353** |
| Petitioner, | Present: |
| | VELASCO, JR. *Chairperson*, |
| | BERSAMIN, |
| - versus - | REYES, |
| | JARDELEZA, and |
| | TIJAM, *JJ.* |
| **FERMIDA CONSTRUCTION SERVICES, represented by its General Manager MYRNA T. RAMOS,** | Promulgated: |
| Respondent. | April 17, 2017 |

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## DECISION

**TIJAM, *J.*:**

Assailed in this Petition for Review[1] under Rule 45 is the Decision[2] dated July 28, 2009 and Resolution[3] dated February 9, 2010 of the Court of Appeals[4] (CA) in CA G.R. CV No. 86540 which affirmed with modification

[1] *Rollo*, pp. 9-31.
[2] Id. at pp. 32-46.
[3] Id. at pp. 45-46.

the Regional Trial Court's (RTC) Decision[5] dated October 7, 2004 and ordered Petitioner Ultra Mar Aqua Resource, Inc., (Ultra Mar) to pay Respondent Fermida Construction Services (Fermida) the construction costs of a warehouse pursuant to the parties' agreement.

## The Facts of the Case

On December 8, 2003, Fermida entered into a Contract Agreement[6] with Ultra Mar for the construction of a warehouse in Wawandue, Subic, Zambales (Project) with a contract price of PhP1,734,740. In the course of construction, variations as to roof coverage, drainage canal, painting and electrical work were made by Fermida upon Ultra Mar's request and instructions.[7]

After completing the Project on January 17, 2004, Fermida sent to Ultra Mar a Billing Statement exclusive of the cost of variation orders and extra work orders made. Pursuant to the parties' agreement, Fermida secured a Surety Bond to satisfy the 10 percent retention to cover any defect in materials and workmanship. A Contractor's Affidavit stating that all claims and obligations for labor services, materials supplied, equipment and tools have been fully settled was likewise executed.[8]

However, Fermida received a letter from Ultra Mar expressing discontentment on some of the former's work. Resultantly, Fermida undertook repairs and another Billing Statement was thereafter sent to Ultra Mar.[9]

Just the same, Ultra Mar refused to pay because of Fermida's alleged failure to submit the FDT Report and Building Permits, and substandard work and delay in the completion of the Project.

Because of Ultra Mar's failure to comply with its obligations, Fermida demanded payment not only of the contract price but for the cost of the variation orders as well. In response, Ultra Mar stated that it did not ask for variations on the Project but only rectifications as the work done by Fermida was below standard.[10]

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[4] Penned by Associate Justice Japar B. Dimaampao and concurred in by Associate Justices Rebecca De Guia-Salvador and Estela M. Perlas-Bernabe.

[5] *Rollo*, pp. 87-95.

[6] Id. at pp. 54-55.

[7] Id. at p. 33.

[8] Id.

[9] Id. at p. 34.

[10] Id. at p. 35.

Consequently, Fermida commenced the Complaint for Collection of Sum of Money with Prayer for Injunction[11] before the RTC.

The RTC ordered[12] an ocular inspection of the subject premises and an ocular inspection by an independent engineer was conducted. The case was then set for pre-trial conference.

However, the scheduled pre-trial conference on August 9, 2004 was postponed upon motion of Ultra Mar's counsel and was then re-scheduled to August 17, 2004. This was again reset to September 7, 2004. Despite several resettings, counsel for Ultra Mar failed to attend the pre-trial conference and failed to file the required pre-trial brief. As a result, the RTC declared Ultra Mar in default and allowed Fermida to present its evidence *ex parte*.[13]

On September 8, 2004, Ultra Mar, through counsel, filed an Omnibus Motion to Lift Order of Default, Admit Attached Pre-Trial Brief and Set the Case for Pre-Trial Conference[14] (Omnibus Motion) alleging that his failure to file the Pre-Trial Brief was due to the intermittent nausea he was experiencing as a result of a sudden drop in his blood sugar level. Affording leniency, the RTC required a supporting Medical Certificate upon submission of which Ultra Mar's Omnibus Motion shall be resolved.

Ultra Mar's counsel failed to comply with the said Order thus the RTC denied Ultra Mar's Omnibus Motion and, on October 7, 2004, issued a Decision[15], the *fallo* portion of which states:

> "WHEREFORE, in view of the foregoing, judgment is hereby rendered in favor of [Fermida] and against [Ultra Mar] as follows: ordering the [Ultra Mar] to pay [Fermida] the amount of P1,106[,]000.38; with interest thereon at the legal rate from the date of the filing of this complaint. The amount of P50,000.00 as attorney's fees and P10,000.00 as litigation expenses; P100,000.00 as nominal damages and to pay the costs of suit.
>
> SO ORDERED."[16]

Ultra Mar moved for reconsideration and attached thereto its counsel's Medical Certificate.[17] The RTC denied the same for being a second motion for reconsideration.[18] Similarly, the RTC denied Ultra Mar's motion for reconsideration of its main Decision dated October 7, 2004.

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[11] Id. at pp. 47-53.
[12] Id. at p. 80.
[13] Id. at p. 82.
[14] No copy attached to the Petition.
[15] *Rollo*, pp. 45-46.
[16] Id.
[17] Id. at pp. 83-84.
[18] Section 2, Rule 52 of the Rules of Court provides:

SEC. 2. Second motion for reconsideration. – No second motion for reconsideration of a judgment or final resolution by the same party shall be entertained.

Ultra Mar then elevated the case to the CA. The CA, however, found no error on the part of the RTC when it denied Ultra Mar's Omnibus Motion. The CA noted that Ultra Mar's counsel failed to provide a plausible justification why he failed to submit the required pre-trial brief.

On the merits, the CA found that Fermida was able to preponderantly establish that it entered into a construction agreement with Ultra Mar and that despite demands, the latter failed to pay. To resolve which between Fermida on one hand, claiming that the Project has been completed, and Ultra Mar on the other, claiming that the Project was not yet complete and the work done was defective, the CA made reference to the Report and Supplemental Report of the court-appointed independent engineer who made the following findings:

> "8. Since there were variations made construction does not conform with the approved plan and specifications. It appears there were items of works completed which are not included from the scope of work indicated in the contract documents.
>
> 9. No variation order approved and issued by the owner to contractor regarding the additional works performed by the contractor, but no written notice from ULTRA MAR AQUA RESOURCES INC., that they opposed the alteration or variation during the construction. It is apparent that PERMIDA [sic] CONSTRUCTION had received a verbal instruction regarding the supposed additional works.
>
> CONCLUSIONS AND RECOMMENDATIONS
>
> (a) Under GC-12 Completion and Acceptance of General Conditions of Contract which states that: 'Upon completion of the Work, written notice thereof shall be served by the Contractor to the Owner. Upon receipt of the said notice, the Owner shall inspect the Work to determine if it has been satisfactorily performed and completed in accordance with the Contract. xxx'
>
> Based on the result of my ocular inspection, the contractor have [sic] to repair all defected [sic] works, and this project cannot be considered substantially completed and final billing should be withheld pending completion of repair and uncompleted item.
>
> x x x x x x x x x"[19]

Supplementing the foregoing, the independent engineer stated:

> "Considering that there are minor repair works noted in my July 1, 2004 report, I have recommended that the contractor have [sic] to repair all defected [sic] works and the final billing should be withheld pending completion of repair of defected [sic] works. I wish to be corrected that I just based that withholding of final billing on the usual way of collection

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[19] Id. at pp. 41-42.

> being done by most private contractor that is 30% down payment followed by progress billing and a 10% final retention. Ultra Mar should withheld the payment of Fermida Construction for the 10% retention and not based on the final billing which includes the whole of contract amount and the supposed variation works. However, in this case, a surety bond was already posted by Fermida Construction, hence, the bond should be liable in this case to Ultra Mar if in case the contractor refuses to repair any of alleged defected [sic] works."[20]

As such, the CA held that the construction works are not without defects. Be that as it may, the CA noted that such defective work is covered by the 10 percent retention that Ultra Mar is allowed to withhold from Fermida. Hence, the CA ruled that Ultra Mar is indeed liable to pay Fermida the construction cost of P1,106,038.82 but subject to the 10 percent retention. Finally, the CA deleted the awards of nominal damages, attorney's fees and litigation expenses for being unsubstantiated.

The CA, in its *fallo* portion, disposed as such:

> "WHEREFORE, the Appeal is PARTIALLY GRANTED. The Decision dated 7 October 2004 of the Regional Trial Court, Third Judicial Region, Olongapo City, Branch 72, in Civil Case No. 199-0-2004 is MODIFIED as follows:
>
> 1. Appellant Ultra Mar Aqua Resources, Inc. is directed to pay appellee Fermida Construction Services the amount of P1,106,038.82 with legal interest thereon from the date of the filing of the Complaint subject to the 10% retention.
>
> 2. The awards of nominal damages, attorney[']s fees and litigation expenses are DELETED.
>
> SO ORDERED."[21]

Ultra Mar partially moved for reconsideration essentially arguing that it was denied the right to present evidence due to the gross negligence of its former counsel.[22] The CA denied Ultra Mar's partial motion for reconsideration.[23]

## The Issues

Unperturbed, Ultra Mar filed the instant Petition on the following grounds[24]:

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[20] Ibid.
[21] Supra Note 2 at p. 43.
[22] Id. at p. 45.
[23] Supra Note 3.
[24] Id. at p. 19.

"(1) The Court of Appeals erred in holding that the Trial Court did not commit any reversible error in denying the Omnibus Motion to Lift Order of Default, Admit Attached Pre-trial Brief and Set the Case for Pre-trial Conference filed by Atty. Mas and in denying Atty. Mas' Motion for Reconsideration [of the Order dated September 17, 2004] with Compliance pursuant to Section 2, Rule 52 of the Rules of Court.

(2) The Court of Appeals erred in not relieving the petitioner from the effects of gross negligence of its counsel Atty. Leonuel Mas who despite receipt of the Decision of the Trial Court on October 15, 2004 did not inform the petitioner albeit deceivingly sent the petitioner a report dated November 26, 2004 that he moved the case be set for pre-trial."[25]

## The Ruling of the Court

Ultra Mar essentially argues that it should have been allowed to present its evidence because its non-appearance at the pre-trial conference and failure to file pre-trial brief were attributable to its counsel's gross negligence for which it should not be made to suffer the consequences. Ultra Mar further postulates that it has a meritorious defense which could lead the RTC to rule otherwise had it been presented.

The petition is devoid of merit.

At the heart of this case is the propriety of the RTC's Order declaring Ultra Mar in default, allowing Fermida to present its evidence *ex parte* and thereafter, rendering judgment on the basis thereof.

Prefatorily, it bears to emphasize that as the Rules of Civil Procedure presently stand, if the defendant fails to appear for pre-trial, a default order is no longer issued. Initially, the phrase "as in default" was included in Rule 20 of the old rules.[26] With the amended provision, the phrase "as in default" was deleted, the purpose of which is "one of semantical propriety or terminological accuracy as there were criticisms on the use of the word default in the former provision since that term is identified with the failure to file a required answer, not appearance in court."[27] While the order of default no longer obtains, its effects were nevertheless retained.

Thus, Section 4, Rule 18 requires the parties and their counsel to appear at the pre-trial conference. The effect of their failure to appear is spelled under Section 5 of the same rule, as follows:

Section 4. Appearance of parties. – It shall be the duty of the parties and their counsel to appear at the pre-trial. The non-appearance of a party may be excused only if a valid cause is shown therefor or if a

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[25] Ibid.

[26] Sec. 2. A party who fails to appear at a pre-trial conference may be non-suited or considered as in default.

[27] Regalado, *Remedial Law Compendium*, Vol. I, Ninth Revised Edition, p. 309.

> representative shall appear in his behalf fully authorized in writing to enter into an amicable settlement, to submit to alternative modes of dispute resolution, and to enter into stipulations or admissions of facts and of documents.
>
> Section 5. Effect of failure to appear. – The failure of the plaintiff to appear when so required pursuant to the next preceding section shall be cause for dismissal of the action. The dismissal shall be with prejudice, unless otherwise ordered by the court. A similar failure on the part of the defendant shall be cause to allow the plaintiff to present his evidence *ex parte* and the court to render judgment on the basis thereof.

Further, Section 6 of the same rule provides:

> Section 6. Pre-trial brief. – The parties shall file with the court and serve on the adverse party, in such manner as shall ensure 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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> x x x
>
> Failure to file the pre-trial brief shall have the same effect as failure to appear at the pre-trial.

Hence, the failure of a party to appear at pre-trial has adverse consequences: if the absent party is the plaintiff then he may be declared non-suited and his case is dismissed; if the absent party is the defendant, then the plaintiff may be allowed to present his evidence *ex parte* and the court to render judgment on the basis thereof.[28]

By way of exception, the non-appearance of a party and counsel may be excused if (1) a valid cause is shown; or (2) there is an appearance of a representative on behalf of a party fully authorized in writing to enter into an amicable settlement, to submit to alternative modes of dispute resolution, and to enter into stipulations or admissions of facts and of documents. What constitutes a valid cause is subject to the court's sound discretion and the exercise of such discretion shall not be disturbed except in cases of clear and manifest abuse.[29]

Elucidating on the circumstances surrounding the denial of Ultra Mar's Omnibus Motion, the CA had this to say:

> "xxx xxx xxx
>
> Here, We note that in the *Preliminary Pre-Trial Order* dated 8 June 2004, the court *a quo* had already directed the parties to submit their respective *Pre-Trial Briefs* at least three days before the Pre-Trial Conference, *i.e.*, on or before 9 August 2004. However, on said date, appellant's counsel filed an *Urgent Ex-Parte Motion for Postponement* on the ground that he had an urgent matter to attend to. The records revealed

[28] *Daaco v. Yu*, G.R. No. 183398, June 22, 2015.
[29] Ibid.

> that the Pre-Trial Conference was rescheduled and eventually pushed through on 7 September 2004. Once again, however, appellant's counsel failed to appear and file the required *Pre-Trial Brief.*
>
> In his attempt to set aside the *Order* allowing the presentation of evidence *ex-parte*, appellant's counsel filed the *Omnibus Motion* advancing his ill-health as reason for his failure to comply with the court *a quo's Order.*
> x x x
>
> From the foregoing factual milieu, We find no convincing ground to apply the policy of liberality. Appellant's counsel advanced no plausible justification why he failed to submit the *Pre-Trial Brief* the court *a quo* had directed him in its *Preliminary Pre-Trial Order.* Lenient as it was, the court *a quo* still gave appellant's counsel a chance albeit with the condition that he submit a *Medical Certificate*. Unfortunately, he failed to comply. That the subject *Medical Certificate* is dated 6 September 2004 did not escape Our attention. Verily, We find it perplexing why it was never attached to the Omnibus Motion dated 8 September 2004 or it was ever mentioned therein. As a practicing lawyer, appellant's counsel is aware that any claim of illness must be substantiated by a *Medical Certificate*. Likewise, We note that appellant's counsel was given five days from 9 September 2004 within which to submit the *Medical Certificate* in question. Interestingly, counsel was mum about the impossibility of his compliance because he left his records in Sta. Cruz, Zambales during the time he was ill. It was only on 13 October 2004 or 34 days after 9 September 2004 that he informed the court *a quo* the reason for his non-compliance. Under such factualness the court *a quo* unerringly denied the *Omnibus Motion* and subsequent *Motion for Reconsideration with Compliance* treating the latter as a *Second Motion for Reconsideration* prohibited under the Rules.
>
> xxx xxx xxx"[30]

Pointedly, Ultra Mar's counsel repeatedly moved for the postponement of the pre-trial conference, and yet still failed to appear. Litigants and counsels are reminded time and again that a motion for postponement is a privilege and not a right. The grant or denial of a motion for postponement is a matter that is addressed to the sound discretion of the trial court. As the Court consistently affirms, an order declaring a party to have waived the right to present evidence for performing dilatory actions upholds the trial court's duty to ensure that trial proceeds despite the deliberate delay and refusal to proceed on the part of one party.[31]

Clearly then, the justifications advanced by Ultra Mar's counsel for its repeated failure to comply with the RTC's Order to appear at the Pre-Trial Conference, to submit the Pre-Trial Brief and to present the supporting Medical Certificate do not constitute a valid cause to excuse such non-compliance.

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[30] Id. at pp. 39-40.

[31] *The Philippine American Life & General Insurance Company v. Enario*, G.R. No. 182075, September 15, 2010.

Ultra Mar would nevertheless point an accusing finger at its counsel for the latter's gross negligence. However, nothing is more settled than the rule that the negligence and mistakes of a counsel are binding on the client.

The rationale for this rule is reiterated in the case of *Lagua v. Court of Appeals*[32]:

> "The general rule is that a client is bound by the counsel['s] acts, including even mistakes in the realm of procedural technique. The rationale for the rule is that a counsel, once retained, holds the implied authority to do all acts necessary or, at least, incidental to the prosecution and management of the suit in behalf of his client, such that any act or omission by counsel within the scope of the authority is regarded, in the eyes of the law, as the act or omission of the client himself."

Ultra Mar, on the other hand, has the following concomitant obligation:

> "As clients, petitioners should have maintained contact with their counsel from time to time, and informed themselves of the progress of their case, thereby exercising that standard of care which an ordinarily prudent man bestows upon his business.
>
> Even in the absence of the petitioner['s] negligence, the rule in this jurisdiction is that a party is bound by the mistakes of his counsel. In the earlier case of *Tesoro v. Court of Appeals*, we emphasized:
>
> > It has been repeatedly enunciated that a client is bound by the action of his counsel in the conduct of a case and cannot be heard to complain that the result might have been different had he proceeded differently. A client is bound by the mistakes of his lawyer. If such grounds were to be admitted as reasons for reopening cases, there would never be an end to a suit so long as new counsel could be employed who could allege and show that prior counsel had not been sufficiently diligent or experienced or learned (citation omitted).[33]"

Consequently, neither Ultra Mar nor its counsel can evade the effects of their misfeasance.[34]

To convince the Court that its counsel was indeed grossly negligent, Ultra Mar cites said counsel's disbarment and the case filed against him for malversation pending before the Provincial Prosecutor of Cavite.[35] These instances, however, cannot support a pronouncement as to counsel's gross negligence. For one, these events have no direct bearing to the instant case.

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[32] G.R. No. 173390, June 27, 2012 citing *Bejarasco v. People*, G.R. No. 159781, February 2, 2011, 641 SCRA 328, 330-331.

[33] *Tan v. Court of Appeals*, 524 Phil. 752, 760-761 (2006).

[34] *Suico Industrial Corp. v. Lagura-Yap,* G.R. No. 177711, September 5, 2012, 680 SCRA 145, 159.

[35] *Rollo*, p. 21.

In fact, these events transpired after the commission of the supposed negligent act complained of. For another, Ultra Mar claimed gross negligence on the part of its counsel for the first time on appeal, that is, when they filed their motion for reconsideration with the CA. The rule is that issues not raised in the proceedings below cannot be raised for the first time on appeal. This must be so considering that Ultra Mar seeks opportunity to present its evidence when fairness and due process dictate that evidence and issues not presented below cannot be taken up for the first time on appeal.[36]

With respect to the CA's order for Ultra Mar to pay Fermida PhP 1,106,038.82 representing the amount of its outstanding contractual obligation, We affirm its findings which were based on the evidence presented by Fermida.[37] We reiterate that as a consequence of Ultra Mar's non-appearance at the pre-trial conference, it was deemed to have waived its right to present its own evidence.

However, pursuant to the parties' Contract Agreement[38] as well as on the observations of the court-appointed independent engineer[39], the 10 percent retention has been sufficiently covered by the Surety Bond secured by Fermida, hence Ultra Mar is no longer entitled to withhold the same.

**WHEREFORE**, premises considered, the Court resolves to **DENY** the petition. The Decision dated July 28, 2009 and Resolution dated February 9, 2010 of the Court of Appeals in CA G.R. CV No. 86540 are **AFFIRMED** with **MODIFICATION** that the payment of PhP1,106,038.82 is no longer made subject to the 10 percent retention in favor of Ultra Mar Aqua Resource Inc.

**NOEL GIMENEZ TIJAM**
Associate Justice

**WE CONCUR:**

**PRESBITERO J. VELASCO, JR.**
Associate Justice
Chairperson

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[36] *Del Rosario v. Bonga*, G.R. No. 136308, January 23, 2001.

[37] *Rollo*, p. 43.

[38] "2 (d) The ten percent (10%) retained amount shall be paid by the Owner to the Contractor, without interest, after written acceptance of the work by the Owner, subject to the formal request of the Contractor and upon posting of Surety Bond equivalent to ten percent (10%) in favor of the Owner."

[39] Supra Note 20.

**LUCAS P. BERSAMIN**
Associate Justice

**BIENVENIDO L. REYES**
Associate Justice

**FRANCIS H. JARDELEZA**
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.

**PRESBITERO J. VELASCO, JR.**
Associate Justice
Chairperson

## CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, 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

CERTIFIED TRUE COPY
WILFREDO V. LAPIÑAN
Division Clerk of Court
Third Division
JUN 07 2017