

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

DENIED: February 15, 2005

GSBCA 16359-ST

ROSALINDA DE PERIO SANTOS,

Appellant,

v.

DEPARTMENT OF STATE,

Respondent.

Rosalinda de Perio Santos, pro se, Las Vegas, NV.

Luisa M. Alvarez, Office of the Legal Adviser, Department of State, Rosslyn, VA,
counsel for Respondent.

Before Board Judges **NEILL** and **DeGRAFF**.

NEILL, Board Judge.

In May 2003, the United States Embassy in the Philippines notified appellant, Rosalinda de Perio Santos that it wished to terminate its lease of a residence owned by her, prior to the expiration of the agreed-upon four-year lease term. The property had been leased as quarters for embassy personnel. The Government's decision to terminate the lease was occasioned by the rescission of the safety certification issued for the property by the embassy safety officer after the appearance of unexplained cracks in a wall of the leased building.

The Government proposed termination of the lease based upon article sixteen of the lease, which authorized termination for the Government's convenience when deemed to be in the tenant's best interest. Mrs. de Perio Santos contends that article sixteen is in conflict with Philippine law and, therefore, not enforceable. She argues that the lease is still in effect and demands that the embassy continue to make annual payments and compensate her for the cost of changes, improvements, and repairs she has undertaken to satisfy the tenant's requests. In addition, Mrs. de Perio Santos seeks damages for the loss of expected income and/or opportunity. In a decision dated November 18, 2003, the embassy contracting officer referred appellant to article sixteen of the lease and insisted that all steps necessary to terminate the lease in accordance with that provision had been taken. He, therefore,

concluded that the Government was not liable for any claims other than rent due through June 14, 2003. This decision of the contracting officer has been timely appealed.

Mrs. de Perio Santos, believing that there are no material facts in dispute in this case, is of the opinion that this dispute turns solely on the legal issue of whether the termination for convenience provision in the lease is enforceable. For this reason, she has filed a motion for summary relief. She writes:

As may be inferred from the uncontested facts, the resolution of this case depends entirely on the determination of the legal issue of whether or not termination of the lease agreement (contract #S-314 FBO-214) by the US Embassy in Manila was valid despite the four (4) year fixed term provided in ARTICLE THREE of the said contract in view of the provisions of ARTICLE SIXTEEN thereof

Motion for Summary Relief at 1. With her motion for summary relief, Mrs. de Perio Santos also filed a notice of election of accelerated procedure pursuant to Board Rule 203 (48 CFR 6102.3 (2003)).

The Department of State is likewise of the opinion that there are no material facts in dispute with regard to what appellant considers to be the single critical issue in this case. The Government opposes, however, appellant's motion for summary relief and has, instead, filed a cross motion for summary relief. For the reasons set out below, we deny appellant's motion and grant the Government's cross motion. In so doing, we deny the appeal.

Uncontested Facts

In accordance with Board Rule 108(g), appellant has filed a Statement of Uncontested Facts with her motion for summary relief. In this statement, appellant has also included an extensive list of almost all the documents contained in the Government's appeal file submission for this case. She states that she admits and does not contest the existence, execution, and contents of these listed documents. Government counsel, in filing her cross motion in opposition to appellant's motion, states that, for purposes of her cross motion, she accepts as true appellant's Statement of Uncontested Facts.

Based upon the pleadings in this case and appellant's Statement of Uncontested Facts, we conclude that the following facts are not in dispute.

1. In a letter dated March 6, 2001, the housing coordinator for the United States embassy in Manila expressed to Mrs. de Perio Santos an interest in entering into a multi-year lease of a residence owned by her at number 21, San Felipe St., Magallanes Village, Makati City, Philippines. Appeal File, Exhibit 1.

2. Mrs. de Perio Santos responded favorably to the embassy's overture. She proposed an annual rental which would remain unchanged for the first two years and a slightly higher rental which would remain unchanged for the last two years of a four-year lease. She also asked that the annual rentals be paid in American dollars. Appeal File, Exhibit 2.

3. On April 5, 2001, Mrs. de Perio Santos and the Government entered into the proposed lease. Among the provisions of the lease are the following:

ARTICLE THREE: LEASE TERM

The terms of this lease shall be for four (4) years, beginning April 15, 2001 and ending April 14, 2005, unless notice to the contrary be given in writing to the LANDLORD at least thirty (30) days before this lease would expire.

ARTICLE FOUR: LEASE RENEWAL

The Lease is renewable by the TENANT under the same terms and conditions with rental to be mutually agreed upon, for one (1) further period of four (4) years or until April 14, 2009, provided that written notice is given to the LANDLORD at least thirty (30) days prior to the date this lease or any extension of it would otherwise expire.

ARTICLE FIVE: PAYMENT

The TENANT shall pay the LANDLORD for the premises rented and the other services provided at the following rate and terms:

April 15, 2001 to April 14, 2002 - \$33,000.00 per year;
April 15, 2002 to April 14, 2003 - \$33,000.00 per year;
April 15, 2003 to April 14, 2004 - \$36,000.00 per year;
April 15, 2004 to April 14, 2005 - \$36,000.00 per year;

paid in Philippine currency, payable one year in advance.

....

ARTICLE NINE: LANDLORD RIGHTS AND RESPONSIBILITIES

....

9C. Maintenance responsibilities. The LANDLORD shall, at his own cost and expense, be responsible for all major maintenance, structural work and major repair including, but not limited to, maintenance and repair of structural elements and systems such as walls, ceiling, roofs, floors, foundations, plumbing and related fixtures. The LANDLORD acknowledges that keeping the premises in good repair and tenantable condition is essential to make them appropriate for use by the Government of the United States of America. . . .

....

9D. Emergency Repairs. The LANDLORD agrees to commence, carry out, and complete emergency repairs within 48 hours after receiving oral or written notice from the TENANT. For repairs which cannot be completed within 48

hours the LANDLORD agrees to present a completion schedule for acceptance by the TENANT. For any emergency repairs which the LANDLORD does not handle in this manner, the TENANT may undertake the repair at the LANDLORD'S expense. Any funds expended by TENANT in this regard shall be deemed prepaid rent and a subsequent rental payment shall be reduced by this amount. . . .

. . . .

9H. The LANDLORD'S obligation to maintain the said premises in good repair and tenantable condition shall include, but not necessarily be limited to the following:

. . . .

i) General and structural maintenance to be performed by the LANDLORD shall include all repairs, replacement or renovation necessitated by structural deficiencies, weaknesses or failure including the following general repairs or other repairs when required as determined by the Contracting Officer (TENANT).

. . . .

6. Replacement of damage[d] kitchen, walls, bathroom and floor tiles.

. . . .

ii) Emergency repairs to structural deficiencies causing serious inconvenience to the occupant shall be corrected by the TENANT without prior notice to the LANDLORD and the cost of such repairs deducted from the LANDLORD'S future rental payments.

iii) If the LANDLORD fails to perform maintenance or repairs of a non-emergency nature within fifteen (15) days of notification by registered letter from the TENANT of the need thereof, the TENANT may effect repairs or maintenance and LANDLORD agrees to pay all costs of such repairs.

. . . .

vi) Failure of the LANDLORD to fulfill the provision for which he is responsible under the terms of this lease shall, at the TENANT'S option, be basis for termination of the lease with prior notice and the LANDLORD is to refund any unused portion of advance rental payment.

. . . .

ARTICLE FOURTEEN: LANDLORD'S DEFAULT

In the event LANDLORD fails to fulfill any of its obligation under this lease, and where this lease specifically provides no other remedy for such failure, the TENANT is entitled either to terminate this lease, or, at its option, take any measures which it deems necessary to establish the conditions contemplated by this agreement at the entire expense of the LANDLORD. TENANT will notify the LANDLORD in writing of its intention to take action in accordance with this article prior to taking such action.

. . . .

ARTICLE SIXTEEN: TERMINATION

The TENANT, may, for its convenience, terminate this lease in whole or in part of [sic] any time, if it determines that such termination is in the best interest of this TENANT, by giving written notice to the LANDLORD thirty (30) days in advance. If the TENANT terminates this lease in accordance with this clause, the TENANT shall not be liable for any charges additional to those normally incurred up to the date the lease in terminated. . . .

. . . .

ARTICLE EIGHTEEN: CHOICE OF LAW

The terms of this lease shall be construed in accordance with the local laws governing the situs of the premises leased thereunder.

Appeal File, Exhibit 3.

4. For the first two years of the lease, appellant was paid the amounts shown in article five of the lease. Payment was in American dollars. With the start of the third year, however, the embassy informed Mrs. de Perio Santos that henceforth it would be paying the rentals in Phillippine currency. Complaint ¶¶ 1, 3; Answer ¶ 3.

5. On April 1, 2003, Mrs. de Perio Santos received a letter from the embassy which read in part:

The occupant of the above leased property reported that the partition wall between the breakfast nook and dining room has a horizontal crack that will have to be repaired at the earliest possible time. Please note that the upper section of the wall is almost detached from the lower section due to the said crack. In this regard, we ask you to send your contractor to the residence to check on the problem and undertake the necessary repair work immediately.

Appeal File, Exhibit 4.

6. Although Mrs. de Perio Santos engaged a contractor to make the necessary repairs, they were not started immediately. The owner sought first to have the premises inspected by her insurance company's claim adjusters. On April 23, 2003, they reported that they had

made an inspection of the house. The damage was said to be confined to a horizontal crack located at the walled portion of the breakfast nook and dining room. The gap in question revealed a hollow-block wall and the termination of a timber beam. The conclusion drawn from the existence of the gap was that either the wall or the beam had moved. No other cracks elsewhere in the building were noted or reported by those living in the building. Appeal File, Exhibit 6.

7. During the month of April, the embassy's Facility Maintenance Office requested a copy of the building's original floor plan in order to assess the structural stability and tenantable condition of the house. Appeal File, Exhibit 5. Although Mrs. de Perio Santos was able to furnish a copy of the current floor plan, she was unable to provide a copy of the original floor plan. The individual from whom she purchased the house in 1986 was not the original owner and had not provided her with any as-built floor plan. Efforts to locate a plan with the Magallanes Village Association or the City Engineer's Office produced no results and the building's original architect could not be reached. Id., Exhibit 10.

8. By letter dated May 9, 2003, the embassy complained to Mrs. de Perio Santos that a request made to her contractor on April 29 for a copy of the building's original floor plan had still not been answered. Appeal File, Exhibit 5. The letter noted that, because the situation posed a safety hazard to the building's occupants, this should be treated as an emergency matter. The letter gave Mrs. de Perio Santos until May 13 to submit the original floor plan. In closing, the letter warned that, if a copy of the original plan was not provided by that date, the embassy would consider terminating the lease. Id., Exhibit 5.

9. By letter of the same date, May 9, Mrs. de Perio Santos replied to the embassy's letter. She explained the difficulties encountered in attempting to secure a copy of the original floor plan. See Uncontested Fact 7. In this letter, she also acknowledged the emergency nature of the situation and suggested that only by actually opening the cracked wall would it be possible to assess the damage and address the embassy's safety concerns. She proposed beginning repair work on Monday, May 12. Appeal File, Exhibit 6.

10. By letter dated May 12, the embassy notified Mrs. de Perio Santos that its safety officer had decided to rescind his safety certification for her house. The letter continued:

This means that we will have to terminate the lease on your property and vacate the premises as soon as possible.

As per Article 16 of the lease, along with your inability to provide the original structural plan of the property, the Embassy has no choice but to terminate the lease because of safety issues effective June 14, 2003. The Embassy will only process the current rental payment for two (2) months, or until June 14, 2003.

Enclosed is a copy of lease amendment reflecting the new expiration date for your signature. We will process the rental payment as soon as a signed copy is received at our office.

Appeal File, Exhibit 7.

11. By letter dated May 14, Mrs. de Perio Santos replied to the embassy's letter of May 12. In it she explained at some length why she had been unable to provide a copy of the original floor plan. She likewise stated that she had already retained a firm to prepare an as-built structural plan of the house for her use as well as for the embassy's use. The plan had been promised for delivery within the next ten days and would be certified by the City Engineer of Makati to meet the requirements of the safety officer as to the safety of the premises and the adequacy of the repair work to be done. The letter stated that Mrs. de Perio Santos intended to proceed "simultaneously" with repair of the damage. In closing, Mrs. de Perio Santos reminded embassy officials that, long after her house had been turned over for the embassy's use pursuant to the lease, at the embassy's request, she had paid considerable amounts for additional work not contemplated under the lease. She noted that this had been done "in a spirit of accommodation that has always characterized our relationship with your office from the beginning." She asked, therefore, that, in the same spirit, the embassy await the delivery of the certified structural plan. Appeal File, Exhibit 10.

12. By letter dated May 16, 2003, the embassy informed Mrs. de Perio Santos that it was vacating the premises even before the expiration of the lease on June 14 and asked that any structural repairs be deferred until further notice. Appeal File, Exhibit 12.

13. By letter dated May 20, 2003, an architectural/engineering (A/E) firm provided Mrs. de Perio Santos with an as-built structural plan of her house in Makati. The letter explained that the damage in question was caused by water leakage coming from the shower above, which had caused warping of the wood at the point where the wall, the floor joist, and the flooring were joined. The A/E firm certified the house as safe and sound for habitation and assured the owner that repairs would be completed before May 31. Appeal File, Exhibit 13.

14. By letter dated May 24, 2003, Mrs. de Perio Santos provided the embassy with the A/E firm's letter of May 20 and informed the embassy of the availability of the new as-built structural plan. She stated that repairs had been started on Monday, May 19, as soon as repairmen were able to gain entry to the premises. She further stated that the building would be in good and tenantable condition by June 1, 2003, at which time it would be turned back to the embassy so that the contract of lease could run its course. Appeal File, Exhibit 13 at 2 (unnumbered).

15. By letter dated October 16, 2003, local counsel, retained by Mrs. de Perio Santos, presented a claim to the contracting officer for amounts allegedly due under the lease.¹ In addition, counsel sought compensation for improvements made to the premises after the lease was entered into but which were not required under the lease. A claim for loss of expected

¹ Mrs. de Perio Santos originally retained local counsel to represent her in this matter. Counsel later withdrew their appearance in recognition of Board Rule 106(a), which requires that any attorney-at-law representing a party in Board proceedings must be licensed to practice in a state, commonwealth, or territory of the United States, or in the District of Columbia. Since the withdrawal of counsel, Mrs. de Perio Santos, a law school graduate herself, has represented herself in this proceeding before the Board.

income and/or opportunity and other damages was also presented by counsel. Appeal File, Exhibit 15.

16. By decision dated November 18, 2003, the contracting officer denied the claims of Mrs. de Perio Santos on the ground that all steps necessary for the termination of the lease in accordance with article sixteen of the lease had been taken and the Department of State, therefore, was not liable for any claims other than rent due through June 14, 2003. Appeal File, Exhibit 16. By letter dated February 4, 2004, local counsel appealed the contracting officer's decision.

Discussion

We agree with appellant and counsel for respondent that this case is ripe for resolution pursuant to a motion for summary relief. It is well established that resolving a dispute pursuant to such a motion is appropriate where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Giesler v. United States, 232 F.3d 864, 869 (Fed. Cir. 2000); Olympus Corp. v. United States, 98 F.3d 1314, 1316 (Fed. Cir. 1996); Dairyland Power Cooperative v. United States, 16 F.3d 1197, 1202 (Fed. Cir. 1994); Copelands' Enterprises, Inc. v. CNV, Inc., 945 F.2d 1563, 1565-66 (Fed. Cir. 1991); Mingus Constructors, Inc. v. United States, 812 F.2d 1387, 1390 (Fed. Cir. 1987); Armco, Inc. v. Cyclops Corp., 791 F.2d 147, 149 (Fed. Cir. 1986).

In this case, in accordance with article eighteen of the lease, we must look to the local law governing the situs of the premises subject to the lease.

Appellant's Motion

Relying on her own experience as a lawyer trained in Philippine law and, presumably, after consultation with local counsel, appellant has moved for summary relief. It is her contention that the lease has never been properly terminated because the termination for convenience provision in article sixteen, on which the Government relied to terminate the lease, is invalid under Philippine law. Appellant argues that the provision violates the principle of mutuality as set forth in article 1308 of the Civil Code of the Philippines. This article states:

The contract must bind both contracting parties, its validity or compliance cannot be left to the will of one of them.

In support of her motion, appellant has provided us with copies of several decisions of the Supreme Court of the Philippines which she believes support her position. One decision to which she refers us succinctly explains article 1308 and the principle it embodies as follows:

Article 1308 of the Civil Code expresses what is known in law as the *principle of mutuality of contracts*. It provides that "the contract must bind both the contracting parties; its validity or compliance cannot be left to the will of one of them." This binding effect of a contract on both parties is based on the principle that the obligations arising from contracts have the force of law between the contracting parties, and there must be mutuality between them based essentially on their equality under which it is repugnant to have one party bound by the contract while leaving the other free therefrom. The ultimate purpose is to render void a contract containing a condition which makes its fulfillment dependent solely upon the uncontrolled will of one of the contracting parties.

Allied Banking Corp. v. Court of Appeals, 284 SCRA [Supreme Court Reports Annotated] 357, 361-62 (1998).

Because article sixteen gives the Government the right to terminate the lease in whole or in part at any time it deems termination to be in its best interest, appellant argues that this renders fulfillment of the contract dependent solely upon the uncontrolled will of one of the contracting parties and, therefore, violates article 1308 of the Civil Code. As such, this provision of the contract cannot be enforced and any action taken in reliance on it is invalid. Accordingly, appellant contends that, as a matter of law, the lease has yet to be validly terminated. In the absence of any contested material facts, she seek summary relief.

Respondent's Cross Motion

Not being trained in Philippine law, counsel for respondent has wisely enlisted the help of local counsel in Manila to assist her in this case. This local counsel has provided the Government with a legal memorandum which addresses the issues raise by Mrs. de Perio Santos in her motion for summary relief. The Government has incorporated this memorandum into its opposition to the motion and has also used it as the basis for its own cross motion for summary relief.

In response to appellant's argument, the author of the legal memorandum contained in the Government's submission strongly defends the principle of autonomy of contracts. Pursuant to this principle, contracting parties are left free to stipulate on such terms and conditions as they deem convenient or necessary. In this regard, article 1306 of the Civil Code reads:

The contracting parties may establish such stipulations, clauses, terms and conditions as they may deem convenient, provided they are not contrary to law, morals, good customs, public order or public policy.

The Government's consultant likewise points out that Philippine case law is no less supportive of the principle of autonomy of contract. Government's Cross Motion for Summary Relief, Attachment 3 at 2 (citing, e.g., Gabriel v. Monte de Piedad y Caja de Ahorros, 71 Phil. [Philippine Reports] 497, 500 (1941) (stating that the freedom of contract is both a constitutional and statutory right and to uphold this right, courts should move with all the necessary caution and prudence in holding contracts void)).

The author of the legal memorandum filed by the Government goes on to state that the Supreme Court of the Philippines has spoken to the issue of whether a provision such as that appearing in article sixteen of the lease is in conflict with article 1308 of the country's Civil Code. He refers us to a decision issued by the Court in 1967, Philippine Banking Corp. v. Lui She, 21 SCRA 52 (1967). In that case the validity of several documents was in issue.

One of the documents challenged in Philippine Banking was a contract of lease for a term of fifty years. A provision of the lease stated: "The lessee may at any time withdraw from this agreement." Those challenging the lease argued that this provision violated article 1308 of the Civil Code. The Court, however, rejected this argument on the ground that the lessee was not entirely free to withdraw from the agreement. It wrote: "[T]he right of the lessee to continue the lease or to terminate it is so circumscribed by the term of the contract that it cannot be said that the continuance of the lease depends upon his will." Philippine Banking, 21 SCRA at 58-59. The same decision quotes language from an earlier decision of the Court indicating that an unqualified option to terminate, on which the parties have agreed, does not violate the principle of mutuality and, if exercised, would be as much in the fulfillment of the contract as any other act which may have been provided for in the original agreement. Id. at 58.

It is, therefore, the Government's contention that, in view of the Philippine Supreme Court's decision in Philippine Banking, and out of respect for the principle of autonomy in contracting, we should acknowledge that the termination for convenience provision in article sixteen of the lease, to which both parties have agreed, is valid under local law and has been properly invoked. Consequently, the Government contends that the pending motion for summary relief should be denied and the Government's own cross motion granted.

Appellant's Opposition to the Government's Cross Motion

In opposing the Government's cross motion, appellant does not impugn the principle of autonomy in contracting. She is, however, critical of the Government's reliance on Philippine Banking. She contends that a close reading of this case and the two earlier Supreme Court decisions cited in it should convince us of the validity of her position rather than that of the Government.

Appellant, first of all, hastens to point out to us that the two cases cited by the Court in Philippine Banking are no more than a recitation of what the law is in the Philippines regarding conditions justifying rescission or cancellation of a contractual agreement.

Before going further in our discussion, a word is in order regarding the nature of a "condition" and, in particular, a "resolutive condition" and a "potestative condition," as those terms are used in civil law. "Condition" generally is defined as "[a] future and uncertain event on which the existence or extent of an obligation or liability depends; an uncertain act or event that triggers or negates a duty to render a promised performance." Black's Law Dictionary 288 (7th ed. 1999). In civil law, a "resolutive condition" is defined as "[a] condition that upon fulfillment terminates an already enforceable obligation and entitles the parties to be restored to their original position." Id. 290. By contrast, a "potestative condition" is defined as "[a] condition that will be fulfilled only if the obligated party chooses to do so." Id.

In the two decisions cited by the Court in Philippine Banking, the issue was whether the contract provision authorizing contract termination was in conflict with article 1308 (or its predecessor provision) of the Civil Code. The Court wrote:

We have had occasion to delineate the scope and application of article 1308 in the early case of *Taylor v. Uy Tieng Piao* [, 43 Phil. 873 (1922)]. We said in that case:

"Article 1256 (now art. 1308) of the Civil Code in our opinion creates no impediment to the insertion in a contract for personal service of a resolutive condition permitting the cancellation of the contract by one of the parties. Such a stipulation, as can be readily seen, does not make either the validity or the fulfillment of the contract dependent upon the will of the party to whom is conceded the privilege of cancellation; for where the contracting parties have agreed that such option shall exist, the exercise of the option is as much in the fulfillment of the contract as any other act which may have been the subject of agreement. Indeed, the cancellation of a contract in accordance with conditions agreed upon beforehand is fulfillment." [*Id.* at 876]

And so it was held in *Melencio v. Dy Tiao Lay* [, 55 Phil. 99 (1930),] that a "provision in a lease contract that the lessee, at any time before he erected any building on the land, might rescind the lease, can hardly be regarded as a violation of article 1256 [now art. 1308] of the Civil Code."

Philippine Banking, 21 SCRA at 58 (footnotes omitted).

Appellant underlines the fact that in both cases cited by the Philippine Supreme Court in its Philippine Banking decision, the conditions permitting cancellation were resolutive conditions which did not leave fulfillment of the contract dependent solely upon the uncontrolled will of one of the contracting parties.² Neither case, therefore, in appellant's opinion, suggested that the use of a potestative condition, such as that which appellant

² In the Melencio decision, the lease provision in question which was said to be in conflict with the predecessor to article 1308 of the Civil Code stated that the lessee, at any time before he erected any building on the land, might rescind the lease. Melencio, 55 Phil. at 105. This is clearly a resolutive condition, for it does not render continual fulfillment of the contract dependent solely upon the uncontrolled will of the lessee. Rather, the lessee's right to rescind is for a limited period of time only. The same must be said of the condition in the Taylor decision. There the contract was one for personal services, and the contract provision said to be in conflict with the predecessor to article 1308 of the Civil Code stated: "It is understood and agreed that should the machinery to be installed in the said factory fail, for any reason, to arrive in the city of Manila within a period of six months from date hereof, this contract may be cancelled." Taylor, 43 Phil. at 874-75. Here too, the right to cancellation is not continual or total. It can be exercised only after a six-month period and then only if the machinery to be installed has not arrived at Manila.

believes to be in article sixteen of the lease in the instant case, would not be in conflict with article 1308 of the Civil Code.

Appellant has likewise referred us to a subsequent decision of the Philippine Supreme Court, issued shortly after Philippine Banking. This subsequent decision, Garcia v. Legarda, 21 SCRA 555 (1967), affirmed the principle that a potestative condition leaving fulfillment of the contract continually dependent solely upon the uncontrolled will of one of the contracting parties is in conflict with the requirement of mutuality expressed in article 1308 of the Civil Code. In addition, appellant has furnished us with several decisions issued by the Court since 1967 which continue to cite to this principle enunciated in the Garcia decision. E.g., Florendo v. Court of Appeals, 265 SCRA 678 (1996); Almeda v. Court of Appeals, 256 SCRA 292 (1996); Philippine National Bank v. Court of Appeals, 196 SCRA 536 (1991); Lao Lim v. Court of Appeals, 191 SCRA 150 (1990).

Is the Termination Provision in Article Sixteen a Potestative Condition?

Appellant's motion for summary relief is undoubtedly based upon the assumption that the termination provision in article sixteen of the lease represents nothing more than a potestative condition which, for the entire period of the lease, renders fulfillment of the contract of lease dependent solely upon the uncontrolled will of the American embassy. Although the Government does not specifically address the issue as expressed in these terms, its initial reliance on Philippine Banking and comments made in the legal memorandum submitted in support of its cross motion convince us that the Government does not agree that the termination provision in article sixteen is a potestative condition which permanently leaves fulfillment of the lease subject solely to the Government's will.

We turn first to the Government's initial reliance on Philippine Banking. As already mentioned, in that case, the Court rejected the argument that the provision -- "The lessee may at any time withdraw . . ." -- was in conflict with article 1308 of the Civil Code. The conclusion reached by the Court in that case was that, notwithstanding the statement that the lessee could withdraw from the lease at any time, the right was so circumscribed by the term of the contract that it could not be said that the continuance of the lease depended upon the will of the lessee. Philippine Banking, 21 SCRA at 58-59. In other words, the provision was not a unlimited potestative condition, but rather, resembled more a resolutory condition supported by sufficient mutuality as to not be in conflict with article 1308.

Comments made by local counsel in the legal memorandum submitted by the Government convince us that in the instant case, the Government's right to terminate under article sixteen of the lease is likewise circumscribed to a sufficient degree -- this time by other provisions of the Civil Code -- as to ensure that it is not an unlimited potestative condition, but rather, is endowed with a sufficient degree of mutuality as to avoid any conflict with article 1308.

Local counsel writing in support of the Government states:

However, it should be pointed out that, notwithstanding Article 16, the termination of the Agreement may, under certain conditions, be a cause for

liability under the quasi-delict and "human relations" provisions of the civil code.

Article 2176 of the Civil Code defines a quasi-delict as follows:

ARTICLE 2176. Whoever by act or omission causes damage to another, there being fault or negligence, is obliged to pay for the damage done. Such fault or negligence, if there is no pre-existing contractual relation between the parties, is called a quasi-delict and is governed by the provisions of this Chapter.

Article 2176 literally requires, as an element of a quasi-delict, that absence of contractual relations between the plaintiff and the defendant, presumably to distinguish quasi-delicts from contract breaches. However, the Supreme Court has effectively eliminated this requirement by holding that "the act that breaks the contract may be also a tort" (*Air France v. Carrascoso*, 18 SCRA 220 [1995]); see also *Singson v. Bank of the Philippine Islands*, 23 SCRA 1117 [1968], and *Coca-Cola Bottlers, Inc. v. Court of Appeals*, 227 SCRA 292 [1993]).

In any event, and considering that Article 2176 applies to both voluntary/intentional and negligent acts (*Dulay v. Court of Appeals*, 243 SCRA 220 [1995]), Article 2176 may potentially be cited as basis for liability if the termination of the Agreement is effected in bad faith.

Other potential sources of liability are Articles 19, 20, and 21, or the "human relations" tort provisions of the Civil Code. These provisions state:

ARTICLE 19. Every person must, in the exercise of his rights and in the performance of his duties, act with justice, give everyone his due, and observe honesty and good faith.

ARTICLE 20. Every person who, contrary to law, willfully or negligently causes damage to another, shall indemnify the latter for the same.

ARTICLE 21. Any person who willfully causes loss or injury to another in a manner that is contrary to morals, good customs or public policy shall compensate the latter for the damage.

Government's Cross Motion for Summary Relief, Attachment 3 at 3-4 (footnote omitted).

The legal memorandum submitted by the Government goes on to point out that the human relations tort provisions of the Civil Code have been successfully invoked to hold a contracting party liable for damages to the other party as a result of contract termination, even when the agreement allowed that party to do so *without cause*, because the right had been exercised in bad faith. Petrophil Corp. v. Court of Appeals, 371 SCRA 702 (2001). We find it particularly significant that in Petrophil, the termination provision was not deemed to

be lacking in mutuality and, consequently, contrary to article 1308 of the Civil Code. Indeed, the legality of the provision was implicitly affirmed in view of the fact that the Supreme Court had previously stated that one of the essential elements of an abuse of right claim under articles 19, 20, and 21 of the Civil Code is that there be a legal right or duty. Albenson Enterprises Corp. v. Court of Appeals, 217 SCRA 16, 25 (1993).

The conclusion we draw, therefore, from the Petrophil decision is that, under current case law, the Philippine Supreme Court considers that the requirement of good faith imposed by articles 19 thru 21 of the Civil Code imposes a sufficient curb on a party having the unilateral option of terminating a contract without cause as to no longer leave that party entirely free to terminate the contract at will. Consequently, such a provision is not an unlimited potestative condition in conflict with the requirement of mutuality as embodied in article 1308 of the Civil Code. Accordingly, it is valid and enforceable.³

In short, we deny appellant's motion and grant instead the Government's cross motion because we are convinced that, under Philippine law, provisions such as that found in Philippine Banking, Petrophil, and article sixteen of the lease in this case are not deemed to be unlimited potestative conditions, but rather are considered to be valid contract provisions supported by mutuality sufficient to render them not in conflict with article 1308 of the Civil Code. We reach this conclusion even though appellant has convincingly demonstrated that the distinction between resolutory and potestative conditions is apparently alive and well under Philippine law.

Given the uncontested facts in this case, we agree with the Government that the termination of the lease was entirely reasonable under the circumstances. In the absence of any substantive evidence suggesting that this action ran afoul of the requirements of articles 19 thru 21 or 2176 of the Civil Code, we conclude that the termination of the contract was in accordance with contract terms and conditions and that the contract was, therefore, validly terminated.

One final matter perhaps deserving of comment is the status of one of the claims originally raised on appellant's behalf by local counsel in their letter of October 16, 2003, to the contracting officer. In addition to presenting a claim for amounts due under the lease,

³ We note in passing that, even within American jurisprudence, the problem posed by an unlimited right to terminate a contract for convenience has raised serious questions as to whether the Government has provided consideration for a contract containing such a provision. As in Philippine Banking and Petrophil, the approach used by American courts has been to somehow find some limit -- express or implied -- on the Government's right to termination so as not to deem the right to be absolute and the contract, therefore, illusory. E.g., Torncello v. United States, 681 F.2d 756 (Ct. Cl. 1982) (stating that the termination clause cannot be used to avoid paying anticipated profits unless there has been some change in circumstances since time of award); Kalvar Corp. v. United States, 543 F.2d 1298 (Ct. Cl. 1976) (explaining that the termination clause cannot be used if exercise demonstrates bad faith); Sylvan Crest Sand & Gravel Co. v. United States, 150 F.2d 642 (2d Cir. 1945) (concluding that a contract containing a termination for convenience provision was not illusory because of an implied promise by the Government to give notice of cancellation).

counsel also sought compensation for improvements made to the premises after the lease was entered into but which were not required under the lease. See Uncontested Fact 15. The merits of the claim appear to us to be extremely doubtful in view of the claimant's own statement that these improvements were made simply "in a spirit of accommodation." See Uncontested Fact 11. Nevertheless, we take no formal position regarding this claim. Rather, in view of appellant's statement in her motion for summary relief that the resolution of this case depends "entirely" on the determination of validity of the termination provision in article sixteen of the lease, and in view of her election of accelerated procedure at the time her motion was filed, we consider this claim for compensation to have been abandoned.

Decision

This appeal is **DENIED**.

EDWIN B. NEILL
Board Judge

I concur:

MARTHA H. DeGRAFF
Board Judge