

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

RECONSIDERATION DENIED: July 21, 2005

GSBCA 16359-ST-R

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.

On February 15, 2005, the Board denied appellant's motion for summary relief and granted instead a cross-motion for summary relief filed by respondent in *Rosalinda de Perio Santos v. Department of State*, GSBCA 16359-ST, 05-1 BCA ¶ 32,896. In that case, Ms. de Perio Santos challenged the cancellation of a lease of a residence owned by her and located in Makati City, Philippines. The property had been leased by the United States Embassy in the Philippines to use as housing for embassy personnel.

In terminating its lease of Ms. de Perio Santos' residence, the embassy relied upon a lease provision granting the Government the right to terminate the lease for its convenience, in whole or in part, at any time, if it determined that such termination is in its best interest.

It was and remains the position of Ms. de Perio Santos that the termination provision violates the principle of mutuality as set forth in article 1308 of the Civil Code of the Philippines and is, therefore, invalid. A choice of law provision in the lease states that the terms of the lease should be construed in accordance with the local laws governing the situs of the premises in question. We, therefore, looked to Philippine law to resolve this dispute. Appellant, a lawyer in her own right, furnished us with numerous decisions of the Supreme Court of the Philippines allegedly in support of her contention. The Department of State provided, in support of its brief, a legal memorandum prepared by a Philippine firm working in that country.

In analyzing the legal materials made available to us by the parties, the various types of "condition," as understood in civil law, proved to be particularly relevant. As we explained in our decision:

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. [*Black's Law Dictionary*] 290 [(7th ed. 1999)]. By contrast, a "potestative condition" is defined as "[a] condition that will be fulfilled only if the obligated party chooses to do so." *Id.*

Rosalinda de Perio Santos, 05-1 BCA at 162,975.

After a review of the parties' submissions to the record, we concluded that the termination for convenience provision in the lease of Ms. de Perio Santos' residence was not an unlimited potestative condition, but rather, resembled more a resolutive condition supported by sufficient mutuality as not to be in conflict with article 1308. *See Rosalinda de Perio Santos*, 05-1 BCA at 162,976-77.

In her request for reconsideration, Ms. de Perio Santos insists that the termination provision in her lease is not a resolutive condition, but rather, by its wording is obviously a potestative condition and thus invalid for want of mutuality. Appellant is critical of our use of the term "unlimited" when referring to a potestative condition. She writes:

The conclusion made by the Honorable Board . . . seems to imply that potestative conditions may be limited or unlimited, that the limited ones may be allowable and valid, but not those which are unlimited. Be it noted that the

law does not distinguish one kind of potestative condition from another as would create a qualification on the validity of potestative conditions. As hereinbefore pointed out, potestative conditions are void for being contrary to law.

Appellant's Motion For Reconsideration at 6.

In its opposition to appellant's request, the Government has again provided comments from local Philippine counsel. These comments convince us that the conclusion we reached in our original decision is, in fact, correct and that any implied distinction between "limited" and "unlimited" potestative conditions is justified in Philippine law.

In his comments, counsel observes that, contrary to appellant's apparent belief, potestative conditions and resolutive conditions are not mutually exclusive concepts. It is rather "suspensive" conditions which stand in contrast or opposition to resolutive conditions. Both types of condition are described in terms of the effect they have on the obligation to which they are attached. If the perfection, birth, or obligatory force of the obligation occurs or arises only upon the happening of the condition, it is a suspensive condition. *Cheng v. Ganato*, 300 SCRA [Supreme Court Reports Annotated] 722, 735-36 (1998). On the other hand, if the condition ends or extinguishes an already existing and binding obligation, it is a resolutive condition. *Baluran v. Navarro*, 79 SCRA 309, 313 (1977).

Based upon these distinctions, counsel further notes that a potestative condition can be, therefore, either a resolutive condition or a suspensive condition. With ample citations to the Civil Code, to commentators on the same, and to decisions of the Philippine Supreme Court, the Philippine counsel retained by the Department of State convincingly demonstrates that it is well settled that the Civil Code provision that conditions depending upon the sole will of the debtor are void, applies only to *suspensive*, potestative conditions but not to resolutive, potestative conditions. Government's Response in Opposition to Appellant's Motion for Reconsideration, Attachment at 4-6. We find this supportive of our conclusion that the termination for convenience clause in appellant's lease was not an "unlimited" potestative condition but rather, because of its resolutive nature, did not fail for want of mutuality. Admittedly, the Government's consultant does not even consider the termination for convenience provision in this case to be a resolutive, potestative condition.¹

¹ The Government's consultant bases this conclusion on a definition of "potestative condition" more narrow than that used in our original decision. Quoting from a Supreme Court decision, *Naga Telephone Co. v. Court of Appeals*, 230 SCRA 351 (1994), he writes that a potestative condition is "a condition, the fulfillment of which depends upon

Nevertheless, it goes without saying that, even if the provision is a potestative condition, because it is in the nature of a resolutive condition which has the effect of terminating an already existing obligation rather than giving rise to one, it does not fail for mutuality.

The basic argument put forward by appellant in her request for reconsideration is not new. In our decision, we addressed the argument in considerable detail and explained why we came to the conclusion that the termination provision is not a potestative condition which fails for a lack of mutuality. In doing so, we cited and discussed specific cases and code provisions.

Board Rule 132 expressly states that arguments already made are not sufficient grounds for granting reconsideration. 48 CFR 6101.32 (2004). Accordingly, we see no basis for granting appellant's request for reconsideration. The request is, therefore, **DENIED**.

EDWIN B. NEILL
Board Judge

I concur:

MARTHA H. DeGRAFF
Board Judge

the sole will of the debtor.” Arguing that the “debtor” in this case is the lessor rather than the lessee, counsel contends that, because continuation of the lease is subject not to the sole will of the lessor but the lessee, the termination provision is not even a potestative, resolutive provision. Government's Response in Opposition to Appellant's Motion for Reconsideration, Attachment n.7.