ATTACHMENT V

U.S. Fire Insurance v. A.E.E.

174 D.P.R. 219 (2008)

[English Translation]

IN THE SUPREME COURT OF PUERTO RICO

US Fire Insurance Company and others Plaintiff-Respondent v. Electric Power Authority and others Defendant-Petitioner v. Universal Insurance Company; Federal Insurance Company; Royal & Sun Alliance Insurance Company Third-Party Defendants-Petitioners	Certiorari 2008 TSPR 160 ~~175~~ D.P.R. ____

Case Number: CC-2006-1060

Date: September 24, 2008

Court of Appeals:

Carolina Judicial Region Panel X

Presiding Judge:

Hon. Carmen A. Pesante Martínez

Attorneys for Petitioner

Atty. Luis M. Ortega García
Atty. José A. Andreu Fuentes

Attorney for Respondent:

Atty. Jaime F. Agrait Lladó
Atty. Blanca E. Agrait Lladó

Subject: Tort Damages

IN THE SUPREME COURT OF PUERTO RICO

US Fire Insurance Company and others Plaintiff-Respondent v. Electric Power Authority and others Defendant-Petitioner v. Universal Insurance Company; Federal Insurance Company; Royal & Sun Alliance Insurance Company Third-Party Defendants-Petitioners	CC-2008 1600

Opinion of the Court delivered by Associate Justice Mrs. Rodríguez Rodríguez

San Juan, Puerto Rico, on September 24, 2008

In this case, we are to determine whether by virtue of a settlement agreement the respondent may retain an amount of money charged in excess to what was owed according to the judgment favoring it.

We go on to summarize the fax that serve as background to the issue before our consideration.

I.

On July 26, 1996. An accident occurred wherein a helicopter of the Puerto Rico Police crashed when impacting some electrical lines that were not duly marked, in the environs of the Carraizo Dam. Three policemen, who were crew of the vessel, died.

As a result of these events, several complaints for damages were filed against the Electric Power Authority (PREPA) and the Aqueduct and Sewer Authority (PRASA). Further, US Fire Insurance Company (US Fire), insurer of the Puerto Rico Police filed a complaint for subrogation to recover the $842,048 paid for the loss of the helicopter.

On September 10, 1998, the First Instance Court granted the complaint filed ordering the payment of the amount claimed (the $842,048). Further, provided to what is in accordance to what is provided in Rule 44.1 (d) of Civil Procedure, 32 L.P.R.A. Ap. III. R. 44.1 (d), the court ordered the payment of attorney's fees and interests for temerity. It also granted the complaint for subrogation filed by US Fire.

US Fire requested the execution of the judgment entered in his favor. To satisfy the judgment, PREPA deposited with the court $250,000 and the PREPA Union of Insurers (the Union) deposited $750,000, for a total of $1,000,000. US Fire filed a motion wherein it requested the withdrawal of the funds. In the motion, it made an express reservation of rights because it understood that the amount withdrawn represented less than what they were entitled to by judgment. It explained that the interests over the judgment were of 9.5% annually, which was the rate applicable to private litigants. It further argued, that the amounts to be paid for attorney fees and costs of litigation to be paid should be added. Based on the above, US Fire claimed the amount of $1,588,294.60,

as amount owed. The First Instance Court authorized the withdrawal of the funds deposited.

Afterwards, PRASA'S insurer, Zurich Insurance Company (Zurich) and US Fire subscribed a settlement agreement. Through it, Zurich agreed to pay **half of the amount of the principal** ($842,048) of the judgment entered in favor of US Fire, **quantity which amounted to $421,000.** In exchange, US Fire released Zurich from all liability under the policy that it had with PRASA. Nevertheless, it reserved the right of continuing its claim against PRASA until the full payment of the amount owed in accordance to the judgment, including, of course, the interests owed.

Meanwhile, the First Instance Court entered a resolution wherein it decided that the interest rate applicable to the judgment entered was 5.25% annually, which is the interest rate applicable to government entities. From said resolution, US Fire resorted to the Court of Appeals. That court affirmed, essentially the resolution resorted, although it modified the applicable interest rate from 5.25% to 5.5% because that was the prevailing interest at the moment in which the instance judgment was entered. Afterwards, this court affirmed the ruling of the intermediate form. *Gutiérrez Calderón* v. *US Fire Insurance Company*, res. February 10, 2006, 166 D.P.R.____, 2006 TSPR 21.

In attention to the above, PREPA filed before the First Instance Court a motion requesting to order US Fire to return the money withdrawn in excess

of the amount of the judgment entered in its favor. In synthesis, it alleged that the total amount which US Fire was entitled to by virtue of the judgment entered was $1,262,036.22, which included principal plus interest. Therefore, after receiving the payment of the $1,000,000 and of $421,000, US Fire received $158,963.78 in excess of what it was entitled to by judgment. PREPA requested the return of that money.

US Fire opposed. It alleged that the payment made by Zurich occurred as a result of a contractual settlement and the amount paid was to purchase the risk that it be judicially determined that the interest rate applicable to private entities had to be paid. It stated that if the issue over the applicable interest rate would have been decided in favor of US Fire, the latter would not have been able to claim additional amounts from Zurich without violating the settlement agreement. It argued that the settlement agreement was agreed exclusively to terminate the litigation between both insurers. It added that PREPA could not expect to be accredited part of the money that Zurich paid to US Fire by virtue of the settlement agreement.

The First Instance Court by resolution entered on May 22, 2006, approved the position of US Fire determined that the return of money requested by PREPA was improper. From said decicion, PREPA and the Union resorted to the Court of Appeals by writ of *certiorari*.

The Court of Appeals denied the issue of the writ. It argued in its resolution that the liability had not been

distributed between codefendants and the amount corresponding to the costs and attorney's fees had not been determined either; therefore, it was not possible to determine whether there had been payment in excess.[1] It added that in the event that PREPA's claim had merit, what was proper was a leveling action against PRASA.

Not in agreement, PREPA and the Union resorted to us and reiterated what they stated before the lower forms. We issue the writ requested. Both parties have appeared, for which we rule.

II

Faced with the issue in this case, we will start reviewing our laws regarding the figure of the settlement agreement and its effects over a claim for damages.

A

Article 1709 of the Civil Code, 31 L.P.R.A. sec. 4821, defines a settlement agreement as an agreement whereby "the parties, giving, promising or retaining each one a thing, avoid the provocation of a lawsuit or terminate the one they had started". This agreement --described by Scaevola as an "instrument of peace attained"-- is consensual, reciprocal and onerous. In it, the parties, through mutual sacrifices, terminate an issue with the purpose of avoiding the sorrows

[1] We must clarify the contrary to what was stated by the Court of Appeals, the instance forum indicated that the amount corresponding to attorneys fees was $5,000.

that a litigation entails. Q. M. Scaevola, *Código Civil*, Tome XXVIII, Instituto Editorial Reus, Madrid, 1953, pg. 246. See, *Mun. de San Juan v. Professional Research & Community Services*, res. May 18, 2007, 171 D.P.R. __, 2007 TSPR 95; *López Tristani v. Maldonado Carrero*, res. September 8, 2006, 168 D.P.R.___, 2006 TSPR 147; *Neca Mortgage v. A & W Developers*, 137 D.P.R. 860 (1995); *Citibank v. Dependable Insurance Company*, 121 D.P.R. 503 (1988), and other cases cited therein.

There are several requirements necessary for its validity. First, it is required that an issue or uncertain juridical relationship exists --judicial or extrajudicial-- representing the possibility of a litigation or that one already be in dispute. *Mun. de San Juan v. Professional Research & Community Services, supra*. See also, S. Tamayo Haya, *El Cotrato de transacción*, Thomson Civitas, Madrid, 2003, pg. 75. The uncertainty refers to the subjective concept that the parties may have over the objective elements --certain and determined-- of the juridical relationship. Tamayo Haya, op, cit,. Second, the parties have the intention of substituting, by settlement, this uncertain relationship with the certainty of another "certain and indisputable" one. *Mun. de San Juan v. Professional Research & Community Services, supra*. The third requirement is represented by the mutual concessions of the parties. The mutual concessions "constitute not only the essential method for the development of the cause of the settlement business, rather, they become part of the cause." *López Tristani v. Maldonado Carrero, supra*. In *Mun.*

de San Juan v. Professional Research & Community Services, supra, we indicated, rightly so, that "every settlement supposes that the parties have doubts on the judicial accuracy or validity of their respective pretensions and choose to resolve the differences through **mutual concessions**." (Emphasis in original.) See also, J. Puig Brutao, *Fundamentos de Derecho Civil*, Tome II, Volume II, Casa Editorial Bosch, Barcelona, 1982, pgs. 626-630; See also I. Sierra Gil de la Cuesta, *Comentario al Código Civil*, Tome 8, Editorial Bosch, S.A., Barcelona, 2000, pg. 84-90.

Because of its complex juridical nature, the settlement agreement must be interpreted restrictively; therefore, its effect extend to what was expressly agreed by the parties. The Civil Code provides concrete interpretive rules for settlements. The rule that disciplines it is Article 1714 of the Civil Code, 31 L.P.R.A. sec. 4826, which sets forth that the settlement "does not comprise other than the object express object determined in it, or that, by a necessary induction of its words, must be reputed comprised in it." As a result, only the matters directly related to the object settled shall be deemed resolved with the final nature, which presupposes the need for clarity and accuracy in the description of the matters settled. Sierra Gil de la Cuesta, *Comentario al Código Civil*, Tome 8, *supra*, pg. 105; *Sucn. Román v. Shelga Corp. supra.*

The settlement agreement may have its place in situations where a plurality of subjects intervene

either from the active side --several creditors-- or from the passive side --several debtors-- because of the existence at the same time of clarity plurality of creditors and debtors. The efficacy of the settlement sets forth doctrinal inconveniences when we consider what the effect of the settlement concluded between one of the debtors and its creditor will be with regards to other debtors. Precisely, that is a matter at hand today.

B

In matters of civil tort liability, the damage caused could be the result of the negligence of more than one causer. In these cases, each one is liable for the totality of the damage caused. *Rivera Hernández* v. *Comtec Communication*, res. June 22, 2007, 171 D.P.R.___, 2007 T.S.P.R. 131; *Arroyo v. Hospital La Concepción*, 130 D.P.R. 596, 603 (1992); *García v. Gob. de la Capital*, 72 D.P.R. 138, 146 (1951); *Rivera v. Great Am. Indemnity Co.*, 70 D.P.R. 825, 828 (1950).

In a lawsuit for tort damages, the victim can waive his claim with regards to one of the co-causers of his damage through a settlement agreement. Depending on what was agreed, so will be the effects of that agreement over the co-causer with whom it is settled, and the other co-causers who remain in the lawsuit. *S.L.G. Szendrey v. Hospicare Inc.*, 158 D.P.R. 648, 656 (2003); *Blás Toledo v. Hospital Nuestra Señora de la Guadalupe, et al.*, res. March 30, 2006, 167 D.P.R. _, 2006 T.S.P.R. 47. Therefore, to test what those effects are, it is necessary

to first establish what was what was agreed. 31 L.P.R.A. sec. 4826.

We have stated in the past that if the victim of the damage releases one of the co-causers of the damage from liability, that does not suppose the release of liability of the other co-causers if the latter does not appear clearly from the settlement agreement. *Merle V. West Bend Co.*, 97 D.P.R. 403, 409 (:969); *S.L.G. Szendrey v. Hospicare Inc., supra*, pg. 655; *Blás Toledo v. Hospital Nuestra Señora de la Guadalupe, et al., supra*. Thus, the victim can continue his claim against the other co-causers of the damage. With which, the liability of these co-causers shall depend, in greater extent, on the settlement agreement between the victim and the released co-causer.

In the settlement agreement, the victim may release the co-causer of all liability that may arise with regards to the harmful event, to wit, that he is released from his liability toward the victim as well as in the internal relationship between co-causers. When this occurs, the victim assumes the portion of liability that is attributed to the released co-causer. *Szendrey v. Hospiscare, Inc., supra*, pg. 656, 659. In these cases, the other co-causers of the damage cannot recover from the released co-causer any amount whatsoever.

The above responds to that according to the settlement agreement, the other co-causers will not have available a leveling action to recover any amount paid in excess to the portion of liability that

corresponds to them.[2] The leveling action pursues to avoid the unjust enrichment of one party. *Szendrey v. Hospicare Inc.*, supra, pág. 654; P.R. *Fuels, Inc. v. Empire Gas Co., Inc.*, 149 D.P.R. 691, 712-713 (1999); *Ramos v. Caparra Dairy, Inc.*, 116 D.P.R. 60, 63-64 (1985). Therefore, the other co-causers cannot be deprived of the leveling action, except when they are not subject to pay more than what corresponds to them according to the portions of liability. Thus, in this context, the other co-causers will not be subject to indemnifying the totality of the damages, rather only in the remaining portion after subtracting the amount corresponding to the portion of liability of the released co-causer. *Szendrey v. Hospicare Inc., supra*, pág. 658. See also, D. Fernández Quiñones, *Análisis del Término 2002-2003: Tribunal Supremo de Puerto Rico: Responsabilidad Civil Extracontractual*, 73 Rev. Jur. U.P.R. 807, 827-830 (2004). Given that the amount that should be paid by virtue of the judgment does not include the amount corresponding to the portion of liability of the released co-causer, the amount received in exchange for the release of liability is not attributed to the payment of the judgment.

Through this type of settlement agreement, the uncertainty of what in due course plaintiff would be entitled to recover by virtue of the portion of liability that is attributed to the released co-causer is eliminated. L.R. Rivera

[2] With regard to the leveling action, Article 1098 of the Civil Code of Puerto Rico, 31 L.P.R.A. sec. 3109, sets forth that the joint debtor that made the payment can only claim from its co-debtors the part that corresponds to each one. See *infra*, n. 3

Rivera, *El Contrato de Transacción, sus efectos en situciones de solidaridad*, San Juan, Puerto Rico, Jurídica Editores, 1988, pg. 36. Said amount is established in the settlement agreement. Therefore, plaintiff will only be entitled to receive the amount established in the settlement agreement as payment of the amount corresponding to the portion of liability of that co-causer. Thus, he assumes the risk of recovering less than what is it determined by judgment in due course.

As a corollary of the above, in the event that according to the judgment entered, the amount corresponding to the portion of the liability of the released co-causer is greater than that received in exchange for the release of liability, plaintiff assumes said decrease. On the contrary, if said amount is less than what is received in exchange from the release of liability, plaintiff receives the gain.

On the other hand, the settlement agreement can be circumscribed to the plaintiff waving an action for tort damages against one of the co-causers, without anything else. This type of settlement does not prevent the victim from continuing the complaint against the other co-causers of his damage, expecting to recover from them up to the totality of the amount corresponding to the damages caused. See, *Blás Toledo* v. *Hospital Nuestra Señora de la Guadalupe, et al., supra*. In the event that in order to satisfy the judgment entered in due course, the other co-causers shall have to pay an amount in excess to the portion of liability that correspond to them in order to compensate the portion of

liability of the released co-causer, they would also have available the corresponding leveling action. *Blás Toledo v. Hospital Nuestra Señora de la Guadalupe, et al., supra*, n. 3.

In this context, the amount received by plaintiff by virtue of the settlement agreement is considered a partial payment of the judgment that may be entered. *Blás Toledo v. Hospital Nuestra Señora de la Guadalupe, et al., supra*. ("… the instance court must only reduce from the amount of the judgment the amount […] corresponding to the alluded settlement.") On the contrary, the plaintiff could recover the totality of the amount of the judgment, in addition to what is obtained through the settlement agreement without having assumed any risk.

The above would constitute an unjust enrichment.[3] This, because defendants would be subject to indemnifying an amount greater than the amount corresponding to the damages caused, which is translated into an impoverishment. In turn, plaintiff would collect an amount greater than the amount corresponding to the damages suffered; and therefore, would experience an enrichment. Since he has not assumed any risk, it would be an enrichment without cause.

---

[3] The doctrine of unjust enrichment responds to the principles of equity and justice. *E.L.A. V. Cole Vázquez*, res. April 13, 2005, 164 D.P.R. ___, 2005 T.S.P.R. 46; *Silva v. Comisión Industrial*, 91 D.P.R. 891, 898 (1965). The basic requirements of this doctrine are: 1. existence of an enrichment; a co-relative impoverishment; 3. a connection between said impoverishment and enrichment; 4. lack of a cause justifying the enrichment and 5. the inexistence of a legal precept excluding the application of enrichment without cause. *E.L.A. v. Cole Vázquez, supra; Ortiz Andújar v. E.L.A., 122 DPR 817, 823 (1988)*.

In light of the normative framework set forth above, we rule that a plaintiff who subscribes a settlement agreement with one of the co-defendants and ends up receiving in total an amount greater than what he is entitled to according to the judgment entered in his favor, could receive said gain depending on what was agreed in the settlement agreement. Thus, as long as he assumes a portion of liability that is charged on the released co-causers in the settlement agreement; for which, he also assumes the risk of recovering less than what is determined in due course by judgment, he may be attributed the gain. If, on the contrary, plaintiff does not assume the portion of liability that is charged on the released co-causer; and therefore, does not assume either the risk of recovering less than what could be determined in due course by judgment, he would only be entitled to recover exclusively what he is entitled to according to the judgment.

III

In light of the above, to resolve the case at bar, we must establish what the agreement gathered in the settlement agreement subscribe between US Fire and Zurich was, to thus determine the effects of the settlement in this judicial proceeding.

In the settlement agreement subscribed by US Fire and Zurich, it was stipulated, in its pertinent part, the following: 1. at Zurich issued in favor of PRASA an insurance policy covering part of liability for the loss of the helicopter property of the Puerto Rico Police; 2. That under the causes of the insurance agreement, Zurich was obligated to reimburse to

its insured the amounts covered under the policy for the payment of the principal of the judgment favoring US Fire; 3. that according to the letter of the policy, Zurich is not obligated to pay interests over the judgment, either pre-or post-judgment; 4. That in exchange of the payment of $421,000, US Fire releases a Zurich from all liability under the policy at reference and 5. that expressly, **Zurich acknowledges US Fire's right to continue its claim against PRASA and PREPA and their other insurers until full payment of what is owed in accordance to the judgment that favors it.**

It appears from the above that Zurich agreed to pay part of the principal of the judgment because it was stipulated that that was the liability it had under the policy issued in favor of its insured, PRASA. In exchange, US Fire released Zurich of all liability **under the policy**. In other words, US Fire obtained $421,000 in concept of what Zurich would be obligated to pay as established in the policy subscribed in favor of PRASA, nothing else.

The settlement agreement also expressly acknowledges US Fire's right to continue its claim against PRASA and PREPA and their other insurers, until full payment of what is owed in accordance to the judgment that favors it. Therefore, it is clear that through said settlement US Fire did not release from liability the other defendants as well as it did not limit either the liability of the other defendants to the remaining portion after subtracting the amount corresponding to the portion of liability of the released codefendant.

It does not appear either from the agreement that US Fire releases Zurich from all liability that may arise in regard to this event. Therefore, it did not release it from liability with regard to an internal relationship between co-causers. Consequently, the other defendants conserve their right to level.

In conclusion, according to the settlement agreement, US Fire did not assume Zurich's liability. The money received by virtue of said agreement did not constitute a payment to assume liability of this codefendant. Thus being so, US Fire cannot benefit from the settlement agreement to obtain monetary benefits greater than what it is entitled to according to the judgment that favors it. As we explained, this benefit is obtained only if plaintiff assumes a portion of liability that is attributed to the released co-causers and likewise, assumes the risk of recovering less than what the judgment entered in due course provides. Pursuant to what is stated above, US Fire can only collect the total of what is owed according to the judgment that favors it, without anything else. In accordance to that, the payment made by virtue of the settlement agreement constitutes a partial payment of the judgment.

IV

Both parties alleged that the total amount that US Fire is entitled to by virtue of the judgment entered in its favor is $1,262,036.22. Nevertheless, US Fire received a total of $1,421,000.00. Therefore, it is to return the amount of $150,963.78, plus the interests

earned ever since it received the payment from Zurich, which is the moment in which the judgment was satisfied.

In this case, the First Instance Court did not pinpoint in its judgment the portions of liability attributed to PREPA and to PRASA. When there is no judicial ruling on the exact portion of guilt of the co-causers or when the harmful effect of the action of the co-causers is not susceptible to be measured, it's "the imposition of joint liability in equal contributive quotas" is proper.[4] *Sánchez Rodriguez v. López Jiménez*, 118 D.P.R. 701, 710 and n. 2 (1987); *Torres Ortiz v. E.L.A.*, 136 D.P.R. 556, 567 n. 6 (1994). Therefore, at this procedural stage, we must infer that PREPA and PRASA are liable in equal parts.[5]

US Fire received from Zurich, PRASA's insurer, only $421,000.00. PREPA being a joint debtor, is liable not only for half of what corresponds to it, rather for the amount that is yet to be satisfied of the judgment in its totality, which according to the parties, amounts to $1,262,036.22. Thus being so, US Fire was entitled to collect from PREPA a total

---

[4] This does not prevent that in light of the absence of a judicial ruling on the exact portion of guilt of the co-causers, the litigants request said ruling through the available procedural mechanisms.

[5] It must be stated that in this case, on September 19, 2006, the primary forum entered partial summary judgment wherein it granted a co-party complaint filed by PREPA against PRASA, to recover half of the interests paid to satisfy the judgment. There, the primary forum, interpreting the judgment entered on September 10, 1998, expressly indicated that PREPA's and PRASA's liability was in equal parts.

of $841,036.22. Nevertheless, PREPA deposited a total of $1,000,000.00. In other words, PREPA paid $158,963.78 in excess to what was owed according to the judgment. Therefore, PREPA is entitled to receive said amount from US Fire, plus the interests owed from the moment in which the judgment was satisfied.

In accordance with the above, the resolution of the Court of Appeals that denied the issue the writ of *certiorari* is revoked and we affirm what was decided by the First Instance Court. US Fire is ordered to return to PREPA $150,963.78, plus the interests earned.

Judgment will be entered accordingly.

Anabelle Rodríguez Rodríguez
Associate Justice

IN THE SUPREME COURT OF PUERTO RICO

US Fire Insurance Company and others Plaintiff-Respondent v. Electric Power Authority and others Defendant-Petitioner v. Universal Insurance Company; Federal Insurance Company; Royal & Sun Alliance Insurance Company Third-Party Defendants-Petitioners	CC-2008 1600

JUDGMENT

San Juan, Puerto Rico, on September 24, 2008

For the reasons set forth in the preceding Opinion, which are incorporated wholly to this Judgment, we revoke the Court of Appeals and US Fire is hereby ordered the return to PREPA of $150,063.78 plus the interests earned.

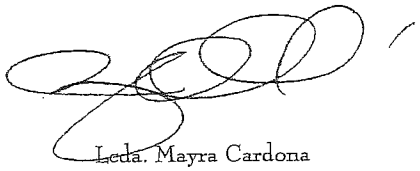
So pronounced, mandated by the Court and certified by the Clerk of the Supreme Court, Associate Justice Mrs. Fiol Matta concurred with the result without written opinion. Associate Justice Mr. Rivera Perez is inhibited.

Aida Ileana Oquendo Gaulau
Clerk of the Supreme Court

No. 2015-012 TRANSLATOR'S CERTIFICATE OF ACCURACY

I, Mayra Cardona Durán, of legal age, single, resident of Guaynabo, Puerto Rico, Certified Interpreter of the United States Courts (Certification No. 98-020) and certified member of the National Association of Judiciary Interpreters (Member No. 10671) member in good standing of the American Translators Association (Member No. 230112), and admitted to the Puerto Rico Bar Association (Bar No. 12390) hereby CERTIFY: that according to the best of my knowledge and abilities, the foregoing is a true and rendition into English of the original Spanish text, which I have translated and it is stamped and sealed as described therein. This document is comprised of Twenty (20) Pages, including this certification page, and does not contain changes or erasures.

In Guaynabo, Puerto Rico today, Tuesday, February 17, 2015.



Lcda. Mayra Cardona
BA Lit/Fr, MA Trans, JD
United States Courts Certified Interpreter
NAJIT Certified Interpreter and Translator
3071 Alejandrino Ave. PMB 306 Guaynabo, Puerto Rico 00969-7035
Tel. (787) 530-1414 Fax (787) 789-7363
e-mail: mayra@cardona.com