

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

Civil Action No. HBC 307 of 2006

BETWEEN : **J K BUILDERS LTD** a limited liability company having its registered office at Nadi, Fiji.

PLAINTIFF

A N D : **AJAY RANIGA** and **KAVITA RANIGA** both of Main Street, Nadi, Fiji.

DEFENDANTS

A N D : **SHARMA ARCHITECTS DESIGN GROUP LIMITED** a limited liability company having its registered office at Suva and carrying business elsewhere in Fiji.

THIRD PARTY

Appearances : Mr R. Singh for plaintiff
: Mr A. K. Narayan for third party
: Non-appearance for defendants

Date of Trial : 22 March 2017

Date of Judgment: 17 May 2017

J U D G M E N T

Introduction

[01] On 12 October 2006, the Plaintiff issued writ of summons with statement of claim attached against the Defendants. The claim arises out of a construction contract entered between the Plaintiff and the Defendants on 10 November 2003.

[02] On 22 March 2017 when the trial of the action was called on, there was no appearance by or for the Defendants. Then, counsel appearing for

the Plaintiff made an application to strike out the statement of defence and the counterclaim filed by the Defendants and to proceed with the trial in the absence of the Defendants. The third-party also made a similar application that the claim against the third party to be struck out and proceed with the counterclaim made by the third-party.

[03] The court accordingly struck off the defence and the counterclaim filed by the Defendants and the claim against the third party and proceeded with the trial in the absence of the Defendants pursuant to Order 35, Rule 2 of the High Court Rules 1988 ("HCR"), which gives power to the court for proceeding with the trial of the action or any counterclaim in the absence of the party who fails to appear when the trial of an action is called on.

[04] At the trial (proceeded in the absence of the Defendants), the Plaintiff called two witnesses and the third party called a witness and tendered their documents in support of their respective claim. In addition, they also filed written submissions.

The Facts

(As regards to the Plaintiff)

[05] On 10 November 2003, J K Builders Ltd ("the Plaintiff") and Ajay Raniga and Kavita Raniga ("the Defendants") entered into a building contract whereby the Plaintiff was to construct building apartments at Lot 11, Fairview Palms, Denarau, Nadi ("the property"), subject to contract specifications. In consideration for the contract work, the Defendants were to pay the Plaintiff the sum of \$335,000.00. The Plaintiff completed the contracted work and a Certificate of Completion ("CoC") was issued for the constructed property and the second named Defendant certified that the construction had been completed satisfactorily on 4 November 2005.

[06] Upon completion of the building work, the agreed Architects duly issued a final payment certificate. The Defendants refused to pay the total amount of \$182,368.52 (at the trial this amount was reduced to \$51,568.52). The Plaintiff issued demand notice through its solicitor. Still, the Defendants refused to pay the balance amount and denied owing money to the Plaintiff. The Plaintiff issued writ of summons and statement of claim to recover the balance sum from the Defendants.

(As regards to the third party)

[07] The Plaintiff was the builder. The Defendants are the owners of the property. The Defendants had engaged the Plaintiff to build their home on the property.

[08] The Defendants had engaged the services of the Third Party in early 2003 to prepare the plans and to provide architectural services during the construction.

[09] Under the building contract the Plaintiff was to commence work on 1 November 2003 and complete by 30 April 2004.

[10] The Defendants had joined the Third Party on 16 March 2009 claiming contribution/indemnity for the Plaintiff's claim, special and general damages, interest and costs.

[11] The Defendants by their defence denied the Plaintiff's claim and counterclaimed against the Plaintiff. They alleged the Plaintiff had breached a duty owed to them and was negligent in failing to follow the approved plans and to follow Standard Australian Code.

[12] The Defendants counterclaimed that they had commenced remedial works and claimed some expenditure incurred namely \$7599.00 for engineers fees and cost of repairs to stage 1 \$34,528.53 with a total as at 26 January 2007 at \$42,127.53.

[13] The Third Party (TP) claim alleged that the TP failed and/or neglected to carry out its responsibilities under the contract with the Defendants.

[14] In the third party claim, the Defendant alleged that the failure and/or negligence was discovered after partial completion of the building, which entailed numerous defects in the construction and design of the building “full particulars of which will be supplied at the trial”.

[15] The TP Statement of Claim also alleged that as a result of the TP’s negligence and/or the combined negligence of the Plaintiff they suffered loss and damages. They pleaded that loss and damage was by way of rectification work they had to carry out (still on going) and “full particulars of which will be supplied at trial”.

[16] The third party filed the statement of defence and counterclaim. The third party counterclaimed, among other things, judgment against the defendants in the sum of \$28,816.79 (At the trial it was limited to \$21,493.76). The basis for the third party’s counterclaim is that the Defendants owe the sum as outstanding fee for the service delivered.

The Claim

[17] It is an agreed fact that the parties have entered into a building construction agreement (“contract”) on 10 November 2003 whereby the Plaintiff was to construct a building on the Defendant’s property. The consideration for the contract was in the sum of \$335,000.00.

[18] It has been agreed in the Pre- Trial Conference minutes (“PTC”) that the Plaintiff had completed the construction work and the relevant authority certifying the building was properly constructed had issued a certificate of completion for the project. The essential issue remained was that whether the Defendants are liable to the Plaintiff under the contract as the Defendants claimed that the Plaintiff did not properly construct their dwelling.

The Issue

[19] The issue to be determined by the court is whether the Defendants owe money to the Plaintiff in the sum of \$51,568.52, being the balance sum under the contract. As regards to the third party, the issue is whether the Defendants owe money to the third party in the sum of \$21,493.76, being outstanding fee.

The Evidence

Plaintiff's case

[20] The Plaintiff called two witnesses namely Abdul Munif ("PW1") and Harish Kumar ("PW2").

[21] While giving evidence, PW1 an employee of the Plaintiff confirmed that the project was completed and that the Nadi Local Rural Authority ("NLRA") issued a completion certificate (PE/4), which is headed as "Certificate of completion and permit to occupy". He further confirmed that under the contract the balance sum of \$51,568.52 was due and owing to the Plaintiff by the Defendants.

[22] PW1 also stated that the Defendants had employed their own engineers (Vijay Narayan) ("third party") during the construction and who inspected and supervised the construction works at the time the works were being carried out by the Plaintiff. No issues were raised by the Defendants or their engineers who they had hired during the construction period in relation to any defects in the constructions works by the Plaintiff.

[23] PW2, a representative from the NLRA confirmed that the certificate is issued when and after a final inspection is undertaken by their office and they have confirmed that the construction has taken place in accordance with the plans and specifications. The completion certificate was issued on 29 December 2005.

[24] The second named Defendant issued a letter of 4 November 2005 to the Plaintiff and confirmed that the construction was undertaken properly and she was satisfied with the same. The letter stated;

“This is to certify that the construction of the residence of Ajay Raniga, at Lot 10 Fairway Palms Denarau, Nadi, has been completed to satisfaction.”

[25] The third party, the Architect for the project, hired by the Defendants to oversee and supervise the project issued a final payment certificate (“PE/6”) and the easement certificate (“PE/7”). The certificate states:

“attached please find your final Payment Certificate [No. 08] with Assessment, in the sum of \$51,568.52 (Fifty One Thousand Five Hundred Sixty Eight Dollars and Fifty Two Cents only) VIP for works executed, plus release of retentions withheld for the above project.

Please forward original certificate to the employer for payments.”

[26] The third party gave evidence that whatever minor issues that were existent at the time of construction the same were rectified by the Plaintiff. He issued the final certificate for payment under the contract.

Third party's case

[27] The Third party called Vijay Sharma (the third party) (“TPW1”), the major shareholder and managing director of the third party. He tendered a bundle of documents marked TP Exhibit 1.

[28] He gave evidence that the final payment certificate of 20 June 2006 was issued by him when all outstanding issues had been attended to by the Plaintiff. He produced a copy of Memorandum dated 16

December 2004 (“TP exhibit 3”) (which drew attention to matters requiring at that time attendance by the Plaintiff). He also tendered TP exhibit 4 dated 11 October 2005 of some matters requiring attention at that date. He also tendered a letter dated 24 January 2006 from Hamen Lodhia Engineers expressing on behalf of the Defendants of only one matter then outstanding being the shower outlet in the master bedroom. He said after all these had been attended to there was a joint meeting between him, the Defendants and the Plaintiff after which he issued his final payment certificate.

[29] In respect of his counterclaim against the Defendants, he said he sent the fee invoice providing the basis of the claim for \$13,500.00 plus VAT (TP Exhibit 3 dated 31 July 2003) for the documentation stage and the total contract fee being \$33,750.00 plus VAT. The Defendants paid the first claim for fees. Payment was received on 24 October 2003 (Document 5 in TP exhibit 1) in the sum of \$15,187.50. The Defendants paid a further sum of \$5000.00 on 12 August 2004 (TP exhibit 6) and balance owing at that time was \$21,493.76 VAT inclusive. He wrote to the Defendants’ former Solicitors regarding the outstanding fees (with interest at that time) of \$28,816.79 (document 14 and the invoice document 15 in TP exhibit 1).

Discussion

Of Plaintiff’s claim

[30] The Plaintiff brought this case to recover the balance sum due under a construction contract between the Plaintiff and the Defendants. The Plaintiff completed the construction as per the specifications stated in the contract. After completion of the building the Engineers (“the third party”) engaged by the Defendants for supervision of the construction and recommendation of the payment to be made to the Plaintiff issued

certificate for final payment. The Plaintiff sent the invoice for the sum of \$51,568.52, being final payment owing and due to the Plaintiff under the contract. The Defendants refused to make payment.

[31] The Plaintiff then demanded the payment through its solicitor. The Defendants neither made payment nor responded to the demand notice.

[32] PW1 stated that there was no issue raised by the Defendants concerning defects in the construction. He however said the Defendants pointed out a few minor defects in the construction, but they were all sorted out before forwarding the final invoice for payment.

[33] According to PW2, the NLRA carried out inspections at stages of the construction of the dwelling to confirm that the construction is in accordance with the required standards. The NLRA has duly issued the Completion Certificate, which proves that the dwelling was properly completed by the Plaintiff.

[34] It is notable that the third party employed by the Defendants, when giving evidence, confirmed that he issued the final payment certificate for payment ("PE/6 & PE/7"). The third party issued the final payment certificate having been satisfied that the construction was completed at the instructions and directions of the third party.

[35] The evidence both oral and documentary offered by the Plaintiff has been clear, straightforward and unchallenged. I accept the Plaintiff's evidence and documents tendered on behalf of the Plaintiff. I accordingly find the Defendants owe the sum of \$51,568.52 to the Plaintiff under the contract and that the Defendants have no reasonable defence to this claim.

Interest

[36] The Plaintiff claims interest on the claim from August 2006 on the basis that the debt was payable in the month of July 2006 when the third party had issued final payment certificate.

[37] The court may award interest on the judgment sum at such rate as it thinks fit pursuant to section 3 of the Law Reform (Miscellaneous Provisions) Act. That provides so far as relevant:

*“3. In any proceedings tried in the Supreme Court for the recovery of any debt or damages the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given **interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:..**”* (Emphasis added)

[38] Section 3 gives discretion to the court to considering interest on the whole or any part of the judgment sum for the whole or any part of the period between the date when the cause of action arose and the date of judgment. In my opinion, it would be prudent to consider interest on the judgment sum for the period between the date when the writ of summons was filed and the date of the judgment. I accordingly award interest on the judgment sum from 12 October 2006 (the date the writ of summons was filed) till the date of the judgment.

[39] The Plaintiff seeks interest at 8% per annum on the judgment sum. The Plaintiff relies on *the case of Q.B.E Insurance (Fiji) Ltd v Prasad [2011] Supreme Court of Fiji Appeal Number CBV0003.2009* where the court awarded 8% interest on the judgment sum for debt payable during the same period the Plaintiff filed its writ of summons.

Costs

[40] As a successful party, the Plaintiff is entitled to costs of these proceedings. The Plaintiff commenced this legal battle in 2006 to recover the money due under the building contract. The Plaintiff was

appearing through counsel throughout the proceedings. I, taking all into my account, summarily assess the costs at \$5,000.00.

Of Third Party's Counterclaim

- [41] The third party counterclaims against the Defendants in the sum of \$28,816.79 which was limited to \$21,493.76 at the trial. The third party's counterclaim arises out of an outstanding fee for service rendered.
- [42] By a contract, the Defendants engaged the Plaintiff to build a flat on their property.
- [43] The Defendants also engaged the services of the third party in 2003 to prepare the plans and to provide architectural services during the construction.
- [44] The Plaintiff witnesses testified that building was constructed in accordance with the approved plan and specifications. PW2 confirmed that the completion certificate and the permit to occupy are only issued by the NRLA when it is satisfied that the building had been built according to the plans and specifications and compliance with the Building Regulations.
- [45] PW1 said in evidence that the project engineer (Vijay Krishnan) would have inspected the building during construction and certified each stage. The completion certificate is only issued after the Engineer has also certified satisfactory completion. The Engineer's Certificate is also required by the NRLA. He also confirmed that the defendants were also satisfied and sent a fax message to the Plaintiff to that effect (P/Exhibit 3).
- [46] The third party denied any breaches of duty or negligence on his part. His evidence was that after all issues raised by the Defendants regarding minor defects in the construction had been attended to and sorted out there was a joint meeting between him, the Defendants and the Plaintiff. Thereafter he issued his final payment certificate.

[47] He (TPW1) sent his invoice for final payment for service he rendered to the Defendants which the Defendants refused to pay, albeit they paid his previous invoices. He finally confirmed that a sum of \$21,493.76 is still to be paid by the Defendants.

[48] The third party's evidence both oral and documentary is clear and straightforward. They remain unchallenged. I, therefore, accept the evidence and documents adduced by the third party. I accordingly find that the Defendants owe the sum of \$21,493.76 to the third party on account of outstanding fee for service delivered and the Defendants have no reasonable defence to the party's counterclaim.

[49] As I awarded interest on the judgment sum given in favour of the Plaintiff, award interest on the third party's judgment sum from 22 October 2013 (the date the third party made his counterclaim) until the date of the judgment at 8% per annum.

Costs

[50] As a successful party, the third party is entitled to costs of the proceeding. The third party had been defending the party notice through his solicitor since 2013. I, taking all into my account, summarily assess the costs at \$2,500.00.

Conclusion

[51] I, for all these reasons, conclude (on the Plaintiff's claim) that the Plaintiff is entitled to judgment in its favour in the sum of \$51,568.52 with interest at 8 per cent per annum from 12 October 2006 (being the date the writ of summons was filed) until the date of the judgment and I also conclude (on the third party's counterclaim) that the third party is entitled to judgment in his favour in the sum of \$21,493.76 with interest at 8 per cent per annum from 22 October 2013 (being

the date the third party's counterclaim was filed) until the date of the judgment. Moreover, the Plaintiff and the third party are entitled to summarily assessed costs of \$5,000.00 and \$2,500.00 respectively.

Final orders

(Of Plaintiff's Claim)

1. There will be judgment in favour of the Plaintiff in the sum of \$51,568.52.
2. The Plaintiff is entitled to interest on the judgment sum at 8% from 12 October 2006 until the date of the judgment.
3. The Plaintiff is also entitled to costs of \$5,000.00, which is summarily assessed.

(Of Third Party's Counterclaim)

1. There will be judgment in favour of the Third Party in the sum of \$21,493.76.
2. The Third Party is entitled to interest on the judgment sum at 8% from 22 October 2013 until the date of the judgment.
3. The Third Party is also entitled to costs of \$2,500.00, which is summarily assessed.

M H Mohamed Ajmeer
..... 17/5/17

M H Mohamed Ajmeer

JUDGE

At Lautoka

17 May 2017

