IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)
AT LAUTOKA
Civil Jurisdiction
Action No. 145 of 1975

Between:

RAM SEN s/o Ram Bharos	Plaintiff
- and -	
GOVIND SWAMY NAIDU s/o Pichaiya Naidu	1st Defendant
NARAYANI alias NARAYAN d/o Raman Nair	2nd Defendant
HOME FINANCE COMPANY LIMITED	3rd Defendant

Mr. R.D. Patel for the Plaintiff
Mr. B.C. Patel for the 1st and 2nd Defendants
Mr. B. Sweetman for the 3rd Defendant

JUDGMENT

In this action the plaintiff claims against the defendants a sum of $6,740 alleged to be owing under a building contract signed between the plaintiff and the 1st and 2nd defendants on 26 June, 1974. The plaintiff also claims special and general damages for breach of contract.

All three defendants deny owing the plaintiff any money under the said building contract.

The 1st and 2nd defendants have counterclaimed against the plaintiff alleging that the plaintiff did not diligently perform the construction of their house to the standard of workmanship required and failed to use materials of the best quality in accordance with the plans and specifications to the reasonable satisfaction of the 1st and 2nd defendants. They allege that the construction work on their house was defective in several respects and that it would cost $4,563.74 to rectify the alleged defects. A further item in the counterclaim is for a sum of $2,690 said to be owing under clause 5 of the building contract and computed at the rate of $10 per day for the period from 16 December, 1974 to 10 September, 1975. The last item in the counterclaim is for loss of rent over a period of three and a half months at the rate of $350 per month.

Certain basic facts in this case are really not in dispute and these I have set out in the next paragraph.

On 26 June, 1974 the plaintiff, a building contractor, entered into a contract (Item 2 Ex.1) with the 1st and 2nd defendants to build a dwelling house for them on their land (C.T. No.11343) at Kennedy Avenue, Nadi, for a total contract price of $30,000 and in accordance with the plans and specifications approved for that purpose by the Nadi Town Council. The 3rd defendant is the mortgagee of the property having agreed to lend the 1st and 2nd defendants a sum of $20,000 towards the contract price by way of progress payments on the works carried out. Under the building contract the 1st and 2nd defendants agreed to pay the plaintiff direct an initial sum towards the contract price for work done to the value of $10,000. This amount was varied by a letter dated 3 July, 1974 signed by the parties (Item 3 Ex.1) to $10,900. On 26 March, 1975 the certificate of completion and permit to occupy (Ex.21) was issued by the building surveyor of Nadi Town Council in respect of the dwelling house in question.

The plaintiff's claim of $6,740 is made up as follows -

total contract price	-	$30,900.00
by direct payment from 1st defendant		10,000.00
		20,900.00
by insurance in course of erection		115.40
		20,784.60
by 6 progress payments between 25.10.74 and 25.5.75 from 3rd defendant		15,464.60
		5,320.00
ADD amount for extra work		1,420.00
		$6,740.00

The extra work of $1,420 claimed by the plaintiff is disputed by the 1st and 2nd defendants who allege that no extra work as claimed was agreed upon between them. The extra work claimed by the plaintiff is said to be as follows:

Difference of tiles on groundfloor (from plain to designed)	450.00
Difference of wall boards (from plain to designed boards)	70.00
A double concrete driveway	450.00
Difference of railings (from wooden to galvanized pipes)	450.00
	$1,420.00

The plaintiff gave evidence that he was requested by the 1st defendant to do this extra work. The 1st defendant denied any such request being made by him. Reliance is also placed by the defendants upon clause 12 of the building contract which states:

> "12. The Contractor shall not be entitled to do any extra or additional work or to make any variations of the plans and specifications without the written consent of the Owner and Home Finance Company Limited."

So far as the first two items of extra work are concerned (tiles and wall boards) I do not think these could properly be regarded as extras. I am satisfied that they are provided for in the contract. There is no dispute that the other two items of alleged extra work (galvanized pipe railings and double concrete driveway) were actually constructed by the plaintiff. The question now arises is whether he did so at the request of the 1st defendant. It is not easy to decide this conflict of evidence between the two principal witnesses each being adamant about his particular version. However on the balance of probabilities I feel I must accept the plaintiff's evidence that he was verbally requested by the 1st defendant to construct the galvanized pipe railings and the double concrete driveway. These two items of extra work are fairly sizeable involving much expense. For that reason I would find it somewhat difficult to believe that the plaintiff would on his own initiative and unprompted proceed to do them without being specifically authorised to do so by the 1st defendant. Accordingly I find as a fact that the request to do the extra work had in fact emanated from the 1st defendant. In my view such request by the 1st defendant operated as a waiver of clause 12 of the contract in so far as the two items of extra work in question were concerned. I am satisfied therefore that the plaintiff is entitled to be compensated for the extra work performed in respect of the galvanized pipe railings and the double concrete driveway. I would therefore allow to the plaintiff a sum of $900 to cover the extra costs of those two items.

As indicated above the plaintiff could not succeed on his claim in respect of the other two items of alleged extra work where amount involved is said to be $520. Subtracting this amount from $6,740 leaves a balance of $6,220 in the plaintiff's claim which I am satisfied must be allowed.

It is to be noted that the extra work in respect of the construction of the driveway must of necessity have prolonged the date of completion of the contract. The driveway was not provided for in the plans and specifications and time must be allowed for it. Having regard to the size and nature of the driveway which the plaintiff had to construct I feel 8 days should be allowed by way of extension beyond the contract completion date. I will have occasion to refer again to this aspect of the

matter.

With regard to the plaintiff's claim for special and general damages, the plaintiff has not in my view made out a case with respect to each of them. His claim under those heads will therefore be dismissed.

I turn now to the counterclaim of the 1st and 2nd defendants.

The first item for which claim is made in the counterclaim is for a sum of $4,563.74 as damages for alleged defective workmanship in the construction of the dwelling house. The items concerned are twenty-two in number and these have been particularised in the statement of defence as follows:

1. Door Type 1
2. Door Type 2
3. Wardrobe
4. Curtain Tracks to Pelmets
5. Shower
6. Two shaving cabinets
7. Railings to stairs and balcony
8. Door to kitchen
9. Door to linen cupboard
10. Architraves
11. Partition to first floor
12. Roofing iron
13. Skirting
14. Battons to screen windows
15. Door to heater compartment
16. Plaster on first floor balcony
17. Kitchen wall cupboard
18. Screen doors
19. Mosquito screens
20. Storm water drains
21. Painting
22. Driveway

Since the list was compiled item 12 (roofing iron) has been rectified and is no longer in contention. The complaint about the railings is that it is unsteady and was not firmly affixed. The driveway is said to be cracking up because no steel reinforcement was used and the storm water drains could not clear waste water properly. However the general complaint about the remaining items alleged to be defective is that they were not constructed in accordance with the plans and specifications to the reasonable satisfaction of the defendants. Much evidence was led on this aspect of the matter but I need not go into it at any length because of the view I have taken in regard to the evidence of Mr. Walker (D.W.2) on this matter. I should however mention that during the course of hearing and before it was concluded the defendants arranged for Mr. Khan (D.W.4), the joinery foreman for Popular Furniture Limited, Lautoka, to visit the site at Nadi and prepare a quotation on the

works to be done in order to rectify all the alleged defects. Mr. Khan went to the site on 17 May, 1978. His quotation which is Ex.26 gives an estimate of $5,456.70 to rectify all the defects alleged by the defendants. I am afraid I find this evidence to be of little use. The quotation was prepared three years after the construction of the dwelling house was completed and did not allow for price variation over the period. Further, it was largely based on replacement costs which give no credit for wear and tear since the house was completed nor for the possibility of upgrading at the time of the carpentry and joinery work in the house. All in all the quotation is in my view too unrealistic for any proper use to be made of it.

On the evidence before me I accept that there were in fact defects not only in the materials used but also in the workmanship with regard to carpentry and joinery work as already particularised. I also accept Mr. Walker's opinion that it would cost between $350 to $450 to rectify the defects in accordance with plans and specifications. Mr. Walker was the architect supervising the work on behalf of the 3rd defendant and it was on his certificate of satisfactory progress of work that the 3rd defendant would advance money by way of progress payments towards the contract price. Mr. Walker was an expert witness with no particular interest in the result of the contest between the plaintiff on the one hand and the 1st and 2nd defendants on the other. He was an independent and neutral witness. I accept his assessment and would allow a sum of $450 to the 1st and 2nd defendants for defective workmanship in the construction of their house. However, it should be noted that Mr. Walker's assessment did not cover the railings, driveway or storm water drains which also suffered from poor workmanship. I consider $180 should be allowed for compensation for defects in those items.

The defendants also claim in their counterclaim a sum of $2,690 for liquidated damages arising from the delay in the completion of the contract on or before the stipulated date namely 15 December, 1974. This claim is based on clause 5 of the building contract which requires a sum of $10 per day to be paid by the plaintiff for any delay. The sum claimed is based on an alleged delay of 269 days. For my part I find this figure somewhat perplexing and unrealistic. Surely the delay must be for the period from 15 December, 1974 to the date when the certificate of completion and permit to occupy was issued, namely 26 March, 1975. The number of days between 16 December, 1974 (inclusive) and 26 March, 1975 (inclusive) is 101. I have also already allowed in dealing with the plaintiff's claim 8 days to be deducted because of the extra time required on the construction of the double concrete driveway which was not included under the contract. Thus the number of days for which the defendants could justly claim under clause 5 of the contract would be 93.

The plaintiff in his evidence claims 20 days of the delay was caused because work was held up just before the laying of the foundations at the request of the 1st defendant who in accordance with Hindu religious traditions wanted to wait for an auspicious day for the laying of the foundation of his house. The 1st defendant denied having made any such request and in this I accept his evidence and reject the allegation about the auspicious day as improbable having regard to all the surrounding circumstances. The plaintiff also claims that much of the delay was caused by wet weather when work could not be proceeded with. In support of his claim he produced a weather chart with which he had been furnished by the Fiji Meteorological Service for the period in question and a time book (Ex.4), the first to show the number of days of wet weather and the second to show the days on which no work was done because of rain. I find the time book to be of little evidential value because it was the plaintiff's own private compilation without any attesting signatures by any of his employees shown against the entries therein. The book is at best a self-serving document and for that reason of questionable worth. The weather chart is no better. All it proves is that during the period in question there were some wet days which fact could hardly support the contention that on several days work under the contract could not proceed because of rain. As I have said 93 days appear to me to be a reasonable figure to be allowed for delay. Thus under this head the defendants would be credited with $930.

In their counterclaim the 1st and 2nd defendants also claim loss of rent for a period of three and a half months at the rate of $350 per month. The claim is for loss of rent during January, February, March and first half of April, 1975. It seems to me that the defendants are only entitled to claim for the first three months in 1975 as the evidence is clear that the house was ready for occupation towards the end of March. The rent claimed is higher than what the defendants were able to get when they did rent the premises. The amount they received for rent was $320. In my view that would be a reasonable figure on which to assess loss of rent. I am satisfied that the defendants have suffered loss of rent during those three months to the extent of $960 and I would allow them that amount.

It will be noted from the above that the plaintiff succeeds in his claim against the 1st and 2nd defendants to the extent of $6,220 while the 1st and 2nd defendants have due to them from the plaintiff a sum of $2,520 (compensation for defective workmanship $630, liquidated damages $930 and loss of rent $960). The amount allowed in the counterclaim ($2,520) must be off-set against the amount allowed to the plaintiff ($6,220). The balance to the plaintiff is therefore $3,700.

The 3rd defendant was joined in this action no doubt in the belief that as agent of the 1st and 2nd defendants it was contractually bound by the terms of the building contract in the same way as the 1st and 2nd defendants. In my opinion the 3rd defendant could not be regarded as an agent in that sense. The 3rd defendant was not a party to the contract between the plaintiff and the 1st and 2nd defendants and therefore could not be made liable in any way under the contract. The relationship as is clear from the evidence is one of mortgagee and mortgagor as opposed to one of agent and principal as alleged. The claim against the 3rd defendant must therefore be dismissed with costs.

There will be judgment for the plaintiff against the 1st and 2nd defendants in the sum of $3,700. Because each side has succeeded to some extent in this action there will be no order as to costs.

Sgd. T.U. Tuivaga
JUDGE

Suva,
3rd July, 1978