

[G.R. No. 1116. November 02, 1903]

TELESFORO DE DIOS CHUA SOCO, PLAINTIFF AND APPELLANT, VS. MARIANO VELOSO, DEFENDANT AND APPELLEE.

D E C I S I O N

WILLARD, J.:

In the summer of 1897 the plaintiff and Don Buenaventura Veloso made a verbal contract, by the terms of which the plaintiff agreed to construct the roof of the warehouse which Don Buenaventura Veloso was erecting in Cebu, for \$5.50 a square meter. The plaintiff was to furnish all the material and labor. He commenced the work on November 4, 1897, and continued it until April, 1898, when it was interrupted by the insurrection. He left Cebu for Manila on April 18, 1898, and returned thereto in May, 1899. Don Buenaventura Veloso died in June, 1897. His brother, the defendant, eventually succeeded to his rights in this building, and about two or three days before the plaintiff's return in 1899, had renewed the work, employing one Pau as a contractor for that purpose. He refused to allow the plaintiff any intervention therein. In January, 1902, the plaintiff brought this action to recover 9,000 pesos. This sum was made up of the cost of the galvanized iron, timber, and other material which the plaintiff had bought for the work, the value of the labor furnished by him, and 1,372 pesos as profit. The judgment of the court below allowed the plaintiff 2,655 pesos. Both parties excepted to the judgment. The plaintiff moved for a new trial, which was denied. Both parties united in preparing a bill of exceptions.

1. Among other items the plaintiff sought to recover 2,408.55 pesos, the cost of the galvanized iron bought by him for the work. This item was disallowed by the court. When the plaintiff suspended work, none of this iron had been placed in position in the building. He testified that on its arrival in the fall of 1897 he placed it in a certain warehouse of Buenaventura Veloso of which he had the key and which key he retained and exhibited at the trial. He testified further that when he returned in 1899 the iron

was not in this warehouse; that his agent, who had had possession of the key in the meantime, then told him that it had been taken from that bodega to the new building. The counsel for the plaintiff in this court relies upon the statement made by his client in the court below to the effect that the defendant broke the lock and took the galvanized iron from said bodega and used it in the building. It is apparent, however, that the plaintiff could have known nothing concerning this matter, because, according to his own testimony, the iron disappeared before his return to Cebu. With the exception of this statement made by the plaintiff himself, and which we have seen is not entitled to any weight, there was no other evidence in the case to show that the defendant had made use of this material. The defendant produced a number of witnesses to prove the contrary. Lope Cabras testified that he unloaded galvanized iron bought by Buenaventura Veloso when it arrived in Cebu and placed it in the bodega near the house of Gotiaoco; no other iron was placed there; and that he took the iron from that bodega, using the key for that purpose. The witness Ciriaco Abella testified that the iron was taken from the bodega of Buenaventura Veloso. The defendant, who was a witness in his own behalf, testified that the iron which was used in the building belonged in part to Buenaventura Veloso and in part to the contractor, Pau. It is apparent that no iron was placed upon the roof until after the plaintiff's arrival in Cebu. The fact that he made no objection when, as he claims, the defendant was using his (the plaintiff's) property, in the construction of the building, is very significant. We agree with the court below that the evidence does not show that the iron was used by the defendant, and that in all probability it was lost by reason of the insurrection.

2. The court found, as a fact, that none of the timber which belonged to the plaintiff, and which was left by him in the building in April, 1898, was used by the defendant when the work was renewed in May, 1899. This finding is sustained by the evidence. The evidence on the part of the plaintiff showed that, when he abandoned the work, there was some of his timber in the warehouse still unused. The testimony of the witnesses for the defendant, Marcelo Quilatan, Lope Cabras, Catalino Rodriguez, and Ciriaco Abella, is to the effect that when the work was recommenced there was no timber whatever in the building; that it had all disappeared. The witness Marcelo Quilatan testified that he went to the building a short time after the insurrection to get his tools and that everything had then disappeared. There is also much evidence in the case to show that Buenaventura Veloso had on hand, at the time when he commenced the construction of the warehouse, a large amount of timber and that a part of this timber was used by the defendant when he completed the building.

3. The court in its decision rejected the item of profits claimed by plaintiff. In this there was no error. There was no evidence whatever in the case to show what the profits were upon the work actually performed by the plaintiff. The only evidence in the case at all upon the subject of profits is a statement by the plaintiff that if he had finished the work according to the contract he would have made from 1,500 to 1,800 pesos.
4. The court also refused to allow the plaintiff for other materials (exclusive of the iron and the timber), the value of such materials being placed by the court at \$735.74. In this there was no error. The plaintiff proved that he had bought materials, exclusive of iron and timber, for the work, which amounted to about that sum, but there was no evidence whatever in the case to show what part of this material he had used in the work at the time of the suspension or that any of it was used by the defendant.
5. We think, however, that the court erred in the matter of two items of \$50 and \$37.50, which appear in the document numbered "3" attached to the complaint. These two items are included in the item of \$702, which appears in the document numbered "7," and this item of \$702 is one of the items included in the \$735.74 rejected by the court. The result, therefore, is that the court has deducted twice these two amounts of \$50 and \$37.50.
6. The effect of the decision of the court was to allow the plaintiff for the work and labor which he furnished in the building, and for half of the cost of the timber which he had supplied for the work.
7. The plaintiff to his brief has attached no assignment of errors, and it is difficult to ascertain what exceptions taken at the trial he relies upon in this court. Apparently only two are mentioned in his brief. It appears from page 60 of the bill of exceptions that, after the defendant had testified that in the inventory of his brother's estate appeared an item of galvanized iron, the lawyers for the plaintiff moved to strike out this answer on the ground that the record of the court was the best evidence of this fact. This motion came too late. The defendant should have objected to the question before the answer was given. Moreover, in no event could the plaintiff have been prejudiced by the answer, because without this statement there was abundance of evidence to show that the said Buenaventura Veloso had during his lifetime this galvanized iron.
8. In the deposition of the witness Singson, he was allowed to state that he had heard Buenaventura Veloso say that the erection of this building was using up his stock of timber. The plaintiff objected and excepted to this statement on the ground that the plaintiff was not present at this conversation. This exception can be disposed of on the ground mentioned in the last exception. The statement could not possibly prejudice the

plaintiff, because with it left out there still remains an abundance of evidence to show that in fact Buenaventura Veloso had accumulated a stock of timber with which to construct this building.

This disposes of the appeal of the plaintiff and the result is that the judgment must be affirmed as to him, with the addition of the amount of \$87.50,

9. The first assignment of error made by the defendant is based upon section 383 of the Code of Civil Procedure. The defendant says that the plaintiff should not have been allowed to have testified to any conversation between himself and Buenaventura Veloso, the latter having died prior to the trial. This assignment of error can not be sustained for the reason that such evidence was not objected to in the court below and no exception was taken to its admission.
10. The defendant's second assignment of error based upon article 1280 of the Civil Code is disposed of by the case of Thunga Chui vs. Que Bentec, decided October 8, 1903.^[1]
11. The evidence is sufficient to show that 200 pieces of the defendant's timber were used in the work.
12. The assignment of error, based upon article 442 of the Civil Code, is unimportant in view of our holding that the defendant did not, as a matter of fact, use any timber or galvanized iron left by the plaintiff.

The defendant's appeal can not be sustained.

The judgment of the court below is .modified by adding to the amount allowed the plaintiff, to wit, 2,655 pesos, the amount of 87.50 pesos. As so modified it is affirmed. Neither party is allowed to recover any costs of the other party.

Judgment will be entered accordingly twenty days after the filing of this decision.

Arellano, C. J., Torres, Cooper, Mapa, and McDonough, JJ., concur.

Johnson, J., did not sit in this case.

^[1] Page 561, *supra*.

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