

6 Phil. 744

[ G.R. No. 3387. November 22, 1906 ]

**T. SUGO AND K. SHIBATA, PLAINTIFFS AND APPELLEES, VS. GEORGE GREEN ET AL., DEFENDANTS AND APPELLANTS.**

**D E C I S I O N**

**JOHNSON, J.:**

This was an action brought in the Court of First Instance of the city of Manila against the defendants to recover damages for the alleged breach of a certain contract entered into between the respective parties to this action on the 20th day of April, 1904.

The record discloses that on the 16th day of March, 1904, the defendants herein entered into a contract with the constructing quartermaster of the United States Army for the erection and construction of sixty-five frame buildings at Fort McKiniey, near the city of Manila, Philippine Islands.

On the 20th day of April of the same year the plaintiffs and defendants herein entered into a contract by which the plaintiffs undertook to furnish all the masonry work, carpentry work, roofing work, and all the work incidental to the construction of fifteen of the said buildings, known as lieutenants' quarters, including the digging of holes for uprights and putting in of footings, etc., all of which labor was to be performed in a good and workmanlike manner. By the terms of said contract the defendants herein were to supply all materials of whatever kind or nature that might be reasonably necessary for the erection and construction of said buildings. The defendants further obligated themselves to deliver such necessary material upon the sites of the respective buildings.

The plaintiffs, under the terms of the said contract, were to complete the said buildings within eight months from the 20th day of April, 1904 (the date of the contract). The contract further provided that the plaintiffs might commence the construction of the buildings on the 1st day of May, 1904, and must commence work not later than the 10th day of, May, 1904.

The contract contained a provision by which the plaintiffs were to forfeit \$25, United States currency, for each and every day which might be necessary to complete the said buildings after the expiration of the said eight months, with this proviso:

“That the said parties of the second part (the plaintiffs) shall not incur any forfeiture, penalty, or liability by reason of delay which may be caused by delay in the transportation ,of building material.”

The defendants herein, by the terms of said contract, obligated themselves to pay to the plaintiffs, for the labor performed by them in the construction of each of said buildings, the sum of 1,400 pesos, Mexican currency.

The contract further provided that a portion of this 1,400 pesos should be paid at certain times during the progress of the work.

The defendants herein, not having complied with their contract with the constructing quartermaster of the United States Army, were prohibited on the 4th day of January, 1905, from continuing in the performance of said contract by the commanding-general of the United States Army, Division of the Philippines; and as a consequence of which prohibition the plaintiffs werej on the same day, prohibited from continuing the performance of their said contract with the defendants. The plaintiffs claim that had the defendants furnished the material for the construction of the said quarters as it was needed and demanded by the said plaintiffs that they, the said plaintiffs, could have and would have completed the said contract within the period mentioned in the said contract.

An examination of the evidence adduced during the trial shows clearly that the plaintiffs were hindered and delayed in performing their contract with the defendants by reason of the failure of the defendants to furnish the necessary material as it was needed by the said plaintiffs. The fact that the defendants caused delay in the performance of the contract on the part of the plaintiffs by their failure to furnish sufficient supplies is evidenced by the following lettersigned by the defendants given to the plaintiffs:

“PORT WM. MCKINLEY, MALAPAT-NA-BATO.

“To the subcontractors at Fort Wm. MeKwiley.

“Sirs : Owing to the bad weather we have been unable to supply transportation adequate to meet your needs. We therefore are pleased to state that you will be allowed more time in which to fulfill your contracts. At the moment we are unable to state how much time can be given as we have not so far received an answer from the Government to our request for an extension.

“Yours faithfully,

“(Signed) GREEN, BROWN & CO.

“(Signed) JOHN APSTER PSOLL.

“(Signed) M. TAGANA.”

This letter is not dated. The plaintiffs claim that it was given to them in the month of November, 1904. This fact is not denied by the defendants.

The contract on the part of the plaintiffs should have been completed on or before the 20th of December, 1904. As further evidence of the fact that the defendants did not furnish the material in proper time to enable the plaintiffs to conclude their contract within the period stipulated, at the time the construction of said houses was taken over by the military department for completion, it was necessary for said military department to furnish large quantities of supplies after the 5th of January, 1905.

The court below, after considering the evidence, found as a fact:

“That the plaintiffs were unable to comply with the terms of their contract with the defendants, owing to the failure of the defendants to supply the transportation of the material as required under the contract.”

There was no evidence adduced during the trial of the cause manifestly contrary to this finding of facts. This court is therefore bound by such finding of facts. (De la Rama vs. De la Rama, 201 U. S., 303.)

The plaintiffs claim that by reason of the fact that the defendants failed to supply the material in accordance with the terms of the contract, and by reason of the fact that they were thereby unable to complete their contract, that they are entitled to be paid the full amount under said contract. The breach of the contract was caused by the defendants. The

evidence shows that the plaintiffs made every reasonable effort to comply with the terms of their contract. The breach being caused by the defendants, they must respond to the plaintiffs in damages. The court below found that the plaintiffs were entitled to recover the full amount for the part of the contract which the defendants had actually performed, less the amount they had actually been paid. The amount the plaintiffs were to receive upon the completion of their contract was 21,000 pesos. The lower court found that 64 per cent of the work specified in the contract had been completed and that the plaintiffs therefore were entitled to recover the sum of 13,440 pesos. The evidence shows that the plaintiffs had been paid in various ways the sum of 9,989,25 pesos, leaving a balance due the plaintiffs at the time they were prohibited from completing their contract of 3,450.75 pesos.

The plaintiffs attempted to show the percentage of each structure which had actually been completed. This percentage, as calculated by the plaintiffs, amounted to from 75 to 80 per cent of the entire amount of the labor to be performed. The defendants attempted to show that a much less percentage of the labor had actually been performed. Upon the question of the exact percentage of labor which had actually been performed by the plaintiffs, taking into consideration the testimony of the plaintiffs and the defendants, there is much confusion. The lower court made the following finding of facts upon the question:

“From the evidence presented in the case, and after duly considering the same and computing the percentage of work completed upon each building and making an average thereof, I find that there was completed, at the time the plaintiffs ceased work under their contract, 64 per cent of the total amount of the work to be performed by them under their contract.”

There was no evidence adduced during the trial manifestly contrary to this finding of facts.

The plaintiffs were partners. After the beginning of the action in the court below one of the partners died. The defendants claim that the court ought not to have proceeded with the action until a personal representative of the deceased partner had been appointed and made a party to the action, and cited section 119 of the Code of Procedure in Civil Actions in support of their contention. We are of the opinion and so hold that section 119 does not apply to actions begun by a partnership where one of the partners dies during the pendency of said action. The surviving partners, as representatives of the partnership, have a right to continue such action to a termination, without the intervention of the personal representative of the deceased partner. (Art. 229 of the Code of Commerce; *Wahl vs.*

Donaldson Sim & Co.,<sup>[1]</sup> 4 Off. Gaz., 216.)

The plaintiff in his argument before this court claimed that certain credits which the judge below allowed in favor of the defendant should not have been charged against the plaintiff. The bill of exceptions presented in this case presents no exception by the plaintiff. The plaintiff did not appeal from the judgment of the lower court; we are therefore not at liberty to consider this question. (See rule 20 of the Supreme Court.)

The judgment of the lower court is hereby affirmed with costs. After the expiration of ten days let judgment be entered in accordance herewith and ten days thereafter the case be returned to the lower court for proper action. So ordered.

*Arellano, C. J., Torres, Mapa, Carson, Willard, and Tracey, JJ., concur.*

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<sup>[1]</sup> 5 Phil. Rep., 11.

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