

TIU SIUCO, PLAINTIFF AND APPELLEE, VS. SIMEON HABANA, DEFENDANT AND APPELLANT.*G.R. No. L-21106. February 21, 1924*

Ponente: TIU SIUCO, PLAINTIFF AND APPELLEE, VS. SIMEON HABANA, DEFENDANT AND APPELLANT. STATEMENT On October 6, 1920, the plaintiff, a contractor and builder at Iloilo, entered into a written contract with Simeon Habana for the construction of a certain building on a lot of the cadaster of Jaro. The contract is specific as to the plans, specifications, and materials to be used, and provides that the plaintiff at his own expense shall furnish all the labor and materials to be used in the building, but, as a part of the contract, it is also provided that in its construction, the tearing down of "the house of strong materials now existing on said lot shall also be for the account of the contractor," and that "all the materials of the house to be demolished shall be used in the new building, with the exception of the rotten or deteriorated materials." The contract price for the completed building was P54,000, to be paid on specified installments. It is further agreed that the building shall be completed "within 8 months from the date of this contract," and that for every day which shall remain uncompleted after that time, the contractor shall pay P10 a day. It is also provided that the owner at all times should have the right to employ an inspector in the construction of the building. The plaintiff undertook to perform the contract in accord with the plans and specifications. At different times during the construction of the building modifications, changes and alterations were requested by the defendant, and at other times, after specific portions of the building were completed by the plaintiff, such portions were ordered torn down and reconstructed with other and different materials to comply with the wishes of the defendant. In the course of time, the building was substantially completed, and the defendant promptly took possession of it and has been in possession of it ever since. It is admitted that the defendant paid P54,000, the contract price, and he also paid the further sum of P4,000. After the defendant took possession, the plaintiff presented his claim, and the parties undertook to mutually settle the matter between themselves. Failing to agree, this action was brought in which plaintiff seeks to recover P67,000 over and above the P58,000 which has been paid. The contract was made, between the plaintiff and Simeon Habana, but on motion Federico Montinola was substituted as, the real party in interest, defendant. Although the execution of the written contract is alleged in the complaint, it is largely founded upon the theory that, on account of the numerous changes and alterations which were made in the construction of the building, there was a novation, and that in legal effect the contract was set aside by the actions and conduct of the parties, and of the defendant in particular, and for such reason the plaintiff was entitled to recover on a quantum meruit, and that the reasonable value of the building as it was remodeled and reconstructed was P125,000, and plaintiff prays judgment for the unpaid balance of P67,000. The amended answer admits the execution of the contract, and alleges that certain changes and alterations were made, but that it was agreed that the plaintiff should be paid for them, and that he would accept, the just and reasonable value for his labor and services for making them; that from January 6, 1922, there was a delay in the construction of the building, and that as a matter of fact it never has been fully completed; also that he loaned the plaintiff P4,404, and the defendant prays judgment for P4,268.93 on one counterclaim, and the further sum of P10 a day for the delay in the construction of the house, and the further sum of P4,404 on account of the loan. Upon such issues, the testimony was taken, and the trial court rendered judgment for the plaintiff for the sum of P53,600, with legal interest from December 28, 1921, the date of the filing of the complaint, with costs, and that he be absolved from all liability on defendant's counterclaim and cross-complaint, from which the defendant appeals, assigning the following errors: "I. The court erred in taking, as the basis for its judgment in this cause, the estimated value (P82,000) of the house constructed by plaintiff for defendant in lieu of the amount (P54,000) stipulated in the written contract, Exhibit A, dated October 6, 1920, plus the reasonable value of the extra work and materials. "II. The court erred in finding that plaintiff was entitled to the sum of twelve thousand five hundred pesos (P12,500) for extra work. "III. The court erred in finding that plaintiff was entitled to recover of defendant the further sum of eighteen thousand nine hundred pesos

(P18,900) for changes and alterations (destroyed work) made during the course of the building. "IV. The court erred in awarding plaintiff the sum of eight thousand two hundred .pesos (P8,200) as contractor's percentage in building the house for defendant Montinola. "V. The court erred in holding that plaintiff accepted the old house at a valuation of P10,000 and not P25,000. "VI. The court erred in failing to award defendant judgment against plaintiff for the following amounts: "A P3,068.93 "B 2,700.00 (5% of P54,000) "C 4,404.00 under defendant's special defense, counterclaim and cross-complaint. "VII. The judgment of the lower court is contrary to the weight of the evidence. "VIII. The judgment of the lower court is contrary to law." JOHNS, J.

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TIU SIUCO, PLAINTIFF AND APPELLEE, VS. SIMEON HABANA, DEFENDANT AND APPELLANT.
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STATEMENT

On October 6, 1920, the plaintiff, a contractor and builder at Iloilo, entered into a written contract with Simeon Habana for the construction of a certain building on a lot of the cadaster of Jaro. The contract is specific as to the plans, specifications, and materials to be used, and provides that the plaintiff at his own expense shall furnish all the labor and materials to be used in the building, but, as a part of the contract, it is also provided that in its construction, the tearing down of "the house of strong materials now existing on said lot shall also be for the account of the contractor," and that "all the materials of the house to be demolished shall be used in the new building, with the exception of the rotten or deteriorated materials." The contract price for the completed building was P54,000, to be paid on specified installments. It is further agreed that the building shall be completed "within 8 months from the date of this contract," and that for every day which shall remain uncompleted after that time, the contractor shall pay P10 a day. It is also provided that the owner at all times should have the right to employ an inspector in the construction of the building.

The plaintiff undertook to perform the contract in accord with the plans and specifications. At different times during the construction of the building modifications, changes and alterations were requested by the defendant, and at other times, after specific portions of the building were completed by the plaintiff, such portions were ordered torn down and reconstructed with other and different materials to comply with the wishes of the defendant. In the course of time, the building was substantially completed, and the defendant promptly took possession of it and has been in possession of it ever since.

It is admitted that the defendant paid P54,000, the contract price, and lie also paid the further sum of P4,000.

After the defendant took possession, the plaintiff presented his claim, and the parties undertook to mutually settle the matter between themselves. Failing to agree, this action was brought in which plaintiff seeks to recover P67,000 over and above the P58,000 which has been paid. The contract was made, between the plaintiff and Simeon Habana, but on motion Federico Montinola was substituted as, the real party in interest, defendant.

Although the execution of the written contract is alleged in the complaint, it is largely founded upon the theory that, on account of the numerous changes and alterations which were made in the construction of the building, there was a novation, and that in legal effect the contract was set aside by the actions and conduct of the parties, and of the defendant in particular, and for such reason the plaintiff was entitled to recover on a quantum meruit,

and that the reasonable value of the building as it was remodeled and reconstructed was P125,000, and plaintiff prays judgment for the unpaid balance of P67,000.

The amended answer admits the execution of the contract, and alleges that certain changes and alterations were made, but that it was agreed that the plaintiff should be paid for them, and that he would accept, the just and reasonable value for his labor and services for making them; that from January 6, 1922, there was a delay in the construction of the building, and that as a matter of fact it never has been fully completed; also that he loaned the plaintiff P4,404, and the defendant prays judgment for P4,268.93 on one counterclaim, and the further sum of P10 a day for the delay in the construction of the house, and the further sum of P4,404 on account of the loan. Upon such issues, the testimony was taken, and the trial court rendered judgment for the plaintiff for the sum of P53,600, with legal interest from December 28, 1921, the date of the filing of the complaint, with costs, and that he be absolved from all liability on defendant's counterclaim and cross-complaint, from which the defendant appeals, assigning the following errors:

"I. The court erred in taking, as the basis for its judgment in this cause, the estimated value (P82,000) of the house constructed by plaintiff for defendant in lieu of the amount (P54,000) stipulated in the written contract, Exhibit A, dated October 6, 1920, plus the reasonable value of the extra work and materials.

"II. The court erred in finding that plaintiff was entitled to the sum of twelve thousand five hundred pesos (P12,500) for extra work.

"III. The court erred in finding that plaintiff was entitled to recover of defendant the further sum of eighteen thousand nine hundred pesos (P18,900) for changes and alterations (destroyed work) made during the course of the building.

"IV. The court erred in awarding plaintiff the sum of eight thousand two hundred .pesos (P8,200) as contractor's percentage in building the house for defendant Montinola.

"V. The court erred in holding that plaintiff accepted the old house at a valuation of P10,000 and not P25,000.

"VI. The court erred in failing to award defendant judgment against plaintiff for the following amounts:

"A

P3,068.93

"B

2,700.00 (5% of P54,000)

"C

4,404.00

under defendant's special defense, counterclaim and cross-complaint.

"VII. The judgment of the lower court is contrary to the weight of the evidence.

"VIII. The judgment of the lower court is contrary to law."

JOHNS, J.:

In a well-reasoned, exhaustive opinion, the trial court found all of the material facts in favor of the plaintiff, and in legal effect that the written contract was annulled and set aside by the actions and conduct of the parties, and that the plaintiff was entitled to recover on a quantum meruit, and upon that basis, there was due and owing him from the defendant the sum of P53,600. The court found as a fact that in the construction of the building there were twelve different changes, alterations, and modifications, eleven of which were material and substantial.

It is conceded that during the construction of the building, the defendant did request a number of changes and alterations, and that, before any of them were made, the question of plaintiff's compensation was mentioned and discussed, and that in referring to such changes and alterations the defendant said: "Pase cuenta" (Bring in your bill). Exclusive of that admitted statement, and the further fact that such changes and alterations were made, and that specific portions of the building were constructed under the plans and specifications, and that they were ordered torn down and removed and reconstructed in accordance with the defendant's wishes and request, there is no other evidence of any novation of the original contract, or that it was ever set aside or annulled. Plaintiff does not claim that the novation was made at any particular time, or by any one specific act, but that in legal effect the whole combined actions and conduct of the parties amounted to a novation, and, for such reason, he is entitled to recover on a quantum meruit.

Upon the question of what constitutes a novation, in *Zapanta vs. De Rotaeché* (21 Phil., 154), this court said:

"Between the civil and common law, with reference to the extinguishment of one obligation by the creation of another, there seems to be no difference. Under both systems of jurisprudence, in order to extinguish one obligation by the creation of another, the extinguishment must be made to clearly appear."

In defining the word "novation," *Words and Phrases*, vol. 5, page 4848, says:

"Novation is the substitution of a new obligation for an existing one.

"Novation is the substitution of a new obligation for the old one, which is thereby extinguished.

"A 'novation,' under the rules of the civil law, whence the term has been introduced into the modern nomenclature of our common-law jurisprudence, was a mode of extinguishing one obligation by another; the substitution, not of a new paper or note, but of a new obligation in lieu of an old one, the effect of which was to pay, dissolve, or otherwise discharge it.

"In every novation there are four essential requisites: First, a previous valid obligation; second, the agreement of all the parties to the new contract; third, the extinguishment of the old contract; and fourth, the validity of the new one. (*Clark vs. Billings*, 59 Ind., 508, 509.)

"Novation is a contract containing two stipulations; one to extinguish an existing obligation, the other to substitute a new one in its place. (Civ. Code La., 1900, art. 2185.)

"Novation requires the creation of new contractual relations, as well as the extinguishment of old. There must be a consent of all the parties to the substitution, resulting in the extinction of the old obligation and the creation of a valid new one. (*Izzo vs. Ludington*, 79 N. Y. Supp., 744, 746; 79 App. Div., 272.)

"A novation is a new contractual relation. It is based upon a new contract by all the parties interested. It must have the necessary parties to the contract, a valid prior obligation to be displaced, a proper consideration, and a mutual agreement.

"It is a necessary incident of a novation that the old debt shall have been destroyed by the new arrangement.

"Novation, at common law, is mainly the same as in the civil law. There must always be an old debt extinguished as a consideration for the new one.

"A novation is never presumed, but must be established by the full discharge of the original debt by the express terms of the agreement or the acts of the parties, whose intention must be clear.

"Novation takes place only when the contracting parties expressly disclose that their object in making the new contract is to extinguish the old contract, otherwise the old contract remains in force and the new contract is added to it, and each gives rise to an obligation still in force. (Hard vs. Burton, 20 Atl., 269, 271; 62 Vt., 314.)

"Novation is never presumed, and must be expressed. (Hamlin vs. Drummond, 39 Atl., 551, 91 Me., 175.)

"It was a principle of the civil law that there must be an express intention to novate—animus novandi. A novation is never presumed. (Sharp vs. Fly, 68 Tenn. [9 Baxt.], 4, 10.)

"To constitute novation it must clearly appear, however, that a substitution of a new debt for an old one was in fact intended. Novation is not to be presumed, and, in the absence of proof of a special agreement, the mere acceptance of the security of a third person is deemed a conditional payment or the receipt of collateral security. (McCartney vs. Kipp, 33 Atl., 233, 235; 171 Pa., 644.)" Corpus Juris, vol. 9, page 721, lays down the rule:

"SEC. 55. E. Operation and effect.—Slight modifications and variations made with the consent of the parties do not abrogate the entire contract and the rights and obligations of the parties thereto, but the original contract continues in force except as altered by such modifications and alterations ; and this is especially true where the original contract expressly provides that modifications and alterations in the plans of the work may be made. Where, however, the original contract is deviated from in material respects so that the work cannot reasonably be recognized as that originally contracted for, the original contract should be treated as abandoned," citing many authorities in the notes, among which is the case of Hood vs. Smiley (36 Pac, 856; 5 Wyo., 70), in which it is said:

"1. Where additions are ordered to be made, and are made, to a building which a workman has contracted to furnish for a certain sum, the original contract is held to exist as far as it can be traced to have been followed, and the excess must be paid for according to its reasonable value.

"2. It is only where the alterations are so great that it is impossible to follow the original contract that it will be deemed to have been wholly abandoned, so that the contractor can recover upon a quantum meruit.

"3. The burden of proof, to avoid the contract, is upon him who claims its abandonment."

The rule there announced is sustained by the authorities. It must be conceded that, upon the facts shown in the record, there are some grounds for holding that there was a novation of the original contract. But upon that point, tested by the authorities, we cannot agree with the trial court. When the defendant said to the plaintiff "pase cuenta" (bring in your bill), it is far more reasonable, upon the facts, to construe it as meaning that defendant intended that plaintiff should bring in his bill for the reasonable value of any alterations or changes which were made at his request. There is no claim or pretense that anything was said by either party about terminating or rescinding the contract, or that the remark was ever made at any other time than when defendant requested changes and alterations.

The original contract specified the price of the building, the amount of payments, and when they were to be made. There was no occasion for the defendant to notify the plaintiff to bring in his bill for anything under the written contract. As we construe it, the statement of the defendant "bring in your bill" was never intended to apply to the original contract, and should be confined and limited to a bill for the amount of any changes, alterations, or

modifications which were made at defendant's request.

Although numerous changes were made, and there was a material increase in the cost of the building, there was no material change in its size or dimensions. In other words, the original contract was used as a basis for the construction of the building, and any changes or alterations which were made were founded upon the original contract, and were made with the understanding and agreement that the defendant would pay the reasonable value of all of such changes and alterations.

As we construe the evidence, the plaintiff was never released from the original contract. The case for the plaintiff was tried upon the theory that he was entitled to recover upon a quantum meruit, and as to what was the reasonable value of the building as it was constructed. For such reason, the evidence as to what was the reasonable value of the alterations and changes, and for the tearing out of the completed work and its reconstruction at the defendant's request is not clear or convincing. The contract price was P54,000, and it is admitted that the defendant has paid the plaintiff P58,404.

The trial court found as a fact that, including the tearing out of portions of the building which were constructed under the contract, and the reconstruction of such portions, there were twelve different changes, alterations, or modifications, which were made at the instance and request of the defendant, and that the plaintiff was entitled to recover on eleven out of the twelve.

Upon the basis of a quantum meruit, the trial court found that over and above all payments and counterclaims, there was due and owing the plaintiff P53,600.

This court has given this case the careful consideration which its importance deserves. There is no merit in either one of defendant's counterclaims. The item of P4,404, which the defendant claims was a loan, was nothing more than a payment on account, and will be treated as such. Although there is more or less conflict in the evidence and some difference of opinion as to the reasonable value of the modifications, changes, and alterations which were made, yet, founded upon the contract and the reasonable value of such changes, all things considered, we are clearly of the opinion that, over and above all payments, set-offs, and counterclaims, the plaintiff is entitled to judgment against the defendant for the sum of P20,000 as a balance due and owing him on the contract price and for the reasonable value of the changes and alterations which were made in the construction of the house.

The judgment of the lower court will be reversed and modified, and one will be entered here in favor of the plaintiff and against the defendant, Federico Montinola, for the sum of P20,000, with legal interest thereon from the 28th day of December, 1921, and costs in the lower court. Neither party to recover costs on appeal in this court. So ordered.

Araullo, C.J., Johnson, Malcolm, Ostrand, and Romualdez, JJ., concur.

DISSENTING

AVANCEÑA, J., with whom concurs STREET, J.:

I do not agree with the decision of the majority so far as it allows the plaintiff the sum of P20,000 as the cost of the additions and alterations made in the building. The plaintiff testified that the cost of said additions and alterations is P18,000 and the decision of the majority accepts this testimony of the plaintiff, allowing him, in addition, a certain per cent on this amount as profit. But a witness for the plaintiff, Mr. Aquino, who was the provincial engineer and who was considered by the trial court as a credible witness, has fixed the costs of these additions and alterations at P12,000. It is true that, according to Mr. Aquino, his estimate does not include the

value of the labor in the destruction of the works already made, but even then the estimate made by the plaintiff appears to be clearly excessive. In the first place, I do not believe, as the plaintiff testified, that he first constructed the balcony and the kitchen with wood and then destroyed and rebuild them with cement. The plaintiff has shown himself unworthy of belief and the trial court must have judged him so, as regards his claim to the value of the increase in the height of the house, which was also claimed by him in his complaint. According to the plaintiff, after having erected the posts with the height stated in the contract and connected them with cleats and belts, the defendant wanted the house built higher and for this reason he had to do again what was already done and make it higher than was agreed upon, to conform with the wishes of the defendant. The lower court, however, rejected this claim of the plaintiff, because in the ocular inspection of the house by the court, it was found that, as it stood, the height was precisely what was stipulated in the contract.

From this finding of the court the plaintiff did not appeal. So I do not believe that any value must be given to the testimony of the plaintiff that he first built the balcony and kitchen with wood, and then, as the defendant wanted it made with cement, he had to destroy and rebuild them in accordance with the wishes of the defendant. Against this testimony of the plaintiff, some of the witnesses presented by the defendant testified that the plaintiff had not first built the front balcony and the kitchen with wood, but did build them originally with cement. Nothing appears in the record contradicting these witnesses in any way, some of whom are neighbors who have continuously seen the work, and one of them is the very person appointed by the defendant to inspect the work, who has in fact been inspect- ing it every day.

On the other hand, I believe that, under the terms of the contract, reasonably construed, specially where it says that in the balcony small tiles must be used, the balcony must necessarily be of cement.

In my opinion, the plaintiff is entitled to a compensation for the costs of the additions and alterations in the work only on the basis of the estimate made by the engineer, Mr. Aquino. The value of the balcony must, however, be excluded, with the exception of the small ceiling that was placed in the center and which is really an addition to the work, according to the contract. But the value of the works omitted and the difference between the materials stipulated in the contract and that of those actually employed in violation thereof, as was sufficiently established in the evidence, must in turn be charged against the plaintiff.

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