

GEORGE EDWARD KOSTER INC., PLAINTIFF AND APPELLEE, VS. JOSE C. ZULUETA, DEFENDANT AND APPELLANT.

G.R. No. L-9305. September 25, 1956

Ponente: LABRADOR, J.

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LABRADOR, J.:

Appeal from a judgment of the Court of First Instance of Manila, sentencing defendant and appellant to pay plaintiff and appellee (1) P46,093.77, with interest of 6 per cent on P30,000 thereof from September 27, 1949 and on P16,093.77 from December 8, 1949 until the amount is fully paid, (2) 20 per cent of the full amount thereof as damages by way of attorney's fees, and (3) the costs of the suit.

On June 29, 1948 plaintiff and appellee undertook to construct for defendant and appellant the building known as the Zulueta or Antonio Apartments, a four-story re-enforced concrete edifice at the north corner of Mabini and Arquiza Streets, City of Manila. Construction was to be in accordance with plans and specifications prepared by Manalac Construction Co., which acted as defendant and appellant's architects. The owner was to furnish the re-enforcing steel, the cement, the steel windows, and the plumbing fixtures and accessories. The contract price was P286,755. It was expressly agreed that should any change in the construction be agreed upon and made, the cost of the same shall be an addition to the contract price. Two hundred and fifteen days was agreed upon as the period for the construction and termination of the edifice, but that said period was to be automatically extended for delays occasioned by late deliveries of the materials, and by fortuitous cases like, earthquakes and bad weather.

As to acceptance, the following terms and conditions ,appear in the contract:

"Article 7.—Acceptance and final payment (a) final payment shall be due and payable ten (10) days after the essential completion of the work provided the work be then fully completed and the contract fully performed and provided further that the Contractor shall have delivered to the Architect or the Owner such Final Certificates as may be required by the public authorities.

"The contractor shall be under obligation to repair hidden defects and leaks in the construction which may be discovered within six (6) months after final completion and acceptance of the construction.

"(b) Upon receipt of written notice that the work is ready for final inspection and acceptance, the architect shall promptly make such inspection, and when he finds the work acceptable under the contract and the contract fully performed, he shall promptly issue a final certificate over his own signature, stating that the work provided for in this contract has been completed and is accepted by him under the terms and conditions thereof, and that the balance found to be due the contractor except the final ten per cent (10 per cent) as noted in said final certificate, is due and payable.

"(c) Before issuance of final certificate, the contractor shall submit evidence satisfactory to the architect that all payrolls, material bills, and other indebtedness connected with the work have been paid.

"Should for any reason beyond the contractor's control or responsibility, due to any reasons as set forth in.

these contractual documents, the contractor be unable to supply the final certificate of acceptance by the city authorities due to portions of the work being incomplete which are not a part of the contractor's work, then said final payment shall be made to the contractor notwithstanding the final certificate of acceptance being not issued: Provided, however, that the contractor shall certify to the satisfaction of the owner that all the work, terms and conditions described in this contract have been performed according to specifications." (Exhibit "A".)

The original contract price was paid in full and the action seeks to recover the additional cost of constructing (a) a swimming pool and changes on the fourth floor, (b) a recreation room, and (c) electric wiring for the swimming pool and an additional pump Exhibits "C" and "N"). The most important defenses set up against the claim are abandonment of the construction and delay in its completion and failure of plaintiff and appellee to secure a final certificate from the public authorities, and defects in the construction, such as leaks, unevenness of the terrace filing, cracks on the walls of the building, etc. The trial court found that the building was completed in accordance with the contract, that the delay in completion was caused by delays in furnishing the building materials and by additional work agreed upon by the parties and substantial changes in the original plan, and that the alleged defects were waived in advance by defendant and appellee, who had insisted on the construction of the swimming pool against the advice of plaintiff, etc.

On this appeal defendant and appellant contends that there was no completion and acceptance, as required in Article 7 of the contract, and hence plaintiff and appellant is not entitled to the payment of the amount of P46,093.77 demand in the action.

There is no question that the work had been completed, but it is also undisputed that there were leaks in some parts of the edifice, same defects in the drainage, and the contractor had not, at the time of the action, delivered the final certificate from the public authorities required of him by the provision of the contract above quoted. But against these objections, we have the following facts: (1) On September 8, 1949 the owner's architects made a certificate of final acceptance as regards the work (Exhibit "B"); (2) there was the occupation of the edifice by the owner, without objection to the manner of the construction, and as to the absence of the certificates of inspection required of the public authority; (3) the contractor had asked the owner to exempt him from inability to secure final certificate of acceptance because the original plans and specifications were not followed and deviations from building permit plans were made, thus:

"* * * there is still one additional subject which must be clarified and that is your instructions to construct the building according to the plans which we estimated from and not from the plans issued by the City Engineer's Office." (Exhibit "FF-1") (Underscoring ours.)

and Zulueta, upon recommendation of his architects, expressly agreed thereto, thus:

"In acknowledgment of your letter of May 19, 1949, requesting me not to hold G. E. Koster, Inc. for any civil liability due to structural failure that may arise from the construction of the swimming pool on the roof of my Antonjo Apartments, kindly inform Messrs. G. E. Koster, Inc., that I am expressly waiving what ever rights the law recognize in my favor as owner of the newly constructed Apartment. Be it known to them, also, that I will hold them responsible for any defects that may arise due to faulty construction and for any leakage in the swimming pool due to faulty waterproofing." (Exhibit "II-2")

(4) the cracks in some parts of the buildings were due to the installation of the swimming pool in the fourth floor, which increased the weight of the building and the load on its beams, and the leaks on the walls were caused by the use of concrete blocks, but the specifications did not call for the use of waterproofing materials and construction was according to the specifications. (Note that the leaks did not come from the swimming pool, which was not waived.) The objections against the building were not due, therefore, to defects in the form and

manner of the construction or to a faulty construction, original and as modified, but to defects in the plans and the materials called for therein. There is another reason for dismissing the owner's objections. It was expressly agreed that as to hidden defects and leaks, the contractor was to be responsible only for those which may be discovered within six months after the final acceptance of the construction. The final acceptance was made on September 8, 1949. The action was brought on August 29, 1950, and only then did the defendant and appellant raise his objections. The objections to the construction must also, therefore, be considered filed out of time and name must be overruled.

We have carefully reviewed the evidence and the analysis and appraisal thereof by his honor, the trial judge, and we find nothing that can justify a modification or reversal of the trial judge's findings and of his legal conclusions as to the main issues involved in the case. But we are not entirely in accord with his honor in the grant of attorney's fees as damages in favor of plaintiff and appellee. He says:

"The Court has, however, found that plaintiff has presented evidence to show that in filing this suit it has retained counsel whom it has agreed to pay a fee of the sum of P9,218.75, and that the filing of this case should not have been necessary if only the defendant paid his just and lawful obligation"

At common law, the successful party usually has no right to have the fees of his attorney, as such, taxed against his opponent (14 L. ed. 181). The court will not ordinarily allow counsel fees to the successful party. Each party to the action must pay his own lawyer * * *. Counsel fees paid in prior action have been allowed * * * (where) the conduct of the party against whom they allowed, so directly and certainly caused the expenditure for this purpose, that the loss of the amount so paid was easily within such casual relations to the defendant's wrong as to warrant the assessment of the damages in compensation for it. (Sears vs. Inhabitants of Nahant, 102 N. E. 491.) Our rulings before the New Civil Code took effect (the present case having arisen before) have been as follows:

"It is not sound public policy to place a penalty on the right to litigate. To compel the defeated party to pay the fees of counsel for his successful opponent would throw wide the door of temptation to the opposing party and his counsel to swell the fees to undue proportions, and to apportion them arbitrarily between those pertaining properly to one branch of the case from the other.

"This court has already placed itself on record as favoring the view taken by those courts which hold that attorney's fees are not a proper element of damages." (Tan Ti vs. Alvear, 26 Phil. 566; The Borden Co. vs. Doctors Pharmaceuticals, Inc., 90 Phil., 500.)

"* * * Counsel fees, other than those fixed in the rules as costs, are not an element of recoverable damages." (Jesswani vs. Massaram Daldas, G. E. No. L-4651, May 12, 1952.)

We are satisfied from a review of the evidence that the refusal of defendant and appellant, although the case is finally decided against him, can not be said to have been caused by mere bad faith. The defects in the building were proved at the trial and certainly he can not be blamed for entertaining the belief that they were caused by faulty construction. To sentence him to pay plaintiff's lawyer's fees would be imposing a penalty on his right, to litigate. Even under the New Civil Code (Article 2208, par. 5) plaintiff and appellee would not be entitled to recover the fees paid to his attorney as damages, as no bad faith on the part of defendant and appellant was shown, in his refusal to pay plaintiff's claim. The part of the judgment sentencing defendant and "appellant to pay P9,218.75 must be reversed and defendant and appellant absolved from said demand.

Wherefore, with the modification above indicated, the judgment is hereby affirmed, with costs against defendant and appellants. So ordered.

Paras, C. J., Padilla, Montemayor, Bautista, Angelo, Concepcion, Reyes J. B. L., Endencia, and Felix, JJ., concur.

RESOLUTION

LABRADOR, J.:

This has reference to the motion for reconsideration filed by defendant and appellant, wherein claim is made that no sufficient evidence to sustain the court's finding that the leaks and defects of which defendant complains were due to the modification of the plans by the building of a swimming pool on the third floor, which swimming pool was not in the original plan. It is to be noted that defendant's own expert witness Gregorio P. Gutierrez could not assert that the construction and the materials were not in accordance with the specifications called for in the contract (t.s.n. pp. 233-235, Vol. IV). On the other hand, during the, period of construction no objection was ever registered by defendant's engineer to the manner in which the construction was being undertaken or to the materials used therein. And when delivery was made the construction was accepted without any objection being registered at all. Again at the ocular inspection, it was explained that the sinking of the floor was caused by the added weight of the building caused by the addition of the swimming pool and other additions, not given in the original plans. These are sufficient evidence to support our conclusion that the defects found were not shown to be due to faulty construction but to the additions to the original plan.

It is to be noted that a contractor's engagement is to build according to plans and specifications; the designs are made by the architect, and as to the sufficiency or adequacy of the structure carrying the weight of the building, the builder may not be held to account. The foundation was designed to carry a specified load, the building without the swimming pool. As the owner insisted on putting additions without a change in the foundation, the fault does not lie in the builder-contractor, but in the owner himself, and in the failure of his architect to provide the adequate foundation to take care of the new weight caused by the additions.

There is no need to consider the other ground for the reconsideration as the same is sufficiently answered in the decision.

The motion for reconsideration is denied. So ordered.

Paras, C. J., Bengzon, Padilla, Montemayor, Bautista Angelo, Concepcion, Reyes J. B. L., Endencia, and Felix, JJ., concur.

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