

ARTHUR F. ALLEN, PLAINTIFF AND APPELLANT, VS. THE PROVINCE OF BULACAN, DEFENDANT AND APPELLEE.

G.R. No. 11434. December 20, 1916

Ponente: TRENT, J.

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TRENT, J.:

On January 15, 1913, the Bureau of Public Works, acting on behalf of the Province of Bulacan, caused to be published an advertisement calling for sealed proposals, to be opened January 27, 1913, for constructing eight reenforced concrete bridges. The plaintiff submitted a proposal in accordance with the conditions set forth in the advertisement, and, on February 3, 1913, the provincial board adopted a resolution authorizing the Director of Public Works to enter into a contract with the plaintiff for the construction of five bridges of the kind mentioned in the advertisement. This resolution contained a proviso that the Director should see that the aggregate cost of the five bridges did not exceed P47,030, and further declared that, in view of the fact that the province was to furnish all the steel for the bridges, the contract of the plaintiff should, in the opinion of the board, be for the fixed sum of P33,820. On March 8, 1913, this resolution was revoked by the board and another adopted authorizing the Director of Public Works to enter into a contract with the plaintiff for the construction of the five bridges for the price named in the plaintiff's proposal (P39,400) and to include in such contract a provision that the province should furnish all of the reenforcing steel on board the cars at the station nearest to the bridges sites at the rate of 11 centavos per kilo, to be deducted from the P39,400. The formal contract was duly executed by the plaintiff and the Director of Public Works on April 16, 1913, in accordance with the last mentioned resolution of the provincial board.

On July 25, 1913, James, the plaintiff's duly authorized representative, sent the following letter (Exhibit No. 2) to the provincial board of Bulacan:

"MALOLOS, BULACAN, July 25, 1913.

"GENTLEMEN: I have the honor to inform you that the earliest date at which I could procure a proper kind of cement and in a sufficient quantity for beginning work on the Malolos-Hagonoy and Malolos-Calumpit Bridges, was June 16. The inclosed letter from Messrs. Findlay, Richardson to the honorable board explains the difficulty.

"The notification of the awarding of the contract to us was forwarded by the Director of Public Works during the last week in February. During that same week the cement dealer made delivery of the last of an order placed in August, 1912, for an Ilocos Sur contract, but until the abovementioned date (June 16) made none for the work in Bulacan.

"Therefore, gentlemen, in view of this unavoidable delay in the starting of work requiring this essential material, for its construction, I have the honor to request an extension of time beyond August first, for completion of said bridges, of one hundred and ten (110) working days, which is approximately the loss of time incurred by non-delivery of cement.

"The piles have already been cast at Paombong, Sapang Patay, and Pinagtulayan Rivers, and will be cast at Baungun the coming week and immediately following that at Kalumpang Creek. Driving of these piles commence at early date.

"Trusting that this will receive your consideration from the point of view that delays such as in this instance are not to be foreseen and justify an extension of time, I am,

Very respectfully yours,

(Sgd.) "FRANK T. JAMES,

"Contractor.

"THE HONORABLE PROVINCIAL BOARD,

"Province of Bulacan, Malolos.

"(Through the District Engineer.)"

On August 21, 1913, the provincial board, acting upon the favorable report made by the provincial governor in reference to the extension of time asked for in the abovementioned letter, adopted the following resolution:

"It was unanimously resolved to grant to the said contractor an extension of 110 days beyond the period stipulated for the delivery of the said bridges, from the 1st of August to the 18th of November, 1913, both dates inclusive; and that the engineer be notified of this resolution for his information."

One of the bridges was completed prior to November 18, 1913, and the other four were completed and accepted by the province's representatives on the following dates: November 29, 1913, December 29, 1913, January 3, 1914, and February 9, 1914. The province paid the plaintiff the full contract price of the bridges less P3,300, retained as -liquidated damages for failure to complete the work within the time specified in the resolution of August 21, 1913. This action was instituted by the plaintiff against the Province of Bulacan for the purpose of recovering the P3,300 thus retained, P367.73 costs of excess steel charged to the plaintiff, and P1,982.13 damages caused by the defendant's negligence. From a judgment of the Court of First Instance absolving the defendant, with costs, the plaintiff appealed and now insists that the trial court erred (1) in finding that the delay in completing the bridges was due to the fault and negligence of the plaintiff, (2) in holding that the defendant was entitled to deduct the P3,300 as a penalty or liquidated damages, and (3) in failing to render judgment in favor of the plaintiff for the amounts prayed for. It will thus be seen that the principal question presented for determination is that relating to the right of the defendant to withhold the P3,300 as liquidated damages.

Counsel for the plaintiff urge that the parties intended that the original contract period for the completion of the bridges should be six months; that as the defendant and its agents delayed the signing of the contract from February 3 to April 16, August 1 became inoperative, thereby imposing upon the plaintiff only the obligation to complete the work within a reasonable time and not on or before August 1, leaving "the defendant to an action for counterclaim for such damages as it may have suffered due to any unnecessary delay on the part of the plaintiff;" and that the delay in the commencement of the construction was due to the failure of the officials to promptly comply with their duties and obligations. Counsel then say that: "Certainly the conditions supervening and which actually prevented the execution of the contract, and the completion of the work thereunder as originally planned, were extraordinary and unforeseen, and were not created by any act of the plaintiff."

Allen, the plaintiff, testified that he received a copy of the contractor's bond about the 10th of April; that the contract stated that he was to finish the bridges by August 1st; that upon the receipt of the letter from the Director of Public Works, dated February 25, he went to the law clerk of the Bureau of Public Works, who had charge of

the contracts and bonds, and requested the bond; that Jones declined to give him the bond because the Bureau and province had disagreed in reference to the form of the contract; that he repeatedly asked the law clerk for the bond, in order to have it executed, so that he could go ahead with the work; that the first steel was delivered the latter part of May or the early part of June; that this steel could only be used for the upper portion of the structure; that the steel for the Kalumpang Bridge was not delivered at San Marcos, but at Malolos; that San Marcos is much nearer to that bridge site than Malolos; that they would have been able to have transported the steel without any difficulty if it had been delivered to San Marcos; that the reason that he could not finish the bridge before November was due to the failure of the provincial government to deliver the steel; that the contract required that the piles ripen thirty days before using them; that he contracted for cement, but the dealers had not forwarded it until the steel arrived, that soon after the steel arrived the cement was forwarded and arrived some three days later; that there was other cement in the market aside from that which he had ordered from Findlay, Richardson & Company; and that he went to Australia about the middle of July and returned the last of October or sometime in November.

James, the civil engineer who was in charge of the work for the plaintiff, testified that he and the district engineer went and looked over the bridge sites about the 20th or 25th of May; that he directed the work until about the 20th of January, 1914, when all the bridges had been completed except the Kalumpang Bridge, which was nearly completed; that with all materials on hand, a reasonable time for completing¹ the five bridges would be six months; that when he "went on the job" there was enough gravel and sand placed at the sites to cast the concrete piles, together with lumber and the necessary tools; that practically everything was ready to cast the piles by the 25th of May; that on that date no steel whatever had been furnished by the province; that the first steel was received by the railroad company on the 31st of May and arrived in Malolos a day or so later; that this first steel could only be used for the girders and Blabs—the superstructure, practically the last thing done; that the first steel for concrete piles arrived after July 7 for the Kalumpang Bridge, and subsequent to June 10 for the other bridges; that among the first or second shipments of steel there was some wire mesh which was not requisitioned for; that ¼-inch round steel was the kind desired by the contractor, the substitution being allowed by the Bureau of Public Works; that some of this wire mesh was in such a poor condition that it could not be used; that he called the district engineer's attention to this fact and the latter agreed with him; that he was aware of the extension of time up to November 18 granted by the provincial board; that two of the bridges were completed before November 18 and two others before January 1; that only two rolls of wire mesh were delivered at San Marcos and the other at Malolos; that he could not haul the steel after it arrived at San Marcos to the bridge site on account of the condition of the roads, as the rainy season had set in; that 274 barrels of cement had been hauled to the site before any large amount of steel had arrived; that he knew that according to Allen's proposal the bridges were to be completed before August 1; that he wrote the letter requesting the extension of time for the completion of the bridges; that the reason for the extension is stated in the letter; that he merely asked for an extension of time—at that time the mesh steel had not been replaced with the ½-inch steel; that they were having high water, thirty days of continuous rain in August and September; that if the steel had been furnished promptly as requested he would have had no trouble in securing cement; and that he wrote the letters marked Exhibits Nos. 2, 4, and 5.

Harrison, district engineer and first witness for the defense, testified that Allen's bond was signed on or about April 15 and the contract on the 16th; that the reason that Allen did not sign the bond and the contract immediately after his bid was accepted, according to Allen's statement to him, was due to the fact that he (Allen) was unable to secure bondsmen; that Allen was repeatedly requested to file the bond by him (the witness); that it is true that Allen asked him to make requisitions for the steel as early as February 2; that he did not do so then because there was no contract between the parties; that the requisitions were made up soon after he was officially informed that the contract had been signed; that the steel ordered was that which was called for in the plans which

formed a part of the contract; that wire mesh was furnished in the place of ¼-inch steel because that was the kind called for in the list of materials which formed a part of the contract; that the first shipment of steel arrived in Malolos on May 31 or June 1; that the steel for the piles did not arrive in the first shipment, but came later in June; that the first shipment of cement arrived in Malolos about June 16; that James stated to him that it was almost impossible to secure cement in Manila, and that the delay was unavoidable on account of the shortage of cement; that he knew of no other reasons for the extension of the time than those stated in James' letter, dated July 25; that all the steel had arrived before that date; that most of the steel for the Kalumpang Bridge was delivered at Malolos because the contractor preferred it; that some three rolls of wire mesh was found defective and had to be substituted by others, which arrived about October 14; that the contractor never notified him when this wire mesh was needed; that this wire mesh was received weeks before it was needed; that when this wire mesh was delivered the contractor had completed the casting for piles and had driven two piles.

"Q. Will you please testify as to the nature of the bridges at the date on which this letter was written, November 3? A. November 3 the piles had been driven in the Paombong bridge but none of the floor work had been done; the wire mesh is only used in the floor of the bridge; it is part of the reenforcing or what we call slab and girder work, or what is in reality the floor of the bridge; on the Paombong bridge the contractor was just about ready on this date to put the floor in but he hadn't fixed his forms quite in place; on the Patay bridge none of the piles had been driven and, of course, the floor was not even contemplated for some weeks; on the Bagungun bridge the driving of the piles was practically completed but the flooring could not be placed until the piles were driven and the false or form work in which the concrete was cast was removed, so the floor wasn't in place; on the Pinagtulayan bridge no piles had been driven; and on the Kalumpang bridge no piles had been driven. So, on November 3, it was impossible for the contractor to use this mesh."

This witness further testified that the wire mesh was used in the floors of the structures; that the first work that the contractor did in which he could use this wire mesh was about the 6th or 7th of November; that the contractor began driving piles about the 7th of October; that the delay which occurred after the piles had been cast and before they were driven was due to the fact that the contractor had no machinery on the ground with which to drive the piles.

George P. Banner, provincial treasurer of Bulacan, testified that Exhibit No. 6 shows a statement of the steel delivered for the bridges, the date and numbers of the requisitions, the date and numbers of the bills of lading, and the dates the steel arrived at the railroad station; that he saw the bridges at different times from about June 1 up to the time of their completion; that three or four days before the resolution of the 20th of October was passed, he and the provincial governor inspected the bridges; that a pile driver on the Paombong Bridge had fallen into the river and only one or two piles had been driven; that on the other bridges there had been approximately no work done except to cast the piles and tear out some of the old bridges; that the condition of the bridges, as noted by himself and the provincial governor by personal inspection, was that piles had been cast, lying at the bridge sites ready to be driven, but that no work had been done except to cast the piles up to October 15, or about that date.

Groxon, superintendent of construction, testified that he was⁴ employed on three of the bridges after October 20 by the province; that on the Paombong bridge two piles had been driven; that the pile driver at that time had just been raised from the river and was almost ready to start driving the other piles; that at Patay and Pinagtulayan (names of two of the other bridges) the piles had been cast before, but nothing else had been done; that on Bangungun, the name of the other bridge, there was a pile driver in the course of erection or being hauled piece by piece and they were getting things assembled for the work.

Allen, the plaintiff, was recalled and testified that he never made the statements attributed to him by Harrison with reference to the delay in filing the bond; that he never had any difficulty in getting bondsmen; that the only delay after the 10th of April, the date he received the bond from the Bureau of Public Works, was because Sellner was

absent from Manila for three or four days.

James was also recalled and testified that sufficient cement had arrived to cast the piles before the arrival of the steel for that purpose; that on the 3d of November it was not possible to make use of the wire mesh because the caps had not been placed on the concrete piles and the reinforcing steel for the slabs could not be placed because the reinforcing steel for the concrete piles had not arrived at an early enough date to permit of casting; that it is true that he stated to the district engineer that he would rather have the steel delivered to Malolos than San Marcos because then, in the month of July, the rainy season had begun and the road from San Marcos to the bridge site was impassable; that if the steel had been furnished before the rainy season started he could have had his machine there ready for work; that when the machine had been gotten ready to send there it was put on another job because the steel had not arrived; that later on the other machine was delayed on account of high water in the rivers; that generally there would elapse anywhere from ten to thirty days after the removal (arrival) of the steel, as shown in Exhibit No. 6, before he would receipt for the same; that the first shipment of cement arrived previous to June 16; and that he did not know whether the last shipment of cement had arrived on January 20, when he quit the job, or not.

Exhibit No. 3 is a letter dated July 24, 1913, sent to the provincial board by Findlay, Richardson & Company, informing the board that they were unable to supply James with any "Alsen" cement, which was the brand supplied the Insular Purchasing Agent for use in the bridges, from February until June 16. And Exhibit No. 4, dated November 3, 1913, is a detailed statement made by James to the Director of Public Works as to the condition of the work on the five bridges on that date. According to this exhibit or letter, all the concrete piles had been driven and the concrete had been placed in the superstructure on the Paombong Bridge. As to the Patay Bridge, the piles had ripened, but the pile driver, engine, etc., had just arrived. The driving of the piles had just been finished for the Bangungun Bridge. The piles for the Pinagtulayan and Kalumpang Bridges had been cast and ripened, but had not yet been driven. Exhibit No. 6 shows conclusively that all of the steel for four of the bridges arrived in Malolos between May 31 and June 15; that the steel for the other bridge (Kalumpang) arrived between June 11 and July 9; that the first shipment, which arrived on May 31, was not signed for by the contractor until June 16; that the other shipments, which arrived before June 15, were not signed for by the contractor for several days (two to twenty-three days) after their arrival; and that one shipment, which arrived on June 8, was not receipted for until July 30.

The foregoing testimony and exhibits establish beyond question that the failure on the part of the province to deliver the steel earlier, after the contract had been executed, did not in any way cause the delay in completing the bridges nor contribute thereto. James, in his letter of July 25 to the provincial board, stated that the earliest date that he could procure the proper kind of cement and in sufficient quantity to begin work on two of the bridges was June 10; that the piles for two others had been cast; that the piles for the fifth would be cast the following week; and that the driving of the piles would commence at an early date. Not a word was said in this letter about the steel not being delivered in time. In fact, out of the twenty-seven shipments of steel all had arrived before June 16, except four and these four were to be used in the Kalumpang Bridge, which, as late as November 3, had hardly been commenced, the piles only having been cast. The three rolls of wire mesh which were substituted for the defective ones did not arrive until October 14, nevertheless, they could not be used before November 3 in either of the bridges, with the possible exception of Paombong, as James in his letter of that date states. The three rolls were so small a portion of that kind of material that their delay certainly could have made no difference, especially when taken into consideration with the condition of the work even on November 3.

As the province did not cause any delay in the construction of the bridges by reason of not having delivered the steel earlier after the signing of the contract, consequently, it is self-evident that no delay was caused by reason of

the failure to order the steel before that time. We might add, however, that the province was under no obligation, in so far as the plaintiff was concerned, to incur any indebtedness for steel before April 16, as there was no contract between the parties before that date. It is true that the defendant authorized on March 8 the Director of Public Works to enter into the contract with the plaintiff, but the plaintiff knew that the Director had no authority to bind the province before the date of that resolution. He also knew that he must file a contractor's bond before the signing of the contract. And it is admitted that the bond was not filed before April 15. The Director could have had no possible reason for hindering or delaying the plaintiff after March 8 in the execution of either the bond or the contract.

Lastly, the contention that the delay in signing the contract waived the time limit and placed upon the plaintiff only an obligation to complete the work within a reasonable time, leaving to the province a right of action for actual damages and nothing more, is without merit either in fact or in law. The contract specifically provided that the bridges must be completed on or before August 1, 1913. The defendant granted the extension of 110 days strictly in accordance with the plaintiff's request without imposing any condition whatever. This extension had the effect of substituting in the contract "November 18, 1913," in lieu of "August 1, 1913," thereby carrying into the new period all the rights and obligations of the parties as fixed in the contract, instructions to bidders, etc. Paragraph 42 of the instructions to bidders, which was expressly made a part of the contract, reads:

"42. It is understood that time is an essential feature of the contract herein contemplated, and that upon failure to complete the said contract within the time stipulated the contractor will be required to pay to the Province of Bulacan, the sum of twenty-five pesos (P25), Philippine currency, per diem for each bridge for each day of delay (Sundays and legal holidays excepted) in the completion of the contract, the said payment to be made as liquidated damages, and not by way of penalty; and the province may deduct from any sum due or to become due the contractor any sums accruing for liquidated damages as herein stated."

Such being the case, we cannot make a different contract from that which the parties made for themselves.

For the foregoing reasons the judgment appealed from is affirmed, with costs against the appellant. So ordered.

Torres, Johnson, Carson, and Araullo, JJ., concur.

Moreland, J., did not sign.

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