

R. FRANCIS ADAMS AND WALTER A. SMITH, PLAINTIFFS AND APPELLEES, VS. SOCIEDAD NATON AND AGUSTIN ALDEA, DEFENDANTS AND APPELLANTS.*G.R. No. 13301. March 29, 1919*

Ponente: AVANCEÑA, J.

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This is an appeal by defendants from a judgment of the Court of First Instance of Iloilo against them for the sum of P7,409, with interest at six per centum per annum, from August 31, 1915, found to be due plaintiffs under the terms of their contract with the defendants, and for the costs of suit, The appeal brings up the whole record for decision upon the facts and the law.

From the evidence of record we find that the material facts are that by a contract in writing made in Iloilo June 9, 1915, the plaintiff Adams undertook to construct a building for the defendant, Sociedad Naton (hereinafter called the owner) in the municipality of Dao, Province of Capiz, for the sum of P11,163.99. Plaintiff agreed to furnish all the labor and materials required. It was stipulated in the contract that the contractor should purchase all the lumber required for the building from one Ramon Hontiveros. Adams agreed that he would commence the work promptly, continue it with all possible dispatch, and complete it within ninety working days from the date of commencement. The owner agreed to pay the contract price in installments, the first, of P5,582 between the first and the tenth of July, 1915; the second, of P2,791, between the first and the tenth of August 1915; and the balance upon the completion of the work. No provision was made in the contract for an architect's progress certificate as a condition to the payment of these installments. On the same date the defendant Aldea executed and delivered a bond to Adams by which he undertook to respond as a surety for the performance of all the undertakings of the owner in favor of the builder.

On August 11, 1915, the plaintiff Adams entered into a contract in writing with the plaintiff Smith in which, after reciting the making of the building contract with the defendant, Sociedad Naton, it was agreed that Smith should furnish all the materials and funds necessary for the performance of the work, that Adams should supervise the construction, and that Smith should be authorized to receive and receipt for all moneys which might become due Adams from Sociedad Naton, under the terms of the contract; and to this end Smith was given full authority to act as Adams' agent in making this collection (Exhibit C). Adams promptly commenced the building, by preparing the ground, building the foundations, and doing everything which he could do in accordance with the plans, up to the point where it became necessary to obtain building lumber from Hontiveros. He promptly gave notice to Hontiveros of the lumber he required and offered to pay for it, but notwithstanding all his efforts in this regard no lumber was forthcoming. In view of this difficulty and the delay which it was causing, Adams purchased some lumber in Iloilo and shipped it to Dao to be used in the work. The representative of the Sociedad Naton thereupon wrote Adams protesting against the use of any lumber except such that might be furnished by Hontiveros in accordance with the terms of the contract. Adams at once replied stating that he was willing to obtain lumber from Hontiveros as agreed, but that the latter had failed to make the required deliveries, and if that particular clause of

the contract was,insisted upon he would not be able to continue with the work so long as Hontiveros should continue to obstruct his progress by refusing to deliver the required lumber. The defendant, Sociedad Naton, however, did not give its consent to the purchase of the necessary lumber elsewhere, and the result was that the work was stopped. At the time that the work was brought to a stand still on this account Adams had expended upon the building for labor and materials the sum of P4,789.92.

When the advance installments on the contract price fell due Adams made demands upon defendants for payment, but pnly succeeded in collecting on account the sum of P964, which was paid him on August 9, 1915.

On August 31, 1915, this action was commenced for the recovery from the defendant, Sociedad Naton, as principal, and froin Aldea, as. surety, the sum of P7,409, this being the difference between the aggregate of the installments due under the terms of the contract in July and August, 1915, namely, P8,373 and the sum of P964 paid on account.

The defendants answered averring (1) that the builders had not complied with their undertaking to commence and complete the work in accordance with the terms of the contract; (2) that Adams had promised to give a bond for the performance of his undertaking as builder and had failed to do so; (3) that he had abandoned the work without justification. By way of counter-claim defendants averred that by the breach of the contract on the part of the builders they had been damaged in the sum of fp=20,557;50, for which they prayed judgment. They also contended that there was no privity between themselves and the plaintiff Smith.

We are of the opinion that the contention of the defendants with regard to the plaintiff Smith is well founded. The evidence is that Smith was authorized by Adams, as the latter's attorney-in-fact, to collect whatever might be due Adams from defendants. It nowhere appears that there was any assignment by Adams to Smith of any moneys which might become due under the contract. It is possible that this was the intention with which the contract of July 15, 1918 (Exhibit C) was executed, but it falls far short of that purpose. Being a mere agent of Adams for the collection of whatever might be due under the terms of the contract, Smith is without authority to maintain an action in his own name against the defendants, either alone or jointly with Adams, and, therefore, as to Smith the action must be dismissed.

With respect to Adams, considering him as the sole plaintiff, upon the facts established by the evidence, as above set forth, it is clear to us that he has done everything in his power to comply with the terms of the contract, and that the suspension of the work was wholly due to the dilatory tactics of the defendants. By their insistence upon the purchase from Hontiveros of the lumber to be used in the building, after they had been informed of the failure and refusal of the latter to supply it, they made it impossible for Adams to continue the work. We find adversely to the defendants as to all the contentions advanced by them, except that which relates to the right of plaintiff Smith to maintain this action as co-plaintiff with Adams.

In the course of the trial the plaintiff Adams testified that he was quite willing to continue the work and complete the building in accordance with the contract, if the defendants would perform the undertakings incumbent upon them by its terms—that is, make it possible for him to obtain the necessary materials from Hontiveros or elsewhere, and pay the matured installments of the contract price.

There is no doubt that by reason of the failure of the defendants to comply with the obligations imposed upon them by the terms of the contract with respect to the payment of the contract price, Adams would have been fully warranted in treating the contract as rescinded and in suing the owner and surety for the work done and materials furnished at the time of the suspension of the. work, and for the profits which he would have earned had he been permitted to carry out the contract in accordance with its terms. It is also true that had defendants seen fit to do so they might have elected to abandon the work, in which event their liability to plaintiff would have been limited to

the payment of the expenses incurred and the profits which he would have made had he been permitted to complete the building in accordance with the terms of the contract. (Civil Code, article 1594.) But plaintiff preferred to sue for the amount due under the terms of the contract, and the defendants, instead of availing themselves of their right to withdraw from the contract in accordance with article 1594 of the Civil Code, set up a defense which we find to be wholly without merit. This being so, and the liability of the owner for the payment of the installments due in July and August, respectively being unconditional, was the court below warranted in giving a judgment in favor of Adams for the money due under the terms of the contract at the time the action was instituted?

We are of the opinion that the judgment, so far as it relates to Adams, is in accordance with law. But dealing with a reciprocal obligation, the right of Adams to demand the compliance with the obligation implies necessarily and correlatively his duty to comply with the same. He can not require the owner to pay the price of the construction and free himself from constructing the building. Neither can he have this right, if, for any reason other than the non-compliance with the conditions of the contract on the part of the owner, it was impossible to finish the construction, and in this case, the only action which Adams may have would be an action for damages. Upon the payment of the judgment the owner will be entitled to insist that the builder continue and complete the work, upon the removal of the obstacles which their own obstructive attitude has placed in the way of its completion—namely, by permitting the builder to obtain the necessary materials elsewhere, or requiring Hontiveros to supply them. As defendants have been guilty of a breach of the contract, however, should the delay occasioned by their delinquency have changed conditions so that the costs to the builder of the completion of the work would be greater now than it would have been under the normal fulfilment of the contract, the owner will be liable to the builder for the damages caused by the delay, in addition to the stipulated contract price.

The payment of the amount due under this judgment will not deprive the defendant, Sociedad Naton, of its privilege of desisting from the work under article 1594 of the Civil Code, or causing it to be completed by some other contractor. In either of these events, should it transpire that the total payments under the first two installments of the contract are greater than the amount which is necessary to reimburse the builder for his outlay for labor and materials and to indemnify him for the loss of the profits which he would have earned had he been permitted to complete the building in accordance with the contract, an action will lie to recover the excess payment. The situation of the parties would be the same as it would have been had the defendants paid in advance the full amount stipulated as the price of the building and had subsequently elected to desist from the continuation of the work in accordance with article 1594 of the Civil Code before its commencement or after it had been partially performed. As Manresa points out (Vol. 10, p. 705), building contracts differ from all others in that the right of the owner to abandon his purpose is absolute. The contractor cannot insist upon completing the contract and enforcing payment of the full amount of the contract price. The right of the owner to desist being absolute, it follows that its exercise cannot be made to depend upon whether the contract price has or has not been paid in advance, wholly or partially, and if the total amounts paid the builder at the time the owner elects to abandon the projected building are more than sufficient to reimburse him for his outlay and to indemnify him for the loss of his prospective profit, the builder must be subject to an action for the recovery of the difference between the amounts received by him and those which he would have been entitled to recover under article 1594 had no payments been made him at the time of the abandonment of the project by the owner.

For the reasons stated, the judgment of the lower court is affirmed, in so far as it affects the plaintiff Adams, and is reversed and the action dismissed with respect to the plaintiff Smith. Appellants will pay the costs of both instances. So ordered.

Arellano, C.J., Torres, Johnson, Street, and Malcolm, JJ., concur.

Judgment modified.

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