

MARIANO MARALIT AND EMETERIO LOTA, PLAINTIFFS AND APPELLANTS, VS. REYNALDO LARDIZABAL AS JUDICIAL ADMINISTRATOR OF THE ESTATE OF GERMANA SOLIS, DEFENDANT AND APPELLANT.

G. R. No. 30472. January 20, 1930

Ponente: AVANCEÑA, C.J.

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AVANCEÑA, C.J.:

On February 15, 1920, the deceased Germana Solis entered into a contract with the plaintiffs for the repair of her house situated in the municipality of Lipa, Province of Batangas, for the sum of P14,000.

Plaintiffs allege that they have performed the work, but have only received P11,550 from Germana Solis, thus leaving a balance of P2,450 due them according to the contract. They also allege that they performed additional work not included in the contract. They pray that the defendant, who is the judicial administrator of the intestate estate of Germana Solis, be ordered to pay them

the remainder of the price stipulated in the contract, the value of the additional work done, and damages, which they allege they sustained by reason of the contract.

The defendant, on the other hand, filed a cross-complaint for the foreclosure of the mortgage given by the plaintiff, Mariano Maralit, to secure the fulfillment of his obligations under the contract, and a counterclaim for the value of the materials and labor engaged by defendant on account of the plaintiffs having abandoned, the work, and for damages caused by the delay in the completion thereof.

The court below ordered the defendant to pay plaintiffs the sum of P2,450, being the unpaid balance of the price stipulated in the contract, with legal interest from the date of the filing of the complaint, namely, January 17, 1926; absolved the defendant from the other causes of action, and absolved the plaintiffs from the counterclaim and the cross-complaint. From this decision both parties appealed.

One of the errors assigned by the plaintiffs to the court below is its failure to adjudge the defendant in default, and its admission of the demurrer and answer filed by the defendant after the period fixed for their presentation. At any rate, according to section 110 of the Code of Civil Procedure, it is within the discretion of the trial court to admit these pleadings even after the time fixed for their presentation. Not only do we find that the trial court did not abuse this discretion, but that it justly made use of it, considering that the defendant did not file his demurrer and his answer within the legal period, because he awaited first the ruling on his petition deprecating the plaintiffs' appeal from the resolution of the committee on claims and appraisal.

The appellants also contend that the trial court committed an error in the rejection of Exhibit C. Neither is there any merit in this assignment of error, for it appears that this exhibit was only prepared during the trial of this case. And, even taking it into account, it is valueless to prove the additional work alleged by the plaintiffs to have been performed by them, for it contains no specification but simply the partial totals of the amounts expended on said

alleged additional work.

As to the court's having refused to admit the testimony of plaintiff Mariano Maralit to prove that the deceased Germana Solis, in the course of the work, ordered some additional repairs to be made not included in the contract, neither do we find any error in this conclusion, based upon section 383, paragraph 7 of the Code of Civil Procedure. It is alleged that this provision is inapplicable because Germana Solis died only after the complaint had been filed against her. But the law does not state that it only refers to cases where the deceased died before the action was instituted. Moreover, the purpose of the prohibition, which is to discourage perjury may be applied where the deceased died either before or after the filing of the suit against her, if, when the testimony is given, she is already dead and cannot disprove it.

As to the rest, a careful examination of the contract between the parties and the additional work alleged, leads to the same conclusion as that reached by the court below, that said additional work may well come within the general terms of the contract, and that, if there appears to be any, the evidence does not support the allegation.

With regard to the counterclaim filed by the defendant, we likewise agree with the trial court that the expenses alleged to have been incurred by the defendant may have been incurred upon the additional work admitted by the court below, although the evidence contains no specification, or upon the old house not referred to in the contract. The same may be said of the labor. The defendant admits that not all the materials listed in Exhibit 1 were employed in repairs under the contract, and this exhibit contains expenditures made subsequent to the delivery of the house.

With respect to the materials taken from the old house and used by the plaintiff in the repairs, the latter is not bound to pay for them, for, although he undertook to pay for the materials, the contract calls only for the enlargement and remodelling of the old house, and he was therefore authorized to utilize the useful materials of the house itself, if, as in this case, there is no agreement to

the contrary.

As regards the P300 claimed as damages for the faulty construction of the azotea, the repairs having not yet been made, this amount cannot be accepted as the exact cost.

The defendant's mere statement to this effect is not sufficient as it does not appear that he is an expert.

Upon the question of the damages claimed on account of the delay of one hundred eighty six days in the completion of the work, the fact that the plaintiff performed some additional work for the improvement of the house excuses him.

Wherefore, the judgment appealed from is affirmed,

without costs. So ordered.

Johnson, Street, Villamor, Johns and Villa-Real, JJ., concur.

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