

ANG TOA, PLAINTIFF AND APPELLANT, VS. BASILIA ALVAREZ AND PEDRO MARTINEZ, DEFENDANTS AND APPELLEES.

G.R. No. 4390. August 24, 1908

Ponente: WILLARD, J.

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WILLARD, J.:

The principal question in this case arises from the following statement made by the court at the opening of the trial on the 26th of August, 1907:

"THE COURT. The plaintiff asked leave to file an amended complaint, to which defendants offered no objection, provided the answer already made by them to the original complaint be considered also as the answer to the amended complaint.

"It is also agreed that Exhibits A and B, attached to the original complaint, shall be considered as attached to the amended complaint, and made a part thereof.

"It is also agreed by the defendants that the allegations of the amended complaint are true, with the exception of those allegations that additional labor was performed, for which additional compensation is due, from that contained in the contract; and that Exhibits A and B, attached to the complaint, are true copies of the originals."

The original complaint alleged that the plaintiff had erected a building for the defendants by virtue of a written contract; that the plaintiff had fulfilled all the obligations imposed upon him by the contract; that the work was entirely finished on the 21st of January, 1907, and that the defendants had only paid part of the contract price. There was no allegation in the original complaint that the property had been delivered to or accepted by the defendants, and there was no allegation in regard to any additional work performed by the plaintiff. The defendant, Martinez, in his answer, denied that the plaintiff had fulfilled the contract on his part, and denied that there was anything due thereon from the defendant to the plaintiff.

The defendant, Basilia Alvarez, made the same denial, and for a counterclaim alleged that the plaintiff had violated certain conditions of the contract. The counterclaim then stated in great detail the different parts of the specifications for the work with which the plaintiff had not complied, and alleged that it would cost P1,500 to reconstruct the building in accordance with the terms of the contract, and asked that the court order such reconstruction by the plaintiff.

The amended complaint to which the court referred in its statement at the opening of the trial is called "a complaint and reply to the answer of the defendants." It was presented on the 26th of August, 1907. It contains the allegations of the original complaint and, moreover, an allegation as to the performance of additional work by the plaintiff to the value of P190. In the eighth paragraph it states for a reply to the answer of the defendants, that after the work had been completed by the plaintiff, the defendants accepted the building without protest, and that they took possession of the same and are now occupying and using it.

The court below found that P1,990 of the contract price had not been paid. It found that the plaintiff had performed extra labor and furnished extra material to the value of P170. In reference to the counterclaim of the defendants, it found that the value of the material which was not used by the plaintiff in the construction of the building on account of using timber and other material of less dimensions was P440, and ordered judgment against the defendants for P1,550. From this judgment the plaintiff has appealed. An appeal by the defendant, Basilia Alvarez, was dismissed.

The plaintiff in his brief insists that, by virtue of the agreement stated by the court at the opening of the trial, no evidence was admissible to show that he had not fully complied with the terms and conditions of the contract and that, therefore, the court erred in receiving evidence upon the defendants' counterclaim.

The statement made by the court below is very broad, but its meaning must be determined not only by the words contained therein, but also by the conduct of the parties at the time and immediately after the making of the statement. The trial proceeded, the plaintiff offered evidence to show the performance of additional work, and, moreover, proved a delivery and an acceptance by the defendants. At the close of the plaintiff's evidence, the defendants called witnesses to prove their counterclaim as set out in their answer. No objection whatever was made by the plaintiff to the reception of this evidence on the ground that it was not admissible by reason of the stipulation. The plaintiff cross-examined the witnesses offered by the defendants upon the counterclaim without suggesting in any way that the evidence was improperly received. The trial court considered the evidence thus offered and, as has been stated, sustained the counterclaim to the extent of P440.

It is thus apparent that, notwithstanding the language used in the statement made by the court, neither the plaintiff, nor the defendants, nor the judge understood that the defendants had thereby waived their counterclaim. The plaintiff did not so understand it, for if he did, he would have made no proof of the delivery of the building to the defendants and its acceptance by them; nor would he have allowed evidence upon the counterclaim to be received without objection and exception. The defendants did not so understand it, for if they did, they would have introduced no evidence upon their cross-complaint, and the judge did not so understand, for if he did, he would have made no finding upon that subject.

It must therefore be held that the agreement did not constitute a waiver by the defendants of their counterclaim. Upon its merits the case is free from doubt. The counterclaim, to the extent to which it was admitted by the court, was thoroughly established.

Upon the question of the acceptance of the building, the evidence, we think, preponderates in favor of the defendants, and it is established to our satisfaction that the building was accepted conditionally and under protest. It is claimed by the appellant that an acceptance of a building and its use by the owner is a waiver of such a counterclaim as is presented herein, and the cases of *Campbell and Go-Tauco vs. Behn, Meyer & Co.* (3 Phil. Rep., 590) and *Naval vs. Benavides* (8 Phil. Rep., 250) are cited in support of his contention. In the first of these cases it does not appear whether the building was accepted under protest or not, and in the second it appears that it was accepted without any protest. In the case of *Marker vs. Garcia* (5 Phil. Rep., 557), it was held that the acceptance of a building by the owner, under protest, was not a waiver of his claim for damages by reason of defects in the construction.

The judgment of the court below is affirmed, with the costs of this instance against the appellant. So ordered.

Arellano, C. J., Torres, Mapa, Carson, and Tracey, JJ., concur.

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