

MACLEOD & CO., PLAINTIFF AND APPELLEE, VS. SIMEON MARFORI AND CENON RASAY, DEFENDANTS AND APPELLANTS.

G.R. No. 6592. December 12, 1911

Ponente: MORELAND, J.

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MORELAND, J.:

On the 13th day of July, 1907, at Davao, Moro Province. the plaintiff and the defendant Cenon Rasay entered into a contract which the parties called a "contract of lease' which, omitting the introductory part, reads as follows:

"The said party of the first part agrees to lease to the said party of the second part a two-story building located on the west side of Calle Bolton about 150 feet south of Calle San Pedro, municipality of Davao, District of Davao, Mindanao, P. I., the lower structure of said building being of cement block, and the upper structure being frame.

"Said building may be used by the said party of the second part, during the term of this lease, for any purpose whatsoever.

"The said party of the first part agrees to keep the said building in good condition and repair, making at his own expense any and all repairs or changes found to be necessary by the party of the second part; also the party of the first part agrees to furnish all necessary shelving in said building found to be necessary by the said party of the second part, this at the expense of the party of the first part.

"The term of this lease will run for the period of five (5) years from the 1st day of January, 1908, by which time the said party of the first part agrees to have said building in such shape as may be required by the party of the second part, provided that any instrument (instructions) which said party of the second part may give in regard to the arrangement of the building shall be given in writing,

"Said party of the second part agrees to pay as a monthly rental on said building, the sum of one hundred and fifty (P150) pesos Philippine currency, said monthly rental to be due on the last day of the month for which paid; further, the said party of the second part agrees to advance to the said party of the first part the sum of four thousand (P4,000) pesos Philippine currency, for the purpose of completing said building, the said four thousand pesos to draw interest at the rate of eight (8%) per cent per annum from date of receipt by the party of the first part, and provided further that said four thousand pesos thus advanced shall be applied as rent on said building at the rate of one hundred and fifty pesos per'month and no further rent shall be paid by the said party of the second part until this obligation may have been satisfactorily settled. In case of the insolvency of the said party of the first part any amount of the said four thousand pesos advanced which remains unpaid and any interest due thereon shall be considered as a lien against any property which the said party of the first part may be the owner or part owner thereof.

"Notes of the said party of the first part for the sums of five hundred (P500) pesos Philippine currency and three thousand five hundred (P3,500) pesos Philippine currency are hereto annexed and made a part of this instrument.

"Upon the termination or expiration of the term of this lease herein described, the said party of the second part

shall have the option of releasing or renewal of the same for a further term of one, two, three, four, or five years, at the discretion of the said party of the second part, said party of the second part in case of renewal or releasing, paying to the said party of the first part, his heirs or assigns, the monthly rental of one hundred and fifty (P150) pesos Philippine currency, said rental being due upon last day of the month for which paid.

"The said party of the first part, his heirs or assigns, are hereby one and all bound to the provisions of this lease. Executed by the within mentioned parties on this 13th day of July, 1907, at Davao, Moro Province, P. I.

"CENON RASAY,

"Party of the First Part,

"GEO. D. TEMPLETON,

"Acting for and in behalf of the Party of the Second Part

"Witnesses -

"MAX L. MCCULLOUGH.

"H. PEAHY."

The two promissory notes above referred to are:

"DAVAO, MIND., P. I., July 13, 1907.

"For value received, I promise to pay Macleod & Co. of Manila, P. I., the sum of five hundred (P500) pesos Philippine currency on or before April 30th, 1908, said amount to be paid in monthly installments of one hundred and fifty (P150) pesos Philippine currency per month beginning with January 31st, 1908. This note to bear interest at the rate of eight per cent (8%) per annum from date.

"CENON RASAY,

"Witness -

"H. DEABDY."

"DAVAO, P. I., September 9, 1907.

"For value received I promise to pay to Macleod & Co. the sum of three thousand five hundred pesos Philippine currency (P3,500), said payment to be made in monthly installments of one hundred and fifty pesos Philippine currency (P150) following consecutively after the previous note given by me for five hundred pesos Philippine currency (P500) and dated July 13, 1907. This note bears 8 per cent interest from date of issue.

"This note is to be attached to the lease or contract entered into by and between myself and Macleod & Co. July 13, 1907.

"CENON RASAY.

"Witness -

"GEO. D. TEMPLETON."

The learned trial court found the facts to be as follows:

"It conclusively appears that the plaintiff and the defendant, Cenon Rasay, entered into a contract on the 13th day of July, 1907, at Davao, in the Moro Province, P. I., whereby the defendant Rasay agreed to lease to the plaintiff a two-story building located in the municipality of Davao, the lower story of said building being of cement block and the upper structure being of frame; that the lease of the building was to begin on the 1st day

of January, 1908, and to run for five years, and the plaintiff was to pay one hundred and fifty pesos per month on the last day of each month, and as another part of the agreement the plaintiff agreed to advance the defendant Rasay the sum of four thousand pesos in order to enable him to complete the building, and the four thousand pesos were to draw interest at the rate of eight per cent per annum from date of its receipt, and that this advance should be paid by applying one hundred and fifty pesos due for rent per month upon the amount, and at the same time and in connection with the same contract the defendant Rasay made two certain promissory notes, one for five hundred pesos and one for thirty-five hundred pesos, the first five hundred pesos to be paid on or before the 30th day of April, 1908, by monthly installments of one hundred and fifty pesos each, and this note bore interest at eight per cent from date, and the note for thirty-five hundred pesos was to be paid in monthly installments of one hundred and fifty pesos each, following consecutively after the previously mentioned note of five hundred pesos had been paid, and this note bore interest at eight per cent from date.

"The plaintiff advanced the money either in cash or in merchandise, and no part of same has ever been paid except the sum of three hundred and sixty-two pesos which an agent of plaintiff succeeded in getting hold of from the defendant Rasay.

"After the contract had been made and the building was in process of finishing, the defendant Rasay had execution levied against him, and the building in question was levied upon and was sold and the defendant Marfori purchased it at a judicial sale. The defendant Marfori resided in Manila and had representing him at Davao, with full power of attorney as he himself declares, one Bienvenido Blanco, who made a contract with the plaintiff in relation to the building, which provided that he was fully informed regarding the terms of the certain contract between the defendant Rasay and the plaintiff as regards the lease of the building, and that by virtue of his power of attorney for the defendant Marfori, he for and in behalf of said Marfori agreed that should the building come into possession of Marfori, or he have control of same, that said Marfori would comply with all the provisions of the contract above mentioned, and that should any sum of money be advanced by the plaintiff to said Rasay, such sum would be used for the purpose of completing the building, and if not used it was to be returned to the plaintiff.

"Among other provisions of the contract between the plaintiff and the defendant Rasay, it was agreed that the four thousand pesos advanced, as long as it remained unpaid, should constitute a lien against any property which the defendant Rasay then had.

"The plaintiff was ready to take over the house as agreed in the contract on the 1st day of January, 1908, but the house was not completed so that it could be occupied by the plaintiff.

"As hereinbefore found, the contract provided that the lower structure of the house should be built of cement block and the upper structure of frame. The house was of two stories, and it must be concluded that that which said lower structure meant was the lower story, and the upper structure the upper or second story. Witnesses for the plaintiff stated that the lower story was to be built of cement blocks, and that no part of the house was built with cement blocks, but that about three or four feet from the ground had been built of some kind of stone, and then above that thin boards constituted the wall of the rest of the lower structure or story of the house, which could not be used by the plaintiff for the purpose to which they designed to put the building.

"Some of the witnesses testified that the building was nearly completed on the 1st day of January, but one of the witnesses for the defendants testified that he worked upon the building all the time until it was finished, and that it was not finished until the last days of March, 1908, and then in the condition in which it now is, and that there were no cement blocks used in the construction of the building in any part of it, as required by the contract.

"There was clearly a breach of contract on the part of the defendant Rasay in two respects: one is that the building was not completed so that it could be turned over for rental to the plaintiff at the time stipulated in the contract, and the other was that the building was not constructed as the contract required."

Judgment was granted by the trial court in the following language;

"Let judgment be entered in favor of the plaintiff, Macleod & Co., and against the defendant Cenon Rasay, for the sum of P3,638, with interest thereon at eight per cent per annum since the 13th day of July, 1907, and for the costs of this action, and against the defendant Simeon Marfori and the defendant Cenon Rasay, that the house described in the complaint is subject to lien for the amount of this judgment, less the costs, and that the same may be sold to satisfy the judgment."

We are of the opinion that the judgment must be affirmed. The evidence produced upon the trial clearly shows that, as the learned trial court well said, the defendant Rasay failed to perform his contract in two particulars: First. He did not construct the lower story of the building in the manner and with the materials required by the terms of the contract. Second. He did not complete the building within the time prescribed by the terms of the contract. The evidence also shows that there was not even a substantial fulfillment of the provisions of the contract. While the failure to perform was not absolutely complete, it was so substantially complete that the plaintiff was fully justified in rescinding the contract and recovering the amount he had paid.

Mr. Kingcome, presented by the attorney for the defendants as their witness, testified that he was the representative of Macleod & Co. at Davao for about two and one-half months in the years 1907-08; that he reached Davao about the 28th or 29th of December and left there about the 17th of March, 1908; that he was the agent of the plaintiff and the manager of its branch; that the Davao branch was engaged in the business of buying products of the country generally, such as hemp, and in selling tin goods and groceries; that when he went to Davao the building mentioned in the contract was being built, but the floor was not quite finished and the lower story was according to the contract and specifications not yet begun. He said:

"The specifications that I refer to are those that appear in the contract dated Davao, July 13, 1907. * * * I did not take much interest in the building. I refused to accept the building and therefore did not take much interest in it. I refused the building, if I remember, on the 29th of December. The reason why I refused it on that date was it was not ready on the 29th and there was no possibility of its being ready and I refused to receive it. It was not ready and I would not take it. I notified Cenon Rasay that I would not take it. I advised him as agent for Simeon Marfori that I should not receive the house unless it was finished according to the specifications by the 31st of December, 1907. That advice was verbal and also in writing. I do not know anything about Macleod & Co. having agreed to furnish part of the material for that building. Macleod & Co. agreed to furnish them with P4,000. All I know is that according to the contract Macleod & Co. agreed to furnish them with P4,000. * * * There was no possibility of the building being finished by the 31st of December; The contract called for the basement to be made of cement blocks. It was very important to us and all he had done he had put in stone to a height of about three feet and the rest was wood. There was no stone floor in the basement at that time but the wall was about three feet high of stone. There was no stone floor in the basement at all. Prior to my departure for Davao I had not received any instructions from Macleod & Co. to receive the building. That subject was not even mentioned to me. When I took over the management when I was looking into things I saw this contract and the condition of the house, and I saw it was not worth our while to go on playing with the house. They had had six months practically to build the house in and had not done it only, really, two months' work. There was no other building in Davao that we might have occupied at that time. Macleod & Co. continued in business at Davao 2 1/2 months after we refused to receive the house. I left Davao about the 17th of March. The business was closed at that time. Some little things I left in charge of another firm down there to clear up for me. I received my instructions as to the closing up of the business at the end of January. I then immediately proceeded to close the business. It took about 2 1/2 months to get it closed up. On the 17th of March the lower story of the house was still practically unstarted according to the contract. It called for cement blocks and as I said they had only got this wood. I do not know when the building was eventually completed but there were no cement blocks in the building on the 17th of March on the lower floor. * * * I believe the floor, the cement floor, was finished on the 17th of March. They started to work on it about January. They bought the cement

from us to make that floor. I knew what they were buying this cement for. When I notified Rasay that I would not accept the building he replied that the building no longer belonged to him but belonged to Simeon Marfori and that Simeon Marfori would not give him any money. That was about the 29th of December. If I remember rightly it must have been about the middle of January that he bought the cement. He paid me cash for it. That cement was to put in the floor in the basement of the building. * * * The cement blocks were to go clear to the ceiling of the second story, the whole basement. When I left there the cement floor was in but the blocks were not in the walls in the lower part. The house was not painted and the balcony was not finished. The house was not only to be used as a warehouse but also as living quarters and office. * * * When I left in December for Davao I had no instructions from Macleod & Co. to remove the branch from Davao. The matter of removing the branch from Davao was not even discussed before leaving. On the contrary, we were discussing the question of extending the business."

On cross-examination this witness testified:

"The reason why we required walls of that character, cement walls, was in the first place for fire insurance and in the second place for the better preservation of the merchandise inside the warehouse. Most of this merchandise consisted of hemp. The condition of these walls after what they called completion was that they were about three feet of stone and the rest of wood and open work, great big chinks in between the slats. The wall was not completed in such condition that it would keep out the elements. It was not even weather-proof. * * * On the 29th of December I called Rasay into the office and spoke to him about the building. I just called his attention to the condition of the building and told him if it was not in the condition required I would call the contract off. He said in reply it had left his hands altogether and the house belonged to Simeon Marfori. He said that it was not completed because Simeon Marfori would give him no money to complete it. At that time he made no complaint that the house was not completed by reason of the fault of Macleod & Co. He never said a word about it. I did not see Marfori. When I was down there he was in Manila."

Juan Mariano, also a witness for the defendants, testified that he was one of seven or eight workmen engaged in building the house in question and that they begun on the woodwork of the same on the 8th day of December, 1907; that that was the first work done on the house; that on that date they began to smooth and prepare the materials for the building; that they began to place the timbers on the 14th of December; that he worked on the building with the other workmen until the latter part of March, 1908, before the same was completed; that prior to the 8th of December he worked for the defendant Rasay on the American Hospital, another building which the defendant Rasay was erecting in that locality; that in the month of December the building lacked a roof and uprights (harigues); that at the end of December there were some stones placed in the lower part of the lower story of the house, but after placing the stones it was necessary to build the wall and place the other materials; that he remembered distinctly that the house was not finished until the month of March. The testimony of this witness was of such a character that the defense deemed it necessary, in order to overcome its evil effects upon its case, to replace upon the stand the defendant Rasay. In his testimony upon his second examination he stated that all of the work on the house was completed in the month of March, 1908.

On cross-examination these questions were asked him:

"Q. What day of the month of March was the house completed? - A. I am not able to tell you the precise date, about the middle of March, almost the end of March.

"Q. From the 1st day of January until the end of March you had employed there for the purpose of completing the house 7 or 8 men continuously? - A. Yes, sir."

This is the testimony presented by the witnesses for the defendant himself.

George D. Templeton, a witness for the plaintiff, testified that, during the time when the house in question was

being erected, he was an employee of the firm of Macleod & Co. in Davao; that the defendant Rasay occupied the house himself in the months of December and January, although it was not completed; that he thereafter rented it to Capt. W. J. Platka and Lieut. E. L. Dunsworth and Antonio de Goicouria, all of the Constabulary. He testified also that the house was not completed until March, 1908.

This witness also testified that while the plaintiff furnished to the defendant certain materials, such materials were so furnished in the same way and for the same purpose as to other customers; that the agreement in controversy was to furnish money and not materials. The witness denied that the reason why the plaintiff refused to accept the house was because Macleod & Co. desired to close their business in Davao.

Simeon Marfori himself testified that Rasay occupied the house and that it was afterwards rented by him to various Americans.

William J. Platka, a witness for the plaintiff, testified that in the year 1908 he occupied the house in question, having rented it from Canon Rasay, one of the defendants; that the lower story of the house is about 12 feet high; that he moved into the house about July, 1908, and lived there until March, 1909; that at that time the sides of the kitchen were not yet put up, nor were they on the lower story which was used as a storeroom. As to the lower story, there was no cement on the floor and the heat of the sun warped the sides so that in a severe rainstorm the water would come in and he found it necessary to give it up as a storeroom. He also testified that the wood in the lower story was of some soft nature, from which the pitch would run.

Herman Forst testified in behalf of the plaintiff that he was assistant manager of the plaintiff company in Manila. He stated in connection with the building of the house as follows:

"The understanding was that it was to be according to the contract, and there was also a verbal agreement that the lower part was to be built of cement and the upper part of wood; and I believe there was some arrangement about the height of the lower part which was to be built of cement; and I remember particularly having taken the matter up because we were going to use the upper part of the building as a dwelling house, and the lower part as a go-down for hemp, and we could not get insurance unless the building was constructed that way, and we would not think of carrying hemp in a building without insurance."

On cross-examination these questions and answers appear:

"Q. You say it was indispensable that the lower part of that building should be constructed of cement? - A. No, sir; not indispensable for those who would accept a house of that kind, but we considered it indispensable that the building should be constructed of stone or brick.

"Q. You mean indispensable for the purposes of insurance? - A. Yes, sir; certainly."

This witness also testified that whatever materials were furnished to the defendant by the plaintiff in the construction of the house were furnished promptly on his orders and were delivered promptly and without delay. Concerning the withdrawal of the branch of the plaintiff company from Davao this witness testified:

"Q. Can you state whether Macleod & Co. had either discussed or had any intention of withdrawing from business at Davao? - A. That was in December; at the time Mr. Kingcome left for Davao there was no intention to withdraw. The first indication that we had that we should withdraw from the Davao business came from one of our principals in Chicago sometime in January, 1908; that was the first intimation we had of the intention to close all provincial agencies.

"Q. Now, if that building had been turned over to Macleod & Co. on the 1st of January, 1908, can you state whether or not it would have been accepted by the firm? - A. Of course it would, by all means, as that would have been living up to the contract."

On cross-examination this witness testified that they had an agent in Davao and that they had received complaints from Mr. Kingcome and Mr. Stevenson that the building was not being constructed in accordance with the contract.

We have given the testimony of the witnesses for the parties thus at length believing that it is perhaps the quickest and most satisfactory way of disposing of the errors assigned by the defendants on this appeal.

That it has met our expectations in this regard will appear when we state the assignments of error. They are as follows:

"The trial court erred in rendering judgment against the defendants and dismissing the cross complaint, because:

"1. Plaintiff elected to sue for damages only, thus under art. 1556 of the Spanish Civil Code, leaving the contract of lease subsisting;

"2. Plaintiff admitted upon the trial that it was not claiming damages, as none such could be proven;

"3. Plaintiff" did not perform substantially its own part of the building contract in question;

"4. Plaintiff admitted upon the trial that notwithstanding that it knew of the alleged noncompliance by defendants with the building specifications it continued to furnish defendants materials for the building, with the intention of later remedying the alleged defects itself, so as to comply with insurance requirements;

"5. Plaintiff knew when it furnished the last lot of building materials that it was physically impossible for defendants to complete the building by January 1st, 1908;

"6. The building contract in question did not require that the building be wholly and completely finished by January 1, 1908:

"7. The alleged nonperformance by defendants of the building contract in no way prejudiced plaintiff, as plaintiff expressly admitted upon the trial.

"8. There was a substantial performance of the building contract upon the part of the defendants;

"9. The delay of one year and seven months in bringing this action is an unreasonable one under the circumstances, and lastly;

"10. The evidence shows that the true reason for plaintiff's refusal to accept the building was the closing up of all its Mindanao branches."

As is readily seen, the evidence above quoted, as a matter of fact, disposes adversely to the appellants of the errors assigned as Nos. 3, 4, 5, 6, 7, 8, and 10.

Apart from the answers which the facts themselves give most of these assignments of error need little attention.

As to the error assigned as number 2, it may be said that while the plaintiff, in one sense, has proved no damages, it certainly cannot be said that it was not injured by the failure of the defendant Rasay to furnish it the building which he had agreed to furnish. When one has paid full value for one kind of a house and is offered another which will in no sense meet the purpose prescribed by the contract of purchase, it seems idle to assert that he has received no injury. The plaintiff in this case loaned P4,000 to the defendant to erect a building for a given purpose and to be built in a certain manner and at a certain time. The building was not completed at the time specified, it was not built of the materials nor in the manner required, nor was it at all suitable to the purposes for which the plaintiff desired it.

As to the third error assigned, namely, that the plaintiff did not substantially perform its own part of the building contract in question, it requires as little notice as the previous one. The plaintiff made no building contract. Its agreement was to furnish to the defendant four thousand pesos, While it did not deliver to the defendant fully that sum, it delivered every peso that he asked for. There is no allegation, and if there were, substantially no proof to support it, that the defendant was unable to complete the building by reason of the failure of the plaintiff to perform his part of the agreement in question. It is the undisputed evidence that the plaintiff never made any contract to furnish the defendant materials in any sense which legally relates it to the contract of building. There is evidence that the plaintiff sold and delivered to defendant certain materials which the defendant used in the erection of the building. On the other hand, the great and unquestioned preponderance of the evidence is that the plaintiff delivered to the defendant such materials promptly and without delay.

As to error number 4, it need be said simply that we have no recollection that the plaintiff made the admission alleged. The assertion on the part of one of the witnesses for the plaintiff was substantially to the effect that the plaintiff stood ready to accept the building, even though it contained many minor defects, provided it was completed so nearly in accordance with the contract as to make it usable for the purposes intended. It nowhere appears, so far as we have been able to find, that it was ever the intention, express or implied, of the plaintiff to accept the building with the serious and substantially irremediable defects which it had even after it had been completed, so called, in March, 1908.

We are unable to see any material relation which error No. 5 has with the merits of this case. There is no reason whatever why plaintiff should refuse to sell the defendant merchandise merely because he had failed to complete a building destined for the plaintiff within the time specified in the contract. Plaintiff sold him materials in the same way that he would sell to any other customer. The mere fact that defendant was at the time engaged in erecting a building for the plaintiff does not, in the absence of other facts and circumstances, necessarily indicate any waiver on the part of the plaintiff as to the time when the building should be completed.

Error No. 6 may be answered by quoting that paragraph of the contract which says:

"The term of this lease will run for the period of five (5) years from the 1st day of January, 1908, by which time the said party of the first part agrees to have said building in such shape as may be required by the party of the second part, provided that any instrument (instructions) which said party of the second part may give in regard to the arrangement of the building shall be given in writing."

Error assigned as No. 7 may be answered in the same way as No. 2 was answered.

In asserting as error No. 8 that "there was a substantial performance of the building contract upon the part of the defendants" the appellants go counter not only to the preponderance of but to the overwhelming weight of the evidence in the case.

We answer error assigned as No. 10 which alleges that "the evidence shows that the true reason for plaintiff's refusal to accept the building was the closing up of all its Mindanao branches" by pointing to the evidence above transcribed in which it clearly appears that the determination of the plaintiff to withdraw its provincial branches was not made until the latter part of the month of January, 1908, when a sudden and peremptory order to that effect was received from one of its principal officers in Chicago. Therefore, at the time of the rejection of the building by the plaintiff, there was no intention whatever upon its part, so far as the proofs go, to withdraw and abandon its provincial agencies. The uncontradicted proofs are to the effect that there was rather an intention to extend them.

Adverting to error number 9, we are unable to say from the whole record of this case that the delay of one year and seven months on the part of plaintiff in bringing this action was unreasonable. It nowhere appears in the

record that the defendants have been peculiarly prejudiced by reason of such delay.

As to the error assigned as number 1, which deals with the nature of the action brought as determined by the complaint filed, it appears to us that the objection is rather technical than substantial. While apparently the complaint is one founded upon a breach of contract and prays for damages caused by reason of such breach, nevertheless, it alleges facts sufficient to sustain an action for a rescission of the contract and the recovery of the sum paid thereunder. Throughout the trial the parties seem to have regarded the action as one for rescission of contract and recovery of the money paid thereunder and evidence was offered by both parties and received by the court apparently upon that theory. No one was deceived by the technical form and prayer of the complaint. All of the material facts to sustain either action appear upon the face of the complaint and the defendant was fully notified of the delinquencies of which he was charged and of the grounds upon which the plaintiff sought to recover the money it had paid out. The question was fairly fought out upon the merits, the facts fully gone into; every phase of the question investigated and discussed; and we can see no reason why at this time an objection to the form of the complaint should be permitted to prevail.

For these reasons the judgment appealed from is affirmed, without special finding as to costs.

Mapa, Johnson, and Trent, JJ., concur.

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