

43 Phil. 435

[G. R. No. 16540. June 07, 1922]

JOHN T. MACLEOD, ASSIGNEE IN INSOLVENCY OF BENITO DEE, PLAINTIFF AND APPELLANT, VS. ESTATE OF E. H. JOHNSON, DECEASED, DEFENDANT AND APPELLEE.

D E C I S I O N

ROMUALDEZ, J.:

This action is based on a written contract between Benito Dee and E. H. Johnson, by virtue of which Dee was to furnish the labor and materials for the construction of a building. He was to receive P45,000 in installments as follows: 85 per cent of the value of the work done during the month payable at the end of the month, and the balance to be paid at the completion of the building by Dee and at its acceptance by E. H. Johnson, the owner.

The building was not completed within the time agreed upon. Johnson took up the work himself until its completion.

Dee was afterwards declared insolvent and E. H. Johnson died.

The assignee in the insolvency of Dee brought this action against the estate of E. H. Johnson claiming a balance due on the contract together with the value of certain extra work and material.

The plaintiff claims that Dee was ordered off the work by Johnson, and, while the witness O'Malley states this contention to be true, the witness Buckley testifies that there was nothing of the kind. The plaintiff's theory cannot be considered as proven by the evidence. As a matter of fact, Dee left the work and did not finish it.

Regarding the extra work, we are unable to find in the case sufficient evidence to prove the real extent and value of the extra work.

The evidence is insufficient to support the claim of the plaintiff regarding the material left

on the work. The testimony of Ramon Zarate in this respect is not based on his actual and personal knowledge of the delivery of the material. Buckley is not positive about this particular; instead, he qualifies his statement by saying "I suppose."

In our opinion, the evidence does not sustain the cause of action of the plaintiff, and the two assignments of error are not tenable.

Judgment is affirmed, with costs to be paid by the appellant. So ordered.

Araullo, C. J., Malcolm, Avanceña, Villamor, and Johns, JJ., concur.