3 Phil. 590

[G.R. No. 1490. April 02, 1904]

O.F. CAMPBELL AND GO-TAUCO, PLAINTIFFS AND APPELLANTS, VS. BEHN, MEYER & CO., DEFENDANTS AND APPELLEES.

D E C I S I O N

MCDONOUGH, J.:

On July 20, 1901, the appellants entered into a contract with the appellees, under which the former were to build for the latter a dwelling, on a certain lot in the city of Manila, according to a plan and specifications made for this purpose for the sum of 13,000 Mexican pesos, payment to be made in three installments—4,000 pesos when the necessary material was on the land and the work was commenced; 4,000 pesos when the house was finished as to walls, roof, etc., and 5,000 pesos on the completion of the work, which was to be finished within three months. In addition 500 pesos were to be paid for the installation of the city water in stables, kitchen, baths, and water closets, and the necessary drain pipes, and for the construction of a stable in accordance with the specifications indicated, 1,500 Mexican pesos, payable at the termination of the work, making a sum total of 15,000 Mexican pesos.

On the 20th day of June, 1901, plaintiffs contracted with the defendants to fill a certain lot, on the bank of the Pasig River, with earth and sand, at the rate of $1.30, Mexican currency, per cubic meter, a copy of which contract is as follows:

Manila, P. I., *June 20, 1901.*

"We, Campbell & Go-Tauco, hereby agree to and

with Behn, Meyer & Co., city of Manila, upon their signed acceptance to fill up a certain lot lying on the bank of the Pasig River, next to Malacañan Palace, with suitable' filling composed of earth and sand of good quality, at the rate of $1.30, Mexican currency, per cubic meter. Material will be measured in whatever way the said Campbell & Go-Tauco, with the approval of Behn, Meyer & Co., deem most expedient; then spread evenly over the ground to bring the lot to a certain level, which level will be determined by Behn, Meyer & Co. Weekly payments to be made to Campbell & Go-Tauco by Behn, Meyer & Co. The amount to be furnished will be over 15,000 cubic meters and delivered at the rate of 5,000 cubic meters monthly, unless some unforeseen cause, as storms, etc., make it impossible.

"Accepted.

"BEHN, MEYER & CO.
"GO-TAUCO, O. F. CAMPBELL,
"Contractors."

The contract and specifications for the building of the house are quite brief; and they, as well as the plans, show a lack of such details as to work and materials as are usually incorporated in contracts, plans, and specifications for expensive buildings.

The specifications are as follows:

" Specifications to govern the construction of a house of strong material on the lot on Malacañan Street, District of San Miguel; owners, Behn, Meyer & Co.

"First The house shall be twenty-four yards in width, twenty yards deep, and seven and one-half yards high.

"Second.
The foundations shall be of ordinary Guadalupe stone and shall have a

depth of 1 m. by 1 m. with piers 1 m. by 0.60 m. The stonework of the lower story shall be of the kind known as ordinary Guadalupe stone of 0.16 of a meter.

"Third. The uprights shall be constructed of apitong, macasin, or amoguis wood 0.20 m. by 0.20 m, square. The framework of the roof, the stringers, trusses, cross beams, hangers, stays, and partitions shall be of apitong, macasin, or amoguis wood; the stays shall be 0.12 m. by 0.07 m. square.

"Fourth. The partitions of the upper floors shall be of boards made of the woods above indicated, one-half inch in thickness; the flooring of the upper story shall be of amoguis or tangili.

"Fifth. The windows shall be of native shell. The doors of the rooms on the upper story and of the apartments on the lower story shall be of macasin or apitong, and the railing of the porch shall be of timber of the same class.

"Sixth. The principal stairway shall be 1.40 m. wide, with a hand rail and railings 0.05 by 0.05 m., and another stairway for the servants 0.05 m. wide, constructed of timber of the second class.

"Seventh. The paint used on the exterior of the building shall be oil paint and on the interior water paint, with the exception of the doors, which are to be varnished."

The parties to the building contract agreed to have certain alterations and additions made to the house, and these were made during the progress of the work. The amount charged by the plaintiffs for the materials and labor for these alterations and the extra work was 7,750 pesos, making the total cost of the structures and appurtenances the sum of 22,750.62 pesos, of which sum the defendants paid to the plaintiffs the sum of 13,500 pesos, leaving an unpaid balance claimed

by the plaintiffs of $9,250.62, Mexican currency, for which sum the plaintiffs brought this action.

The defendants, in their answer, disputed their liability to pay a sum of $2,333.12, Mexican, claimed by plaintiffs for alterations, extra work, and labor; but at the trial they practically admitted that if they failed in their defense that the plaintiffs constructed said dwelling house in an unworkmanlike, careless, and negligent manner, the plaintiffs would be entitled to judgment for the full amount claimed by them for their work and materials, viz, 9,250.62 pesos.

In his decision of the case, the learned judge of the Court of First Instance must have found that this extra sum claimed by plaintiffs was proved, for he stated:

> "I have concluded that an equitable adjustment of this matter is to deny the plaintiffs any other compensation than they have already received, because of their breach of contract in so defectively constructing the improvements of the defendants, and that the defendants are entitled to at least the *unpaid balance* as damages sustained by them on account of the manner in which these improvements were constructed by the plaintiffs."

The unpaid balance claimed by plaintiffs was $9,250.62, Mexican currency. As the defendants neither objected nor took exception to this finding of the court, it must stand as the amount which the court held was offset by the failure of the plaintiffs to comply with their building agreement.

The defendants not only claimed damages for this breach of the building contract for the reason, "as they alleged, that the work was not performed according to the contract, plans, and specifications, but, by way of counterclaim, they also allege that plaintiffs represented to the defendants that the amount of sand and earth used in the filling of the lot was 62,690.50 cubic meters, and that the

defendants paid to the plaintiffs therefor, $81,497.65, Mexican currency; that the amount of earth and sand actually deposited on said, lot was 31,000 cubic meters, and that they had paid the plaintiffs for 31,690.50 cubic meters of sand or dirt which was not used to fill the lot in question, amounting to the sum of $41,197.65, Mexican currency, and prayed judgment for the sum of $71,197.65, Mexican currency, to wit, $30,000 on their first counterclaim for the failure of plaintiffs to comply with the building agreement and $41,197.65 on the second counterclaim, with costs.

In their reply the plaintiffs allege that they had delivered on said lot, for defendants, 64,444 cubic meters of earth and sand, for which they are entitled to $83,777.20, Mexican currency, and that there is due them thereon. $2,279.55.

In the decision of the court below it is said by the judge:

> "I am further satisfied that the defendants paid plaintiffs $1.30 per cubic meter for at least 40,000 cubic meters of sand and dirt as filling for their lot that was not put thereon by plaintiffs, which amounts in the aggregate to $52,000, Mexican currency."

And judgment was ordered "that the complaint be dismissed and that the defendants recover of the plaintiffs the said sum of $52,000, Mexican, and costs of this case.

Plaintiffs duly excepted, and made a motion for a new trial.

The house was finished early in May, 1902, and the defendants accepted it by moving into it at that time. A careful reading of the evidence in this case, and an examination of the plans and specifications lead to the conclusion that there are defects in the building in question. Among these are the following: The foundations are not such as a first-class architect would recommend for a large building, to be erected on soft and spongy ground; the pillars are not

placed on these foundations in such a way as to give the best support; the wood is of an inferior kind or group. The house has settled; the floor boards and others have shrunk and the floor of the veranda slopes toward the house on all sides. In order, however, to hold the plaintiffs liable for these defects of plans, specifications, and of construction it must be shown that they were caused by the plaintiffs and because of their defective workmanship.

During the progress of the work the defendants had two engineers on the premises, Mr. Duff, who died, and Mr. Cook, who succeeded him, whose duty it was to see to it that the work was done in a workmanlike manner and according to the plans and specifications.

There is no evidence to show that the instructions of the engineer who directed the work were, at any time, disregarded by the plaintiffs, nor is there anything in the case showing that the engineer complained of defective work. Moreover, it is practically conceded by all the witnesses examined on this question that the wood and timber provided for in the contract was of an inferior group or grade, such as warps and shrinks.

The most serious defect in the house was caused by the settling of the pillars for lack of proper foundations.

The proof, however, shows that the foundations were built according to the plans and specifications and that the pillars were placed as the plans required them to be placed. The plaintiffs are not to be held in damages for following these plans, especially when they were followed under the eyes of the defendants' engineer and without objection from him.

In fact it was affirmatively shown in the case that Mr. Duff gave orders regarding the changes of posts and made the modifications he deemed necessary in regard to the foundations and posts; and Mr, Dettmer, the manager of the defendants, testified that Mr. Duff, as surveyor "had power to see that the building was properly carried out."

The principal expert witness for the defendants testified that there

was a defect of construction, in that not all of the piers are under the posts or pillars; that the pillars ought to rest on top of the foundation; but when shown the plan of the building, which was approved by the municipal authorities, he admitted, that according to these plans, the pillars were to rest not on top of the foundations, but to pass through the foundations and to rest in the ground; and that when the builders placed a course of stone under the pillars in the middle of the foundation, they improved on the plan and made the foundations of the pillars stronger; nor did this witness say that the joints of the pillars were insufficient. He said they could be improved by using straps as well as bolts. There is nothing, however, in the plans or specifications requiring such things.

Other defects mentioned by this witness are undoubtedly due to the grade of lumber used, the same kind provided for in the contract and specifications. The specifications, said this witness, provide for timber of the third group. This grade of timber is lighter and more spongy than the groups higher than the third. On account of being spongy it shrinks during the heat. It can not be tightly adjusted so as not to leave a space. It would be difficult to make a good joint with this wood which would remain joined; it could be tight but it might shrink and open and close again.

Surely the plaintiffs can not be held responsible for the defects of the timber which they furnished, as provided for in their agreement, and which was of the group and quality designated by the defendants.

From the evidence in this case it must be found as conclusions of fact:

(1) That in the construction of the building, the contract, plans, and specifications have been complied with, with the exception, of a variation to the advantage of the owner, which is that the principal posts rest upon layers of stone instead of upon the ground," as called for by the plan.

(2) That if there has been any variation from the original plan, this was done largely, if not wholly, with the consent of the owner,

and, at all events, with that of his agent, the inspecting engineer, and that these changes have been improvements.

(3) That the house was constructed under a contract and specifications which did little more than to designate the size of the building, the material to be employed, and, with the plan, gave a drawing of the building, leaving the details necessarily almost completely to the direction of the inspecting architect or engineer.

(4) That the owner instrusted the direction of the work to an inspecting engineer selected by himself, with full authority to represent him, and that the contractor has performed the work wholly in accordance with the direction of the said inspecting engineer.

(5) That although there is some evidence to indicate thai a part of the house has settled a little more than other parts, this is due either to the ground itself or to a defect in the plan, or to the directions of the inspecting engineer, and can not be attributed to a failure on the part of the contractor to comply with the conditions of the contract.

(6) If there are any cracks in the floor and in the joints in the building, this is due to the class of lumber which was selected by the owner.

(7) That the plan of the work and the placing of the principal posts were approved by the city engineer and were in conformity with the ordinances.

(8) That the owner took possession of the house in the month of May, 1902, and has occupied it since that time as a dwelling house.

By the very fact of accepting the house and occupying it, the defendants acknowledged that it was constructed substantially as required by the contract, plans, and specifications; and this is the law even when the work is not done according to the contract, but accepted.

In case of a contract for furnishing materials and building a house in a specific manner, if it be not done according to the contract, the party for whom it is built may refuse to receive it and elect to take no benefit from what has been performed. If he does receive it, he shall be bound to pay the value—the reasonable worth of what he receives. (6 New Hampshire, 481, 8.[1])

Where the owner moves into the building contracted for, the rule of substantial performance should be applied in an action by the contractor. (Duell *vs.* McCraw, 86 Hun. N. Y., 331.[1])

This being the law, the court below erred in adopting as a measure of damages what it would cost to take this building down and to rebuild it, estimating the cost of the materials and of necessary new materials, and without proof of the actual costs of either.

This is not the rule or measure of damages adopted by the courts. (Kidd *vs.* McCormick, 83 N. Y., 391; Carland *vs.* New Orleans, 13 La. Ann., 43; Cullen *vs.* Sears, 112 Mass., 299.)

It follows that inasmuch as the plaintiffs complied with their contract and constructed the house according to the plans and specifications and under the directions of the defendants or their authorized agents, they are entitled to recover therefor the unpaid balance as found by the court below, viz, the sum of $9,250.62S Mexican currency.

The claim for a recovery of the money paid by the defendants to the plaintiffs for 31,690.50 cubic meters of sand and earth which it is alleged were paid for but were not placed on the defendants' lot, is next to be considered.

The contract is undisputed, but the defendants claim that the total amount of earth and sand paid for was not delivered, and that the money was paid therefor under a mutual mistake of facts. The plaintiffs are not charged with receiving this money by fraud or deceit, or with any fraud or deceit in the measurement or delivery of the sand and earth.

The defendants paid for 62,690.50 cubic meters, and the plaintiffs

claim that they delivered to the defendants 64,444 cubic meters and ask in their reply to the defendants' answer for payment of 1,753.50 cubic meters, not paid for, amounting to $2,279.55, Mexican currency.

The burden of the proof is on the defendants to show that they did not receive the 62,690.50 cubic meters of sand and earth, and on the plaintiffs to show that they delivered 1,753.50 cubic meters of sand and earth, for which they were not paid.

Pursuant to their contract, the plaintiffs began to deliver the sand and flli the lot on or about July 14, 1901, and continued to deliver the same until April, 1902.

The sand was measured in bancas by the agent or servant selected and paid by the defendants. Receipts for this sand were given daily to plaintiffs and at the end of each week duplicate bills were rendered by them to the defendants, which were O.K.'d by the manager of the defendants' firm and then paid.

The authorized representative of the defendants' who gave the receipts was on the ground constantly to receive this sand—in fact he lived on the ground. The sand was taken from the river and was wet when delivered.

The defendants kept a book account of all sand delivered. The plaintiffs kept a man there to see to it that all the filling went on and to take the receipts from defendants' representative. One of the representatives of the defendants who measured the sand was called as a witness by the plaintiffs and testified that he measured the water line of the bancas containing the sand. That the number of cubic meters of sand were told by certain marks on both sides of each banca; and that he was instructed by the manager of the defendants that it was not necessary to measure the bancas. The defendants by their own books and receipts, and as measured by their own agents or servants, showed that they received and paid for 62,690.50 meters of sand and earth.

In order to disprove their own admissions and books, they called two expert witnesses to show that this amount of sand and earth was not on

the lot in question at the time of the measurement by these witnesses—presumably after September 6, 1902; for in the letter of the defendants to the plaintiffs of that date the former do not appear to have had the figures subsequently given by these witnesses—and many months after the sand and earth was all delivered.

The defendants did not call as witnesses any of their own agents or servants who measured this sand at the time of delivery, nor any of the banca owners or managers to show the amount delivered.

The lot which was filled contained, according to defendants' witnesses, a superficial area of 16,573.50 square meters.

It was, before it was filled, a rough piece of land, covered with very deep ditches, in part a paddy field and in part a swamp where people fished and watered their carabaos. The defendants' experts made a survey of this lot and an examination of the sand thereon, many months after it was deposited, with a view of determining the amount of sand originally deposited there by the plaintiffs. They measured the area of the lot and sunk five or six holes down to what they called the original soil, took the depth of the sand as shown by these holes, made a general average allowing 15 per cent for settlement, and reached the conclusion that there had been placed thereon a quantity of sand amounting "approximately" to 20,965 cubic meters. These holes, it was said, were distributed at intervals over the property, so as to enable the witnesses to get an average "guess" at, or approximation of, the amount delivered.

One of these experts stated that he did not see this zacate field before it was filled up and that he did not know how many little ridges there were or how many canals may have existed on the property.

We can not assume, in the absence of proof, that these witnesses sunk holes in that part of this large lot where the deep ditches or canals existed or where the swamp was. The correctness of the conclusion reached by these experts depended to a great extent on the depth of the holes sunk through the sand, and this depth depended on

whether or not they were sunk on the level part of the lot or in the ditches or swamp.

The evidence, therefore, is uncertain, and does not enable us to accurately determine the exact number of cubic feet of sand or earth delivered on the lot; and this is especially true when the evidence shows that the conclusions of the defendants' experts are disputed by two experts called by the plaintiffs, experts of larger experience than those of the defendants and equally as competent to give opinions on this question.

These experts called by the plaintiffs testified that the amount of sand and earth mentioned as delivered and paid for could have been delivered on this lot and yet shown no greater bulk than that which appeared there when the defendants' experts made their measurements, provided, a greater percentage were allowed for settlement, and they cited the works of eminent engineers to show that the allowance for settlement should be from 31 to 38 per cent instead of 15 per cent.

In view of the fact that this filling was measured at so long a time after it was placed on the lot; in view of the fact that the estimates of these witnesses of the amount delivered is but an approximation or '"guess;" in view of the conflict of testimony regarding such amount, and in view of the fact that the defendants, by their authorized representatives, actually measured the sand and earth, at the time of the delivery of each banca load, in the manner directed by the manager of the defendant, we can not now say that this latter measurement is all wrong and the new measurement all right; especially when there is no proof that any fraud or deceit was practiced on the defendants in the matter of measurements or in the keeping of the accounts thereof.

The learned judge who tried this case seems to have been of the opinion that because the contract states that the amount of sand to be delivered shall be "over 15,000 cubic meters," therefore it was a conclusive corroboration of his finding that not more than 21,000 cubic meters of filling was placed on the lot.

If only about 15,000 cubic meters were intended, why did not the defendants stop the delivery when they knew that 15,000 cubic meters had been delivered?

After the amount had gone beyond that mark, why were not the defendants put upon inquiry? Why, if they suspected anything wrong in the measurement, did they not make an investigation?

Delivery of filling began early in July, 1901, and down to October 20 of that year the amount delivered exceeded 16,000 cubic meters according to the defendants' own record. Why, then, if only about 15,000 cubic meters, or even 21,000 cubic meters, were sufficient to fill the lot, did the defendants let the filling go on during the remainder of October, the whole of November and December, 1901, and January and February, and down to the latter part of March, 1902, and this without a word of complaint from the defendants during its progress, and not a word afterwards until plaintiffs began to press defendants for their unpaid balance on the house contract?

It is not unusual to allow a plaintiff to recover money paid to a defendant through a *mutua*l mistake of fact. That was the case of Whedon *vs.* Olds (20 Wendell N. Y., 174), cited by the defendants' counsel. There the parties guessed at the quantity of oats in a store house and payment was made on the basis of this guess. Afterwards the oats were actually and accurately measured and the plaintiff recovered the excess of payment on the principle that there had been a mutual mistake in the amount guessed. There could be and was no doubt in that case as to amount actually delivered, because it was measured. In the case at bar this process has evidently been reversed by the court below. The parties first actually measured the sand and earth and the amount was paid for according to actual measurement; but now the defendants, by their experts, have guessed that they did not receive as much as the defendants' former measurement shows, and they want a return of money on the ground that the guess is more reliable than the measurement. The plaintiffs deny that there was any mistake, mutual or otherwise, in this former measurement; and so this Whedon case does not sustain the contention of the defendants. Nor does the case of Whitcomb vs.

Williams (4 Pick. Mass., 228) sustain the contention of the defendants. In that case one of the parties, for years, had been buying rum of the other party, and had been paying for the same oh the belief that the cask in which it was measured contained 121 gallons, whereas it turned out, after payments had been made, that the cask contained only 114 gallons. Here was a mutual mistake, a mistake which could not be denied. Here was accurate measurement of the actual amount of rum delivered and, of course, the plaintiff was entitled to recover the excess of his payments. But the case at bar is entirely different. No fraud or deceit is proved and no mutual mistake is shown by unmistakable evidence.

This case in the absence of evidence of a mutual mistake is governed by the doctrine of estoppel. The defendants measured the sand, they receipted for it, and they paid for it. They can not now say they did not receive it. It comes within the principles laid down in Austin *vs.* Wauful (36 N. Y., St. Rep., 779; 13 N. Y., 184), where it was held that a receipt given by the plaintiff in that case for the property in question estopped him from denying that he had the property when the action was brought.

In Behring *vs.* Somerville (44 Atl. Rep., 641) it was held that the fact that both parties had equal means of information, and money was paid upon a mistake of fact, it can not, in the absence of fraud, be recovered back, the money being that of the payee.

It follows that the defendants are not entitled to recover from the plaintiffs the said sum of $52,000, Mexican currency, allowed by the court below.

As we do not find that the plaintiffs have satisfactorily proved the delivery of the additional sand and earth for which they claim $12,279.50, Mexican currency, that claim is disallowed.

The judgment of the Court of First Instance is reversed and judgment ordered for the plaintiffs for the sum of $9,250.62, Mexican currency, with costs of both instances.

Arellano, C. J., Torres, Willard, Mapa, and *Johnson, JJ.,* concur.

---

[1] Britton *vs.* Turner.

[1] 26 Am. Dec., 713.

CONCURRING

COOPER, *J.*

I conform to the reversal of the judgment, but the case should be remanded to the Court of First Instance for a new trial.

Date created: January 24, 2019