

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2017-03179

BETWEEN

EVELYN CAMPBELL

Claimant

AND

SHURLAND WILLIAMS trading as AL BE SURE CONSTRUCTION CO. LTD

Defendant

Before The Hon. Madam Justice C. Gobin

Date of Delivery: April 30, 2019

Appearances:

Mr. Frank Lorris Peterson, Attorney at law for the Claimant

Ms. Lisanne T. Laloo, Attorney at law for the Defendant

REASONS

The Claim

1. The Claimant, Evelyn Campbell is an 84 year old pensioner. In April 2015 she completed the purchase of a four bedroom home at 126 Bonair Gardens, Tacarigua at a price of \$950,000.00. Even before that date she hired the Defendant, Mr. Shurland Williams and his firm Al Be Sure Construction Co. Ltd to do what appeared to be substantial renovations. The parties signed an agreement on 25th March 2015 for the remodelling of an existing four bedroom, both single storey house by converting the same into a three bedroom, three bathroom house for seven hundred and eight five thousand (\$785,000.00), for materials and labour “as agreed by the owner”.

2. The agreement specifically provided as follows:-

“Work to be performed on property: Lot 126 An lac Crescent Bonair Arouca
– Duration 6 weeks – construction of a three bedroom, three bath single
house – see attached Estimate.”

Please note any works variation from the agreement would be subject to
additional charges and a new agreement drawn.

A 50% deposit on additional works is required to be paid upfront to the
contractor – failure to pay the additional charges would result in the works
for any variations being stopped immediately by the contractor.

3. The agreement appeared to treat variations and additional works as one and the same thing. The estimate was dated 18th March 2015. It provided no details, only general broad estimates for the costs of identified works which totalled \$785,000.00. At the date of the estimate and subsequently of the agreement on 25th March there was no actual floor plan within the contemplation of the parties for what was a huge renovation project, but the Claimant at least on the pleadings accepted the agreement. The estimated price was in fact treated as the contract price.

4. The Claimant filed this claim against the Defendant for the sum of \$310,337.29 of which \$233,066.27 represented a claim for monies paid under the contract for works included in the estimate, which she alleged the contractor did not complete. She claimed that he walked off the job in or about September 2015 and refused to complete the remodeling works. She claimed he had effectively repudiated the contract and she had accepted his repudiation. The balance of \$77,271.02 was the cost of remedial works which she caused to be done by Aleem Baksh of Aleem’s Construction. The Claimant paid one hundred thousand dollars over the contract price. She claimed she did that the request of the Defendant to enable him to hire extra workers to complete the job more quickly. She was therefore seeking the return of this payment.

The Defence

5. The Defendant's case was that all times the Claimant agreed to extend the date for completion, the necessity for which arose, as a result of her continuous requests for variations of the said works and for additional works. He denied that his works were defective. He said at all times he carried out the works with due care and skill and in a workmanlike manner.
6. The Defendant says he was unable to complete it because on 30th November 2015, at which stage all that was left to be done was the tiling of the yard, the Claimant physically assaulted him. On the specific items of works allegedly left incomplete the Defendant generally denied the allegations and said he had made appropriate deductions for any works which were unfinished at the time of his departure.
7. The Defendant counterclaimed for the sum of \$299,250.00, bearing late fees in the sum of \$274,500.00, the loss of tools which he was not allowed to remove when the Claimant refused to allow him back on the site – replacement estimate \$22,676.63 and the sum of \$24,750.00 outstanding on an invoice he submitted on 15th September 2015 for the variation works. He applied the additional sum of one hundred thousand dollars paid by Mrs. Campbell to this invoice. He also claimed the sum of \$15,000.00 a Consultancy fee. There was no reference to this in the agreement but he said this was agreed.

Reasons for dismissing counterclaim

8. The Defendant's counterclaim can be determined summarily on the basis of my understanding of the law. The bulk of this claim is the accumulation of the late fee charge on alleged outstanding sums under the amended contract in the sum of \$274,500.00. That claim as well as the claim for sums outstanding for variation works cannot succeed. The Claimant agreed in writing to certain terms of a contract prepared by the Defendant with specific provision for any variation requests to be the subject of a "new agreement drawn." This is not an obscure clause inserted by lawyers in a complex agreement. It is a simple and plainly worded clause which would have been inserted primarily for the

contractor's protection and his benefit. It was clearly contemplated that additional costs of variation works would impose fresh obligations to pay an increased deposit. This was to be achieved not merely by an amendment, but a fresh agreement altogether.

9. The success of the Defendant's counterclaim and much of his defence rests on the validation of the oral variation and subsequent unilateral reduction into writing, of the new terms contract which he alleged significantly altered the terms of the scope of works and the price on the estimate of 18th March 2015. It also warranted an extension of the completion time from 6 weeks to at least 5 months. I have considered the judgment in the authority provided by Counsel for the Defendant in **Rock Advertising Ltd and MWB Business Exchange Centres Ltd 2018 UICS (24)**. This is an authority which is not binding but it is highly persuasive. This case dealt, in part, with the issue of the legal effect of a "no oral modification" clause, which is essentially what these parties agreed in the matter before me though it is arguable that Mrs. Campbell and Mr. Williams went even further.

10. In delivering the judgment of the majority in **Rock Advertising Ltd**, Lord Sumption concluded that "the law should and does give effect to a contractual provision requiring specified formalities to be observed for a variation." Lord Briggs in delivering the minority ruling agreed with Lord Sumption that the appeal should be allowed on the ground that the no oral modification provision clause (9) (5) of the agreement between the parties deprived the alleged oral agreement asserted by the respondent of any binding force as a contractual variation. He said this: -

"I fully agree with Lord Sumption's proposition that parties who orally agree the terms of a variation of the substance of their contractual relationship do not truly and without more impliedly by agree to dispense with the nom clause.

11. In both Judgments their Lordships considered the safeguard against injustice in cases in which a party was precluded by his conduct from relying on the "no oral modification" clause. The answer was simple. Estoppel defences could be relied upon.

12. The Defendant in this case did not raise an issue of Estoppel, nor did he rely on any other equitable principle. His counterclaim was firmly rooted in the March 25th agreement, and on his subsequent submission of an invoice dated 15th September, signed only by himself for the additional sum of \$172,000.00. He pleaded this as an act of compliance with the terms of the original agreement for a variation or new agreement to be in writing. The Claimant at all times denied that she agreed to any variations of the contract. She signed no other document and the evidence established that she did not. As a matter of law then and in the light of the authority, it is my view that the claim to any further payments under the “varied term” and penalty fees must fail.
13. The claim for consultancy fees is refused. The absence of any reference to it in the estimate 18th March 2015 and the contract of 25th March 2015 or in the alleged invoice of 15th September 2015 is significant. I reject this claim entirely. The floor sketches hardly approach anything that could be considered professional, and it seems that that is what this “fee” was about.

Credibility of Defendant

14. I turn to the matter of the Defendant’s general credibility on which I shall indicate my findings as there is the issue to be determined of why the Claimant paid at least \$100,000.00 in addition to the agreed contract price to this Defendant. She has included the recovery of this sum in her claim for damages. The Defendant claimed it was paid toward the variations and additional works that she requested, while Mrs. Campbell said he asked for it to hire additional workmen to complete the job more quickly.
15. In the Defence at paragraph 10 (ii) the Defendant annexed two sketches which he said represented floor plans the first of which was drawn in accordance with the terms of the contract made on March 25th and the second which was prepared in accordance with the variation works as requested by the Claimant. The ink had barely on the page of the original contract when Mrs. Campbell paid substantial monies towards the price, about 80% - \$600,000.00. The plan was a basic sketch dated 1st April 2015. The alleged second plan which was drawn in accordance with the variation works as requested by the Claimant, (Defence para 10, (ii)), was dated 3rd June 2015. There was no indication on either plan

that the Claimant had seen or approved them and I do not believe that she did. Neither plan indicated the location of a storeroom, which turned out to be a contentious issue.

16. In his Witness Statement quite inconsistently with his defence – the Defendant said (paragraph 8) that it was at the end of July 2015 the Claimant made an oral request for additional works and variations toward which he had to purchase materials and commence further construction. The inconsistency on these dates significantly undermined his credibility. The effect of this from his departure pleaded case left him essentially saying that the plan which reflected the variations was drawn before the Claimant requested them.

17. The submission of an invoice date 1st September 2015, almost four months after the request at the end of June with no indication of an agreement by the Claimant did not assist the Defendant's case. In the light of the clear terms of his agreement, and his evidence of concerns that the Claimant kept changing her mind about what she wanted, it hardly seems credible that the Defendant would not have reduced their fresh agreement to writing. This does not mean that there may not have been some variation, but I believe such as they were, fell well within the broad estimates submitted at the date of agreement.

18. The Defendant submitted a receipt for the rental of a bobcat for clearing the site in the sum of \$2,500.00. It pre dated the agreement executed by the parties. This has not been explained. However, in the Defence in answer to the claim by the Claimant that he had failed to remove debris the Defendant produced a single receipt dated 18th March 2015 signed by Vishnu Maharaj in the sum of \$1500.00 in addition to the bobcat rental one above. These two amounted to \$4,000.00 the figure agreed by Mrs. Campbell. At the trial stage the Defendant and Mr. Maharaj produced receipts for removal of rubble amounting to almost \$17,000.00. I reject this significant department from the pleaded defence and the belated self serving production of these receipts which I do not believe were genuine.

19. As to the stage at which the project had reached in November 2015, in his Witness Statement, Mr. Maharaj said the job had ended, but the Defendant said that the yard was to be tiled. The Defendant

produced a tax invoice from Plumbing World to show that he had in fact purchased a water tank and pump. The date on the tax invoice and the computer generated invoice are not the same. The latter gives a date of the order as 17th December 2015, this was after the Defendant had left the site. The date of the tax invoice on the face of it appears to have been over written. This raised a further question as to the credibility of the Defendant.

20. On alleged loss of his tools and equipment, this was never actually particularised in his counterclaim. I find it significant that up to the date of the trial, the Defendant, a contractor had not actually replaced the tools he allegedly lost but was only relying on a quotation obtained 6 months after he allegedly lost them more than three (3) years ago. If, as he said he had only tiling work left to do, it does not seem plausible that the Defendant would leave behind tools of a replacement value of \$22,000.00. Further, the Claimant introduced extracts from the Magistrate's Casebook of the outcome of the private complaints brought against her by the Defendant. The claim for stealing his property was withdrawn with leave. The extract contained no particulars as to what was allegedly stolen.
21. The Defendant did not produce evidence of his complaint which would have reflected particulars of the items and their value to support his claim in these proceedings as to the extent of his alleged loss. Consistency on the face of a more contemporaneous document filed in court would have assisted his credibility. The fact that he sought the assistance of the police as evidenced by the note in the station diary does confirm he lost some of his tools but special damage has to be strictly proved. These tools have never been identified with sufficient particularity.
22. On the issue of the reason for the further payment of \$100,000.00, I find the Claimant's explanation more plausible. The Defendant has failed to explain how a project which he estimated would take 6 weeks for completion was continuing, up until the end of November. There was no issue as to payment. There has been no explanation as to why the changed floor plan of 1st June 2015 that he produced, resulted in the months of delay. There is no evidence that as a result, any substantial demolition and reconstruction works were required.

Claimant's credibility

23. The Claimant's case was also fraught with inconsistencies as well and her failure to produce Mr. Aleem Baksh had a devastating effect on her claim for remedial works in the sum of \$77,271.02. That claim had to be dismissed. The first serious question about her credibility arose on the face of a pre-action letter dated 7th April 2016 by her previous attorney, Ms. Beverly Marcus who claimed the sum of \$473,071.00 for corrective work. At the date of it, the Claimant would have already contracted Aleem Baksh, he would have done the work and he would have been paid \$77,271.00. The inconsistency in the pre-action claim and the actual amount she allegedly claimed she paid undermined her credibility from the start. The sum claimed in the pre-action letter was clearly inflated by almost 5 times. This did not impress.
24. Mrs. Campbell is an elderly lady with a clearly very strong personality and one who believed herself to be and who held herself out to be very much in charge of her business affairs. But under cross-examination and in answer to the Court she appeared not to be entirely so. So for example although she sued on the agreement dated 25th March she kept insisting she had signed no agreement. Despite her denials, I do believe that she did have involvement in and did request certain changes from what she desired originally but I do not believe that these were so substantial as to affect the original estimates. I do not believe there was an agreement to build with any fixed plan and none was actually shown to her. Given the estimates, it seems that the arrangement stated was to remain fairly loose. Her upfront substantial payment for materials and labour did not identify any particular design in writing. There were no measurements, no details or specifics of what was agreed to be done and there was no timetable to indicate, how long any particular part of the project would take. The contractor who produced it chose to ignore these specifics. It seems he accepted the risk to build in those circumstances and if he did not in accordance with the terms of his own agreement draw up a new one, I am prepared to infer that nothing materially affected the costs or indeed the timeline.
25. In any case if the requests did indeed significantly increase the costs, on my analysis of the law, I do not believe that those requests without the formalities required could have any legal effect.

26. On the issue of the further payment of \$100,000.00 I prefer the Mrs. Campbell's explanation of why this payment was made. The Defendant, a businessman with experience in the construction industry gave 6 weeks as a timeframe for completion of a substantial remodelling job. He has never indicated the actual start up date. What is clear is that even from 1st June with the variations he alleged (and which I have rejected) the job took another 5 months from the date of his new plan. Even on his evidence, the new plan involved some shifting around of the position of sinks, fixtures cupboards, some electrical and plumbing works. He failed to produce any evidence as to what was involved in the change from one floor plan to the next, what if any breaking down and reconstruction was involved and how the original completion was impacted.
27. I believe the contractor's six week estimate was unrealistically optimistic and Mrs. Campbell a lady who had paid upfront the bulk of her monies began to experience the owner's nightmare. It was just taking much longer than she was promised. I accept that she had moved in and still had unfinished work and she paid in the belief that it would expedite the completion.
28. This is supported by the absence of a new contract for variation in accordance with the original agreement. I accept the Claimant's evidence that the Defendant did not submit any further invoice to her for these alleged additional work. The payment of the significant \$100,000.00 in advance on an invoice which was supplied in September even for a lady who had paid up front before does not seem like something she would have done. The first time round she had a contract which she signed and she had an estimate. At the stage of the \$100,000.00 payment there was as yet not even an estimate for additional costs far less an agreement. The amended plan of 1st June on which the Defendant was relying had already been long produced, according to his account.
29. The "invoice" of 1st September does not even refer to the payment of \$100,000.00. There is no other contemporaneously issued document which specifically refers to the payments of the sum of \$100,000.00. Two documents were produced with the date 1st September 2015, one was still labelled as a "quote", while the second one, the invoice referred to "reimbursements and additional works completed to 3 bedroom house between April to August. The latter suggests the project was finish. The figure was the same. This begs the question, what then was the Defendant still doing on the site

until 30th November 2015. The Defendant's documents put the lie his own account. I believe the Defendant simply produced these documents after the fact and to justify the extra payment of \$100,000.00 by the Claimant. I do not believe it was actually produced and submitted to the Claimant. She knew nothing of it until she received the response to her pre-action letter.

30. I believe that he did in fact practically abandon the job without completing same and that the Claimant was understandably very upset when he showed up on 29th November 2015. I do believe she attacked him physically as well and that is to be denounced. However, I do not believe that that is the reason the Defendant did not go back. As far as he was concerned and as the invoice D0002481 shows he had completed the job in an estimated 5 months from April to August, even before he issued that invoice.

31. In her Witness Statement however the Defendant's wife Marsha Armstrong said the project including the whole renovation process with variations and additional works took approximately 9 months to complete (Witness Statement para 19). This is a serious jump from 6 weeks even with a new plan dated 1st June. This confirms that there was inordinate and inexcusable delay as well as a complete halting or what the claimant took to be abandonment by August/September 2015.

Specific Claims

32. I did not consider the Defendant's witnesses to be independent. One of them claimed he began to do masonry work on a completely empty lot. This could not have been true. Mr. Maharaj assisted the Defendant in his inflated claim for removal of debris. I believe he was paid no more than \$1,500.00. I will allow the Claimant's claim for \$21,066.27 for electrical works. This lady paid \$60,000.00 for electrical work but so far has not had the work approved by the relevant authorities – the Electrical Inspectorate. It is true that her own electrician did not get that done but he was hired to do corrective work. I accept his evidence as to what he considered unworkmanlike features of the work

33. Because the Defendant and the Claimant agreed only to the very broad estimates provided by the Defendant for material and labour in the absence of a detailed provision of actual costs and required works with no reference to a particular plan or design, I have found it difficult to conclude that the Defendant did indeed do what he was supposed to do and provide what he was supposed to provide under the agreed contract price. But the Claimants' evidence as to what was actually omitted was not very reliable either. Doing the best that I can in the circumstances, I am prepared to give judgment for the Claimant and to order the following: -

Return of additional payment	\$100,000.00
Electrical corrective work	\$ 21,066.27
Water pump	\$ 2,000.00
Tiling of the yard	\$ 12,500.00
TOTAL	<u>\$135,566.27</u>

34. There shall be no order as to costs of the action.

35. The counterclaim is dismissed with no orders to costs.

Carol Gobin
Judge