

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2016-01914

BETWEEN

MAYA LAKHAN

Claimant

AND

SHAZARD MOHAMMED

Defendant

Before the Honourable Mr Justice Frank Seepersad

Appearances:

1. Mr Raphael instructed by Ms Marcano for the Claimant.
2. Ms Mohammed for the Defendant.

Date of Delivery: 15th November, 2017.

Oral Decision reduced into writing

Overview

1. Before the Court for its determination is the Claimant's claim for breach of an oral agreement for which she seeks the following reliefs:
 - i. Damages for breach of contract.
 - ii. An order that the Defendant do pay the Claimant the sum of \$647,920 for breach of contract representing the following sums:
 - a. \$376,000 representing the difference between the value of the property and sums paid by the Claimant to the Defendant;
 - b. \$6,000 for two steel doors;
 - c. \$41,920 for stolen materials resulting from the Defendant's negligence;
 - d. \$140,000 for rental accommodations for the Claimant for the period 30/9/11 to 31/5/16;
 - e. \$84,000 for the rental of warehouse space for the period 30/9/11 to 31/5/16.
 - iii. Costs.
 - iv. Interest.
 - v. Such other costs as this honourable court sees fit.

Facts

2. The Claimant is the owner of a parcel of land situated at LP No. 92 Private Access Road, Lot 23 Mc Bean Village Couva. In or around April, 2010 she entered into a verbal agreement with the Defendant for the construction of a dwelling house on the said land and disbursed the sum totalling \$840,000 to the Defendant. She contends that the Defendant breached the contract and failed to complete the structure as was contractually agreed.
3. In support of her case, the Claimant procured the expertise of the firm of Welch, Morris and Associates, Quantity Surveyors, to assess the value of the work done and the firm opined that the value of the work done on the property as at the date of their survey amounted to \$464,000.

Preliminary Point- Evidential Objections

4. The Defendant filed evidential objections which the Court sought to address on the first day of trial. In particular, there was the notice of application with respect to the evidence of the Claimant's expert Ms Welch which was contained in a report annexed to the Statement of Case. The Court allowed the evidence on terms which are recorded as follows:

D: My Lord, I have filed a notice of application with regard to the expert witness.

Court: I didn't see that notice. Do you have a copy of it? Is it in the Trial Bundle? Was a Part 33 application made Mr Raphael?

C: No please My Lord, I don't think so.

Court: And Ms Mohammed's application is with regard to the failure for a Part 33 order?

C: Yes please My Lord.

Court: I have just perused your application Ms Mohammed. I'm guided by the approach of the Court of Appeal where essentially the Court of Appeal has said that the Court ought not to deprive itself of the benefit of expert evidence if that evidence is germane to an issue or issues that fall for the Court's determination. In this matter, evidence from a Quantity Surveyor can provide assistance to the Court having regard to the issues that fall for its determination. The Court, in a small society such as ours cannot operate with blinders on. In fact, the Court has had in previous matters, the evidence from this witness and the witness's company where orders were made at case management and pre-trial stages deeming Ms Welch and the other partners in the company as expert witnesses and therefore the Court even at this stage, mindful that her witness statement would have been served upon the Defendant that no prejudice can be occasioned by the Defendant this morning, the Defendant having been duly alerted as to the nature of the evidence proposed to be adduced from the witness. If it were a circumstance where an application was being made to now adduce expert evidence then that may have impacted upon whether or not the trial can proceed and the issue of costs but I do not think that any prejudice is going to be occasioned to the Defendant by allowing Ms Welch to testify and the Court hereby makes

a Part 33.3 order deeming Ms Welch as the Claimant's expert witness in this matter. **Having done so, and although the Defendant would have been served with this report, is it your instructions Ms Mohammed that you now wish to adduce expert evidence in their own right to counter or provide some evaluation of the opinions expressed in Ms Welch's report?**

D: No, please My Lord.

5. In considering the Defendant's application, the Court addressed its mind to the Court of Appeal's decision in **Christianne Kelsick v Dr Ajit Kuruvilla and Others Civ App No. P277 of 2012** where Jamadar JA outlined the test for allowing expert evidence as follows:

"7. The principle to be applied in determining whether or not permission ought to be granted to allow expert evidence is as provided for in Part 33.4, CPR, 1998: "Expert evidence must be restricted to that which is reasonably required to resolve the proceedings justly". In this regard, the overriding objective is an aid to analysing the legitimate considerations that impact on deciding what dealing justly with a case involves.

8. In determining whether permission should be granted to use expert evidence and what expert evidence is reasonably required to resolve the issues that arise for determination, a court ought to weigh in the balance the likelihood of the following (assuming admissibility):

(i) how cogent the proposed expert evidence will be; and

(ii) how useful or helpful it will be to resolving the issues that arise for determination. In determining whether this evidence is reasonably required to resolve the proceedings justly, the following factors that allow one to assess proportionality should also be weighed in the balance:

(iii) the cost, time and resources involved in obtaining that evidence, proportionate to the quantum involved, the importance of the case, the complexity of the issues, the financial position of each party involved in the litigation, and the court resources likely to be allocated to the matter (in the context of the court's other obligations); Depending on the particular circumstances of each case additional factors may also be relevant, as such:

(iv) fairness;

(v) prejudice;

(vi) *bona fides*; and

(vii) *the due administration of justice.* "[all emphasis mine]

6. As the record reflects, the Court assessed the Defendant's application in terms of the objectivity, impartiality and independence of the witness and her testimony was found to have been useful in resolving the issues at hand. The evidence was also already annexed to the Claimant's claim so that the Defendant would have had notice of it. On the issues of fairness and prejudice, the Court gave the Defendant the opportunity to adduce expert evidence on his own behalf to counteract that which was adduced by the Claimant but he declined to do so. Therefore the Court allowed the evidence of Ms Welch.

Evidence and Findings

7. There is no dispute before this Court that the contractual arrangements which defined the relationship between the parties were oral as there was no written contract with respect to the construction that was to be effected on the lands at LP No. 92 Private Access Road. The Claimant contends that the two-storey structure that she envisioned was to be constructed at a cost of \$900,000. The Defendant contends that the cost of the structure was not \$900,000 and testified that the first floor of the two-storey structure was contemplated to cost \$975,000. At paragraph 5 of his Defence the Defendant pleaded that the cost of the two-storey structure was \$1.95M and that there was an erroneous statement in a letter dated the 26th November, 2015 which stated that the cost was \$1.8M. Notwithstanding what was pleaded at paragraph 5 of the Defence, in his witness statement, the Defendant again repeated the cost associated with the structure and stated at paragraph 6 that that cost was \$1.85M. In his evidence before this Court he gave another figure by saying the cost was \$1.875M and then attempted to say that he may have made errors in relation to the cost.
8. The contradictions with respect to the alleged cost of completion of the two-storey structure did not engender in the Court a feeling that the Defendant was being frank or forthright with respect to the cost of constructing the two-storey structure and the Court did not accept his evidence either that the first floor was to be constructed at \$975,000 or his evidence in relation to the cost of the two storey structure.

9. The Defendant called no expert evidence and the Claimant called Ms Candice Welch, a Quantity Surveyor. The Court found that the evidence of Ms Welch provided invaluable assistance. Her evidence was not contradicted nor was any evidence adduced to challenge the veracity of her conclusions.
10. Ms Welch produced a report in relation to the structure that she observed at LP No. 92 Private Access Road. The report assessed the work that was done and placed a value on same.
11. The Court found no reason to disregard the opinions expressed in the report. The expert stated that the costs associated with the works she saw was \$464,000. Appended to that report were several photographs which the Court considered. The photographs demonstrated that the structure was incomplete. No second floor was visible on the photographs and the first floor was partially completed and had no roof. The walls and foundation floors were not finished. Given that the expert placed that cost of what was done at \$464,000, the Court found that it was highly improbable and highly implausible that the rest of the two-storey structure could have been completed for \$436,000. Consequently, the Court did not accept the Claimant's evidence that the entire two-storey structure was to cost \$900,000.
12. The dispute revolves around the value of the work done by the Defendant. The Defendant stated that the cost associated with the foundation increased substantially because of the Claimant's variation of the contract to build a three-storey structure as opposed to a two-storey structure. The Court had to resolve whether or not there were any variations and the costs associated with those variations. The Defendant prepared a plan which he said reflected the three-storey structure but the Court noted that the plan was undated and was never submitted to the relevant authorities for approval. The construction spanned from August, 2010 to October, 2012. The Court felt that if the intention was to construct a three-storey structure, on a balance of probabilities, the plan would have been submitted so that the requisite approvals could have been obtained. The Court was not inclined to accept the Defendant's evidence that he was constructing a three-storey structure and the Court found as a fact that the Defendant had been instructed to construct a two-storey structure.

13. The Defendant's evidence was that the foundation height changed because of the change in dimensions of the building and that the foundation increased from a 1 foot height to 5 feet or 5 block heights. The Defendant contended that that was done because of the three-storey structure that had to be provided for but in his Defence, he pleaded that in response to the excessive rain and flooding on the land which the Claimant observed, she requested more foundation blocks. The Defendant sought to demonstrate on the plan the differences between what now stands on the ground and what was initially contemplated with the two-storey plan but the Court found that it was more probable that the variation in the block height was as a result of flooding issues which occurred on the land.
14. The structure was supposed to have been completed between 12 and 15 months but although the Defendant was on the site for a period in excess of two years, the structure was far from completion. The Court having accepted the expert report found as a fact that the work that was done by the Defendant was valued at \$464,000. Consequently, the Defendant owes the Claimant the difference between the sum of \$840,000 which was paid to him and the value of the work done in the sum of \$464,000. The difference is the sum of \$376,000.
15. The Defendant testified that the work on the first floor was 90% complete. That assertion was wholly inaccurate when the Court noted what was depicted on the photographs annexed to the expert's report. Having looked at the photographs in the expert report, the Court rejected the Defendant's assertion that the first floor structure was 90% complete. In fact, what was seen was an unfinished structure with bare walls and no roof. The Court also rejected the Defendant's assertion that he spent an additional \$300,000 in relation to construction costs since this was not pleaded. In addition, the Defendant sought to adduce no evidence in support of the contention that the foundation cost him an additional \$300,000 and as stated previously, this contention conflicted with what was pleaded in the Defence where the additional foundation work was referenced as being necessary because of flooding.
16. With respect to the Claimant's claim for \$6,000 for the steel doors, the Claimant paid \$840,000 and what Ms Welch saw was work done which was valued at \$464,000. Whether the two doors were ordered or not, there is no basis for her to get a refund.

17. The Claimant also claimed the sum of \$41,920 for stolen materials. Building contracts are unique contracts which require specificity. If what was contemplated was an arrangement where the Defendant would have been responsible for the securing of the materials, then that should have found its way into a written contract. In the view of the Court, there is insufficient information before it to conclude on a balance of probabilities that there was a specific, contractually agreed term that the Defendant would be responsible for the securing of materials on the site. Given the locale of the area and the fact that the Claimant had relatives who lived around, it is more plausible that this was never expressly addressed as the construction was in an area where there were relatives upon whom she could have relied to look out for her interests. The Court is not convinced on a balance of probabilities that the arrangement between the parties provided that the Defendant had to secure materials.
18. The Court next considered the issue of rental expenses incurred during the construction period. The Claimant asserted that the Defendant knew that she was renting a residential premises during construction and that she was relying on the prompt completion of her property so that she could earn rental income. An assertion that the Defendant knew that she was renting was not sufficient. If in the context of a building contract time was to be of the essence then that had to be an express term of the contract. The Claimant demonstrated some level of naivety and she made assumptions of trust and hope and she failed to put in place clear and specific contractual provisions. While she may have incurred rent expenses between September, 2011 and May, 2016, that is not, in the context of the ad hoc arrangement which existed, a cost that the Defendant must bear. The same applies to the warehouse rental cost which was claimed.
19. In the circumstances, the Court granted judgment in favour of the Claimant as against the Defendant in the sum of \$376,000. On the issue of interest, there was insufficient evidence before the Court for the Court to hold that the Defendant was contractually responsible for the mortgage interest charges which were incurred for the period. The Court awarded pre-judgment interest at a rate of 2% to the date of this judgment and also ordered that statutory interest was to accrue from the date of the judgment until repayment.

20. The Defendant was ordered to pay the Claimant's costs calculated on the judgment sum of \$376,000 plus interest, on a prescribed costs basis in accordance with Part 67 of the Civil Proceedings Rules 1998 (as amended) and a stay of execution of 28 days was imposed.

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FRANK SEEPERSAD

JUDGE