

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA**

**IN THE HIGH COURT OF JUSTICE
(Civil)**

SLUHCV2014/0106

BETWEEN:

**ALBERT JOHN
(Doing Business as John's Construction)**

Claimant

and

LAURALEE MARIATTE

Defendant

Before:

The Hon. Mde. Justice Kimberly Cenac-Phulgence

High Court Judge

Appearances:

Mr. Callistus Vern Gill for the Claimant

Mr. Kendall Gill for the Defendant

2017: July 13;
September 22.

JUDGMENT

[1] **CENAC-PHULGENCE, J:** This is a typical house construction project which has not ended well for both parties. The claimant, Albert John operating under a business name John's Construction ("Mr. John") filed a claim against the defendant, Lauralee Mariatte ("Ms. Mariatte") in February 2014 claiming the retention monies owed to him, the costs of variations made to the structure and a refund of the cost of installation of 110V electricity.

- [2] Ms. Mariatte filed a defence to Mr. John's claim and also filed a counterclaim against Mr. John claiming damages for poor workmanship and defective works in the construction of her home.
- [3] Case management directions were given and when the matter finally came up for pre-trial review on 15th May 2017, the claimant had not complied with any of the case management directions and had done nothing to prosecute his claim. As a result, his claim was dismissed with prescribed costs awarded to the defendant. Ms. Mariatte indicated her interest in proceeding with her counterclaim and the trial was set for 13th July 2017.
- [4] This decision concerns the trial of Ms. Mariatte's counterclaim. By counterclaim filed on 27th May 2014, Ms. Mariatte claimed against Mr. John damages as a result of incomplete, defective works and poor workmanship.
- [5] The evidence is that Ms. Mariatte entered into a written agreement dated 1st July 2011 with Mr. John in the contract sum of \$285,000.00 for the construction of her dwelling home situate at Balembouche. The house size was to have been 2,060 square feet and the construction period was to have been six months.
- [6] It is Ms. Mariatte's case that in breach of the contract, Mr. John failed and/or refused to complete the construction of the house with due diligence and to carry out and complete the construction in a good and workmanlike manner and according to accepted building standards in Saint Lucia. The particulars of breach identified were as follows:
- i. Incomplete and/or faulty electrical works
 - ii. Irregularity in paint and wall finishings for internal and external walls
 - iii. Faulty plumbing
 - iv. Substandard construction and installation of roof material
 - v. Poor construction of septic tank

- vi. Incomplete and /or poor installation of septic pipes and vents
- vii. Unlevelled flooring throughout the house
- viii. Incomplete and/or poor construction of shower in guest bathroom

[7] Mr. John filed a reply to Ms. Mariatte's counterclaim in which he stated that he carried out the work requested in a good and workmanlike manner and further that none of the breaches stated in the counterclaim had been brought to his attention by Ms. Mariatte. It is rather unfortunate that Mr. John filed no evidence in support of his pleadings and the Court did not have the benefit of hearing from him at all.

Issues for determination

[8] The issues for determination on the counterclaim are simple and are identified as follows:

- (a) Whether Mr. John is in breach of the term of the contract to carry out and complete the construction of Ms. Mariatte's house in a good and workmanlike manner and according to accepted building standards prevailing in Saint Lucia.
- (b) If so, what is the measure of damages to which Ms. Mariatte is entitled?

Whether Mr. John is in breach of the term of the contract to carry out and complete the construction of Ms. Mariatte's house in a good and workmanlike manner and according to accepted building standards prevailing in Saint Lucia.

The Evidence

[9] Ms. Mariatte's evidence is that during construction of the house she was for the most part in Belize and her mother and granduncle would visit the construction site to provide her with updates on the construction. She testified that when on island she would visit the site and Mr. John would walk her through the site. On those occasions, she testified, Mr. John showed her the variations he had made to the design and although she told him of her disappointment with the changes, she

went along with them since he told her that the changes were more aesthetically pleasing. Ms. Mariatte being a first-time home owner said she trusted Mr. John's professional opinion perhaps more so because he had built her sister's house.

[10] At paragraph 13 of her witness statement this is Ms. Mariatte's testimony which I reproduce in full:

"Mr. John handed over the keys for the house o[n] 26 January, 2012 in the presence of my mother and uncle (Eli Cotter). At that point there were some shelves to be installed in the kitchen and there was some work to be done in the guest washroom and Jacuzzi in the master bedroom. The master bedroom was poorly painted and not as I had instructed. I was also very concerned that the paint on the outside walls was incomplete but Mr. John assured me that he would return to remedy this along with all the unfinished works. Unfortunately he never returned."

[11] The evidence from Ms. Mariatte is that three months after the handing over of the keys, Mr. John sent her a text message asking for the retention money. She said she indicated to him at that time that according to the contract the retention period was six months and that he had failed to keep his promise to return to complete the works. She said she also asked him to meet to discuss the defects and incomplete works which she had discovered.

[12] Ms. Mariatte testified as to the several defects and incomplete works which she discovered which included a broken toilet in one of the bathrooms, poor tiling in the guest bathroom, poor plumbing in the ensuite shower, clogging drains as a result of poor waste plumbing, inferior material used for kitchen shelves and no electrical wiring in one of the guest bedrooms and washroom. Ms. Mariatte further testified that she tried without success to contact Mr. John via text messages to inform him of her observations but he did not respond. She also asked her sister and uncle to ask Mr. John to contact her but still there was no response from Mr. John.

- [13] Ms. Mariatte testified that when she could not get Mr. John she hired one Kirt Dickson to paint the master bedroom and bathrooms, run electricals in the guest room, retile the shower area in the guest bathroom, repair drainage in the bathrooms and repair the vanity stand in the guest bathroom which she said cost her a little over \$10,000.00 in materials and labour. It is noteworthy that Ms. Mariatte did not provide any evidence of this expenditure nor was any evidence presented from Mr. Dickson.
- [14] After hiring Mr. Dickson, Ms. Mariatte's evidence is that there was still work that needed to be done so she hired Richard Sammy, a Quantity Surveyor to provide an estimate of repairing the defects in the house and he produced a report dated 22nd September 2012 which is approximately eight months after the keys were handed over. Mr. Sammy's report was exhibited to Ms. Mariatte's witness statement.
- [15] Ms. Mariatte then received a letter from Mr. John's attorney to which she responded but heard nothing further until she got served with the claim. She indicated that she was hoping that the matter could have been resolved amicably. Ms. Mariatte engaged the services of a qualified Engineer, Mr. Adrian Dolcy to assess the works to ascertain what needed to be fixed and he presented a report which is part of the evidence in this case which I will deal with a little later.
- [16] Ms. Mariatte testified that when it is windy the roof sounds like it is coming off and so she obtained an estimate to repair the roof at a cost of \$18,363.30 from Mr. Denis Adonis. Mr. Adonis did not give evidence of his findings to the Court and so there was no opportunity to assess his expertise and competence to provide the estimate and report which is exhibited to Ms. Mariatte's witness statement.
- [17] Ms. Mariatte's testimony in chief is that she did not move into her house until one year after the keys were handed over to her by Mr. John. She said she moved in

for a few months but it became too emotional. She went onto to testify that she has not lived in the house for almost three years. Ms. Mariatte's evidence is that it is her intention to move into her house permanently and she is making arrangements to get financing to remedy the defects in the house. It is noteworthy that Ms. Mariatte works out of Saint Lucia.

[18] In cross-examination, counsel for Mr. John, Mr. Callistus Vern Gill ("Mr. C. Gill") made much of the fact that Mr. John had not been asked to be a part of the site visits which resulted in the reports from Mr. Richard Sammy and Mr. Adrian Dolcy. However, Ms. Mariatte's evidence in this regard is clear. She testified that she made several attempts to contact Mr. John to speak about the defects and also the incomplete work which he had promised to address and never did. Mr. John has provided no evidence to contradict the very forthright testimony of Ms. Mariatte.

[19] Testimony was also received on Ms. Mariatte's behalf from Mr. Adrian Dolcy, a registered professional Engineer. Mr. Dolcy provided a very comprehensive report dated 16th June 2014 in which he details his assessment of the construction works at Ms. Mariatte's property. His objects as outlined in his report were to assess the works carried out by the contractor, to quantify and cost all incomplete works and to list the defective works and provide a cost for correcting the defective work.

[20] Mr. Dolcy in his report indicates that he noted the general poor workmanship and unacceptable standards of the construction works, coupled with structural deficiencies and that there were many areas of incomplete and defective works.

[21] He identified the following as incomplete works:

- (a) Painting incomplete-ceiling
- (b) Wall finish-sanding and painting
- (c) Plumbing-no soak away for septic tank

- (d) Electrical installation
- (e) Kitchen cupboards
- (f) Incomplete work on opening below jacuzzi.

[22] These are more or less supported by the testimony of Ms. Mariatte. Mr. Dolcy makes the point in his report that the client has proceeded to complete and rectify some of the works, electrical and plumbing. He noted that there were several changes to the layout, roof structure and septic tank location.

[23] The report also provided details of the defective works as follows:

- (a) Floors: The floor was not levelled leading to difficulty in the closing of some doors. There were several cracks in the floor possibly due to improper compaction of material beneath the slab, resulting in depression in the floor slab.
- (b) Cracks in masonry walls: There were several areas of cracking in the western section of the building; (a) vertical cracks in walls & wall/wall intersections and (b) horizontal cracks in walls.
- (c) Doors: Two of the bedroom doors were improperly installed.
- (d) Painting: Painting of entire building walls (inside & outside) was uneven and untidy. The ceiling had not been painted.
- (e) Plasterwork: There was poor bonding between mortar and concrete members and the concrete surface had not been roughened prior to the application of the mortar.
- (f) Roof & Guttering: There was long span of guttering before outlets. There was no flow in the guttering and there was a belly or depression in the roof. In addition the report noted that the roof structure had not been constructed in accordance with the approved plan and there were many defects. The ridge and hip rafters were not properly laid. The fascia board at the front was not levelled and there were depressions in sections of the roof.

(g) Plumbing & Septic Tank: The septic tank was constructed too far below ground. This would cause the soak away to be too deep below ground and not be effective. There was an exposed pipe and feedback of sewer smell into the building.

[24] Generally, Mr. Dolcy identified the poor workmanship in the paint work, door installation, roof construction, jointing of timber members and installation of electrical fittings. He also identified the structural issues which must be addressed and listed these as (a) lower than required concrete strengths in the floor slab (b) cracks in the floor slab and (c) cracks in the western walls.

[25] Mr. Dolcy detailed the remedial works required to remedy each of the defects and structural issues which he identified and provides the cost associated with each. He estimates the total cost of correcting the defective works and completing all works at \$44,920.00 which amount exceeds the retention amount.

[26] In cross-examination, counsel for Mr. John, Mr. C. Gill asked Mr. Dolcy in relation to the cracks in the masonry walls, whether these could be due to issues of settlement. Mr. Dolcy responded in the affirmative and also provided an explanation as to the different types of cracks. He testified that a horizontal crack in a wall is an indication of settlement of foundations due to inadequate foundation design or inadequate reinforcement of steel. A vertical crack he said may be due to differential settlement and possibly an inadequate foundation design or lack of adequate steel reinforcement. When asked whether the quality of sand used plays any part in these types of cracks, Mr. Dolcy said that it would not result in these types of cracks.

[27] Mr. C. Gill also asked Mr. Dolcy whether he was privy to the report done by Richard Sammy in September 2012 in which he does not report observing any cracks. Mr. Dolcy said he was not aware of this report but indicated that Mr.

Sammy is a Quantity Surveyor and not a Civil Engineer. He admitted though that one did not have to be a Civil Engineer to see cracks. Whilst this may be the case, the fact that eight months after construction, no cracks were observed by a Quantity Surveyor is not conclusive that they did not exist and does not displace any of the clear findings of Mr. Dolcy. Mr. John provided no evidence to dispute Mr. Dolcy's evidence that these cracks may have been the result of inadequate foundation design or lack of adequate steel reinforcement.

[28] Mr. Dolcy was asked in cross-examination about the paint and whether it was faded in some areas. Mr. Dolcy gave evidence that what he saw was differences in the texture of the paint on the wall, the colour and shades of paint. When asked whether this could happen if the wall is repainted, he said that it could happen if the same colour is not used. It was clear that Mr. Dolcy was not aware that anyone had repainted any of the walls after the hand-over.

[29] In cross-examination, he said it was possible that if the walls had been repainted, it would impact his findings but he did indicate that he could not say with any degree of certainty. Mr. Dolcy also said that the variations in texture and colour could be as a result of the mix from the paint shop but stressed that it is for the builder to ensure that the mix is the same.

[30] While it is clear from Ms. Mariatte's evidence that the paint job was not done to acceptable standards, she has failed to provide evidence to show what paint work was actually done by Mr. Dickson who repainted after the hand-over. Nor does she provide any evidence from Mr. Dickson as to the quality of the paint job at the point when he undertook the work. Given the intervening paint work after the hand-over by Mr. John, I cannot say on a balance of probabilities that what Mr. Dolcy's report speaks to in relation to the quality of the paint job on the walls is wholly attributable to Mr. John. In the circumstances, I would not grant the amount estimated for repainting the structure. It is different in relation to the ceiling which

clearly was never painted and this would be attributable to Mr. John's incomplete construction work.

- [31] Mr. C. Gill in his closing arguments submitted that Ms. Mariatte had been away from the house for at least 4 years and asked the Court to take judicial notice of how things deteriorate once they are not lived in. However, counsel for Ms. Mariatte, Mr. Kendal Gill ("Mr. K. Gill") submitted in response that it was never Ms. Mariatte's evidence that the house was unoccupied and so the suggestion that the defects were due to her absence from the house are not sustainable.
- [32] Mr. C. Gill also submitted that there was nothing to distinguish the work of Mr. John and that of the other person who had intermeddled in the process. Mr. K. Gill however pointed out that Ms. Mariatte did indicate what work Mr. Dickson was engaged to do and apart from these minor things, she testified that she had not undertaken the repairs listed in Mr. Dolcy's report to enable Mr. John's expert to assess the building in the condition it was when he handed it over. It is noteworthy that Mr. John has not provided any evidence to counter the evidence as presented by Ms. Mariatte or Mr. Dolcy.
- [33] Mr. John had every opportunity to defend this claim and to provide evidence to counter the evidence of Ms. Mariatte and the expert, Mr. Dolcy and he cannot now just say to the Court that he was not given an opportunity to participate in the assessments or to answer to them. Mr. C. Gill argued that the uncertainty of the expert as to the alleged defects and lack of knowledge by him of the interventions made by other persons must be taken into account. While this is so, I do not find that this materially affects the findings of Mr. Dolcy as all the defects identified by him with the exception of the painting are not defects which were remedied by any third party. This is borne out by the evidence of Ms. Mariatte.

Conclusion

- [34] Clause 1 of the contract provided that the contractor shall with due diligence carry out and complete the works in accordance with the contract documents in 'a good and workmanlike manner and according to the normally accepted building standards prevailing in Saint Lucia using material of the quality and standards specified therein subject to variations as may be authorised.'
- [35] There is no dispute on the report of Mr. Dolcy that the construction work carried out on Ms. Mariatte's house was far from acceptable. I have no reason not to accept the evidence as provided by Ms. Mariatte as to her observations as regards the quality of the workmanship in relation to her house. I find Ms. Mariatte to be credible and a naïve first-time home owner. In the absence of any evidence to the contrary, I accept the evidence as provided by Mr. Dolcy as an expert in his field and accept his assessment of the defective and incomplete works without cavil. I find on a balance of probabilities that the defective and incomplete works with the exception of the paint work in relation to the internal and external walls was solely as a result of the poor workmanship of Mr. John.

What measure of damages is Ms. Mariatte entitled to?

- [36] As a general rule, the measure of damages in cases such as this would be the cost of remedying the defective and incomplete works. Of course, the amount would have to be discounted by any amount being held by way of retention. This is supported by the case of **East Ham Corporation v Bernard Sunley**,¹ a case of defective building in which the House of Lords accepted as the normal measure of damages the cost of reinstatement.² There is no evidence from Ms. Mariatte of what the estimate of repairs would be today given that the estimate was done in

¹ [1966] AC 406.

² See also the case of *Dakin v Lee* [1916] 1 KB 566 where the Court of Appeal said that the owner who was sued for the work was entitled to deduct such an amount as is sufficient to put that insufficiently done work into the condition in which it ought to have been according to the contract.

2014, three years before the trial of her counterclaim and so I have not considered this.

- [37] By clause 2 of the contract it was specifically agreed that Ms. Mariatte would retain 5% of the sums paid to the contractor and that within 7 days after the expiry of the six-month period or upon making good any defects whichever is later, the retention monies would be paid to Mr. John.
- [38] Clause 7 speaks to defects liability and states that the maintenance period is six months after the practical completion of the works. It provides that one week before the end of the maintenance period, Mr. John and Ms. Mariatte were to inspect and list any defects appearing in or on the works and Mr. John was to make good any such defects before the release of the retention sum.
- [39] In her evidence, Ms. Mariatte stated that the retention was \$6,000.00. She however did go on to say that she would have to refer to the contract as she was not sure. Having reviewed the contract document, I am satisfied that the retention amount is \$14,250.00, being 5% of the contract sum of \$285,000.00. The \$6,000.00 which Ms. Mariatte quoted refers to not the retention but an additional amount to the contract sum stipulated by the contract which was to be held by employer, Ms. Mariatte for contingencies. When one looks at the amounts paid to Mr. John it becomes clear that \$6,000.00 could not be the retention amount.
- [40] Mr. C. Gill made much in his closing of the fact that Ms. Mariatte had failed to provide proof of the amounts she had expended in remedying the defects and for the preparation of the reports. Counsel rightly pointed out that damages must be specifically pleaded and proven and therefore in relation to these items I agree that Ms. Mariatte cannot expect to recover the costs for preparation of the reports as there is no evidence to support such claims.

[41] At Appendix 1 of Mr. Dolcy's Report, he provides an estimate for remedying the defective and incomplete works in the sum of \$44,920.00. This estimate includes the cost of painting of the entire building walls in the sum of \$4,480.00. This amount will not be allowed for the reasons I have already outlined above.

[42] Therefore, Ms. Mariatte is entitled to the sum of \$40,440.00 less the retention sum of \$14,250.00.

Conclusion

[43] The order is as follows:

- (a) Judgment is entered for Ms. Mariatte on her counterclaim in the sum of \$26,190.00 with interest thereon at the rate of 6% per annum from the date of judgment to the date of payment.
- (b) Prescribed costs to Ms. Mariatte in the sum of \$3,928.50, being 15% of \$26,190.00.

Justice Kimberly Cenac-Phulgence

High Court Judge

By the Court

Registrar