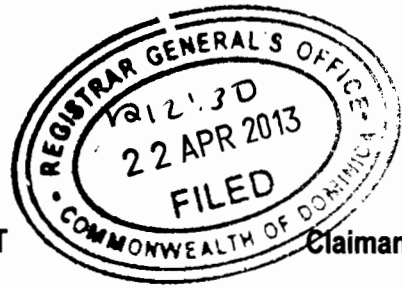


COMMONWEALTH OF DOMINICA

DOMHCV2009/0281



BETWEEN:

DOROTHY CYNTHIA NISBETT
and

RUTHINE ROYER
EUGENE ROYER

Defendants

Before: The Hon. Justice Brian Cottle

Appearances:

Mr. Darius Jones for the Claimant
Mr. David Bruney for the Defendants

[2013: February 13th, 22nd]
[March 3rd
[April 22nd]

JUDGMENT

- [1] **COTTLE J:** The claimant entered into a building contract with the first defendant. The written agreement was dated 24th November 2005. The first defendant agreed to construct a dwelling house for the claimant. The second defendant was the architect who was engaged by the claimant to produce the architectural designs. He was also appointed to represent the claimant by overseeing the building works and certifying and disbursing payments to the first defendant.
- [2] The defendants are husband and wife. The claimant brought the present claim against the first defendant averring breach of a building contract and against the second defendant for breach of contract and negligence. The claimant is an elderly lady who lived in England but wished to retire and return to Dominica. The second defendant is an architect engaged by the claimant to produce architectural drawings for the construction of the claimant's home. The first defendant operates as a building contractor.
- [3] By an agreement in writing the first defendant agreed to build a house for the claimant. The contract was executed on 24th November 2005. The completion date was fixed for 16th April 2006 as the building was a modest two bedroom affair. The second defendant agreed to act as agent for the claimant to supervise the construction. He would certify the works done and disburse payment

to the first defendant against certificates which he would issue having inspected the works actually done. The total contract price was agreed at \$228,733.00.

- [4] The first defendant failed to complete the works by 16th June 2006. The parties agreed a further extension of 6 months. When the claimant came to Dominica in October 2006 the house was still incomplete. The first defendant promised completion by Christmas 2006. By that date the house remained incomplete.
- [5] In January 2007 the second defendant wrote to the claimant. He said that the works had stopped and the contractor would do no further work unless further payment was received. The claimant thereupon demanded that the first defendant cease work. She engaged other contractors to complete the project. Before the new contractors began work, the claimant had Mr. Eric James, Quantity Surveyor, assess and value the work done. In his report, Mr. James valued the work done to have cost \$146,869.80. He also found variation works and accepted the second defendant's valuation of these works at \$21,459.47 making a total \$168,329.27. From the available documentation he found that the first defendant had been paid \$212,628.50 making an over payment of \$44,299.28.
- [6] When one considers the original contract several things stand out. Almost the entire contract sum had been paid to the contractor. The project was very seriously delayed in terms of completion and substantial work remained to be done. It was the duty of the second defendant to ensure that the works were properly executed before certifying and paying the first defendant. The relationship between the defendants must have made this difficult to achieve. The potential for conflict of interests was patent.
- [7] Apart from funds received by the first defendant for building works there were also two sums of \$20,393.00 and \$37,567.00 represented by bank drafts paid to the second defendant. At the trial he was unable to explain these. When it was pointed out that he had deposited these funds into two bank accounts he was unable to say to whom these bank accounts belonged. Suffice it to say that there was no demonstrated benefit to the claimant for the payment of these substantial amounts.
- [8] The second defendant at first suggested that these might have been for his professional services but when he was forced to admit that his fees are fixed at 5% of the contract price, he resiled from that position.
- [9] The claimant's case is simple. She says the delay by the defendants to complete the house is inexcusable and justified her in treating the contract as at the end. She demands a refund of sums paid to the first defendant in excess of the value of the work actually done by the first defendant. She says that the delay has caused the price of completing the house to increase and wishes to be compensated for that increase.
- [10] As against the second defendant she says he has been negligent in his carrying out of his responsibility as her representative to supervise the building works. She demands repayment of the moneys he has received without explaining any reason for having paid himself those amounts.
- [11] The defendants say that the delay was not of their doing. They offer 5 reasons for the delay

- I. Intermittent supply of cement
- II. Several days of heavy rain
- III. Difficulty in obtaining electricity from a neighbor or the electricity company
- IV. A delay in issuing a payment certificate
- V. Delays due to variation works

[12] At the trial no further details emerged to explain just how these reasons caused such a protracted delay. The contract began in November 2005. It was expected to end on 16th April 2006. In the absence of specific explanation it cannot be reasonable to expect that a 5 month project would be delayed for over 9 months.

[13] Counsel for the defendants submitted that the defendants were entitled to be discharged from their obligations as the conduct of the claimant demonstrated that she did not intend to abide by the terms of the contract. As far as the first defendant is concerned she contends that the claimant's conduct entitled the first defendant to conclude that the contract between the parties was at an end. The second defendant, through his counsel, also argues that he too, was entitled to treat himself as discharged from all obligations under the contract he had entered into with the claimant to act as her representative and supervise the building works. He says that the claimant insisted on variations to the plan as approved by the local planning authorities.

[14] It is common ground that the claimant was displeased with some of the works executed. She says she is not skilled in reading architectural drawings and depended on the second defendant to produce drawings that reflected her instructions. When she realised that the building, although being constructed according to the plans produced by the second defendant and approved by the planning authorities, was not what she wanted she insisted that the first defendant demolish some of the works and rebuild them.

[15] These altered designs were never reduced to plans and submitted to the authorities. Counsel thus submits that this behavior by the claimant showed she did not wish to abide by the relevant planning legislation. This unlawful behavior intimated to the second defendant that the claimant had no intention of keeping to the contract between herself and the second defendant.

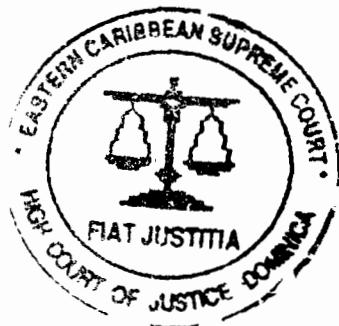
[16] I do not accept these submissions. Neither of the two defendants indicated, by words or conduct, that they considered the contract to be at an end. The correspondence written to the claimant by the second defendant shows that, had the claimant been willing to make additional payments, the defendants would have been content to continue the building works.

[17] I accept the evidence of the quantity surveyor Mr. E. James that the first defendant has received \$44,299.00 more than the value of the works she performed. She must return the amount to the claimant. The first defendant is only entitled to be paid for works she has actually performed. As indicated above, the second defendant has received \$57,957.00 of the claimant's funds. He has offered no explanation for this and must repay it. The delay in the completion of the works has not been explained to my satisfaction.

[18] It was the second defendant's duty to make progress reports to the claimant at regular intervals. He produced only one report; a site report dated 5th January 2006 which showed the project to have been proceeding in a timely fashion. He certified payments up to 14th September 2006. He

did not provide any evidence that he was aware then of problems that would account for delaying the building unduly. Mr. James concluded that the delay resulted in additional costs of \$9,425.75 because of increases in prices.

[19] I fix the second defendant with responsibility for this loss to the claimant. Had he performed his duties as he should have, it is more likely than not that the project would have been finished far earlier. I have already provided the parties with the order of this court and the foregoing represents my reasons for the order that this court has pronounced in this matter.



Brian D. Cottle
Brian Cottle
High Court Judge