

**IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)**

SAINT LUCIA

CLAIM NO. SLUHCV2007/0606

BETWEEN:

DEBRA ANNIUS

Claimant

And

AUGUSTIN WILLIAMS

Defendant

Appearances:

Ms. Veronica Barnard for Claimant

Mr. Huggins Nicholas for Defendant

2008: October 16, 17, 29;
2009: February 17;
September 7.

JUDGMENT

- [1] **GEORGES, J (Ag.):** This is not an untypical house building project which has gone sour. The evidence shows and it is not disputed that about the latter part of January 2006 the defendant at the request of the claimant agreed to construct a two-bedroom bungalow for her at Piaye in the quarter of Laborie comprising a gross floor area of 1,600 square feet at a cost of \$160,600.00.
- [2] By letter dated 25th January 2006 addressed to Mrs. Carol Mangal at First Caribbean International Bank and signed by the defendant as Contractor the defendant wrote:

"As per discussion with Miss Debra Annus with regards to the construction of her house I have decided to write to inform you that the length of time for the construction of her house will be six months effective from the date of commencement."

[3] The evidence also revealed that the claimant Debra Annus was and still is employed by M & A Soufriere Sight Seeing Tours as secretary and that the defendant one of two shareholders is her boss. The claimant testified that she was also secretary of his building contracting firm Augustin Williams Contracting and assisted with his taxi service and anything else that needed doing in the office.

[4] The defendant was evidently an industrious and enterprising businessman.

[5] Early in his evidence-in-chief he told the Court that he was not the initial person who was supposed to have built the house. It was someone called Steve but after Steve and the claimant fell out he came into the picture and at the claimant's request he agreed that he would still build her house. He had no problems with that he declared adding that at the time "our relationship was very good."

[6] The claimant told the Court that she thereupon gave the approved plan of the building to him and he gave her a written signed estimate for constructing the proposed bungalow at a cost of \$160,000.00.

[7] Paragraph 7 of her witness statement states:

"The Defendant presented himself to be a qualified building contractor and that he would build my house with all reasonable care and skill and that the work would be of satisfactory standard and workmanship. As my boss I trusted the Defendant and trusted that he would build my house in a professional and satisfactory manner and as a single woman I would have to repay the loan from my salary. The Defendant knows my salary as I am employed by him."

- [8] That briefly is the background against which the parties operated at the inception. The agreement/contract between the parties was plainly partly oral and partly written although the defendant contended that there was no contract at all between them. I firmly hold otherwise notwithstanding the absence of a written agreement per se setting out the precise scope of work and the conditions of contract.
- [9] It was not long after construction work had begun when the milk began to turn sour for the evidence shows that the defendant had evidently prepared the cost estimate of the proposed bungalow from Herbert Peter the construction engineer's design/drawings (DA2) without going to the site itself which turned out in actual fact not to be flat or level throughout (as believed) but in fact sloped at some point. It was therefore necessary to excavate a larger foundation than was originally intended resulting in a larger house being built which was partly flat and partly suspended (on pillars) with extra floor space of 745 square feet and consisting of three bedrooms instead of a two bedroom bungalow.
- [10] There were consequently inevitable cost overruns and by the time the bank loan was exhausted the house was incomplete and there were complaints of defective and poor workmanship. The estimated six month completion period had also elapsed. The claimant further alleged that she only knew of the increase in size of the house after its foundation had been constructed and she had invited Mr. Adrian Dolcy the bank's quantity surveyor to measure it and it turned out to be 2345 square feet as against the original plan of 1600 square feet adding that at the time that the foundation was being built she was at work and could not see what the defendant was doing.
- [11] She further testified that when she drew Mr. Dolcy's findings to the defendant's attention and pointed out that it would be an additional cost to her he responded that the bank had given her enough money to build the house and that every house he built he extended it by four feet all around. She firmly denied that the reason why she had got a plan from the architect (sic) for a bungalow was because she had shown him a flat plot of land – thus implying that the claimant had shown 'the architect' a different plot from that which was built on and sloped.

[12] At paragraph 10 of her statement of claim dated 29th June 2007 the claimant claims:

1. \$59,800.00 the cost of remedying the defects (to date)
2. \$1,800.00 the cost of the two valuations by Adrian Dolcy
3. A refund of rent paid to date being the sum of \$4,000.00 and continuing at the monthly rate of \$400.00
4. General Damages
5. The costs hereof
6. Further or other relief as to this Court sees fit

And interest on all sums due to her at 6% per annum from 1st September 2006 to date of payment.

[13] Having regard to all the circumstances the issues which to my mind fall to be determined are:

1. (a) whether the defendant's construction work was defective and whether he is liable for the cost of remedying the alleged defective construction work of the building (part of which was admitted by him).
(b) whether the construction of the house was incomplete and whether the defendant is liable for the cost of completing it.
2. (a) Whether the defendant is liable to the claimant for the cost of accommodation after the six month period for completion had elapsed to the date of her entry into occupation of her house.
3. If the answer to 1 and/or 2 is in the affirmative what then is the measure of damages.

[14] The defendant has counterclaimed for \$122,400.00 in respect of value add on of the building and \$36,000.00 for preliminaries (which incidentally were unspecified) as well as

other ancillary heads of loss and/or damage totaling \$164,300.00 altogether which are all refuted by the claimant and will be addressed later.

[15] The pith and substance of the claimant's case as foreshadowed in the introductory paragraphs of this judgment are clearly set out in her statement of claim and other pleadings and elaborated upon in her witness statement and oral testimony as well as that of her two witnesses namely Adrian Dolcy a professional civil engineer and the bank's quantity surveyor and Matthew Jn Jacques the building contractor who carried out remedial work as well as necessary alterations and final completion of the claimant's house.

[16] After alleging at paragraph 4 of her statement of claim that the house built by the defendant was defective and flawed she continued thus:

5. *In August 2006 the Defendant agreed that the Claimant should obtain the services of a competent civil engineer and both parties agreed to obtain the services of Adrian Dolcy to view and value the defects and flaws of the aforesaid dwelling house.*

6. *On 6th November 2006 Adrian Dolcy produced his report of the defects to the Claimant a copy of which Report the Claimant gave to the Defendant.*

The Report has listed the following defects:

- *General poor workmanship of the construction works. There were some configurational changes to the original plan. There are also many areas of incomplete and defective works.*
- *Incomplete works include painting plumbing carpentry works installation of all cupboards placement of fascia board tiling plasterwork and general site work.*

- *Defective works include construction of door frames poor carpentry joints poor placement of doors and windows uneven arches in balcony area and poorly constructed roof over the balcony area.*

These are listed in the tables below with the respective remedial solution and the cost of remedying defective works and completing works.

- [17] Two tables were displayed. Table 1 listed no fewer than 7 items of works which were alleged to have been incomplete including painting fascia cupboards plasterwork site work tiling and plumbing and what it was felt was to be done in order to complete the building all at an estimated total cost of \$31,300.00.
- [18] Table 2 lists seven items of alleged defective work to be corrected including door frames and windows carpentry jointing doors ceiling roof over balcony lintel over kitchen door and arches and the total remedial cost is put a \$18,400.00.
- [19] The total estimated cost of completing the building and remedying defective works was therefore \$49,700.00 altogether. A further report however dated 29th March 2007 re-estimated the total cost of remedying the defects and effecting completion at \$59,800.00. The replacement cost of similar property at the then current prices of materials and labour was put at \$272,000.00.
- [20] And whilst the Court notes that the cost estimates of Matthew Jn Jacques dated 12th December 2006 (DA8) to rectify certain items of defective works and to complete the claimant's dwelling house differ in some respects from those of Mr. Dolcy the difference of \$200.00 in their total amounts is really not significant in my view to affect that head of claim. The Court was particularly impressed by Mr. Dolcy's comprehensive critical and detailed analytical report (DA4) dated November 6 2006 which displayed a high level of professionalism and which was complemented by fourteen colour photographs which put the defective and incomplete work in sharp focus.

- [21] The defendant's version of the case and that of his witness Herbert Peter turned out to be most baffling to say the least. Firstly Mr. Peter's witness statement filed April 16 2008 is not signed or dated and contains no statement of truth. Attached to it is a report dated January 23 2008 which does have a statement of truth certificate and is signed and dated 11th April 2008.
- [22] In his witness statement Mr. Peter stated that he prepared the design and drawings for the claimant's bungalow style house which were approved by the Development Control Authority in December 2005. At paragraph 8 he further stated that the defendant asked him to prepare a costing for the said house which he did.
- [23] The claimant on the other hand states at paragraph 6 of her witness statement that she gave the approved plan of the building to the defendant and then **he gave her a written and signed estimate (DA2)** for the proposed building at a cost of EC\$160,000.00. This is dated 18th January 2006.
- [24] Yet Mr. Peter states at paragraph 4 of his report which is attached to his witness statement:

"The clients (sic) brief state clearly:

1. A two bedroom building to include a master bedroom.
2. A bungalow
3. A bay window to be included
4. A budget of \$160,000.00
5. I would prepare the estimated (sic) for the bank
6. Mr. Augustin Williams would oversee the construction

Mr. Peter goes on to say that on January 18th 2006 he prepared an estimate for the construction of the said building and later in the month he received a call from one of First Caribbean International Bank's agent or loan manager (he did not specify which) who informed him that the loan for Ms. Annius (the claimant) had been approved but that

disbursement could not be done because his "estimates indicated two bedrooms but their consultant Mr. Dolcy estimates indicated three bedrooms and he was asked to change two bedrooms to three bedrooms as the estimates captioned. I complied to the request."

[25] That in my respectful view is incredible and too absurd for words and is plainly not consonant with sound and prudent banking practice. Ordinary commonsense would dictate that a three bedroom house would inevitably and normally cost more than a two bedroom edifice. Yet Mr. Peter states that he simply complied with the bank's request to make the alteration sought to the estimate which curiously is in fact signed by "Augustin Williams Contractor" who in paragraph 1 of his defence pleads that he (Williams) only signed the estimate so as to facilitate the release of funds to the claimant!

[26] I frankly find this mindboggling as the only estimate disclosed for the proposed building of Debra A. Annius to be erected at Piaye quarter of Laborie and which is addressed to her and is dated 18th January 2006 (DA3) is in actual fact signed "Augustin Williams Contractor." And it is a copy of that estimate which was doubtless submitted to the bank for procurement of the loan and explains the letter a week later dated 25th January 2006 (DA1) from the defendant to Mrs. Mangal at FCIB informing her that "following discussions with Mrs. Debra Annius with regards to the construction of her house I have decided to write to inform you that the length of time for the construction of her house will be six (6) months effective from the date of commencement." That letter was signed "Augustin Williams Contractor" as well.

[27] I accordingly reject the defendant's averment in the opening paragraph of his defence that he only signed a document from the lending institution (sic) as builder to facilitate the release of funds to the claimant and denies the existence of any contract between them. As stated at paragraph 8 above there is no question of the existence of a contractual agreement between the parties notwithstanding the absence of a written agreement clearly defining the scope of works and conditions of contract. His role was certainly not to merely oversee the construction as Mr. Peter stated in his report. He was hired as the building contractor by the claimant to build her house. Herbert Peter the defendant's sole witness

quite frankly impressed as a witness who clearly had an interest of his own to serve and scrutiny of his testimony and report fully demonstrate this.

[28] I pause however to say that it is my considered view that that letter from the defendant to the bank per se would not ipso facto render time of the essence of the contract for completion of the building as the claimant maintains. The letter is construed as one of committal which the claimant contends bound the defendant to complete in six months. In my opinion without more and in the absence of any express provision (preferably in writing) or other compelling factors time in my view could not reasonably be said to have been of the essence in this contract having regard to all the circumstances. That of course does not relieve the defendant from his legal obligation to complete in a satisfactory and workmanlike manner and to handover within a reasonable time after the expiration of the six month period.

[29] The preponderance of the evidence however plainly shows that the defendant contracted with the claimant to build her house and the defendant in fact asserts in paragraph 4 of his defence that the house built by him was not defective but done in a competent manner with due skill care diligence and workmanship. Under cross-examination he however admitted that there were some defects and conceded that he did not exercise the care and skill of a prudent builder/contractor in some instances. The precise degree and extent of the areas of incomplete and defective works are set out at paragraphs 17 18 and 19 of the judgment.

[30] The evidence shows and it was not disputed that the parties had opened a running account at Builders' Choice which supplied the materials for the construction of the house and they were paid for by the claimant from the loan account. If any items were not available at Builders' Choice they were procured elsewhere by either the claimant or the defendant and he was generally reimbursed by the claimant. The defendant provided labour which again was paid for by the claimant from the loan account including the defendant's remuneration at the rate of \$100.00 per site visit.

- [31] The release of funds in respect of the project itself was determined by the value of construction works completed as assessed by the bank's quantity surveyor Mr. Adrian Dolcy. There was no provision for a retention fee to be withheld pending satisfactory completion.
- [32] At paragraph 10 of her witness statement the claimant states that when the six months period was up (in August 2006) she asked the defendant for her house keys so that she could move in. That seems somewhat odd given that the house was incomplete and needed significant remedial work. According to the claimant the defendant acknowledged that he had disappointed her adding that she had provided all the materials labour was paid and the work was not completed and some of it was not well done. He went on according to her to say that he was sorry and had no money to complete or make the necessary changes to the building. All of this the defendant strenuously denied.
- [33] She then spoke to his co-director in his sightseeing tour business Mr. Michael Gustave she said following which they met on site with the defendant and Mr. Gustave expressed the view that from what he had seen it was lack of supervision on the defendant's part which had caused the problem. That was also refuted by the defendant.
- [34] At paragraph 2 of his witness statement the defendant interestingly describes himself as a businessman partner M & A Soufriere Sightseeing Tours part-time builder/contractor and taxi operator. Mr. Gustave allegedly suggested according to the claimant that the defendant should engage a quantity surveyor to value the defective and incomplete work to which he agreed leaving the choice to the claimant and undertaking to pay the bill and all associated costs because he was not going to the building anymore.
- [35] This is where Mr. Dolcy fully entered into the picture and visited the site on November 01, 2006 and presented his report and bill (DA4 and 5) whereupon the defendant was informed of Mr. Dolcy's findings under cover of the claimant attorney's letter dated 21st November 2006.

- [36] I have had the opportunity of observing the demeanor of each of these witnesses closely especially throughout their rigorous cross-examination by Counsel and I am satisfied that on a balance of probabilities that the claimant's testimony was on the whole a far more credible and consistent account of what had occurred than that of the defendant who impressed as someone who was constantly striving to extricate himself from a plainly embarrassing situation and had palpably failed.
- [37] The milk had well and truly turned sour by then. Having failed to complete the construction of the house satisfactorily after the six month contractual period had ended the claimant requested her keys from the defendant and the removal of his tools from the premises. This he did on 01 November 2006 alleging that some of them had meanwhile been stolen or had gone missing and demanding restitution. Matthew Jn Jacques another contractor had to be hired to rectify the defective work and to complete the house at a cost of \$60,000.00. He estimated that this could have been achieved within an estimated time of six weeks.
- [38] It is my considered view that having regard to all the circumstances the defendant is clearly through his own fault liable to the claimant for the additional cost incurred by her in rectifying the defective construction work and completion of the claimant's dwelling house and I so hold. He would also be liable to reimburse the claimant for the cost of the two valuations provided by Mr. Adrian Dolcy.
- [39] For the reasons set out in paragraph 28 I do not hold that time was of the essence in this contract. In my view the estimated time for completion of the building given by the defendant to First Caribbean International Bank on 25th January 2006 was no more than a forecast in the circumstances. The defendant could certainly not be said to have been fixed with notice of the importance and possible consequences of failure to strictly adhere to that time frame vis á vis the claimant. The claimant seeks reimbursement of rent paid from 24th August 2006 to 26th September 2007 at the rate of \$400.00 per month that is approximately 13 months! That to my mind seems to be unduly excessive and I would accordingly allow 3 months rent i.e. \$1200.00 as reimbursement of rent under that head of

loss/damage bearing in mind that the defendant had vacated the premises on 01 November 2006 and Mr. Jn Jacques in his estimate dated 12th December 2006 (DA 8) states that the remedial and completion work could be completed six weeks after commencement. A claimant is after all under a duty to mitigate his/her loss.

[40] So that in the final analysis I find that the defendant having represented himself to be a builder/contractor ought to have exercised the care and skill of a prudent builder in the construction of the claimant's dwelling house. Having failed to do so resulted in the house containing a number of defects which required remedial work and ended up being incomplete. The resultant expenditure thus incurred by the claimant to complete the house satisfactorily and render it habitable was absolutely necessary.

[41] The defendant's claim for an increase in the value of the building cannot in my view be legally maintained as this was no part of the agreement between the parties and no variation thereto had been concluded between them. A fortiori the defendant failed to provide the claimant with an estimate of the projected cost of rectifying defective construction works and completing the house. It was all left up to the claimant to shoulder the burden and the financial responsibility of putting what was wrong right colloquially speaking so that she could eventually move into her house. On what basis then can the defendant legally claim for value add on in respect of the claimant's house or loss or damage allegedly incurred or sustained by him?

[42] The evidence shows and I find as a fact that the increase in size of the structure was well known to the defendant at the commencement of the construction and he is therefore estopped from claiming additional charges or an increase in the value of the building in the circumstance. The claimant paid all the workers on the project including the defendant himself and also paid for all materials used in keeping with their contractual agreement. With cost overruns when the money ran out and the house incomplete and allegations of defective workmanship the defendant literally found himself with his back against the wall. It is therefore small wonder that Michael Gustave the defendant's co-director in their sight seeing tour business concluded after a site visit of the construction in November 2006 that

the root cause of the problem was inadequate supervision by the defendant who proclaimed himself to be a part-time builder/contractor. There were ofcourse other reasons.

- [43] Learned Counsel for the claimant helpfully referred to Article 1590 of the Civil Code which states:

"When an architect or builder undertakes the construction a building or other works by contract upon a plan and specifications at a fixed price he cannot claim any additional sum upon the ground of a change from the plan and specifications or of an increase in the labour and materials unless such change or increase is authorized in writing or admitted by the proprietor...."

- [44] The claimant contended and fully demonstrated that the defendant failed to provide a dwelling house in a workmanlike manner and built in accordance with proper building standards and practice and she produced in evidence a number of lucid photographs in support of her contention. The defendant further failed to complete the works in accordance with the terms of their contract by defective workmanship and failure to build the said house in accordance with the plans – building a three bedroom instead of a two-bedroom house. Mr. Adrian Dolcy's reports enumerate and elaborate on those deficiencies. His academic and professional qualifications speak for themselves and I accept his expert testimony and balanced reports without cavil.

- [45] As a general rule the measure of damages in such circumstances is the cost to the owner of completing the building in a reasonable manner less the contract price. 'In *East Ham Corporation v Bernard Sunley* (at paragraph 1091 Halsbury's Volume 4(2)) a case of defective building where the claimant had acted reasonably in effecting the necessary repairs the House of Lords accepted and applied as the normal measure of damages the cost of reinstatement this cost being taken as at the time the defects were discovered.

[46] In the instant case I take the measure of damages to include the cost of necessary remedial work and satisfactory completion of the building project as well as the cost of estimates and valuation reports. By way of general damages a reasonable sum by way of reimbursement for expenditure incurred by the delay in completion has also been awarded in respect of rental accommodation.

[47] I now turn to the defendant's counterclaim for \$170,308.00 comprising:

- (i) \$122,400.00 the "value add on" of the building
- (ii) \$36,720.00 for preliminaries
- (iii) \$408.00 cost of cement
- (iv) \$10,000.00 for tools and equipment
- (v) \$780.00 payment of workers
- (vi) Costs
- (vii) Interest

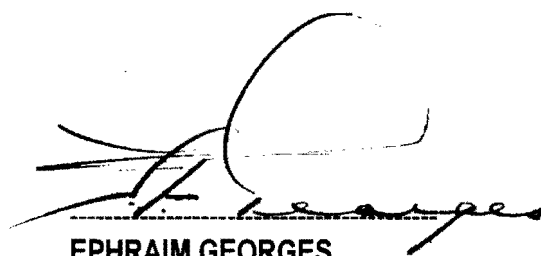
[48] With regard to Item (i) of the defendant's counterclaim in respect of "value add on" of the building learned Counsel submitted that if the defendant is asked to pay for incomplete work and alleged defective work and the claimant has value added on in excess of \$122,400.00 that he put on the claimant should be made to pay to him the extra value of \$122,400.00 that he put on the house for the claimant who will derive the benefit of it.

[49] Counsel for the claimant on the other hand contended that the defendant has not produced any valuation whatsoever of his work. Indeed no evidence has been produced whatsoever to substantiate the value of any of the claims numbered (i) to (v) at paragraph 47. There is no indication of what preliminaries specifically consisted of and their cost. They are not defined in any way. The claim for cement presumably supplied/purchased by the defendant is also wholly unsubstantiated. The usual practice was for the claimant to reimburse the defendant for such disbursements. There is no receipt or purchase order. There is no itemized cost of the tools or equipment which make up the global figure of \$10,000.00. Besides that there is not sufficient evidence from which the Court can on a

balance of probabilities reliably conclude whether any of the defendant's tools were misappropriated by the claimant as alleged or went missing since from all accounts the premises were not properly secured and access thereto was not by any means apparently difficult. So too the claim of \$780.00 payment for workers gives no account of the number of masons employed over what period or dates or their rate of pay. The amounts claimed are in truth ballpark figures unsupported by reliable data. The counterclaim is accordingly dismissed with costs.

- [50] In the result judgment is entered for the claimant in respect of her claim in the sum of \$62,800.00 plus interest at the rate of 6% per annum from date of service of the claim (16th July 2007) to date of payment.

The defendant's counterclaim is dismissed and the defendant will pay the claimant's prescribed costs on the value of the claim (\$62,800.00) and counterclaim (\$170,308.00) i.e. \$233,108.00 calculated at \$43,966.20 in accordance with CPR Part 65.5 (3).



EPHRAIM GEORGES
HIGH COURT JUDGE (Ag.)