IN THE SUPREME COURT OF SEYCHELLES

DR. MAXWELL FOCK-TAVE

VERSUS

1. UNICORN CONSTRUCTION (Pty) ltd
2.AUBREY MONTHY

Civil Side No: 119/09

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Ms. Micock for the plaintiff
Mr. Elizabeth for the defendants

JUDGMENT

Renaud, J.

The Plaintiff entered this suit on 12th May, 2009 claiming damages from the Defendants jointly and severally in the sum of **SR300,720.00** with interest at the commercial rate and cost of this suit for breach of a building contract. The Plaintiff particularized his loss and damage as follows:

(a)	Money overpaid for value of work carried out	SR 64,120.00
(b)	Rectification of defects made by Defendant	SR 80,000.00
(c)	Rent for alternative accommodation for 6 months at SR1100 per month	SR 6,600.00
(d)	Moral damage	SR150,000.00
	Total	**SR300,720.00**

The Plaintiff testified in person as well a Quantity Surveyor and a Civil Engineer adduced evidence in support of the Plaintiff's case. The 2nd Defendant testified in support of the Defendants' case.

After the close of the hearing Learned Counsel for the Plaintiff made written submissions whereas Learned Counsel for the Defendants although invited by Court to do so, did not make any.

The issues

The pleadings of the parties revealed that the following issues have been joined which this Court has now to determine.

The Defendants raised a plea in *limine litis* to the effect that:

> "***The Plaint discloses no cause of action against the 2nd Defendant and ought to be struck off.***"

Findings

Section 75 of the Seychelles Code of Civil Procedure (SCCP) requires that a statement of defence must contain a clear and distinct statement of the material facts on which the defendant relies to meet the claim. A mere denial of the plaintiff's claim is not sufficient. It goes on to state that material facts alleged in the plaint must be distinctly denied or they will be taken to be admitted. In the instant case the Defendants in their statement of defence simply state – "Paragraphs 1 to 4 are denied". In the light of the provision of Section 75 of SCCP I take that paragraphs 1 to 4 of the Plaint are deemed admitted.

The Plaintiff is and was at all material times the owner of the residential property, parcel number J3050 situated at Bel Ombre, (hereinafter referred to as the "premises").

The 1st Defendant was at all material times a Company organized under the laws of Seychelles and a Building Contractor licensed under the Seychelles Licensing Authority. It was at all material times represented principally by the 2nd Defendant who is and was at all material times the Manager and a Director of the 1st Defendant.

The 1st Defendant signed a minor building works agreement with the Plaintiff on the 8th October, 2007. The express terms of the Agreement were as follows:

(a) Payment shall be made in accordance with a specified payment schedule at clause 2.3 of the Agreement, commencing with a payment of 20% of the total consideration to be paid in advance of any work done;

(b) The Works shall be complete by August 2008; and

(c) The Works shall be constructed with due diligence and in good and workmanlike manner.

In due performance of the Agreement, the Plaintiff paid to the 1st Defendant or to its order the advanced payment totaling **SR166,120.00** and the 1st Defendant commenced the Works on or about 8th October, 2007. The 2nd Defendant admitted that he knowingly received the sum of **SR166,120.00** which was due to

the 1st Defendant and the 2nd Defendant is bound to return to the Plaintiff the entire sum paid to him.

In April 2008, the Defendants abandoned and vacated the Works, leaving all remaining works and construction incomplete in spite of several requests to complete the works. By April 2008, the Defendants abandoned the works. Even during the period when construction was taking place, the work was sporadic and sometimes there would be no workers on site. The 2nd Defendant admitted that the Defendants stopped work on the site.

When the works were abandoned, the Plaintiff went to the offices of the Defendants and the 2nd Defendant's father, Mr. Berard Monthy, went with him to the site to arrange for a settlement. Following this, the Plaintiff attempted to contact the 2nd Defendant and Mr. Berard Monthy and they both ignored his calls and they eventually informed him that their Lawyer was dealing with the matter.
I find that the Defendants breached the Agreement they entered into with the Plaintiff on 8th October, 2007.

The Quantity Surveyor, Mr. D Blackburn and the Site Engineer Mr. V. Prea, testified that the works were of poor quality and of sub-standard. Each of them submitted a report of their observations and professional opinion **(Exhibits P5 and P6).** I believe the testimonies of those two witnesses and accept their respective findings contained in the reports as being truthful, factual which reflect the true situation on site. I reject the version adduced by the 2nd Defendant with regard to the standard of work etc.. That leads me to find on a balance of

probabilities that the works actually carried out by the 1st Defendant was faulty, sub-standard and defective and has to be demolished and re-done. As a result I find the Defendants further breached the Agreement between the Plaintiff and themselves.

The 2nd Defendant claimed that the value of works that were carried out amounted to over **SR100,000.00.** However, he could not substantiate that to my satisfaction on the required standard of proof. The Plaintiff claimed that works to the value of only SR52,000.00 were carried out. That figure was supported by the evidence of the Quantity Surveyor, Mr. Blackburn. I reject the evidence of the 2nd Defendant and accept the evidence of the Plaintiff and his Quantity Surveyor with regards to the value of the works completed. I find on a balance of probabilities that the value of the works completed is **SR52,000.00**.

The 2nd Defendant though denying that he entered into a contract with the Plaintiff for the construction of his house, he however acknowledged that he received payment from the Plaintiff and the amount was paid into his personal account and not into the 1st Defendant Company Account. He was the one who instructed the Plaintiff to make the payment that way and the Plaintiff acted in good faith and accordingly complied with the request of the 2nd Defendant. He also acknowledged that he was working at the 1st Defendant Company and that he was the one who all along met with the Plaintiff in relation to his project. He further admitted that in spite of the work done, even to his calculations, he was the one who still retained the profit. The 2nd Defendant admitted that he became a Director of the 1st Defendant Company.

Article 1376 of the CCSey states that **–**

> **"***A person who, in error or knowingly***,** *receives what is not due to him, shall be bound to make restitution to the person from whom he has improperly received it"*.

For reasons stated earlier above , it is my considered judgment that the 2nd Defendant misrepresented the technical abilities and financial and other means of the 1st Defendant and that he acted in *bad faith* in entering into the agreement on behalf of the 1st Defendant. I also find that the 2nd Defendant knowingly misguided the Plaintiff in getting the latter to pay the money into his personal account. Therefore, I find the 2nd Defendant liable *in solido* with the 1st Defendant to make good the damages and losses incurred by the Plaintiff.

In the final analysis I find on a balance of probabilities that the Defendants have jointly and severally breached the Agreement which they entered into with the Plaintiff for the construction of his house and they are therefore liable to the Plaintiff for the loss and damages that the Plaintiff suffered. I enter judgment in favour of the Plaintiff as against the Defendants jointly and severally.

Conclusions

Having concluded that the Defendants are jointly and severally liable to the Plaintiff for loss and damages I will now consider the claim of the Plaintiff in that respect.

The Plaintiff paid the Defendants **SR166,120.00** prior to the commencement of work. The Defendants carried out works to the value of only **SR.52,000.00.** The Plaintiff is claiming SR64,120.00 being the balance deemed unspent in the circumstances. I find this sum to be reasonable and I therefore award that sum of **SR64,120.00** to the Plaintiff.

The report of the Quantity Surveyor reveals that in order to rectify the defects in the works of the Defendants the Plaintiff would have to incur extra costs which has been quantified in the sum of **SR 80,000.00.** I also find this sum to be reasonable and I award this sum to the Plaintiff.

The Plaintiff claimed rent for alternative accommodation for 6 months at SR1,100.00 per month, in the total sum of SR6,600.00. I believe that this head of claim is remote to the Agreement of the parties and it was not a term of the Agreement between the parties. Breach of the Agreement by the Defendants entails the latter paying for loss and damages in addition to interest and costs. I have made an award for loss incurred by the Plaintiff and will be considering the Plaintiff's claim for moral damages. I make no award under this head.

The Plaintiff claimed Moral damage in the sum of **SR150,000.00.** It is my considered judgment that this sum is on the high side considering that the Plaintiff has been awarded sums totaling SR144,400.00 for breach of Agreement. Taking in consideration all the circumstances of this case I award the Plaintiff the sum of **SR55,000.00** as moral damages.

As a result of my findings stated earlier above, I now conclude that the Counter-claims of the Defendants are not sustainable and in the circumstances these are entirely dismissed.

I accordingly enter judgment in favour of the Plaintiff as against the Defendants jointly and severally in the total sum of **SR169,120.00** with interest and costs.

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B. RENAUD
JUDGE

Dated this 26 February, 2013