KRISPIL O. IKEDA, Plaintiff

v.

WESTERN CAROLINE TRADING CO. And Its Manager JACOB SAWAICHI, Defendants

Civil Action No. 379

Trial Division of the High Courts

Palau District

November 26, 1969

Action on contract for construction of house. The Trial Division of the High Court, D. Kelly Turner, Associate Justice, held that one who contracts absolutely and unqualifiedly to erect a structure for a stipulated price must bear the loss occasioned by the accidental destruction of the building before completion, the fact that delay in completion required an entire new start did not warrant a finding that plaintiff .prevented completion of the contract, and in the absence of a strong showing of damage all the court could do was to restore the parties, as nearly as possible, to their condition before the contract.

1. Contracts-Performance-Destruction Before Completion

   One who contracts absolutely and unqualifiedly to erect a structure. for a stipulated price, in other words, enters into an entire or indivisible contract to complete such work, must bear the loss occasioned by' the accidental destruction of the building before completion.

2. Contracts-Performance-Destruction Before Completion

   Generally, destruction of the subject matter is no legal justification for nonperformance of a contract unless the contractor stipulates in the agreement that he shall not be responsible for losses occasioned in such manner.

3. Contracts-Performance-Destruction Before Completion

   One who contracts to do something possible to be done must make his promise good.

4. Contracts-Indivisible Contracts
   A lump-sum payment for the entire contract is the test of an entire or indivisible contract.
5. Contracts-Breach-Defenses
   One of the defenses for nonperformance of a contract is that the other party .prevented performance.
6. Contracts-Breach-Defenses
   The fact the delay in completion required an entire new start did not warrant a finding that the plaintiff prevented completion of the contract.
7. Contracts-Breach-Damages
   Normally, a plaintiff sues a contractor for damages for failure to perform.
8. Contracts-Breach-Damages
   In the absence of a strong showing of damage, all the court can do for the parties is to restore them as nearly as possible to their condition before the contract.

Assessor:	JUDGE PABLO RINGANG
Interpreter:	KAZUMOTO H. RENGULBAI
Reporter:	SANAE N. SHMULL
Counsel for Plaintiff:	WILLIAM O. WALLY
Counsel for Defendants:	KALEB DDUI

TURNER, *Associate Justice*

FINDINGS OF FACT

1. The Plaintiff and the Defendant company entered into a written contract, dated September 5, 1966, whereby the company would build a house on the land furnished by the plaintiff in Medorm Village, Aimeliik Municipality, Palau District.

2. The contract provided for a down payment plus payment of the balance upon completion, calculated upon the cost of labor and materials.

3. No time for completion was fixed.

4. Construction was to be in accordance with a plan and specifications (referred to as a sketch in trial testi-

mony) prepared by the company in accordance with the expressed desire of the plaintiff.

5. The plaintiff paid the sum of $250 down at the time of execution of the contract and because during October he had raised funds by means of an *ocheraol,* he paid the sum of $1,807.75 which the company's accountant calculated to be and accordingly issued a receipt for "full payment of Krispil House".

6. "Full paYment" was made October 31, 1966, but there was general agreement that the house was not completed at that time.

7. The house was substantially unfinished when it was destroyed by Typhoon Sally on March 1, 1967, in that doors, windows, and hot closets had not been installed. Neither plaintiff nor anyone else had occupied the house when it was destroyed.

8. The defendant company did not salvage the materials and there was no evidence that the plaintiff did either.

CONCLUSIONS OF LAW

The defense to the plaintiff's claim was largely based upon three propositions:-

1. Delay in completion was caused by changes requested by the plaintiff and but for the delay the house would have been completed before its destruction by Typhoon Sally.

2. That the plaintiff prevented the defendant company from completing performance before destruction by the typhoon by requesting changes in the plans.

3. There was no assumption of liability for loss of the house by fire or typhoon before completion. There was no written agreement to this effect and even if there was an oral understanding, it was ineffective to amend the written contract under the parole evidence rule.

[1,2] We consider the last of the defenses first because the law is settled and certain on the subject. The rule is relatively simple:-

"One who contracts absolutely and unqualifiedly to erect structure for a stipulated price-in other words, enters into an entire or indivisible contract to complete such work-must bear the loss occasioned by the accidental destruction of the building before completion; the theory is that destruction of the subject matter is no legal justification for nonperformance of the contract, unless the contractor stipulates in the agreement that he shall not be responsible for losses occasioned in this manner."

The foregoing rule, quoted from the annotation in 53 A.L.R. 103 at 105, entitled "Who must bear loss from destruction of or damage to building during performance of building contract, without fault of either party," is supported by an impressive list of cases from the United States and England.

[3] In this case, whether the company orally assumed liability for the loss of the house before completion is immaterial since it was obligated for the loss as a matter of law. One who contracts to do something possible to be done-complete the construction of a house-must make his promise good. He is obliged to protect himself by express provisions against liability for loss. The company is not an insurer, as its manager testified, but it might well have obtained insurance for its own protection. Most construction firms do in the United States. If insurance is not available or prohibitive in cost, then the company must protect itself from loss under the general rule of law by disclaiming liability and having the other party agree to it at the time the construction contract is entered into.

On this subject also see: 12 A.L.R. 1284. 84 A.L.R.2nd 106.13 Am. Jur. 2nd, Building and Construction Contracts, § 64.

[4] The foregoing rule of law is applicable when the contract is indivisible. A lump sum payment, as here, for the entire contract is the test of an entire or indivisible contract. The somewhat different rule which prevails for a divisible contract, as urged by defendant, clearly is not applicable to this case.

[5, 6] It also is true that one of the defenses for nonperformance of a contract is that the other party prevented performance. The defendant urged this proposition but the evidence does not sustain him. Even though the plaintiff may have caused delay in completion by requesting changes, the last one perhaps being the substitution of glass window louvers for wooden. The glass louvers did not arrive from the United States until after the typhoon. At that time it was possible to build and complete the house as the contract required. The fact the delay in completion required an entire new start does not warrant a finding that the plaintiff prevented completion of the contract.

There was nothing the plaintiff did, nor resulted from the typhoon, an act of God, which prevented the defendant from fulfilling its promise to build the house.

[7,8] Normally, a plaintiff sues a contractor for damages for failure to perform. Here the plaintiff made no showing he was damaged, except the loss of interest on his money paid to the defendant. In the absence of a strong showing of damage, all the court can do for the parties is to restore them as nearly as possible, to their condition before the contract. For the plaintiff, this means the recovery of the money he paid the defendant. For the defendant, it permits the recovery of the materials, if still available, it employed in the construction project. If they are not now recoverable, the fault lies with the defendant for not making a salvage effort immediately after the typhoon.

JUDGMENT

It is ordered, adjudged, and decreed, that:-

1. The plaintiff have and recover from the defendant the sum of $2,057.75 together with interest thereon from date hereof until paid.

2. The defendant company is entitled to repossess the materials, if they may be found and identified, it employed in the construction of the plaintiff's house.

3. The plaintiff is awarded costs provided by law.