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NZLR

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP No. 973/89

NOT RECOMMENDED

1580

BETWEEN J.W. JENKIN CONSTRUCTION LIMITED

Plaintiff

A N D J.R. BUTLAND

Defendant

Hearing: 5 October 1989

Counsel: Mr McEntagart for Plaintiff
Mr Blackie for Defendant

Judgment: 5 October 1989

ORAL JUDGMENT OF GAULT J.

This is an application for summary judgment in which the plaintiff seeks to recover from the defendant the balance, said to be owing, in respect of building and alteration work undertaken for the defendant on his residence. The amount claimed is $51,881.04, together with interest thereon.

Prior to the commencement of the work estimates were made but no formal contract was entered into and no price was agreed for the work to be undertaken. Total invoices amounting to $174,569.94 were rendered by the plaintiff to the defendant and the defendant paid the sum of $122,688.90. The work was carried out over a considerable period of time. On the affidavit evidence it is said, for the defendant, that the unjustified length of time taken to do the work resulted in

inconvenience and expense to the defendant for which he will have a counterclaim against the plaintiff.

The matter is unsatisfactory in a number of respects. First it is in the nature of a building dispute in which it will be rare that the summary judgment procedure is appropriate. Secondly, Mr Blackie, who appeared for the defendant, felt in some difficulty because of the absence of the defendant from New Zealand. He applied for an adjournment of the application on the ground that he needed time to secure instructions from the defendant, who was participating in an international yacht race and is not expected to return to New Zealand until some time in November.

After hearing argument I declined the application for an adjournment. The evidence includes, as an exhibit to an affidavit, a letter written by the solicitors for the defendant, to the plaintiff on 21 February 1989 in which this paragraph appears -

> "After reviewing all relevant material and seeking the advice of a quantity surveyor, our client is of the view that the amount claimable by your company (if any) is more than offset by the added costs met by our client to complete the original work in a tradesmanlike manner and to remedy innumerable defects."

In addition there is a letter written by the plaintiff's solicitors to the defendant's solicitors following a meeting on 8 March 1989 in which it is said -

> "We confirm that you will forward to us reports by Mr de Vine and Mr Butland's quantity surveyor, within the next seven days. Jenkin will respond to the matters raised in those reports within a further 14 days. We propose that we settle on a method of dispute resolution by 3 April. If we are unable to agree on a method by that date, we will issue proceedings out of the High Court."

From this correspondence it is quite apparent that the defendant was fully aware of, and had made an assesssment of, the alleged dispute before he left New Zealand, and had the assistance of a building consultant and solicitors at that time. That he should leave New Zealand for an indeterminate period of months, without making arrangements for the matter to be advanced, is not a reason why now he should be granted an adjournment on an application for summary judgment which, by its nature, is to be dealt with expeditiously.

The refusal of the adjournment however, left Mr Blackie in a position of some difficulty in that he had, in support of the notice of opposition to the application, only one affidavit, that of Mr de Vine, the project consultant who had been instructed to supervise aspects of the work for the defendant.

The plaintiff's claim is that the work was done. The charges have been made in relation to the work actually undertaken and not on the basis of any fixed price. The work that was the subject of the unpaid account constituted the plaintiff's final claim dated 6 October 1988.

On the affidavit evidence before me, at no time since that

date have the defendant's grounds for refusing payment of that account, been detailed. It is apparent from the correspondence I have referred to that a dispute between the parties had arisen as early as February 1989 and a reference to proceedings had been made in March. It is to be expected then, that by 2 October when Mr de Vine, the project consultant, made an affidavit in opposition to the proceedings, he would have been in a position clearly to identify the nature of the dispute to the plaintiff's claim. I bear in mind that in a summary judgment application the defendant need do no more than show that there is a defence which should be heard and that, at this stage, it is not appropriate to make findings on disputed questions of fact arising from the affidavits.

In the context of a building dispute then, a defendant needs to do very little to avoid summary judgment. However, the fact that the plaintiff's claim is in respect of building work does not necessarily mean that summary judgment cannot be obtained. The burden on a plaintiff however, will be significant in showing that there is no defence. Nevertheless the Court should be alert to circumstances in which a defendant seeks to delay payment until the last moment and resists an application for summary judgment with vague and unspecified complaints about the nature of the work.

In this case Mr de Vine became involved in supervising the work only at a late stage, following dismissal by the defendant of architects previously instructed. As a result Mr

de Vine's knowledge of the work in the course of its early stages, necessarily is incomplete. In his affidavit he sets out defects in the work he found upon assuming responsibility for supervision in April 1988, and he lists a number of matters. He also acknowledges that, under his supervision, a number of the defects were remedied by the end of April 1988. He does not say that any of those matters remain today, unattended to. In some detail his affidavit makes reference to the time taken for completion of the work and the inefficient use of labour. However, in the absence of any time within which the work was to be completed and, bearing in mind the account is for work done, based upon hourly charges for labour, I do not find in this evidence any basis for challenging the account.

Mr de Vine identifies in particular a leaking skylight, which has been replaced by another contractor, and the charge for painting which considerably exceeded an earlier estimate of the cost for that work. Those two matters are answered expressly, on behalf of the plaintiff, in an affidavit in reply which states that the skylight was not the responsibility of the plaintiff. A letter exhibited in reply confirms this. As to the charge for painting it is said this included additional work which was required to be done. Time recordings and invoices relating to the painting contractor were offered to Mr de Vine by letter of 2 December 1988 and apparently have not been inspected.

The evidence does not specify any items of expense

incurred by the defendant in completing and rectifying the work (apart from a skylight which I have mentioned). Any such costs would be in the nature of a counterclaim in any event.

Mr Blackie, for the defendant, has submitted that without opportunity to answer the evidence in reply the defendant is unable to place in issue the statements of the plaintiff. He submits, however, that on the papers it is apparent that there is a dispute in those areas which require investigation by proceedings in the normal way. I do not find that to be so. There is no conflict in the affidavit evidence in respect of which I have preferred the plaintiff's evidence, although I have taken note of some factual matters on which the plaintiff has provided further evidence which is not contested.

"Mr de Vine's affidavit concludes with these two paragraphs-

> "14. OVERALL, the standard of workmanship is not represented by the money that is being claimed. I regard the total finish of the job as less than one would expect from a professional builder. In order to have a proper appreciation of what I mean, one would have to visit te site. The leaking skylight has recently been replaced by another contractor at a cost anticipated to be in the region of $5,000.00.
>
> 15. I believe that the Defendant has good cause to challenge the Plaintiff's account."

The view expressed by the deponent is that the standard of workmanship is unsatisfactory and that the amount claimed by the plaintiff therefore, is unjustified. These two paragraphs come at the end of an affidavit in which he has referred to a

number of matters but specifically his complaint as to the standard of workmanship appears to arise from the matters listed (which are said to have been rectified without charge in the course of maintenance work) and the very general statement that the paint work was one of the worst features of the contract.

In the circumstances in which these statements are made they lack the detail which is required. The reference to "overall the standard of workmanship" seems to be a conclusion from what has preceded it in the affidavit, rather than a separate, considered, comprehensive statement as to the standard of work upon which weight could be placed.

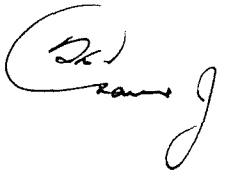
Apart from the matter of workmanship, Mr Blackie has submitted that the question generally arises in the context of the dispute as to whether the amount claimed is reasonable. I am of the view that the defendant and his advisors all have had ample opportunity to demonstrate the manner in which the claim is regarded as unreasonable and have not done so. Accordingly, I consider that this is one of those rare cases where, although it is said to be a building dispute, the real dispute has not been identified. I am inclined to think that Mr de Vine and the defendant's solicitors have anxiously sought to hold matters until the defendant chooses to return from overseas. They are not in a position clearly to indicate to the Court a defence to the plaintiff's claim and they are anxious to secure instructions from the defendant in that regard. He, on the other hand, had ample opportunity to

provide them with that material, if it exists, before his departure and did not do so.

In those circumstances, although it might appear to be indeed a robust approach, I am of the view that this is a case in which the plaintiff should not further be denied payment of the account.

On the evidence presented to me I am satisfied that there is no defence to the claim and accordingly the plaintiff is entitled to judgment.

There will be judgment for the plaintiff in the sum of $51,881.04, together with interests at 11% from 6 November 1988 to date. The plaintiff also is entitled to costs which I fix at $1,250.00 together with disbursements to be certified by the Registrar.



Solicitors: Simpson Grierson Butler White, Auckland for Plaintiff
Brandon Brookfield, Auckland for Defendant