SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

(CIVIL)
A.D. 1999

Suit No. 158 of 1990

Between:

Eustace Octave

Plaintiff

V

Lane Pettigrew
Louis Hamal

Defendants

Appearance

Mr. Evans Calderon for the Plaintiff
Mrs Brenda Flemming Flossaic for Defendant

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Judgment delivered
16th September 1999

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JUDGMENT

d'Auvergne J.

This is an action shrouded in antiquity (from date of filing to judgment).

By a writ of Summons endorsed with a Statement of Claim the Plaintiff claimed against the Defendants jointly and severally the following:

Special Damages - $61,884.91

Interest thereon form 5th February 1987 to date of payment

General Damages

The Costs hereof

The said writ was filed on the 7th day of June 1990 and on the 25th day of June 1990 an appearance was entered on behalf of the first Defendant. The second Defendant was never served.

On 12th day of July 1990 a defence was entered on behalf of the said first Defendant and on the 24th day of March 1992 an amended defence was entered pursuant to an order of the Court.

Facts

The Plaintiff gave evidence on his own behalf and called no witnesses whereas Robert Fagan and Lane Pettigrew gave evidence on behalf of the defence. The Plaintiff's case is that he was employed by the Defendants to construct on the compound of the Hotel known as Club Mediterranean hereinafter referred to as the Hotel the following:

(a) Tenis Club House Project

(b) Vendor's Market Project

(c) Scenery Store

(d) Pool pump room

(e) Modification to interior room

(f) Timber Framing to lobby area

He said that there was a verbal agreement between the first Defendant and himself that the labour cost for the above mentioned was

$106,100.00 and that he would supply all the material for the construction of (a) to (f) enumerated on page 2 and he would be re-imbursed.by the said Defendant.

He said that he received $59,169.00 towards the labour cost leaving a balance of $46,931.00 and $32,450.78 in respect of the purchase and transportation of materials but that the Defendants have refused to pay the balance of $14,953.91 which is still owing with regards to the latter despite his repeated request for the payments

The Plaintiff tendered seventeen (17) documents illustrating the work he was contracted to do for the Hotel and two other exhibits which showed that he had submitted quotations for (a) to (f) mentioned earlier.

Under Cross examination he admitted receiving $128,797.69 from the company but denied receiving cheque dated 17th December 1986 in the sum of $49,424.07.

He said "I received the amount of $128,797.69 in many different payments in material and labour but I did not receive cheque for $49,424.07 I never went to Barclays Bank in December to cash any cheque"

I pause here to note that under cross examination the Plaintiff said I had a contract with Mr Lane Pettigrew I never had any dealings with Mr Hamal. Yet the latter is named as a Defendant in the case.

The defence's case is that the first Defendant was not an employee of the Hotel Holiday Village (St Lucia) Ltd but was engaged by the said Hotel as a Consulting Architect; that as a consulting architect he acted as agent for the said Hotel and that the Plaintiff was one of approximately ten contractors who were employed by the Hotel to execute work on its property. That as an agent, the first Defendant submitted architectural drawings to the Plaintiff who inturn would submit written quotations to the Hotel.

The first Defendant Lane Pettigrew told the Court that he was a member of the American Institute of Architects and he gave the Court an explanation of his Contract which had been tendered as an exhibit by Robert Fagan better known as Bob Fagan who worked for the Hotel as general manager during the period under review.

During the explanation of the contract much emphasis was placed by this witness on Clause 1.5.3, 1.41, 1.5.7, 1.58 which will be set out later in this judgment.

He categorically denied that the Plaintiff tendered any bills to him for payment nor did he ever pay the Plaintiff "one single penny for any work of any kind".

The witness said that while performing his duty of inspecting and valuing the works he noticed that "Mr Octave was claiming for some work which he had not done and that he was over valuing, charging too much for some of the work that he did"

He gave a few examples of work done and valued by the Plaintiff which he had to reduce substantially. He denied even assisting in accepting any bids for the Plaintiff but admitted that he had in the past checked materials delivered on site as being those listed on a receipt tendered by Plaintiff. He said that after this was done the Plaintiff would "then take the receipt to the owner with whom he was contracted and it was the owner's responsibility to reimburse Mr Octave against the amount shown on the receipt."

Robert Fagan's evidence was in conformity with that of the first Defendant. He told the Court that the Plaintiff had a verbal agreement with the Hotel. He submitted eight cheques which showed that the Hotel had paid the Plaintiff a total of $128,817.65 and a ledger to show that that the amount of $49,424.07 was debited from the Hotel's account on the 16th of December 1986, whereas the cheque made out to the value of $49,424.07 to the Plaintiff was dated 17th December 1986.

I pause here to note some of the clauses mentioned above in the terms and conditions of the first Defendant's contract between the Company and himself.

1.41 The Architect, following the Owner's approval of the Construction Documents and of the latest Statement of Probable Construction Cost, shall assist the Owner in obtaining bids or negotiated proposals, and assist in awarding the preparing contracts for construction.

1.5.3 The Architect shall be a representative of the Owner during the construction Phase, and shall advise and consult with the Owner. Instructions to the Contractor shall be forwarded through the Architect. The Architect shall have authority to act on behalf of the Owner only to the extent provided in the Contract Documents unless otherwise modified by written instrument in accordance with Subparagraph 1.5.16.

1.5.4 The Architect shall visit the site at intervals appropriate to the stage of construction or as otherwise agreed by the Architect in writing to become generally familiar with the progress and quality of the work and to determine in general if the Work is proceeding in accordance with the Contract Documents. However, the Architect shall not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. On the basis of such on-site observations as an architect, the Architect shall keep the Owner informed of the progress and quality of the Work, and shall endeavor to guard the Owner against defects and deficiencies in the work of the Contractor.

1.5.5 The Architect shall not have control or charge of and shall not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, for the acts or omissions of the Contractor, subcontractors or any other persons performing any of the work, or for the failure of any of them to carry out the work in accordance with the Contract Documents.

1.5.6 The Architect shall at all times have access to the work wherever it is in preparation or progress.

1.5.7 The Architect shall determine the amounts owing to the Contractor based on observations at the site and on evaluations of the Contractor's Applications for Payment, and shall issue Certificates for Payment in such amounts, as provided in the Contract Documents.

1.5.8 The issuance of a Certificate for Payment shall constitute a representation by the Architect to the Owner, based on the Architect's observations at the site as provided in Subparagraph 1.5.4 and on the data comprising the Contractor's Application for Payment, that the Work has progressed to the point indicated; that, to the best of the Architect's knowledge, information and belief, the quality of the work is in accordance with the Contract Documents (subject to an evaluation of the Work for conformance with the Contract Documents upon Substantial Completion, to the results of any subsequent tests required by or performed under the Contract Documents, to minor deviations from the Contract Documents correctable prior to completion, and to any specific qualifications stated in the Certificate for Payment); and that the Contractor is entitled to payment in the amount certified. However, the issuance of a Certificate for Payment shall not be a representation that the Architect has made any examination to ascertain how and for what purpose the Contractor has used the; moneys paid on account of the Contract Sum.

Arguments

Learned Counsel for the First Defendant contented that the Plaintiff's case should be dismissed with costs to the First Defendant because of the following:

Firstly that Plaintiff pleaded and gave viva voce evidence that the First Defendant was indebted to him in the sum of $61,884.91 but he neither produced any voucher to substantiate his claim nor provided any details of the materials, the cost of which he was seeking re-imbursement for.

That he admitted receiving the sum of $128,817.65 (the actual figures when added) "I agree that I received in all the amount of $128,797.69" but denied receiving the sum of $49,424.07 E.C, whereas the back of the cheque clearly shows that denominations of payment were stamped at the back of the cheque.

That the Plaintiff was fully aware that he contracted with Club Mediterrian and not the First Defendant hence the reason why he initially brought an action against Club Mediterrian which was dismissed on the ground of abandonment and then sought to bring the same action against the First Defendant.

That the First Defendant was an agent and was therefore not liable to a third party when it can be proved that he acted within the bounds of his agency. Article 1615 of the Civil Code of St Lucia.

Learned Counsel argued that the Plaintiff was well aware that the First Defendant was an architect and that he had no personal contract with him the (Plaintiff) for when ever the First Defendant checked, delivered goods against any receipt given to him by the Plaintiff, after the checking the said receipt was returned to the latter who would produce it elsewhere for payment. She quoted. **Halsbury's Laws of England 4th Edition Volume 4 Para 1343.** Which provides.

As these is no contractual relationship between the architect or engineer and the Contractor the only liability that can be incurred towards him is in negligence, and when the architect or engineer is acting as agent for the employer he can incur no personal liability provided that he acts honestly and within the scope of his employment.

She further contended that the denial by the Plaintiff of the signature at the back of the cheque dated 17th December 1986 when that signature appears to be identical with his signature on all the other cheques can be proved by the provision set out in **Halsbury's laws of England 4th Edition Vol 17. Paragraphs 89 and 124.**

89. **Handwriting in general**. *The proof of handwriting may [1]..require either lay or expert evidence, or both, depending upon the point at issue. A person's handwriting may be proved by the opinion of witnesses who are acquainted with it[2] The knowledge necessary for this purpose may have been acquired by the witness at any time [3]. Having (1) seen the party write, or (2) received communications purporting to come from him[4] in answer to those addressed to him by the witness, or (3) observed*

documents purporting to be in the party's handwriting in the ordinary course of business[5] ……

124 **Proof of handwriting**. *Except when judicial notice is taken of official signatures*[1]*, or where an apparent or purported signature is deemed by statute to be the actual signature*[2]*, the handwriting*[3] *or signature*[4] *of unattested documents may be proved in the following ways: (1) by calling the writer; or (2) by a witness who saw the document written or signed; or (3) by a witness who has a general knowledge of the writing, acquired in any of the ways mentioned earlier*[5]*; or (4) by comparison of the disputed document with other documents proved to the judge's satisfaction to be genuine*[6]*; or (5) by the admissions of the party against whom the document is tendered*[7]*; or (6) in particular cases, by a document purporting to be a solemn declaration in a prescribed form made before a prescribed person*[8].

She said that Bob Fagan as manager, of the Company would have received the drawn cheques of the Plaintiff and therefore he can be said to be "acquainted with" the Plaintiff's handwriting, She concluded by stating that a post dated cheque is not invalid **Halsbury's Laws of England Volume 3 (1) Para 163 2nd paragraph on page 143**

Learned Counsel for the Plaintiff contended that the issues to be settled in his opinion were:

(1) Who did the Plaintiff contracted with.

(2) was the work done and paid for

(3) who received the benefit of the Contract and

(4) who was liable for payment for the work done.

He argued that the Plaintiff contracted with the First Defendant and no one else who at the time was an undisclosed principal. He said that this was so, since the First Defendant not only accepted the Plaintiff's bids but showed him the paymaster's office where he presented his claim for payment.

He further argued that the Plaintiff was not privy to and had no knowledge of the contract agreement between the Hotel and the First Defendant. He urged the Court to consider a St Lucian setting and asked the question whether an ordinary contractor like the Plaintiff would be aware of the inside knowledge of the working of a Hotel, such as club Mediterranean Holiday Village (St Lucia) Ltd.

Again he urged the Court to note that the First Defendant on oath said that the "owner of the project was Club-med." Therefore the First Defendant was the agent who employed the Plaintiff for his undisclosed principal.

Learned Counsel boldly stated that from the evidence led by the Plaintiff there was no doubt that the work done by the Plaintiff was completed according to plans and bids but that he had not been fully paid. He drew reference to First Defendant's evidence.."I held back money for incomplete work, the money I referred to in my previous testimony is $1200.00. "

Learned Counsel further urged the Court to accept the Plaintiff was a truthful witness who admitted to receiving the amounts on the other cheques exhibited but denied receiving the $49,424.07 from cheque dated 17th December 1986.

Learned Counsel argued that the work was done and the owner benefited therefore the First Defendant who acted for the undisclosed principal should be made to pay the Plaintiff for his labour and costs of materials and that the First Defendant would be at liberty to claim "indemnity" from his principal.

He quoted the case of **Thacker V Hardy (1878) 4 Q.B.D. 685 at 687 from Chitty on Contract 23rd Edition Vol 2 Page 118**

"The Principal is under a duty to indemnify the agent against all liabilities incurred in the execution of his authority"

Pople V Evans 1968 2 ALL E R Page 744 as authority that the action under consideration was not barred as Res Judicata on account of the previous suit filed by the Plaintiff against Club Mediterranean which was dismissed on the ground of abandonment.

CONCLUSION:

The Plaintiff has brought an action against the First Defendant for breach of contract stating that he contracted with the First Defendant to execute certain projects on Club Mediterranean Hotel (St. Lucia) Ltd. The question therefore to be decided is whether the First Defendant acted as

principal or as agent in his dealings with the Plaintiff. It is the Plaintiff's contention that the First Defendant contracted with the Plaintiff without disclosing his principal and therefore is answerable to the Plaintiff.

The First Defendant on the other hand states that he acted as agent as can be seen by Article 1.53 of his contract (noted earlier) The Plaintiff admitted that he knew that the First Defendant "was an architect but did not know whether he owned Club Med."

A perusal of Paragraph 3 of the Statement of Claim of Case 69 of 1987, an exhibit in this case (that case was deemed abandoned) reads.

Paragraph 3 the Plaintiff contracted with the said company through their Architect and Manager one Lane Pettigrew and Louis Hamal respectively of Vieux Fort for the construction of certain buildings for the use and benefit of the Hotel.

In my judgment the logical conclusion is that the Plaintiff was aware that the First Defendant was not the owner of Club Mediterraean, that the Hotel did not and does not belong to him but that he was an agent of the Hotel.

Art 1615 of the Civil Code provides

An agent acting in the name of the principal and within the bounds of agency is not personally liable to third persons with whom he contracts.

Paragraph 137 of Halsbury's Laws of England 4th Edition volume 1

(2) provides

Rights and liabilities of Principal

As a general rule, any contract made by an agent with the authority of his principal may be enforced by or against the principal where his name or existence was disclosed to the other contracting party at the time when the contract was made.

Paragraph 170 of Halsbury's aforesaid provides *where an agent in making a contract discloses both the existence and the name of a principal on whose behalf he purports to make it, the agent is not, as a general rule, liable on the contract to the other contracting party, whether he had infact authority to make it or not but a personal liability may be imposed upon him by the express terms of the contract, by the ordinary course of business, or by usage, and he will be liable for breach of warranty of authority in cases where he had no authority.*

Paragraph 1343

Liability of architect to contractor

As there is no contractual relationship between the architect or engineer and the contractor the only liability that can be incurred towards him is in negligence, and when the architect or engineer is acting as agent for the employer he can incur no personal liability provided that he acts honestly and within the scope of his employment.

There is no evidence before this court that the First Defendant had exceeded his agency or that he was negligent.

Therefore I have no alternative but to conclude that the First Defendant acted as agent within the bounds of his agency and therefore is not liable to the Plaintiff.

The claim is that the First Defendant is indebted to the Plaintiff in the sum of $61,884.91; $46,931.00 balance on labour from the agreed sum of $106,100.00 and $14,953.91 balance from the purchase cost and transportation of materials.

"He who alleges must prove"

The Plaintiff exhibited two bills one which showed an amount of $27,300.00 and another for $27,000.00 which amount to $54,300.00. This Plaintiff told the Court "I do not remember receiving cheques from Holiday village totaling $128,797.65 and latter said" Correct I told the Court in Re-examination that I received $128,797.69. I received the amount of $128,797.69 in many different payments in material and labour. I agree that I received in all the amount $128,797.69 but I did not receive cheque for $49,424.07.

The above is confusing but it is clear that Plaintiff has failed to substantiate his claim for the sums stated for labour and for the cost and transportation of materials.

The Plaintiff in his evidence made copias references to his indebtedness to a Mr Son Pierre from Pierre Enterprises. A perusal of the exhibited cheques will show that three of them were endorsed to National

Commercial Bank and one clearly states that the amount was endorsed to the account of Pierre Enterprises at the above mentioned bank.

I agree with Learned Counsel for the First Defendant that Mr Bob Fagan through his acquaintance with Plaintiff and the Plaintiff's handwriting he can prove the Plaintiff's handwriting and I believe him when he said that he recognised the Plaintiff's signatures on all the cheques.

Finally with regard to the cheque dated 17th December 1986 and drawn on the 16th December 1986 the authorities show that post dated cheques are not invalid.

Based on the above my order is as follows.

(1) This case is dismissed.

(2) Costs to the First Defendant to be agreed or otherwise taxed.

Suzie d'Auvergne
High Court Judge