IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX: AT KINGSHILL

EARL CHARLES d/b/a/ UNIQUE CONSTRUCTION, Plaintiff, vs. IAN PRINGLE, Defendant.	CIVIL NO: 1058/1985 ACTION FOR DEBT AND FORECLOSURE OF LIEN

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SILVERLIGHT, Judge

MEMORANDUM OPINION
(October 27, 1986)

This matter proceeded to a bench trial on a complaint filed by the plaintiff contractor, against the defendant owner, for alleged breach of a construction contract.

FACTS

The parties entered into a written contract for construction of a house on certain premises known as Plot 106-E, Estate La Grande Princess, Christiansted, St. Croix. The substance of the contract called for construction of the house according to plans provided by the owner to the contractor for a price of $138,995.00. In addition to the written contract, the parties orally agreed to relocate the driveway and to install additional footings for which a separate price of $6,700.00 was paid.

The defendant made progress payments on account of the written contract totaling $75,666.00, and though defendant's payments were not in accordance with the contract requirements, the plaintiff acquiesced to defendant's payment plan. This altered payment schedule however, was not due to a lack of funds, since defendant at all pertinent times had at least $70,000.00 in a savings account.

Sometime around April 12, 1985, for reasons not fully disclosed at trial, defendant notified plaintiff that the contract was terminated. Plaintiff thereupon stopped work on the house. The testimony revealed and the court finds as a fact, that at the time the termination letter was sent, the plaintiff had performed substantially in accordance with the terms of the contract. The testimony concerning the degree of completion of the project at the time of termination was conflicting. Defendant's expert witness testified that the house was 54 percent complete when plaintiff stopped work on the premises. According to his testimony, his figure was based on an inspection of the premises made by defendant's expert and calculated by him from notes made during the inspection. On cross examination, however, the witness was unable to produce the notes and his in court breakdown of the percentages of work completed varied substantially from the figure testified to on direct examination. This court cannot speculate as to which is the more accurate figure. Instead, the court finds that the testimony of Mr. Lambert Pierce, plaintiff's expert, is worthy of greater weight and accepts his estimate of 74.6% as the more accurate calculation of completion. 1/

Even though the plaintiff performed substantially in accordance with the contract requirements, portions of the work did not conform to the plans. The walls, according to the plans, from footing to bond beam were supposed to be 8 feet, 6 inches, but because of the contractor's unilateral decision to use different concrete block, they actually measure 8 feet in height. The ridge of the roof over the living room area was lowered by three inches by the roofer. Neither the change in the height from footing to bond beam, nor the lowering of the

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1/ Mr. Pierce's testimony disclosed that he had made an on site inspection of the premises, studied the construction plans and had calculated the worth of each category of labor and material supplied to the date of termination.

roof were discussed with the owner. In fact, the roofer upon examining the plans, found that they did not contain the symbol signifying the roof pitch. However, instead of going back to the owner or the drafter of the plans, the roofer determined the pitch himself, 2/ measured the roof center, and laid out the rafters. Because the rafters were cut without consideration of the fact that the bond beam was 6 inches lower than shown on the plans, the meeting of the valley beam with hip roof was not as shown on the plans. At no time did the plaintiff or the roofer discuss this problem with the owner.

LIABILITY

An anticipatory repudiation of an agreement constitutes a total breach of the contract giving rise to a claim for damages by the non breaching party. Rest. of contracts (2nd) § 253. There is little doubt that the defendant repudiated the contract when he delivered the termination letter to the plaintiff. Defendant's actions would be justified only if the deviations from the plans were of such magnitude as to go to the essence of the contract. In addition, at least one of the reasons given for the termination was for an alleged

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2/ This pitch could be easily calculated by using other measurements set forth on the plans establishing the height of the roof and the distance from roof center to eave end.

variation from the terms of a separate oral contract to which defendant agreed or which he ratified. Repudiation of the contract by the owner is not justified where the contractor has substantially performed the terms of the contract but has committed a minor breach. 3A Corbin on Contract § 708, 709 (1951).

Even though the defects do not justify a repudiation of the contract, the owner is entitled to relief by way of set-off for work not done according to the plans. Under the Restatement (2nd) of Contracts § 348 Subsections (2) and (6), the defendant may recover the reasonable cost of remedying the defects caused by the contractor. This is the appropriate remedy since the evidence presented at trial by the defendant, did not prove with sufficient certainty the diminution in value of the property resulting from the defects. Restatement of Contracts (2nd) § 348, subsection (2).

The contractor asserts that the owner is not entitled to recover on his counterclaim because the defect in the roof construction was due to defective plans which were supplied by the owner and draws the court's attention to 6 ALR 3d 1394 and cases cited therein. That annotation states the general rule that:

> A construction contractor who has followed plans or specifications furnished by the Contractee, his architect, or engineer, and

> which have proved to be defective or insufficient, will not be responsible to the contractee for loss or damage which results, at least after the work is completed, solely from the defective or insufficient plans or specifications, in the absence of any negligence on the contractor's part, or any express warranty by him as to their being sufficient or free from defects. 6 ALR 3d at 1397.

The language quoted above however, specifically excludes a situation where the contractor was negligent.

The facts of this case reveal that the contractor was aware of the allegedly defective plans but went ahead and constructed the roof according to plans without notice to the owner. This is simple negligence. Under the practice and usage of the trade, the problem should have been discussed with the owner or designer of the plans for modification or authorization to modify which was never obtained. [3] A contractor who has reason to feel that plans supplied by the owner are defective, has a duty to examine the plans and warn the owner of his fears. Draube v. Rieth, 114 So. 2d 879, 882 (1959). If the contractor warns the owner and but is told to go ahead, the owner waives liability for the defective construction. If, however, the

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[3] Plaintiff's expert testified that if any questions concerning defects in the plans arose, such questions should be resolved after discussion with the owner or designer.

contractor fails to inform the owner, he is liable for building in a negligent fashion.. Id.

DAMAGES

We turn to the evidence adduced at trial to determine the amount of recovery to which plaintiff is entitled. The plaintiff, because he substantially performed, should receive the benefit of his bargain. The evidence at trial established that 74.6% of the work was completed and that payments totalling $75,666.00 were made by the defendant. On this basis, defendant was obligated to pay 74.6% of the contract price which yields a figure of $103,690.27. In addition, the plaintiff is entitled to the 20% anticipated profit in the remaining 25.4% representing the unfinished portion of the construction which plaintiff was prevented from completing by defendant's repudiation of the contract. The anticipated profit in the remainder is computed to be $7,060.95. Adding these two figures together, establishes a total of $110,751.22. From this sum, the court deducts the progress payments of $75,666.00 which leaves a balance of $35,085.22. This last figure represents to plaintiff, the benefit of his bargain.

This, however, does not end the matter. For as the court pointed out supra, the defendant is entitled to a set-off for defects in the construction that were caused by the contractor.

Three workmen testified on behalf of the defendant that they knocked down three defective walls and plastered the entire downstairs except for one wall. They also found that the cutout for the installation of the glass door was two inches too small. The defendant is entitled to $1,400.00 for the repair of the walls and an additional $6,000.00 for plastering and for the laying of the floor tiles. In addition, the defendant is entitled, according to the testimony of plaintiff's expert, to a set-off of $2,400.00 for the roof repair. The replacement method described by Mr. Pierce, is the method accepted by the court as opposed to the bracing method to which he referred because the latter method would leave exposed the roof rafters running in a counter direction to the brace. Thus, the bracing method would not be aesthetically acceptable and would likely diminish the market value of the property.

The total set-off to which the defendant is entitled equals $9,800.00. When the contractor left the job, the valley beam was on a 2 x 4 from the floor to the rafters and not in accordance to the plans. The result of this was that the defendant had to build a stone column in the living room area to support the valley beams. However, there was no evidence as to how much was spent to put in the column. Even though the testimony of the architect was that it detrimentally affected the project, the defendant failed to meet its burden on the loss of value to him. Finally, the expenditure of $1,700.00 for the cistern cannot be allowed because there was no evidence that the cistern failed to conform to the plans or that its construction was improper.

The plaintiff is entitled to recover from the defendant, the net sum of $25,285.22, together with costs and attorney's fees in accordance with the Lindy Builders guidelines. Defendant's counterclaim will be dismissed on the merits.

DATED: October 27, 1986

E N T E R:

IRWIN J. SILVERLIGHT, JUDGE