

BARBADOS

[Unreported]

No. 2358 of 2002

IN THE HIGH COURT OF JUSTICE

HIGH COURT

CIVIL DIVISION

BETWEEN:

LYMAN THEODORE BELLAMY

PLAINTIFF

AND

D.C.L INC.

DEFENDANT

Before the Honourable Madam Justice Kaye Goodridge, Judge of the High Court

2005: December 12, 13, 14

2006: March 21, 22, 23, 30

April 25

2008: July 25

Mr. Leslie Haynes, Q.C in association with Mr. Ivan Alert, and Mrs. Alicia Richards-Hill of Yearwood & Boyce for the Plaintiff

Mr. Ramon Alleyne in association with Mr. Kevin Boyce, and Mr. Craig Kinch of Clarke, Gittens and Farmer for the Defendant

DECISION

NATURE OF ACTION

[1] In this action the Plaintiff claims damages, interest and costs against the Defendant for breach of contract.

[2] According to the Plaintiff's statement of claim, by contract in writing dated July 29, 1999 and made between

the Plaintiff and the Defendant, the Defendant agreed to construct a townhouse for the Plaintiff on property situate at Ridge View Estates Development, Christ Church according to the terms contained in the contract and according to the plans, drawings and specifications annexed thereto for the sum of \$475,000. It was further agreed that the construction would be completed on or before November 30, 1999.

[3] The Defendant did not complete the construction until January 2001 and the Plaintiff was compelled to seek

alternative accommodation for the period December 1999 to December 2000 at a monthly rental of \$2,000.

[4] Further, in breach of the contract, the Defendant failed to build the townhouse in a substantial or workmanlike manner and this resulted in the Plaintiff suffering loss and damage.

THE DEFENCE

[5] In its defence, the Defendant denied that there was an agreement to complete construction of the townhouse on or before November 29, 1999. It further denied that it was in breach of the contract and stated that the townhouse was constructed in accordance with the requirements of the contract. The Defendant further stated that if there were any defects, the Plaintiff refused to allow the defendant proper access to the townhouse so that the defects could be repaired and that the Plaintiff failed to give proper notice of the alleged defects within the time stipulated in the contract.

ISSUES FOR DETERMINATION

[6] This matter raises the following issues for the determination by the court:

(1) Whether there was a collateral agreement between the parties for the completion of the townhouse by 30th November, 1999 and if so, was the Defendant in breach of that agreement?

(2) Was the townhouse built in accordance with the terms of the contract and if it was not, what is the measure of damages to which the Plaintiff is entitled?

ISSUE NO. 1

Was there a collateral agreement between the parties for the completion of the townhouse by November 30, 1999 and if so, was the defendant in breach of that agreement?

[7] Certificate of Compliance of the Town and Country Planning Officer. The said certificate was issued on the 15th December, 2000. Therefore pursuant to the said contract the unit was to be completed in or around the month of June, 2002.

[8] The Certificate of Practical Completion is dated May 21, 2001 and therefore the property was clearly completed within the contractual date.

[9] The evidence of Mr. Peter DeFreitas requires consideration at this point. Mr. DeFreitas testified that he is a director of the Defendant company and that the Defendant did appoint AAA as one of its agents and that AAA were the agents in respect of unit No. 27. He admitted communicating with Ms. Storey about the Plaintiff but he could not recall what the communication was about. He did not recall the Plaintiff explaining to him that he wanted to move into No. 27 in December 1999 and he could not recall trying to assist the Plaintiff. However, it was his evidence that it was impossible for the Defendant to finish the unit in December 1999.

[10] It is interesting to note that there is a letter dated May 4, 2000 from Mr. DeFreitas in which he apologised to the Plaintiff for

the delay in completion due to a number of set backs which had "cost us a few months which were beyond our control". He then estimated completion by July, 2000 assuming no further delays. One must therefore ask the question: why was Mr. DeFreitas apologising for delay in completion in May 2000 if the completion date was two years later *i.e.* June 2002?

[11] Further, by letter of 3rd February, 2000 written by the Plaintiff's Attorney-at-law to the Defendant's Attorneys-at-law, Messrs. Evelyn Gittens & Farmer, the Plaintiff reiterated the assurance given to him that the townhouse would be completed by November 1999, that in reliance on that assurance he had sold his house at Retreat, St. George at the end of November 1999 and complained of delay in completion of the townhouse. He also informed of the inconvenience and expense caused the Plaintiff as the Plaintiff was forced to lease alternative accommodation and requested to be informed of the new completion date.

[12] When this letter was drawn to the attention of Mr. DeFreitas he did not deny seeing the letter but testified that he could not recall it. He also did not deny seeing a facsimile from AAA dated 4th February, 2000 in which a date was requested for when the plaintiff would be able to take up residence of unit No. 27 but testified that it might have been brought to his attention as it was addressed to the Defendant's office. While there is the Defendant's letter of May 2000 apologising for the delay in completion there is no correspondence from the Defendant challenging the Plaintiff's assertions about the delay in completion of the unit.

[13] In the court's view Mr. DeFreitas' evidence can be characterised as vague and unhelpful. It is strange that he was unable to recall details of certain important matters which would have been of assistance to the court in determining this issue.

[14] Having reviewed the evidence the court finds the following facts:

- (1) AAA was the agent for the Defendant in respect of unit No. 27 at Ridgeview Estates:
- (2) The Defendant's agent, AAA (Ms Elaine Storey) and Mr. Altman showed that unit(which was at ring beam stage) to the Plaintiff and the Plaintiff agreed to buy it:
- (3) The Defendant's agent warranted or represented to the Plaintiff that the unit would be ready by the end of November, 1999;
- (4) In reliance upon that warranty and/or representation the Plaintiff sold his property at Retreat, St. George and completed that sale by the end of November, 1999 in the expectation that No. 27 would be ready for him to occupy by that time;
- (5) The unit was not completed as promised by the end of November, 1999.

[15] The Defendant was therefore in breach of the collateral agreement to complete construction of the townhouse by the end of November 1999 and it is this breach which caused the plaintiff to lease alternative accommodation. The Plaintiff is therefore entitled to recover damages from the Defendant in respect of this breach.

ISSUE NO. 2

Was the townhouse built in accordance with the terms of the contract and if it was not, what is the measure of damages to which the Plaintiff is entitled?

[16] It is not in dispute that it was an express term of the agreement that the townhouse was to be built in a substantial or workmanlike manner. The Plaintiff testified that he was informed by the site manager Mr. Gomez that unit No. 27 was finished but that the investors' clearance would be required for him to deliver the keys to the Plaintiff. Mr. Gomez subsequently delivered the keys to the Plaintiff and the Defendant allowed the Plaintiff to move into the unit.

[17] The Plaintiff further stated that upon moving into the unit he found the tiles not properly laid, doors not fitted properly and that rain came in through the door because of gaps between the door and the door frame were too wide. He inspected and submitted to the site manager Mr. Gomez a snag list of 101 items. Some faults were corrected and the contractor came and inspected and agreed that there were some jobs to be done. Carpentry masonry and painting work was carried out but not all the defects were corrected.

[18] Mr. Bellamy also testified that the contractor told him that it was costing too much and that he would have to deal with the architect. Despite promises from Mr. Anthony Hoad, the Defendant's architect to come and inspect, he did not do so. The Plaintiff then went back to Mr. Gomez who inspected and said that there was still work to be done. According to Mr. Bellamy the walls in the bedroom were out of plumb, the floor was not level, the stairs leading from the upper level to the lower level pitched left, the floor on the lower level sloped downhill, the floor in the master bedroom sloped in three different directions and he was affected by the heavy dust in the unit due to bad tiling.

[19] Under cross-examination, the Plaintiff also testified that the window hinges and straps were of such quality that the wind blew off one window and they had to be changed, that the doors and windows were not painted properly and paint was flaking off as early as January, 2001 and that the pickle was rough.

[20] Despite work done by the Defendant's workmen defects and faults still remained. The Plaintiff through his attorneys at law then engaged the services of an Architect and a Quantity Surveyor to inspect and report on any defects and or faults in construction in the unit.

[21] Ms. Vickie Telford (formerly Marshall) testified that she was the architect assigned from SRM Architects, the firm engaged to inspect and report by the Plaintiff, to do a snag list (dated May 2001) which was a list of defects in relation to unit No. 27. Under cross-examination she testified that the tiling was generally poor and that any qualified architect would be able to determine inadequate tiling.

[22] Mr. George Holder, Quantity Surveyor of Design Collaborative testified that he inspected unit No. 27 and found that the list of defects prepared by SRM Architects was an accurate representation of the defects stated in that list. He testified that his inspection revealed defective items that could be made good as well as items which were matters for compensation because in order to make them good would require radical works. He explained that by radical he meant for example that some load bearing walls were out of plumb and would have to be taken out. Mr. Holder identified the report he prepared dated 7th January, 2002 and testified to some of the defective items.

[23] He gave evidence that the staircase was defective and was a compensation item. To repair it meant disrupting a lot

of the finished work. He also testified that the asphalt shingles were a defective item requiring compensation. Defects still existed in January, 2002 according to the Quantity Surveyor.

[24] The Defendant's architect Mr. Anthony Hoad testified that the plaintiff was allowed to move into the unit against his advice. When he visited the site and met with the Plaintiff the unit was not complete to his standards, that he was not allowed to do what he would normally do, that is snag for defects and that it was very hard for him to snag the unit when it was furnished. He also testified that he gave the contractor instructions to correct the errors which he saw.

[25] Under cross-examination at the locus in quo he admitted that a slant at the floor of the bedroom door was visible to the naked eye. He further admitted that a roller placed on the floor of the master bedroom which rolled from 3 different directions showed that the floor was slanted and stated that his snagging could have made it good had that been done at the right time. Further under cross-examination he testified that he never disputed that the banister rail at the veranda of the master bedroom patio was higher at one end and agreed that the rail would have to be removed.

[26] When water was poured on the floor of the downstairs patio and settled he gave evidence that the outside tiles needed to be removed and the floor graded to allow for water to run off and the tiles replaced. He also agreed that the front door was not fitted in the centre of the portico but excused that by saying that it was not designed to fit that way.

[27] The building contractor of unit No. 27 Mr. Lawrence Depradine under cross-examination testified that he was instructed that the units had to be top of the line units. When asked in what type of properties he would put a drip groove he answered that he would expect to see a drip groove on a luxury house. When further asked if there was a drip groove in the patio door in the type 1 units (which the plans and drawings labeled unit 27 as) he answered, 'no'.

[28] Mr. Depradine was shown the plan drawing of unit No. 27 and his attention was directed to the scaled drawing showing the portico its columns and the front door. He testified that having scaled that drawing the door on the drawing was equidistant from both columns and so when someone looked straight at the portico they should be looking straight at the door.

[29] During its visit to the locus in quo the court was able to observe that the front entrance door was not fitted in the centre as required by the drawings for unit No. 27. This was in direct contrast to the evidence given by Mr. Anthony Hoad that the front entrance door was not designed to fit in the centre of the portico.

[30] There was the further submission of the Defendant that the Plaintiff's claims about defects were grossly exaggerated when regard is had to the evidence given at the locus in quo. But it must be recalled that this visit was undertaken some years after the Plaintiff had been in occupation of the property and there is the evidence of Ms. Telford and Mr. Holder and their written reports of the defects which they found when they inspected the property in 2001 and 2002 respectively which the Court accepts.

[31] In the court's view the weight of the evidence establishes that there were defects of such a number and nature that it could not be said that the defendant constructed unit No. 27 in a workmanlike manner. The basis for coming to this view is the testimony given by the Plaintiff, the defects detailed in the written reports of Ms. Marshall and Mr. Holder and the admissions made by Mr. Anthony Hoad referred to earlier.

[32] The Defendant also claimed that the Plaintiff failed to give the Defendant any proper notice of the defects in the townhouse

and failed or refused to allow the Defendant proper access to repair the defects. The evidence before the court is that the Plaintiff complained to the site manager about the defects his attorneys complained on his behalf after some remedial work was done but some defects still remained. The Defendant's architect admitted that he received the snag list prepared by Ms. Telford and by letter of 27th June 2001 the Defendant was again informed in writing of the defects. Defects still remained. The Plaintiff then exercised his right, to bring an action against the Defendant for damages

[33] There is no evidence before the court of any request made by or on behalf of the Defendant for further access to No. 27 or that the Plaintiff denied the defendant any access. The evidence is that the Plaintiff complained of faults and defects to the site manager. Some of these were remedied. The Plaintiff met with Mr. Defreitas and Mr. Hoad for the purpose of addressing the defects. The building contractor also worked to remedy the defects. Defects still remained. The Plaintiff then exercised his right to bring an action against the Defendant for damages.

DISPOSAL

[34] In the circumstances the Court find that the Plaintiff is entitled to judgment against the defendant for breach of contract as follows:

- (1) the sum of \$26,000 being the cost of rental of alternative accommodation at a monthly rental of \$2,000 for the period of 13 months;
- (2) the sum of \$52,180.05 being the cost of remedying the defects inclusive of an uplift for inflation of 5% on the painting works and 20% on the tiling and carpentry works;
- (3) the sum of \$7 500 as compensation in respect of radical works.

[35] The Plaintiff is entitled to interest on the said sums at the rate of 4% from the date of the filing of the writ until today's date and 8% from today until payment. The Plaintiff shall have his costs certified fit for two Attorneys -at-law to be agreed or taxed.

KAYE GOODRIDGE

Judge of the High Court