

IN THE HIGH COURT OF BELIZE, A.D. 2023

Claim No. 442 of 2021

BETWEEN

MARIE HENRY

CLAIMANT

AND

JOHN TILLET

DEFENDANT

Before the Honourable Madam Justice Patricia Farnese

Trial Date: October 11 and 12, 2022

Appearances

Ms. Alberta Perez, for the Claimant

Mr. Mark E. Williams, S.C. for the Second Defendant

DECISION AFTER TRIAL

Background

[1] Ms. Henry entered into a verbal contract with Mr. Tillet to complete the construction of a simple, single-story, two-room house in January 2016. She advanced \$29,700 to Mr. Tillet based on an estimate he provided for completing the house. Ms. Henry claims that Mr. Tillet has done no work on the project. Mr. Tillet alleges that he purchased materials and began construction, but was ordered by the Central Building Authority to cease construction in April 2016 because the project was not approved. He argues that the contract was frustrated when Ms. Henry did not provide him with an approved building plan. Ms. Henry wants the money she advanced returned. In a counterclaim, Mr. Tillet asserts that he should be discharged from further performance of the contract and compensated \$17, 727.00 for the materials he purchased and the labour he expended prior to the project being shut down.

Issues

[2] The parties do not dispute that they entered into a verbal contract, that \$29,700 was exchanged pursuant to that contract, and that no house has been built. The central issue to be decided is what amount of money, if any, Mr. Tillet is obligated to return to Ms. Henry. The answer to that question raises the following issues:

- (1) Was the contract breached?
- (2) Is Ms. Henry entitled to the full amount she paid to Mr. Tillet because he did not begin construction on the house?
- (3) Was the contract frustrated by the actions of the Central Building Authority and Ms. Henry's failure to obtain the requisite building approvals?
- (4) Was Ms. Henry entitled to rely on Mr. Tillet's expertise to obtain the requisite building approvals?
- (5) Is Mr. Tillet entitled to be compensated for work completed and materials purchased for the project?

Analysis

Was the contract breached?

[3] I have no difficulty finding that the contract has been breached. Ms. Henry has the burden to prove, on a balance of probabilities, that the contract has been breached. The Parties agree that they entered into a verbal contract in 2016 to construct the house. While disputing Ms. Henry's claim that no work was done, Mr. Tillet admits that no work has been done since April or May of 2016. Although I was not provided with any evidence that specified when the parties agreed that the house was to be completed, I find a delay of over 5 years with no activity is a breach of the contract. The size and simple design of the house supports a finding that the Parties anticipated the project to be completed long before Ms. Henry initiated her claim.

[4] What, if any, remedy should flow from the breach of the contract is at the heart of this dispute. The burden to prove that she is entitled to a remedy also falls on Ms. Henry. Mr. Tillet has the burden of proving he is entitled to set-off his expenses from any amount owing.

Is Ms. Henry entitled to the full amount she paid to Mr. Tillet because he did not begin construction on the house?

[5] Ms. Henry has failed to prove that Mr. Tillet did no work on the house. Photographs submitted into evidence shows that construction of the house has commenced on the building site. Ms. Henry has not convinced me that all evidence of construction was completed by another builder prior to the start of the contract with Mr. Tillet. Ms. Henry lives in the United

States and claims that she visited the site during her multiple trips to Belize and saw no change in its condition after she paid Mr. Tillet. She also provided little detail about the state of the property before she hired Mr. Tillet. While the owner of the adjoining property provided a witness statement where he stated no construction has occurred for some time, under cross-examination, he was unable to confirm whether construction at the building site stopped before or after the Spring of 2016. Ms. Henry also did not lead any evidence from the prior contractor as to the work he completed.

[6] When Mr. Tillet's evidence is weighed against Ms. Henry's, the balance supports a finding that some work was done by Mr. Tillet. The Parties do not dispute that another contractor commenced construction. Mr. Tillet, however, claims to have placed forms on the site for future concrete work and to have completed much of the steel work present, including placing columns for support. One of his contractors also testified that they completed the work Mr. Tillet described. Mr. Tillet and his contractors also testified that the concrete forms were removed by vandals soon after they were ordered to cease construction by the Central Building Authority.

[7] A review of the photographs of the site and the initial quote Mr. Tillet provided to Ms. Henry also supports this court's finding that Mr. Tillet completed some work. An intersecting and overlapping mesh of steel rods on the roof of the home is clearly visible in the photographs. Mr. Tillet's quote itemizes the "estimated cost of the roof slab" and includes 150 steel rods that were 40' in length and 3/8" in diameter. Given that the home was not intended to have a second floor constructed at this time, he would have no other need to include the steel rods in the estimate. I find on a balance of probabilities that Mr. Tillet was responsible for placing the steel rods and supporting columns in partial performance of the contract.

Was the contract frustrated by the actions of the Central Building Authority and Ms. Henry's subsequent failure to obtain the requisite building approvals?

[8] Mr. Tillet argues he should be relieved of any obligation owing under the contract because the contract was frustrated. Mr. Tillet asserts that he was unable to continue building the home because Ms. Henry did not provide him with an approved building plan after construction was stopped by the Central Building Authority. Mr. Tillet relies on the oral testimony of his contractors who state that they were on the site when the Central Building Authority ordered the project stopped until a building plan was submitted and approved.

[9] Ms. Henry doubts Mr. Tillet's claim that he was ordered to cease construction by the Central Building Authority. In addition to testifying that no work was completed, she testified that the contract was breached because Mr. Tillet prioritized other, more lucrative projects over hers. She does not recall Mr. Tillet informing her that the construction was stopped or asking for a building plan. She states the building plan was prepared by her first builder and shown to Mr.

Tillet when they were initially discussing the project. She testified that she let Mr. Tillet know that she left the plan with her son when she returned to the United States and that the plan was always available to him had he asked for it. She testified that she only learned of the order to cease construction after she initiated court proceedings.

[10] Ms. Henry, however, does not dispute that the plan was not approved as required by the *Belize Building Act*.¹ The balance of the evidence, therefore, supports a finding that the project was halted as Mr. Tillet's employees testified. Mr. Tillet's employee was forthright and credible. He did not embellish and admitted the limits of his memory. His testimony was consistent without the appearance of being rehearsed. Finding truth in Ms. Henry's testimony that Mr. Tillet was preoccupied with other builds does not preclude a finding that the construction on her home was ordered to stop. Her explanation can equally explain why Mr. Tillet stopped pursuing the authority to build shortly after the construction stopped.

[11] Nonetheless, Mr. Tillet cannot rely on the doctrine of frustration to avoid responsibility for the contract breach because the circumstances that made the contract unperformable were both forceable and could have been avoided. Lord Simon provides a leading definition of frustration in *National Carriers Ltd. v. Panalpina (Northern) Ltd.*:²

Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performance.

[12] Mr. Tillet knowingly began construction without ensuring the project had the required building approvals. He also knew the consequences of doing so. He testified that he sometimes takes "the chance" of building without an approved plan on smaller projects. As an experienced contractor, Mr. Tillet testified that he knew that the Parties were required by the *Belize Building Act* to apply for a permit from Belize City Council before construction. That the project may be shut down was foreseeable.

[13] It was not solely Ms. Henry's responsibility to ensure that the construction had the required approvals as Mr. Tillet argues. The requirement to obtain a permit under section 13(1B) of the *Belize Building Act* applies to "any person". Mr. Tillet's argument that he assumed that the requisite approvals were in place because he took over construction from another builder is also not reasonable. As an experienced contractor, he ought to have ensured that the construction was approved especially if he was not provided with a building plan as he claims.

[14] Furthermore, this is not a situation where the circumstances changed so significantly that it would be unjust to hold Mr. Tillet to his contractual obligation. The standard to find that a

¹ Cap 131 of the Substantive Laws of Belize, Rev. Ed. 2020.

² [1981] AC 675 at p.700.

contract has been frustrated is high. Mr. Tillet did not present evidence that a building approval was sought and denied thereby making the build impossible. In his defence, Mr. Tillet outlined that he offered to complete the project after it was ordered stopped. If the contract was frustrated, Mr. Tillet could not have made that offer to Ms. Henry to avoid litigation. By his actions, Mr. Tillet demonstrated that the contract was not impossible to perform.

[15] Having rejected Mr. Tillet's assertion that the contract was frustrated and he ought to be discharged from further performance, Ms. Henry's claim that she ought to have been able to rely on his expertise to obtain all the required approvals need not be considered. Nonetheless, this case provides an opportunity to clarify what the *Belize Building Act* requires. Both Ms. Henry and Mr. Tillet have pled that they ought to be relieved of their statutory duties under the Act. The only issue that remains is what amount of money must Mr. Tillet return to Ms. Henry because of the contractual breach. Ms. Henry claims the return of the full sum she advanced to Mr. Tillet plus interest. Mr. Tillet counterclaims for an amount to be set-off in recognition for his expenditures and labour towards completion of the project.

Was Ms. Henry entitled to rely on Mr. Tillet's expertise to obtain the requisite building approvals?

[16] Without an express delegation and acceptance of this responsibility, Ms. Henry was not entitled to rely on Mr. Tillet's expertise to relieve her of her statutory duty to obtain the requisite building approvals. As previously explained, the *Belize Building Act* equally obliges Ms. Henry as the owner and Mr. Tillet to submit a building plan for approval for any building project:

13(1B) Any person who proposes to construct or demolish a building described in subsection (1C) shall submit to the relevant Building Unit an application for a permit to do so.

Subsection 1C outlines that subsection 13(1B) applies to buildings within a municipality.

[17] Ms. Henry did not testify that she was unaware of her statutory obligation to obtain a permit. Mr. Tillet was also not the first contractor that Ms. Henry engaged for this project. Ms. Henry did not lead evidence to establish that she had a reasonable belief that the first contractor had obtained the required approval. Likewise, no evidence was led to suggest that she and Mr. Tillet discussed her expectation that he would get the approvals. If such a discussion occurred, the court would have expected that the cost of obtaining the approval be reflected in the initial quote Mr. Tillet prepared. Like Mr. Tillet, the evidence supports a finding that Ms. Henry was willing to risk an unapproved build.

[18] I am not convinced, however, that Mr. Tillet effectively communicated to Ms. Henry that he would not continue the project without the City's approval. No other explanation is consistent with the fact that Ms. Henry did not attempt to obtain the approvals herself or that she waited until 2019 to ask Mr. Tillet to return her money. Her behaviour and testimony confirm that she clearly continued to expect that Mr. Tillet intended to complete the project.

Is Mr. Tillet entitled to be compensated for work completed and materials purchased for the project?

[19] As both Parties are equally responsible for the order to cease construction, I find both Parties hold some responsibility for the contractual breach. Neither Party is entitled to be relieved of their contractual obligations. That said, an order that would require the Parties to complete the contract is not reasonable in the circumstances.

[20] Mr. Tillet is entitled to be paid for the work he has done, and anything remaining must be returned to Ms. Henry. Mr. Tillet has not provided any receipts to confirm that he spent \$17,727 as claimed. That amount includes the \$8000 paid to his contractors and the remainder for materials. I will deal with each category of expenses separately.

[21] Mr. Tillet did not provide evidence about the number of workers he hired to complete the project. The contractor who gave evidence in the trial did not address the number of persons working or what they were paid. The only gauge the court has to assess the reasonableness of Mr. Tillet's claim is his initial quote which estimated \$7069 for labour costs, excluding labour related to the electrical system and the installation of doors and windows. Therefore, the amount Mr. Tillet claims to have spent on labour exceeds his estimate for the labour cost for the complete build.

[22] Mr. Tillet presented no evidence that work had begun on the electrical system or the installation of the doors and windows. The testimony of Mr. Tillet's contractor indicates that they prepared the forms for concrete work and placed steel to support the roof of the structure. The steel work and support columns are clearly visible in the photographs submitted into evidence. I accept Mr. Tillet's evidence that the forms were removed by the vandals.

[23] I find Mr. Tillet is entitled to \$4000, which is 1/2 of the labour costs he claims to have spent on Ms. Henry's house. The photographs reveal that the roof and some of the exterior walls are nowhere near completion. Even considering the theft of concrete forms, I find that the photographs reveal that a substantial amount of work has yet to be done on the house.

[24] I find that Mr. Tillet is also entitled to \$3,475 for materials he purchased and placed on Ms. Henry's property. Only the steel used to prepare the roof before the concrete is poured and their support columns are visible in the photographs. In Mr. Tillet's counterclaim, he claims \$2,340 for 130 steel rods that were 40' in length and 3/8" in diameter, and another \$896 for 16 steel rods that were 10' in length and 5/8" in diameter. He also claims \$239 for miscellaneous nails that were used to secure the steel work and concrete forms. These amounts are comparable with the original estimate. Mr. Tillet has not established that any other building materials he claims to have purchased remain on Ms. Henry's property.

[25] While I accept Mr. Tillet's claim that some materials were stolen, I find that Mr. Tillet bears the risk of their loss. The verbal agreement between the parties was for the completion of the construction of Ms. Henry's home. In the absence of a written agreement to the contrary, I find that the bargain struck was not complicated. Both parties testified that a discussion took place whereby Ms. Henry inquired whether Mr. Tillet could complete the construction of her home. After Mr. Tillet viewed the site, he drafted an estimate as to the cost. On that basis, Ms. Henry transferred the full amount for the build in exchange for a completed house. She entrusted Mr. Tillet to make all decisions about the timing of the build including the delivery of the materials. She was not involved in those decisions. Mr. Tillet could have bargained for Ms. Henry to bear the risk of theft or the cost of security if he so wished.

[26] Moreover, despite being in the estimate, some of the materials were never intended to remain on the property. Even if the contract was not breached, I find that property in these items would remain with Mr. Tillet. Bush sticks, plywood, and timber used for the concrete forms would be removed and remain with Mr. Tillet.³ This finding is supported by the statement in Mr. Tillet's defence that he "remains ready and willing to complete the construction at no extra cost to the Claimant, a fact which he has previously indicated to her." As Mr. Tillet continues to work as a contractor, he likely has these materials on hand therefore they would not need to be repurchased to complete the build. Mr. Tillet's counterclaim for \$2080 for miscellaneous lumber, \$3472 for plywood, and \$700 for bush sticks is denied.

Disposition

[27] The claim and counterclaim are each allowed in part. Ms. Henry is entitled to the \$29,700 inclusive of interest as claimed, but Mr. Tillet is entitled to set-off \$7,475 to reflect his expenses for work completed pursuant to the contract.

[28] It is hereby ordered that:

- (1) Mr. Tillet pay to Ms. Henry \$22,225 for breach of contract
- (2) Mr. Tillet pay to Ms. Henry 6% interest on the judgment amount pursuant to section 176 of the *Senior Courts Act, 2022*.
- (3) As there has been mixed success, there is no award as to costs.

³ The exception may be for some 2x4s which may have intended to be used for the framing of interior walls, but there is no evidence that any framing was completed before the project was shutdown. Mr. Tillet's contractor also testified that no loose material was left at the site. If I accept Mr. Tillet's counterclaim as truthfully reflecting his expenditures, these 2x4s must have formed part of the concrete forms and were stolen.

Dated January 23, 2023

Patricia Farnese
Justice of the High Court