

**COMMONWEALTH OF THE BAHAMAS**

**IN THE SUPREME COURT**

**Common Law and Equity Division**

**2019/CLE/gen/00683**

**BETWEEN**

**MAYGEN P. SMITH t/a PYRAMID BUILDERS**

**Plaintiff**

**AND**

**MICHAEL WRING**

**1<sup>st</sup> Defendant**

**AND**

**TAMARA WRING**

**2<sup>nd</sup> Defendant**

**Before Hon. Chief Justice Sir Ian R. Winder**

**Appearances:      Robyn-Dawn Lynes for the Plaintiff  
                            Clinton Clarke for the Defendants**

**22 April 2022, 14 September 2022, 4 October 2022 and 8 June 2023**

**JUDGMENT**

## **WINDER, CJ**

This is a claim by the plaintiff (Smith) for breach of a construction contract to build the defendants' home at Lot #38, Royal Palm Drive, Killarney Shores, New Providence.

[1.] Smith is a building contractor. The defendants, husband and wife, entered into a contract with Smith to construct a single storey home in Killarney Shores. The defendants financed the construction which was to be performed in 5 stages.

[2.] The contract price was \$310,000. The contract was terminated by the defendants in January 2019 as they were dissatisfied with the pace of the construction and the quality of the work being performed by Smith. At the time of the termination Smith had been paid for the first 4 stages and a portion of the final stage in the amount of \$40,000. The balance of the 5<sup>th</sup> stage in addition to the retention (\$15,500) had not been paid. The sums remaining in the contract amount to \$45,210.40.

[3.] Smith's claim is set out in her Statement of Claim. As the claim is relatively short, I set it out in full:

1. At all material times the Plaintiff was in the business of construction and renovations and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants ("the Defendants") were Clients who had contracted the Plaintiff to construct a single storey (sic) home in Killarney shores.
2. Pursuant to the contractual agreement the Defendants obtained financing through CIBC – First Caribbean International Bank ("the bank") for the construction of the said home. All payments relative to the cost of construction were to be paid to the Plaintiff through the bank, at the completion of each phase of the works, which was 5 phases in total.
3. The Plaintiff duly received payments for phases 1-4 however, During (sic) the course of completion of phase 5, the Defendants requested a number of changes and upgrades that were not part of the original agreement. The challenges with respect to these alterations and the demands of the Defendants led to a break down in rapport between the parties as there was a consistent renegeing by the Defendants of previous requests. This led to frustration of the agreement. The Defendants subsequently terminated the Plaintiff's services.
4. Upon termination, the Plaintiff requested settlement of the amounts due and owing for the works completed and the Defendant's refused to pay, citing various deductions that should be made from the amount. The Plaintiff was advised by the bank that the funds could not be released without the Defendants' authorization and the matter had to be resolved between the Plaintiff and the Defendants.

5. The Plaintiff made several attempts to reconcile the matter with the Defendants but to no avail as there was a disparity in the amount the Plaintiff was owed and the amount the Defendants were willing to pay.
6. To resolve the issues, the Defendant contracted the services of Construction Services Group Ltd (“CSG Ltd”) to conduct a final assessment of all works completed. As requested, a report was prepared to independently confirm the status of all works done so as to determine what was owed to the Plaintiff and what was to be remitted to the Defendant to complete the project.
7. The report was finalized on February 13<sup>th</sup>, 2019 and submitted directly to the bank for their review. In accordance with the report the Plaintiff is owed the sum of Thirty Thousand Two Hundred & Eleven Dollars and Sixty cents (\$30,211.60) in final settlement of the work and the Defendants should receive the sum of Seven Thousand Two Hundred & Eighty-eight Dollars and forty cents (\$7,288.40) to complete.
8. Notwithstanding the findings of the report they commissioned, the Defendants have persisted in their refusal to pay the Plaintiff causing the Plaintiff great distress and loss.
9. Further the Plaintiff has been unable to satisfy payments due to independent contractors and employees of the Plaintiff who worked on the home, thereby causing the Plaintiff reputational damage.
10. The Defendants are aware of the debt owed to the Plaintiff and the loss the Plaintiff has suffered, yet despite numerous attempts to recover the outstanding sum; the Defendants have failed and/or refused to authorize the payment due.
11. As a result of the Defendants willful refusal to pay the Plaintiff, the Plaintiff has suffered damages and loss.

AND the Plaintiff claims:

- (i) Damages in the amount of \$30,211.60;
- (ii) Cost; and
- (iii) Such further and other relief the Court thinks just.

[4.] The defence was a bare denial asserting simply that they did not request any changes or upgrades to the home and that they had formally requested that Smith indicate in writing whether she would continue with the contract. At trial, albeit not pleaded, they allege poor workmanship and the need to expend moneys to correct the poor workmanship.

[5.] At trial Smith gave evidence in her case and called Randolph John (John), a construction engineer/quantity surveyor, to give expert testimony as to the value of the works left to be completed. The second defendant (Wring) gave evidence and called Joseph Major (Major), chartered surveyor, to give expert testimony as to a valuation which he performed on the property.

[6.] Smith's evidence was contained in her witness statement upon which she was subject to cross examination. According to Smith:

- (1) During the course of the completion of the stage 5, of the contract the defendants requested a number of changes and upgrades that were not part of the original building plan for the home. A number of modifications were made to the home including the front porch steps, kitchen cabinets, kitchen island and door trims. The changes called for an increase in the labour and material charges.
- (2) The alterations and demands of the defendants led to a breakdown in communication and rapport between the parties. Wring's main issue was the height of the cabinets. She complained that they were not the correct height. There were a number of exchanges back and forth about the matters via WhatsApp messaging but the issue was not resolved.
- (3) There were constant discussions about the costs and timelines associated with changes which led to frustration. The defendants subsequently terminated her services in January of 2019, at which point she was almost completed with the final stage of construction and there were very minor things left to be done.
- (4) All other stages of the project had been assessed and paid for by the bank. Upon termination, she requested settlement of the amount due and owing for work completed and the defendants refused to pay citing various deductions that should be made from the amount.
- (5) The defendants had contacted John of Construction Services Group Limited to conduct a final assessment of all works completed. John had been hired by the defendants to appraise the property prior to the commencement of construction and was further retained to check all stages of construction thereafter. The final assessment report was prepared to confirm the status of all work done to determine what was owed to her and what was to be remitted to the defendants.
- (6) The report was finalized on 13 February 2019 and submitted directly to the bank for their review. The defendants took issue with the conclusions in the report and thereafter sought another Company, J.M. Appraisers, to carry out an assessment of the works.
- (7) She sought to recover her monies from the bank to pay outstanding sums due to her workmen and also recover amounts exhausted during the building process. She was told that the approval of the defendants was required to release the funds to her. Subsequently all funds held on retention were released to the Defendants who made no attempts to contact her and settle amounts owed.

[7.] Randolph John's evidence was contained in his witness statement upon which he was subject to cross examination. According to John:

- (1) He became (1) familiar with the defendants in November 2017 when he was engaged to carry out an appraisal of their vacant lot described as Lot #38 Royal

Palm Drive, Killarney Shores, Nassau, Bahamas. They were seeking financing to facilitate the construction of a single-storey, single-family residence. After approval of the loan and commencement of construction he continued to act on behalf of the defendants and the Bank. At each phase of the construction, he was responsible for advising the bank as to the quality of the work completed in order for the project to proceed and funds to be disbursed.

- (2) In February 2019 the defendants contacted him to conduct a site inspection and assessment of the Completion or Final Stage of construction. This was inclusive of the value of all work completed as of the 29 January 2019 and also to determine what payment if any should be paid to the contractor as they were in the process of terminating their contract with the Plaintiff.
- (3) After the inspection and assessment of the construction works, he issued a report which concluded that there were needed repairs and/or correction of defective works to be carried out. Additionally there were outstanding work to be done under the contract. John assessed this work at Seven Thousand Two Hundred Eighty Dollars and Forty cents (\$7,280.40)
- (4) Smith should be paid the sum of Thirty Thousand Two Hundred Eleven Dollars and Sixty cents (\$30,211.60) for works already completed.
- (5) He had inspected the project at each phase and can speak thoroughly to the quality of work and the stage at which Smith's services ceased.

[8.] Wring's evidence was contained in her witness statement upon which she was subject to cross examination. According to Wring:

- (1) In November 2018, she and her husband went away and purchased the tiling for the common area of their home. Whilst they were away, Smith continued with performing works, even though the last communication with them she had said that she had quit.
- (2) They were dissatisfied with the workmanship and some items were poorly installed. The kitchen cabinets were not the right size and tiles were selected which were not approved. Additionally, they selected a tile for the master bathroom but Smith chose and installed other tiles, without their consent/approval.
- (3) They nonetheless authorized the payment of \$40,000 in December 2018 out of the final stage funds as it seemed Smith was low on cash. The partial payment of \$40,000 was given to Smith. Works went on as usual, however, the nagging view of the kitchen cabinets needed to be resolved for them and they were going back and forth with Smith on how to rectify. She told them that they needed to pay for the additional cabinets which that would put the cabinets to the planned height. They told her that they were not paying extra for the cabinets and that she should replace with the cabinets that were planned. A few days later Smith messaged via email and a call that she was quitting.
- (4) On 26 January, 2019, she sent an email to Smith to confirm her disengagement that she had expressed verbally and on email on January 24, 2019, and to deliver

on the 28<sup>th</sup> of January 2019 at 12pm items owing to them to the attention of attorney Clinton Clarke. Smith never acknowledged or responded to the email.

- (5) On the morning of the 28<sup>th</sup> of January they went to the home and observed the crew removing all work items from the property. They were told that Maygen had told them to pack up, they were finished with the job. At 12 pm there was no response or delivery of the items to their attorney. They were advised by their lenders to submit a formal termination letter as this was needed for them in the closing of the loan. John was asked to perform an assessment. He took photos and left. The formal letter of termination was sent that evening. Smith never responded or acknowledged.
- (6) She contacted John to have a conversation of what usually happens in these cases, but he was hesitant to discuss the issues. John seemed as if his objectivity was compromised. They sought an independent appraiser, JM Appraisal, to perform an assessment of the home.
- (7) Mr. John's report was submitted to FCIB and the lenders performed a site inspection. John's report shows bias as he mentioned the conversation he had with her, and never mentioning the conversation he had with Smith. It seemed to them as if he favored a relationship with Smith over the clients that he had an obligation to satisfy.
- (8) After they received Mr. Major's report, they advised FCIB that they would not be reimbursing the funds to Smith as they needed to finish their home with the items that were outstanding. There were a number of issues which Smith considered upgrades but are actually part of the architectural plans. Additionally there were items which were removed and or replaced which should have resulted in savings to Smith.

[9.] Major's evidence was contained in his witness statement upon which he was subject to cross examination. According to Major:

- (1) JM Appraisers Company Ltd was hired by the defendants to conduct an assessment and valuation report on building defects at the site of Lot 38 Royal Palm Drive, Killarney Shores Subdivision.
- (2) The purpose of the assessment report was to identify defects at the site and an explanation and cost of the scope of work required to correct the defects.
- (3) After a careful assessment of the architectural plans of the subject building, a site assessment, the stage breakdown and receipts from the owners, they have arrived at the following conclusion.
  1. All of the defects can be repaired without reducing the value or beauty of the home.
  2. The remaining funds are sufficient to complete the defects and expenses incurred by the owners.
  3. The architectural plans don't note that the property isn't flat and thus, would require a modified foundation.
  4. The architectural plans indicate doors at the kitchen that accesses the rear patio and two doors at the Jack and Jill bathroom. Also, the door at the master bedroom that accesses the rear porch is specified to be much larger

than the one installed. Further, the ceiling design in the entry area is not as elaborate, but is a simple flat design. These changes were obviously communicated and were not specifically noted in the stage breakdown.

5. A U-shaped driveway, front wall and walkway is depicted on the architectural plans; however, the slope of the property required a modified driveway layout. How these changes affected the overall construction cost and profitability for the contractor is unknown.
6. Overall, the design and beauty of the home is good. However, proper installation of the windows, doors and the screens (and the long-term use of the window operators) is critical for the longevity of these components. If after only a few months the screens are frayed and the window operators are shaky, this is a major concern that has to be addressed once and for all.
7. The sum of \$31,200.20 [Thirty-One Thousand Two Hundred Dollars and Twenty cents] is required to repair and correct all defects in the residence.

#### Smith's Submissions

[10.] Smith submits that :

- (1) If the assessment report of CSG is to be relied upon, Smith is owed a balance of \$37,922.84 (\$45,210.40 - \$7,288.40).
- (2) If the report of J.M. is to be relied upon, Smith is owed the sum of \$14,010.20 (\$45,210.40 - \$31,200.20).

Smith says that in order to determine the amount due and owing to her, the Court must have regard to the assessment and valuation reports provided by the expert witnesses. If the reports of both CSG and J.M. are analyzed, there are discrepancies that the Court must take into consideration in its determination of which report presents a more accurate account of what amounts from the contract sum should be deducted for completion and what sums are due to Smith. The report of CSG is most accurate and should be relied upon in determining the amount owed to the Plaintiff.

#### Defendants' Submissions

[11.] The defendants submit that the evidence of John ought to be rejected. They say that he has shown to be biased and more pro-contractor friendly rather than being neutral and unbiased. They say that he made errors by showing work as being completed when in fact it was not completed. The defendants submit that Major's report ought to be accepted as it identifies the defects and gives the costs of the scope of works required to correct the defects. Smith did not complete the contract work on time and on budget.

[12.] The fact that an occupancy certificate is issued does not mean that there are no defects or that the work was completed. The retention money is there in a construction contract for a specific purpose. The employer holds the retention money as a safeguard for any defects or non-conforming work by the contractor.

#### Analysis and disposition

[13.] The defendant accepts that upon its best case there is a sum which will be owed to Smith. They submit:

*There is \$15,500.00 in retention which per industry standard is not released until the defects is completed together with the unfinished works. If you were to take the \$15,500.00 and the \$22,000.00 and minus from the \$31,200.00 there would be a difference of \$6,300.00 remaining to be paid over to the Plaintiff.*

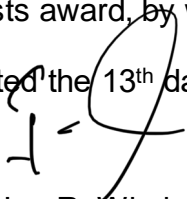
[14.] I accept that the true amount remaining in the contract for the 5<sup>th</sup> stage and the retention is \$45,210.40. I also accept Smith's submission that the sums due will fall between \$37,922.84 (by John's valuation) and \$14,010.20 (by Major's valuation). The retention is a part of the moneys contracted for and an entitlement of Smith once defects and outstanding work has been accounted for.

[15.] Having heard the witnesses and observed them as they gave their evidence I find that they were all generally truthful in the evidence they gave. I nonetheless preferred the evidence of Smith and her witnesses. Major came to the project late and did not get an opportunity to observe the state of the construction at the termination. He was forced to rely upon information for the clients rather than his own observations to make his valuation. Invoices were not provided for the proposed purchases. Additionally, whilst John had the advantage of being involved in the project from the inception of the construction he nonetheless acknowledged some deficiencies in his valuation process.

[16.] In my opinion, given the narrow differences, albeit contentious as between them, a fair resolution would be to split the difference between the expert assessors. This would ameliorate the discrepancies found in each report of the assessors. I would therefore award Smith the sum of \$25,966.52 and the amount due under the contract taking into account any deficiency or contract work which was not completed.

[17.] I will hear the parties on the proper order for costs, and the amount of any such costs award, by written submissions within the next 14 days.

Dated the 13<sup>th</sup> day of October 2023

A handwritten signature in black ink, appearing to be 'I. Winder', written over the date line.

Sir Ian R. Winder  
Chief Justice