



MALTA

**TRIBUNAL GHAL TALBIET ZGHAR**

**GUDIKATUR DR.**

**KATJA PSAILA SAVONA**

Seduta tat-13 ta' Lulju, 2015

Talba Numru. 257/2013

**Perit Elena Borg Costanzi**

**vs**

**David Elyan**

*"It-Tribunal,*

*Ra l-avviz tal-attrici datat 29 t'April, 2013 fejn ippremettiet:*

*Illi fuq talba espressa tal-konvenut l-attrici giet inkarigata sabiex hija tirrendi servizzi professjonali konsistenti f'certification of works rigwardanti proprjeta' tal-istess konvenut li jinsab gewwa l-Furjana u mmarkat bin-numru 29, fi Triq il-Mall.*

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*Illi tali servizzi gew rezi b'mod sodisfacenti u gew jammontaw ghall-prezz ta' elf u tnejn u sittin Ewro (€1,062.00) inkluz it-taxxa fuq il-valur mizjud.*

*Illi minkejja diversi interpellanzi da parti tal-attrici sabiex il-konvenut jaffettwa tali pagament, dan baqa' nadempjenti.*

*Illi ghalhekk kellhom jinbdew dawn il-proceduri u dan sabiex is-somma hawn fuq imsemmija tigi mhallsa lill-attrici.*

*Bl-ispejjez u bl-imghaxijiet mill-4 t'Awwissu, 2011.*

*Il-konvenut li jinsab minn issa ngunt ghas-Subizzjoni.*

*Ra r-risposta tal-konvenut datata 17 ta' Gunju, 2013 fejn eccepixxa illi:*

*1) Fl-ewwel lok, il-preskrizzjoni tal-azzjoni attrici ai termini tal-Artikolu 2149(c) tal-Kap 16;*

*2) Fil-mertu, u bla pregudizzju ghas-suespost, it-talba attrici mhix gustifikata stante illi l-attrici m'espletatx l-inkarigu moghti lilha b'mod professjonali u trasparenti, naqset illi twettaq hafna mix-xogholijiet mitluba u naqset illi twettaq supervizzjoni tax-xoghol imwettaq fil-fond tal-konvenut;*

*Bhala rizultat tas-suespost il-konvenut kellu jwettaq xogholijiet rimedjali ghal liema xogholijiet qiegħed minn issa jirriserva illi jitlob il-likwidazzjoni tad-danni u rizarciment tal-istess".*

The Tribunal,

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Having seen the Notice of Claim put forward by the applicant on the 29<sup>th</sup> April, 2013 by means of which she requested the Respondant to pay one thousand and sixty two Euro (€1,062.00);

Having seen the Reply filed by the Respondant on the 5<sup>th</sup> February, 2013 by means of which he replied thus to the Claim put forward by the Applicant:

Having seen the note (*verbal*) of the 28<sup>th</sup> April, 2015 where the case was put off for judgement for today.

Having heard all the evidence and seen the Acts presented to the Court;

Considers the following:-

On 2nd December, 2013 the defendant filed an affidavit wherein he stated that he purchased a property no 29, The Mall, Floriana towards the end of 2009 and he decided to refurbish it. He also wanted to check drainage, water and electrical supply in order to avoid any potential problems. He contacted the plaintiff who was to supervise the works in his absence. (see Doc 'A'). They met on site on the 15<sup>th</sup> March, 2010. On that day she made some suggestions as to what sort of refurbishments could be made. She was instructed to find a builder and was given an estimate of what he would have wanted to spend circa fifteen thousand Euros (€15,000). The estimate provided was the same amount at a meeting with Carlo Salamone and the plaintiff on the 10<sup>th</sup> June, 2010. The amounts of two thousand five hundred forty Euros (€2,540), two thousand three hundred and sixty Euros (€2,360), four thousand seven hundred Euros (€4,700) and five thousand eight hundred Euros (€5,800) were paid to Mr. Eder Catania in full and final settlement after works were completed. He never met the plaintiff again. He had frequent meetings with both Eder Catania and Mr Salomone on site but Architect Borg Costanzi was never present for them. Perit Borg Costanzi set an invoice dated 5<sup>th</sup> July, 2011, on the 27<sup>th</sup> October, 2011. He stated that:-

*'Infact I genuinely thought that Architect Elena Borg Costanzi was not going to bill me for her services as she had not done anything in my place and failed to carry out any supervision of the works''.*

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The respondent continues that there were a lot of shortcomings on the plaintiff's part and that if the plaintiff had done her job properly these shortcomings would not have resulted subsequently with the flooding of the basement for which he had to pay another two thousand one hundred fifty Euro (€2,150) by way of remedial works.

*"In fact it turned out, it turned out, lots of shortcomings surfaced subsequently when the basement was flooded with drainage water and I had to pay another two thousand one hundred fifty Euro (€2,150) by way of remedial works....."*

When cross examined he confirmed that he does not reside in Malta. When the flooding occurred he did not contact plaintiff.

Mr. Eder Catania confirmed that he was instructed to do works. In the three months he did said works he referred to the architect a couple of times however it was he who was in charge while the main contact person was Carlo Salomone his partner who was in communication with her. He did not recall the amount of times he was in communication with her. He did remember however she was at a meeting on site once. The measurements were done by them; no construction was required to be done. The snag list was prepared with the defendant and carried out so a bill was issued and not a certificate of works. In March 2011 the works done were cleaning services. He confirmed that he was given specific instructions at the beginning by the architect and they were sufficiently necessary for them to carry out the works.

*"With regards to this I finished I just made in the beginning the Architect listed a list of works that had to be done; when I say 'at the beginning' I say at the start before we quoted. Then we quoted there were some site visits and then from there on we started to coordinate with both. In the beginning the Architect was also present on site. During the rest of the terms may be a couple of times. With regards to have .. on site she was actually checking on the job; she was not there with regards to just a quotations"*

Architect Borg Costanzi under oath stated that the claim is based on 6% of fifteen thousand Euros (€15,000) which was the agreed percentage based on the value of works of 'Arredando Limited'. She recommended 'Arredando Limited' because 'Arredando Limited' are involved in a number of the trades required for the works Mr Elyan needed. It was she who set up the meeting with 'Arredando

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Limited' who had to look through the building and did an estimate of works and provided a quotation. Contact was through Rosemarie Elwood and the reason is because Mr Elyan does not have a mobile and neither does he have an e-mail address and the only way of communicating with him was through this Barrister as per his instructions. The quotation provided in 'Doc B' is dated March, 2010 and works started a few months later. She stated that she used to regularly attend and go to the property; however she was not given keys so she had to time it with when contractors were present. She stated that she went at least once a week. There was little contact with the client because of the set up therefore she would send an e-mail to the Barrister and wait for her to revert.<sup>1</sup> A few months before actually she sent the bill she had bumped into Carlo Salamone of 'Arredando Limited' and informed him that she had to certify the works that were done, and that she was finding the property locked up and that no one was on site to let her in. It was then that Mr Salamone told her that he had been paid in full; which was also a strange thing because usually this is done with the architect's certification. Therefore she issued the bill on the 5<sup>th</sup> July 2011 after trying to contact the client several times. A reminder was sent in October, 2011. And that is why he wrote back. She never met with Mr Elyan throughout the time that works were being carried out. The contact was through email. On being cross examined the architect stated that the reason why she did not know that the works were done was because she didn't have a key to the place and neither did she have contact with the client. It is normally usual practise that if works are slackening the client would bring it to her attention and she would get in touch with the contractor. She declared that she went on site between September and November 2010 about five times and had contact with the contractors. She was never contacted by client or contractor to be told to go and verify conclusion of the works and/or create the usual snag list. She was never told to certify the works as is the usual procedure. During the course of the works when she deemed fit she corrected things and asked for changes.

In October 2011 after she had sent the bill the defendant contacted her disputing the bill. She had contacted Miss Elwood about the bill in August of the same year.

The Tribunal has been asked to give a decision on the defence of prescription according to article 2149 of the Civil Code of the laws of Malta.

### **Preskrizzjoni 2149(c)**

*2149. The following actions are barred by the lapse of two years:*

*(c) actions of advocates, legal procurators, notaries, architects and civil engineers, and other persons exercising any other profession or liberal art, for their fees and disbursements;*

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<sup>1</sup> See Doc "EBC 1"

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In the Case 'AIC Eric Mamo v Pupul Fenech' (Court of Appeal ) the Court stated that :

*"Illi azzjoni ta' Arkitett għall-hlas tal-onorarja tagħhom tippreskrivi ruhha b' sentejn u tibda minn meta jkunu saru prestazzjonijiet tagħhom".<sup>2</sup>*

This means that prescription starts to run from the time when the works were given and obviously concluded. Therefore one must therefore establish first when the work was done and concluded as it is from this date prescription would commence to run. Mr. Eder Catania stated that the work was completed on a particular date that is September 2010 and that he was paid in full following a snag list. (see dok 'C' dated 24<sup>th</sup> November, 2010) However contrary to what is usually done, no communication was made with the Architect and no certificate of works was issued at the request of either the client or the contractor. In fact the plaintiff argues that this is highly irregular since usually the parties would want the architect to verify works and take on the responsibility that the works were done. Her contention here is that payment of the contractor was done behind her back and with intent to avoid paying her.

Accordingly, therefore the issue that the Tribunal has here is that the final bill of the contractor was issued without the Architects' involvement. Therefore at what point is one expected to consider termination of work and therefore at what point prescription start to accrue against the plaintiff does. Plaintiff argues that since no communication was ever made with her it can only be due to bad faith and that therefore the time that should be taken into consideration should be the time that she actually issued the bill.

The Tribunal feels that in the circumstances it is highly irregular that no communication was made with the Architect responsible. It is obvious from the evidence that communication with the client was not easy and that he himself made no attempts to contact his Architect despite initial instructions and agreement. It is the Tribunal's view that if defendant had any issues with the Architect's performance he should have communicated this to her and not tried to get out of the

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<sup>2</sup> 26 ta' Novembru 1951 QA AIC Eric Mamo vs Pupul Fenech

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agreement. There was no evidence provided where defendant communicated to Architect that her services were terminated or no longer required. Therefore in view of this the Tribunal feels that it should establish the date of invoice as the date from which prescription should run and therefore and the defence of prescription is not accepted.

Decide

The Tribunal, in view of all the above, declares that Respondant's first pleas of prescription is unfounded in fact and at law and orders the continuation of the case.

Costs to be borne by defendant.

**< Sentenza In Parte >**

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