

- demand for payment under a contract of works



FIRST HALL

CIVIL COURT

MR. JUSTICE GRAZIO MERCIECA LL.D.

Today, 2nd APRIL, 2019.

Sworn Application No. 1114/2012GM

JOSEPH TABONE

VS

CAPECE CONSTRUCTION LIMITED U GHAL KULL INTERESS

FABIO BILLI

The Court:

Having seen the Sworn Application by which Joseph Tabone is asking this Court to condemn either or both defendants to pay him:

- (1)
- (2) €7316 including VAT as price of works carried out by him on the Vittoriosa bastions including extra works.

Having considered that defendant Fabio Billi pleaded that he had acted only as an employee of the other co-defendant.

Having seen defendant Company's pleas that:

- (1) its Director was Italian and did not understand Maltese
- (2) the Sworn Application is null
- (3) it had never engaged the services of plaintiff for works in Vittoriosa and therefore should be non-suited in respect of this claim
- (4) plaintiff had executed only a small part of the Valletta contract

and its Counter Claim asking the Court to:

- (1) declare plaintiff responsible for damages pre-liquidated in the contract for the Valletta Waterfront works.
- (2) liquidate the damages.
- (3) condemn plaintiff to pay them

Having considered that by a judgement of 6th May 2014, this Court rejected pleas numbers 2 and 3 of defendant company and non-suited defendant Fabio Billi.¹

Having taken cognizance of the acts of the case;

Having seen the report of the court appointed expert Architect Godwin Abela of the 4th October 2018;

Having considered that:

Defendant company was a contractor engaged to carry out works in Vittoriosa and Valletta. It signed a subcontract with Joe Pace K3 Limited regarding works at Birgu, with whom plaintiff had some sort of relationship, either as a partner or a subcontractor. Defendant terminated the contract with Joe Pace K3 Limited due to certain inadequacies and delays. Plaintiff claims defendant had then asked him to conclude the works himself. In this he is corroborated by George Pace, a director and shareholder of Joe Pace K3 Limited although he fails to state how he knew of this fact alleged by him.² Plaintiff claims the agreement was verbal. He does not proffer any proof as to what rates were agreed. The court-appointed expert rightly points out³ that defendant did not receive any request for payment for plaintiff nor did plaintiff ask for works to be measured. Maurizio Carpese, director of defendant, in various sittings during which he gave evidence, repeatedly and consistently denied that plaintiff was engaged by defendant to complete the works; claiming that the works were carried out by its own employees.⁴ He denied having a meeting with plaintiff during which he was entrusted to finish the Birgu

¹ Fol 1090

² fol 1215, affidavit

³ Fol 1176 at para 7.02.7 of his report

⁴ inter alia, vide fol 1226, 1335, 1337

job.⁵ A similar denial was made by Fabio Billi, entrusted to manage the execution of works contracted by defendant in Malta, and who initially was himself a defendant but was non-suited by this court by the preliminary judgement abovementioned. Incidentally during the hearing plaintiff stated on oath that it was Fabio Billi and Maurizio Carpese approached him in their personal capacity, and not on behalf of the defendant. Therefore, his claim that he contracted works at Birgu with the defendant cannot be upheld, even though the claim in his Sworn Application is directed against defendant and/or Fabio Billi. Alternative claims are allowed; contradictory ones are prohibited;

Plaintiff has not produced credible evidence that he was personally engaged to complete the works at Birgu. Moreover, the Court does not find it at all credible that plaintiff contracted with defendant after not having been paid for work in Birgu;

The only agreement between defendant and plaintiff the written subcontract dated 19th April 2012 related to works on the Valletta Waterfront Forifications. It was for a pre-determined sum of €22,730 excluding VAT; consisting of €20,000 for the works and €2,730 for provision of a mobile platform. €7,200 was to be held as retention money. €12,800 was to be paid in four 30-day payments (€3,200 each) commencing of the 30th day after commencement of works and on subsequent 30-day periods totalling 120 days. Delays entailed a penalty of €3,780 per calendar day. Plaintiff was paid the first installment €3,200 on the 6th June 2012⁶ after 30 days in accordance with the payment schedule. Plaintiff confirms that the first installment was paid on time⁷ but claimed he abandoned the site as defendant was late in paying the second instalment. On another occasion he gave a different

⁵ fol 1020

⁶ Fol 1228

⁷ Affidavit, fol 963

version, claiming he did so because he was not paid for the Birgu site. However it does not result that there was a late second payment, because it was not yet due when he abandoned the site. Therefore, plaintiff has not justified the stopping of his works;

According to calculations carried out by the court appointed expert, plaintiff worked on the site for approximately 6 weeks between May 2012 and mid-June 2012. Thus he is owed €1,888 (€1,600 + VAT);

The court appointed expert did not find any evidence of bad workmanship as claimed by defendant.

The counter-claim filed by defendant is for pre-liquidated damages of €3780 daily in terms of the contract between 22th June 2012 till 14th September 2012.⁸ Such damages are, however, for delay after the date set for the completion of the contract. Plaintiff abandoned the site sometime during mid-June which is well before the date set for the completion of the contract. In the meantime, the remaining work was carried out by defendant and completed on time. Consequently the damages clause in the contract (clause 7.2) does not apply. Defendant presented costs which it incurred to complete the work, without distinguishing between ordinary costs and extra costs which may have been incurred due to the abandonment of site by plaintiff, and therefore proffered no proof as to any actual damages incurred. Even had it put forward such proof, it would have been inadmissible because it goes beyond the terms of the counter-claim, through which defendant is claiming pre-liquidated damages only.

For these considerations this Court:

(1) rejects defendant company's counter-claims

⁸ para 7.2 of the Subcontract Agreement, signed on the 19th April 2012, at fol 8

(2) accepts its plea that it did not order plaintiff to finish the works on the Vittoriosa bastions

(3) liquidates the sum of €1,888 (VAT included) as the balance of price of works carried out by plaintiff at the Valletta Waterfront fortifications

(4) condemns defendant company to pay the sum of €1,888 against the presentation by plaintiff of a fiscal receipt, with interests according to law from the date of this judgement until eventual payment

(5) rejects plaintiff's demand for payment regarding works allegedly carried out at Vittoriosa.

Costs of the main suit are to be borne one-third by defendant company and two-thirds by plaintiff. All costs of the counter-claim are to be borne by defendant company.

Mr. Justice

Grazio Mercieca