JUDGMENT : ASSOCIATE JUDGE D.I. GENDALL High Court New Zealand, Napier Registry. 10th October 2008.

Introduction

[1] Before the Court is an application by the plaintiff for summary judgment against the defendant seeking the sum of $246,372.70 plus interest said to be owing under a building contract.

[2] The application is opposed by the defendant.

Background Facts

[3] In March 2004 the plaintiff, a Havelock North builder, agreed with the defendant that he would build a home for her at 40 Chambers Street, Havelock North ("the house"). It was intended that the plaintiff would supply the defendant with a price for the total job once the defendant had finalised her plans for the house. The plaintiff contends that the defendant's requirements for the house changed on a number of occasions and her variations to the original plans were such that it was not possible for the plaintiff to supply a firm price to the defendant. Nevertheless, by agreement construction of the house began in May 2004.

[4] It is the plaintiff's contention that, absent an agreement for a fixed price, the contract reached between the parties at the time was for the house to be constructed on a "*charge-up*" basis. The plaintiff says this effectively meant that he would invoice the defendant on the basis of the material supplied, sub-trades contracted and paid for by him, labour supplied by his workers together with his own labour, which he did.

[5] The house is substantial. It has a floor area of approximately 547 square metres with an additional 106.25 square metres of enclosed patios making a total of 653 square metres. It is two storied with the first floor level accessed by a lift and stairs. A building permit originally issued by the Hastings District Council in April 2004 showed an estimated building cost of $750,000.00.

[6] From May 2004 down to June 2005 the plaintiff rendered invoices to the defendant for the work carried out on the house which he says were calculated on the agreed "*charge-up*" basis. These invoices totalled $901,545.10. They were all paid without question by the defendant.

[7] The plaintiff continued working on the house from July 2005 through to the end of November 2005. During this time he continued to render invoices to the defendant on the same basis for work completed but none of these were paid. At the end of November 2005 the plaintiff left the job because the defendant had not paid any of these invoices. He says the outstanding invoices for work done subsequent to June 2005 total $246,372.70.

[8] The plaintiff demanded this $246,372.70 from the defendant but no payment has been made. Despite countless letters between the lawyers for the parties, reports from quantity surveyors engaged by plaintiff and defendant, and much negotiation since that time, the plaintiff has not received payment of this sum or any part of it from the defendant in what is now over 3 years.

[9] As a result, on 4 July 2008 the present proceedings were issued.

[10] In response, on 15 August 2008 the defendant filed her notice of opposition to the present summary judgment application setting out her grounds of opposition in the following way:

> "*1. The quantum of the Plaintiff's claim is in dispute.*
> *2. The applicable terms of the underlying arrangement are in dispute.*
> *3. The appropriate amount payable if any by way of restoration or quantum merit is in dispute.*
> *4. The Defendant has a claim against the Plaintiff for:*
> *4.1 failing to provide sufficient, accurate or comprehensible records by which to ascertain the amounts, if any, owed to him; and*
> *4.2 thereby has put the Defendant to unnecessary professional cost (architect, lawyer, quantity surveyors); and*
> *4.3 failing to carry out and complete the work so as to enable occupation and use of the house by the Defendant; and*
> *4.4 causing the Defendant to engage a new builder to complete the house with as a consequence either wasted or increased costs.*"

Counsel's Arguments and My Decision

[11] The jurisdiction to grant summary judgment is found in r 136(1) of the High Court Rules, which states:

> "*(1) The Court may give judgment against a defendant if the plaintiff satisfies the Court that the defendant has no defence to a claim in the statement of claim or to a particular part of any such claim.*"

[12] The onus is on the plaintiff to satisfy the Court that the defendant has no defence to the claim. In ***Pemberton v Chappell*** [1987] 1 NZLR 1 Somers J said (at 3): "*At the end of the day Rule 136 requires that the plaintiff "**satisfies the Court that a defendant has no defence**". In this context the words "**no defence**" have reference to the absence of any real question to be tried. That notion has been expressed in a variety of ways, as for example no bona fide defence, no reasonable ground of defence, no fairly arguable defence. …On this the plaintiff is to satisfy the Court; he has the persuasive burden. Satisfaction here indicates that the Court is confident, sure, convinced, is persuaded to the point of belief, is left without any real doubt or uncertainty.*"

[13] However, if the plaintiff's case shows prima facie no defence, the defendant may have an evidential burden to raise a defence. Thus, Somers J continued in ***Pemberton v Chappell*** (at 3): "*If a defence is not evident on the plaintiff's pleading, I am of the opinion that if the defendant wishes to resist summary judgment, he must file an affidavit raising an issue of fact or law and give reasonable particulars of the matters which he claims ought to be put in issue. In*

this way a fair and just balance will be struck between a plaintiff's right to have his case proceed to judgment without tendentious delay and a defendant's right to put forward a real defence."

[14] But real issues of credibility will not be determined on summary judgment applications. The determination of such issues requires examination and cross-examination of witnesses, and this is not possible under the summary judgment procedure: ***Busch v Dive & Marine Tours Ltd*** HC AK CP1587/86 19 February 1987; McGechan on Procedure at HR136.03.

[15] However, as stated in ***Eng Mee Young v Letchumanan*** [1980] AC 331 at 341, a Judge will not be bound: *"[t]o accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit, however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be."*

[16] Thus McGechan on Procedure comments at HR136.08: *"It is well established that as a general rule in determining summary judgment applications the Court will refrain from attempting to resolve genuine conflicts of evidence or to assess the credibility of the parties' statements in their affidavits. However, the object of the procedure would be thwarted if spurious defences or plainly contrived factual conflicts were permitted to prevent judgment being obtained, especially in the context of the structure of rule 136 where the onus is on the applicant …".*

[17] And, the Court in ***Bilbie Dymock Corporation Ltd v Patel*** (1987) 1 PRNZ 84, 85-86 makes it clear that the Judge is entitled to take a robust approach to cases involving summary judgment, and to dismiss defences which do not stand up to scrutiny: *"…the need for judicial caution has to be balanced, when considering a summary judgment application, with the appropriateness of a robust and realistic judicial attitude when that is called for by the particular facts of the case. In the end it can only be a matter of judgment on the particular facts."*

[18] Ultimately, the test is as stated by McGechan on Procedure at HR136.06: *"The Court must be satisfied there is no defence. In **Towers v R & W Hellaby Ltd** (1987) 3 NZCLC 100,064 Thorp J said that the critical question under r. 136 will generally be whether the Court is satisfied that the plaintiff's case is unanswerable and the Court will not reach that conclusion if it can see an arguable defence."*

[19] At the outset it needs to be noted that before me, Mr Calver for the plaintiff submitted that the present dispute between the parties is not a building dispute. He accepted that in the past the authorities made clear that generally summary judgment was not appropriate in cases involving building disputes – ***McLean v Stuart*** (1997) 11 PRNZ 66 (CA), ***Savory Holdings Limited v Royal Oak Mall Limited*** (1992) 1 NZLR 12 and ***Appletrees Nominees Pty Limited v Jodanto Nominees Pty Limited*** (1984) 1Qd R286. This was not the situation, however, where claims were made pursuant to the Construction Contracts Act 2002. There, the Courts have not shown the same reluctance to grant summary judgment where payments to contractors under construction contracts were not paid in a timely fashion – ***George Developments Limited v Canam Construction Limited*** [2006] 1 NZLR 177 and ***West City Construction Limited v Edney*** (2005) 17 PRNZ 947.

[20] In the present case, however, the plaintiff has chosen not to follow the payment claim process outlined in the Construction Contracts Act 2002.

[21] Instead, before me counsel for the plaintiff contended that the oral contract between the parties was for construction of the defendant's house to be carried out on a simple *"charge-up basis"* and the defendant, although honouring this arrangement and promptly paying substantial payments totalling over $900,000.00 for progress up to June 2005, simply reneged on this arrangement from that time, with the result that work stopped in November 2005.

[22] Although this history of the arrangements between the parties is a significant aspect here, in my view it is unfortunate to say the least that for a major residential construction contract of this type, at the outset there was no written contract detailing all arrangements concluded between the parties.

[23] That said the first issue for consideration flagged by Mr Macfarlane for the defendant involves the question whether there was a contract in existence between the parties and, if so, what were its terms.

[24] On this Mr Mcfarlane noted (and it does not seem to be disputed) that the plaintiff and the defendant at one point had an expectation of agreeing on a total contract price for the house but no agreement on this aspect was ever reached.

[25] Notwithstanding this, there can be no doubt in my mind that the parties here did reach a contractual arrangement in May 2004 when work commenced. Certainly for nearly 12 months thereafter the plaintiff himself, through his staff and subcontractors carried out substantial work on the house construction and the defendant in turn made payments to him totalling in excess of $900,000.00.

[26] As to the plaintiff's contention that this contract was a *"charge-up"* contract and that effectively, absent any fixed price being agreed, the defendant would pay him for all work carried out on a *"cost-plus"* basis, the defendant in her affidavit dated 15 August 2008 describes the arrangement reached in the following way:

"4.1 Although I tried to get a proper contract in place which would ensure the price was known, the plaintiff despite promises never produced either a contract or a price.

4.2 It was agreed that he could start the work but that was in the expectation that those matters of price and contract would be resolved. Obviously it would be reasonable to pay as we went a reasonable amount so when invoices were presented I did pay, but still expecting contract terms and price to be fixed.

4.3 In the end nothing was agreed, except after the disputes arose when I was prepared to accept and pay certain amounts but never the full amount.

4.4 I accept the plaintiff is entitled to a reasonable amount for the work, but it also must be reasonable to me, and for the work done, and the result achieved.

4.5 I engaged quantity surveyors to advise me. They found numerous errors and excessive invoices in the plaintiff's claim. By way of the provision of my quantity surveyor's opinion to the plaintiff and his advisers it was and must always have been clear to the plaintiff that the amount claimed in this proceeding was in dispute. I refer in particular to the DRL report dated 9 March 2007 which was provided to the plaintiff and his advisers on 14 March 2007." (Emphasis added)

[27] With regard to the fact that the parties initially expected to agree on a contract price for the construction of the house but no such agreement was ever reached, Mr Macfarlane for the defendant noted that the law deals with circumstances such as these by applying the contract the parties at the outset were assumed to be intending to make and they finally do make as if it had applied from the outset. In ***Trollope and Colls Limited v Atomic Power Constructions Limited*** [1962] 3 AllER1035 the Judge imported into the contract:

"…… when ultimately made, a term that it should apply retrospectively to all that had been done in anticipation of it. Whether such an implied term of retrospectivity can be implied will depend on the circumstances of the transaction.

In such situations, a finding that no retrospective contract was intended, or was formed, will not leave the sub-contractor bereft of recompense for work performed. The Court may find that certain specific works were contracted for, or that the parties had engaged in some form of interim agreement for part, or all, of the period while the major issues were under negotiation. Lastly, in the absence of any contract at all, the sub-contractor may well recover the value of the work done on an action for quantum meruit." (emphasis added)

[28] And in cases such as the present where there is no later agreement having retrospective effect and the essential terms of the parties' agreement may be difficult to ascertain, one possible approach to ensure that a plaintiff is not left without payment or remedy is a restitutionary one – see Burrows Finn & Todd Law of Contract in New Zealand Third Edition and T Kennedy-Grant Construction Law in New Zealand paras. 2.88, 2.94 and 11.01.

[29] Mr Macfarlane notes also that in restitution cases the enquiry made by the Court is usually as to the value of the work that has been undertaken rather than by applying a simple "*cost – plus*" approach.

[30] Here, Mr Macfarlane contends that at no time did the defendant accept the "*cost-plus*" approach adopted by the plaintiff as she was concerned throughout to have a fixed price for the house to give her certainty. The plaintiff strongly disputes this. And on this aspect, the defendant's actions between May 2004 and June 2005 in simply paying without question the "*cost-plus*" accounts presented to her by the plaintiff for work undertaken on the house might be seen as providing some support for the argument advanced by the plaintiff.

[31] Notwithstanding this, I remind myself that the present application before the Court is one for summary judgment and to succeed the plaintiff must satisfy the Court that the defendant has no defence to the claim advanced.

[32] Clearly in a case such as the present where there is no recorded agreement in writing between the parties or direct undisputed evidence as to exactly what its terms may be, crucial aspects of that contract including details of price (if any) and payment arrangements can only be determined when all the facts are carefully ascertained and weighed. The authorities are clear that such a fact sensitive enquiry is generally inappropriate for the summary judgment process.

[33] That said, in this case one matter is clear, however. This is the clear confirmation that even on the defendant's own evidence which I have outlined above, the plaintiff here is entitled at least on a restitutionary basis to "*a reasonable amount for the work undertaken*". Proceeding on this basis in considering the present application, it is clear to me that effectively therefore the defendant's principal opposition to the present claim relates simply to the quantum of that claim. This is outlined at paras. 1 and 3 of the defendant's notice of opposition noted at paragraph [10] above. I turn now to consider that aspect.

[34] On this the defendant in her affidavit dated 15 August 2008 filed in opposition to the application confirms at paragraph 4.5 that she engaged a quantity surveyor Mr David Laurence Richards ("Mr Richards") to advise her – (see paragraph [26] above). As to the question of quantum, the defendant refers to Mr Richard's affidavit and states in her affidavit at paragraph 6.1 "*He covers the current situation ….*" and at paragraph 6.3:

"*6.3 Previously the plaintiff had claimed a much larger sum and Mr Richards had been able to show that this should have been for a much lower amount simply on account of the removal of errors and overcharges.*"

[35] Mr Richards in turn has provided a substantial report annexed to his affidavit also dated 15 August 2008 which was filed by the defendant in support of her opposition to the summary judgment application.

[36] That affidavit essentially only takes issue with the plaintiff's labour charges for work carried out on the house. At paragraph 9.11 of the affidavit Mr Richards deposes:

"*9.11 The claimed man-hours are in excess of those that would reasonably be expected when calculated based on the scope of work and materials required.*"

[37] The dispute identified by Mr Richards is simply as to the hours of work involved on the part of the plaintiff and his work-men and the appropriate amount that ought to be paid for those hours.

[38] So far as the plaintiff's provision of materials and his engagement of subcontractors is concerned, Mr Richards in his affidavit states:

"9.14 I have analysed the quantity of materials and costs and find the quantities and costs are within our expectations." and

"9.16 The dialogue (with two sub-contractors Wynands Masonry Limited and Atlas Plaster Company) established the final value of their work and resulted in credit notes being issued as the invoices initiated by the sub-contractors were well in excess of the correct value. These have subsequently been revised to reflect the true amounts. In this regard I have no issue with the remaining sub-contractor's costs." (emphasis added)

[39] Returning for a moment to the plaintiff's labour charges, as I understand the position, the plaintiff's claim is for a total of 8,937.75 hours and amounted to $278,465.00. Mr Richards' assessment of what he describes as a fair value for the plaintiff's hours totals 3,708.93 hours and amounts to $129,812.55. The shortfall between these two amounts totals $148,652.45. Adding goods and services tax at 12.5% ($18,581.56) to this figure gives a total labour charge difference of $167,234.01.

[40] It is this $167,234.01 difference noted by Mr Richards at paragraph 14 of his affidavit which he describes there as: "*…not an amount which is justifiable in regards to the construction of the property at 40 Chambers Street nor payable or owing by Mrs Barnett to the plaintiff.*"

[41] With the exception of this $167,234.01, however, as I see the position, the effect of Mr Richards' detailed report is to raise no other issues over the balance of the plaintiff's $246,372.20 total claim. That balance claim as I have noted effectively amounts to a claim for unpaid materials, sub-contractor's accounts and agreed mark up.

[42] That said, this $79,138.69 (being the difference between the plaintiff's claimed $246,372.70 and the disputed labour component totalling $167,234.01) appears to be undisputed by Mr Richards both in his report and affidavit. Indeed this is confirmed at paragraphs 9.14 and 9.16 of his affidavit which I have outlined at paragraph [38] above.

[43] It was noted earlier at paragraph [11] above that r. 136(1) High Court Rules dealing with summary judgment applications makes clear that a Court may give judgment against a defendant if a plaintiff satisfies the Court that the defendant has no defence to the claim or to "*a particular part of any claim in the statement of claim*". In the present case I am satisfied that the $79,138.69 portion of the plaintiff's total summary judgment claim identified above is confirmed by the defendant (through her own quantity surveyor Mr Richards upon whom she relies) as being properly payable to the plaintiff here. As I have noted, that sum effectively represents payments which the plaintiff has himself made from his own funds for materials used on and sub-contractors engaged in construction of the house between June and November 2005. This amount has thus been outstanding for nearly 3 years now. This can hardly be seen as acceptable.

[44] Notwithstanding this aspect, and the obvious sympathy that must be expressed for the resulting position in which the plaintiff has found himself, again I remind myself that the application before the Court is a summary one on which the plaintiff must satisfy the Court that the defendant has no defence to the claim.

[45] At paragraph 7.3 of her 15 August 2008 affidavit the defendant goes on to identify a counter-claim which she maintains she has against the plaintiff in this proceeding. She describes and quantifies this claim in the following manner:

"7.3 I expect my claim (for delays such that I have had no access to my home, and for professional fees to try and sort out the plaintiff's claim) will be by way of general damages of $10,000.00, loss of use of my property and delays $50,000.00 and professional fees as so far expended $13,599.00 for legal fees and $30,332.00 for quantity surveyor fees. No architectural fees have been paid yet but my estimate at this stage is that they will be around $30,000.00. Further legal costs and quantity surveyor costs are anticipated …".

[46] How has the plaintiff responded here to this counter-claim? On 19 August 2008 the plaintiff Mr Coles chose to swear a further affidavit described as a "*Response Affidavit*". This was filed in this Court on 20 August 2008. That affidavit however ran only to one paragraph and dealt solely with one point in Mr Richards' 15 August 2008 affidavit which the plaintiff claimed was deliberately misleading. The affidavit made no reference to the counter-claim outlined in the defendant's affidavit.

[47] Instead, before me Mr Calver for the plaintiff contended that the defendant's grounds advanced in her affidavit to justify her counter-claim were "*based on the vaguest of evidence*". He submitted that no suggestion has been made that any of the building work on the house carried out by the plaintiff was anything other than of the highest standard. He noted that the plaintiff walked off the job in November 2005 simply because he had not been paid anything since June of that year. On this basis, Mr Calver suggested that it was difficult in the present circumstances to see how the defendant could possibly have good grounds for a counter-claim against the plaintiff.

[48] And further, Mr Calver submitted that it is a settled principle that a counterclaim is not a defence to a summary judgment application – ***Pemberton v Chappell***.

[49] Ultimately, although the counter-claim raised by the defendant in her 15 August 2008 affidavit may well turn out to be of little substance, nevertheless it has been raised here and it is clear that the defendant is still not living in the house which remains uncompleted. The counter-claim is simply not addressed by the plaintiff despite his filing his subsequent affidavit sworn 19 August 2008, an affidavit in his words said to be "*in response to the affidavits filed by or on behalf of Mrs Barnett*". This however simply ignored the claims made by the defendant.

[50] Notwithstanding this, and given particularly that the present application requires the plaintiff to establish that the defendant has no arguable defence to the claim and its quantum, in my view the proper approach here is first, to grant summary judgment to the plaintiff but only for the undisputed amount of $79,138.69, and secondly, to stay execution of that summary judgment pending proper resolution of this counter-claim advanced by the defendant. In saying that, I accept that, under the circumstances prevailing here, this claim is fairly categorised as a counter-claim rather than a set-off (which might in itself provide a valid defence to the plaintiff's present application) and that it is in the interests of justice here to provide a limited stay of the summary judgment order pending resolution of that counter-claim.

[51] On these aspects McGechan on Procedure at para. HR142.02 notes: *"In cases where the defendant has a counter-claim which cannot be classified as a set off, the question arises as to whether the Court should stay execution of the summary judgment pending resolution of the counter-claim. The defendant should therefore apply for a stay at the time of filing the counter-claim:* ***Roberts Family Investments Limited v Total Fitness Centre (Wellington) Limited*** *[1989] 1 NZLR 15 … The decision to grant a stay rests essentially on whether it would be a miscarriage of justice to allow execution of the plaintiff's judgment – see* ***NZ Apple & Pear Marketing Board v Wallis*** *(1990) 4 PRNZ 713, where there was a possibility of the defendant being declared bankrupt before the counter-claim could be heard."*

[52] In my view in the present case there might be a possible miscarriage of justice if the plaintiff was allowed to execute the summary judgment which I am about to grant against the defendant (for example by having her declared bankrupt) before the defendant's alleged counter-claim could be fully heard – ***New Zealand Apple & Pear Marketing Board v Wallis*** (1990) 4 PRNZ 713.

[53] Rule 142(2) High Court Rules clearly envisages that an approach such as I am contemplating here, which is to include a partial stay of the summary judgment order I am about to grant, is often appropriate. Rule 142(2) provides:

> "2. *If it appears to the Court on an application for judgment under r 136 or r 137 that the defendant has a counter-claim that ought to be tried, the Court –*
>
> *(a) May give judgment for the amount that appears just on any terms it thinks fit …"* (emphasis added)

[54] That approach is confirmed in the decision of ***Roberts Family Investments Limited v Total Fitness Centre (Wellington) Limited*** [1989] 1NZLR 15 where McGechan J states at page 92: "*Rather than give an immediately enforceable judgment to the plaintiff on the plaintiff's (summary judgment) claim, perhaps allowing the plaintiff to bankrupt the defendant before the latter's counter-claim can be brought to judgment and off set, the Court may and commonly does grant the plaintiff summary judgment accompanied by stay of execution of such judgment pending resolution of the counter-claim, or occasionally dismisses the summary judgment application, directing trial of both claim and counterclaim.*" (On this aspect see also McGechan on Procedure para. HR142.01.)

Conclusion

[55] For the reasons I have outlined above, I am satisfied that the plaintiff has done enough here to satisfy the onus upon him to show that the defendant has no defence to that part of his summary judgment claim relating to the acknowledged $79,138.69 claim due under the contract. As to the balance of the plaintiff's claim ($167,234.01) however, there is a clear evidential dispute over whether this amount is payable to the plaintiff and this will necessarily entail a fact sensitive enquiry at substantive trial where all the appropriate evidence can be tested through cross-examination.

[56] That said the present application succeeds but only in part. An order for summary judgment against the defendant is to follow.

[57] A further order is to be made, however, staying execution of the successful part of this summary judgment application pending proper resolution of the defendant's counter-claim against the plaintiffs.

[58] Orders are now made therefore as follows:

a) An order for summary judgment is now made in this proceeding in favour of the plaintiff against the defendant in the sum of $79,138.69 plus interest at the rate of 7.5% p.a. from 1 December 2005 down to the date of payment subject to paragraphs [58] (b) and (c) following.

b) Execution of this summary judgment order is stayed pending further order of this Court once the defendant's counter-claim against the plaintiff is properly resolved.

c) This stay is conditional upon the following:
   (i) The defendant within 10 working days of the date of this judgment issuing proceedings against the plaintiff in terms of her counter-claim; and
   (ii) The defendant then taking all reasonable steps to pursue and prosecute this counter-claim to completion with all due expedition.

(d) Leave is reserved for the plaintiff to approach the Court at any time on 48 hours notice to apply to have the stay lifted or to seek any further orders or directions that may be appropriate in the event that the plaintiff considers the defendant is failing to comply with these conditions.

Costs

[59] As to costs the plaintiff's summary judgment application has partly succeeded and partly failed. In my view it is appropriate for costs here to be reserved until final disposal of this proceeding is achieved.

[60] That said costs are reserved.

Next Event

[61] As a next event in this matter the Registrar is directed to list this matter for call in the Associate Judge's Chambers List on 13 November 2008.

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M.J.S. Macfarlane - Counsel for Defendant instructed by Scannell, Hardy & Co, Solicitors, PO Box 219, Hastings