

**IN THE HIGH COURT OF FIJI SUVA**  
**CIVIL JURISDICTION**

**Civil Action No. 197 of 2014**

**BETWEEN**

**GAYA PRASAD aka MUKESH PRASAD and PRAVEEN PRASAD**

both of 33 Tyndall Avenue, Toronto, Ontario, Canada,  
businessman and Domestic Duties, respectively.

**PLAINTIFFS**

**AND**

**SABIR HUSSAIN aka SABIR QAIYUM HUSSAIN of 73 Ratu Dovi Road,**

Nadera, Nasinu, Fiji trading as **SABIR BUILDERS** and

**KHALIL HUSSAIN of Nausori, Fiji, Businessman.**

**DEFENDANTS**

**Counsel** : Mr. S. Singh for the plaintiff  
Mr. N. Tuifagalele for the 1<sup>st</sup> Defendant

**Dates of Hearing** : 09<sup>th</sup> and 10<sup>th</sup> November, 2016

Date of Submissions : 24<sup>th</sup> November, 2016

Date of Judgment : 27<sup>th</sup> January,, 2017

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## JUDGMENT

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- [1] The plaintiffs and the 1<sup>st</sup> defendant entered into a construction contract on 17<sup>th</sup> September, 2012 where by the 1<sup>st</sup> defendant agreed to construct a house for the plaintiffs on the property comprised in Certificate of title No. 29615 being lot 22 on Deposited Plan No. DP 7667. The 2<sup>nd</sup> defendant is not a party to the above contract. He has been brought into the case on the basis that he is the father of the 1<sup>st</sup> defendant and the promoter of the business Sabir Builders.
- [2] The plaintiffs instituted these proceedings claiming damages from the defendants for acting in breach the contract. There is no cause of action disclosed against the 2<sup>nd</sup> defendant. Only the parties to a contract are bound by its terms and conditions.
- [3] The plaintiffs averred in the statement of claim that;
- (a) despite receiving the sum exceeding the agreed price, the defendants did not build the residence in accordance with the plan;
  - (b) the Nausori Town Council conducted a survey of the premises and identified severe anomalies in the construction of the said premises; and
  - (c) by the report dated 14<sup>th</sup> August, 2013, engineers Hounge Lee Kaba condemned the construction of the building and recommended partial or complete demolition of the building.
- [4] The 1<sup>st</sup> plaintiff testified at the trial and called another witness to testify but the defendants sought not to testify or adduce any evidence at the trial in support of their defence.
- [5] The defendants admitted in their statement of defence that the plaintiffs paid \$143,946.20. Apart from this amount the plaintiff says that he purchased electrical items to the value of \$2382.55. The total claim of the plaintiffs is therefore \$146,328.75.

The plaintiffs also claim liquidated damages at the rate of \$50 per week from 12<sup>th</sup> March, 2013.

[6] Paragraph 3.1 and 3.6 of the agreement read as follows;

3.1 The contractor has already commenced work on the said property and shall complete the work within 6 months subject to weather permitting.

3.6 If the construction works are not completed within the agreed time, *i.e.*, within 6 months then the Contractor shall pay \$50-00 per week as liquidated damages, if due to bad weather (as stated in clause 3.5) and emergency case such as death in the family, the Contractor is not liable to finish within 6 months, then prior arrangements with the Owner shall be made. In such case the owner agrees to increase the term for a further term.

[7] There is no evidence that anything stated in clause 3.5 such as hurricane, earthquake, flood occurred during the period of six months after the construction work commenced.

[8] It is common ground that the contractor did not complete the building as agreed and it was not completed even at the time of filing these proceedings. The agreement does not say the period for which this amount was agreed to pay. It appears from the agreement that the contractor had agreed to pay \$50.00 per week after the lapse of the period of six months until the construction was completed. Since the construction was not completed even at the time of filing of the action the plaintiff is entitled to recover the said amount until the date of the institution of the action which comes to \$3570.00.

[9] The plaintiffs have obtained a report from an engineer which was tendered in evidence marked as "P7" which says, *inter alia*, that;

Based on our investigations and assessment of the building and its various structural elements, the existing building is generally non-compliant and not in accordance with the approved drawings. It should also be noted that workmanship is found to be of sub-standard nature with numerous defects observed generally throughout with disregard to details provided in the

drawings. During our findings, concrete was also found to be weak and it is suspected that the concrete used on-site would failed to meet the 25 MPa specified in the drawings. Most of the intrusive investigation revealed the use of non-compliant steel enforcement and deviation from steel content shown in the approved drawings indicating possible non compliant construction generally throughout.

Based on our professional opinion, part of the current structure is not structurally safe and it is recommended that consideration is taken into account for extensive repair work either by partial or complete demolition and rebuilding to a satisfactory standard.

[10] The engineer who prepared this report after an inspection testified that the defects in the building cannot be corrected and it has to be demolished and re-build. In cross-examination the witness said that if repair work is carried out the building would collapse.

[11] The report of the Secretary to the Nausori Rural Local Authority (P6) gives a list of defects in the building and states thus;

From the inspection it can be concluded the works carried out are not in accordance with the approved plans and progress inspection was only carried out for the inner pad footing only.

The current status of the building will be affected by the vibration from moving heavy vehicles along the Koronivia Rd.

[12] These reports or the evidence of the engineer were not challenged by the defendants. The court has no reason not to rely on the oral and documentary evidence adduced by the plaintiffs in support of his claim. The court is therefore, of the view that the plaintiff is entitled to recover \$146,328.75 from the defendant.

[13] The plaintiffs also claimed special damages and also general damages from the defendant. It is an internationally accepted principle of law that special damages must be pleaded and proved. In the statement of claim it is stated that the particulars of special damages for breach of contract would be provided to the defendant within 35 days for the date of the statement of claim but no particular of special damages have

been provided to the court or to the defendant. It is also to be noted that there is no evidence whatsoever, to show the nature of the special damages sought by the plaintiffs.

- [14] The plaintiffs also claim general damages. Normally, the remedy that the innocent party has for a breach of contract is to sue for damages. The object of seeking damages is to obtain compensation for the actual loss he has suffered. In addition, if the innocent party has paid a deposit or spent money on trying to perform the contract, this incurred expenditure can also be claimed in an action for damages against the guilty party.
- [15] There are some people who are under the impression that litigation is like a lottery and much money can be gained by filing action for a breach of contract. But this is far from the truth. The object of an award of damages is to compensate actual loss, at least I so far as money can do so.
- [16] The net result of the above view of contractual damages is that the innocent party is assured of recovering actual loss and the guilty party is guaranteed that he or she will not be liable for an amount over and above that actual loss.
- [17] It follows that whereas an innocent party can sue for any breach, substantial damages can only be recovered for substantial loss which has to be proved. Where there has been no or almost no consequential loss, or where there is no evidence of what the plaintiff's actual loss was, all that can be recovered is what are call nominal damages.
- [18] *Luna Park (NSW) Ltd v Tramways Advertising Pty Ltd.* (1938) 61 CLR 86:  
An advertising firm was given a contract to display billboards on tramcars travelling along main streets "for eight hours every day". Later there was a dispute between the parties and the tramway company sued the advertising firm for damages for not strictly performing the contract. The court found that on the average the billboards had been displayed for eight hours per day. Therefore, the court only awarded nominal damages of one shilling.
- [19] Although this judgment, on the face of it, appears to be of no relevance to this case, it was cited to show the extent to which a party is entitled to claim damages for breach of

contract. The principle cited above clearly show that the plaintiff in this case is not entitled to claim general damages.

[20] For the above reasons the court makes the following orders:

1. The 1<sup>st</sup> defendant is ordered to pay the plaintiffs \$149,898.75 with interest on the said sum in terms of section 4 of the Law Reforms (miscellaneous Provisions)(Death and Interest) Act (Cap 27) as amended by Law Reform (Miscellaneous Provisions) (Death and Interest) (Amendment) Decree 2011, from the date of the judgment until the entire sum is paid in full.
2. The 1<sup>st</sup> defendant is also ordered to pay the plaintiffs \$4000.00 as costs.



  
Lyone Seneviratne

**JUDGE**

27<sup>th</sup> January, 2017