All-Trade Construction Pte Ltd v Lo Geok Kwee
[2000] SGHC 120

Case Number : Suit 1322/1999

Decision Date : 29 June 2000

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : R Manoj and Syn Kok Kay (Patrick Chin Syn & Co) for the plaintiffs; Louis Lim (Chee & Teo) for the defendant

Parties : All-Trade Construction Pte Ltd — Lo Geok Kwee

Contract – Building contract – Agreement in writing – Singapore Institute of Architects' (SIA) Articles and Conditions of Building Contract (Lump Sum Contract) – Parol evidence – Owner claiming separate agreement from the one in writing – Whether parol evidence can be used to show separate agreement

Contract – Building contract – Architect's certificate – Owner not paying amount due under certificates to main contractor – Whether main contractor entitled to payment

Civil Procedure – Summary judgment – Conditional leave to defend – Security – Defendant requesting reduction in security required – Defendant requesting extension of time to furnish security – Whether defendant discharge burden of showing why security should be reduced – Whether defendant discharged burden of showing why time should be extended

: ***Background***

The defendant is the owner of the property under development known as Lots 387-14 and SL TS 12 at North Bridge Road, Singapore (`the property`). In 1997, the defendant decided to erect a seven-storey building on the property. By a letter dated 27 May 1997, her architects, Messrs Architects Group Associates Pte Ltd, the defendant appointed the plaintiffs as the main contractor for the construction of the building.

The letter of award stated that the works were awarded at a revised lump sum of $1,680,000 derived from nine items to be effected ranging from preliminaries to the hosereel, sprinkle and fire alarm system installation. In the letter of award, separate amounts were allocated to each of these items. The letter stated that the contract sum was to be a fixed lump sum and no provisions would be allowed for fluctuations in prices of materials, wages or levies etc provided that this clause did not prohibit variations duly authorised under the conditions of contract. It was also confirmed that the plaintiffs had read, understood and accepted the terms and conditions of the form of contract which was based on the Articles and Conditions of Building Contract (Lump Sum Contract) published by the Singapore Institute of Architects (`the SIA Conditions`).

By an acknowledgement dated 27 May 1999, the plaintiffs confirmed their acceptance of the terms and conditions stipulated in the letter of award.

By September 1999, the architects had certified that works totalling $1,242,118.05 had been completed by the plaintiffs under the contract. As of that date, however, the defendant had only paid the plaintiffs $781,210.47, leaving a balance of $460,907.58 outstanding. On 7 September 1999, the plaintiffs commenced this action to recover the said sum of $460,907.58.

In due course the plaintiffs filed an application for summary judgment and this was heard on 1 March 2000. The learned assistant registrar ordered at the end of the hearing that the defendant be given

conditional leave to defend upon furnishing a banker`s guarantee for a sum of $460,907.58 within the next 28 days and in default there would be judgment for the plaintiffs as claimed with costs fixed at $4,500.

There was then a slew of applications. First, on 14 March the plaintiffs filed an appeal against the assistant registrar`s order and asked for summary judgment to be entered against the defendant. The next day, the defendant filed an appeal against the order for conditional leave and she asked that this be substituted by an order that the payment into court be only for the sum of $109,615.59 and that the defendant be given an extension of one month from the date of the notice to make such payment. The third application, filed on 24 March 2000, was a summons-in-chambers whereby the defendant applied for leave to amend her defence and counterclaim. The final application was another summons-in-chambers filed by the defendant on the same day. This was for an extension of time of two months up to 29 May 2000 in which to comply with the order of court dated 1 March 2000.

The defendant did not furnish security for the plaintiffs` claim within the 28 days as ordered and, by the time all the matters mentioned in [para] 6 came on for hearing before me on 4 April, the plaintiffs had entered judgment in default. At that hearing therefore, the plaintiffs applied for leave to withdraw their appeal against the order granting the defendant conditional leave to defend. I granted their application. After hearing the parties on the other applications, I dismissed the defendant`s appeal with costs and also dismissed her application for an extension of time of two months. I made no order on her application to amend her defence and statement of claim as that application was rendered otiose by the judgment which the plaintiffs had obtained. The defendant has now appealed against everything I did that day including my grant of leave to the plaintiffs to withdraw their appeal.

The defence

The defendant filed a defence and counterclaim in which she alleged that it had been agreed between the plaintiffs and the defendant that there were to be two separate contracts, one between the parties directly and the other between the plaintiffs and their sub-contractors for and on behalf of the defendant. Under the second contract, the plaintiffs were to act as middlemen only and were to be paid a percentage of the profit and attendance.

She further alleged that under the first contract, the agreed sum was only $708,000 made up of preliminaries, structural and architectural matters and mechanical and engineering works. It was agreed that a total sum of $560,000 would be due upon completion of the second contract and this was made up of the air-conditioning installation, the curtain wall cladding, the lift installation, the hosereel, sprinkle and fire alarm system and piling works. These amounts were to be due directly from the defendant to the sub-contractors. In this regard, the amount of $80,000 due under the second contract for piling works had been paid directly to the sub-contractor by the defendant. The defendant averred that she had paid the plaintiffs $781,210.47 which was in excess of the amount to which they were entitled.

The last substantial allegation was that the plaintiffs had in breach of contract wrongfully terminated their services and thereby caused loss and damage to the defendant. The defendant put in a counterclaim for such loss and damage. She also counterclaimed for damages sustained by the plaintiffs` failure to pay the sub-contractors resulting in the said sub-contractors refusing to complete the work on schedule. As a result the project had not been completed.

In her affidavit, the defendant pointed out that the plaintiffs had invoiced her for less than the amounts stated on the certificates issued by the architect. She said that this was because the

invoices prepared by the plaintiffs took into account the provisional items for which she was to be directly responsible to the sub-contractors. She also alleged that in breach of the letter of award, the plaintiffs had failed to comply with the drawings and specifications and therefore had to carry out variation works which were not authorised under the contract documents. She explained that the separate agreement between herself and the plaintiffs was not made known to her architect and that is why they had stated the contract sum to be $1,680,000 in their letter of award.

Based on the above documents, counsel for the defendant contended that there were the following grounds on which the defendant could dispute the plaintiffs` claim:

(i) the existence of the separate agreement between the plaintiffs and the defendant in relation to the defendant`s obligation to herself carry out and pay for the provisional items;

(ii) the fact that the plaintiffs had carried out variation works without authority; and

(iii) the plaintiffs` abandonment of the works before completion.

The decision

There was no doubt from the documents that the agreement between the parties had been reduced to writing (the architect`s letter identified the various documents that would form part of the contract) and that the SIA Conditions were an integral part of this agreement. The defendant`s contention that the architect`s award did not represent the agreement and that there was a separate contract in respect of the provisional items did not appear to me to constitute a substantial line of defence. Once there is a written contract, parol evidence cannot be adduced to contradict it. Further, the architect was the defendant`s agent and had been acting on her behalf when the letter of award was made. There was no evidence that in making the award, he had not been acting in accordance with the defendant`s instructions or that the defendant had taken any action to rectify the position once the letter of award went out and she discovered he had made a mistake. She gave no evidence either to show that when payment certificates were issued, she had informed her architect that the payee in the certificates was wrong and that it should not have been the plaintiffs. At no time was any correction certificate issued by the architect.

The plaintiffs` explanation for the fact that their invoices were for lower amounts than those certified due by the architect was that they were doing the defendant a favour as she had informed them that she had cash flow problems. They were willing at that stage to receive less than was actually due to them and had accordingly issued the invoices for the smaller amounts. This seemed to be a reasonable explanation. Further, the defendant contradicted herself to an extent when she complained that the plaintiffs had not paid the sub-contractors and that was why the sub-contractors had refused to complete their works. If her stand was that she would deal with the sub-contractors directly then she had no basis to criticise the plaintiffs for not paying them and could not hold the plaintiffs accountable for delay on the part of the sub-contractors. The defendant had also acted in a manner that contradicted her position when she paid the plaintiffs $781,210.47 which was about $73,000 more than was, on her version, contractually due to them, without apparently giving any indication that the payment was made under protest.

As far as the written contract was concerned, the plaintiffs` right to receive payment was clear. Pursuant to the terms of the SIA Conditions, a party who has the benefit of a certificate in his favour and who does not receive payment can seek to enforce the same by taking legal proceedings and obtaining a summary judgment against the defendant. The effect of such judgment is that it requires

the other party to pay the amounts certified. Any alleged false claims which had not been certified by the architects or any disputes as to the certificates in question are reserved for resolution at trial.

The well known decision of the Court of Appeal in **Lojan Properties Pte Ltd v Tropicon Contractors Pte Ltd** [1991] 1 SLR 80 confirmed that where the contractor had the benefit of a certificate of payment from the architect, the employer was obliged to pay the amount certified unless he has a cross claim, the validity of which had itself been certified by the architect. In a subsequent decision, **Aurum Building Services (Pte) Ltd v Greatearth Construction Pte Ltd** [1994] 3 SLR 330 which followed the Tropicon case, the High Court in a dispute between a contractor and his sub-contractor held that the contractor had to pay the certified amount first and pursue the counterclaim against the sub-contractor separately.

A further decision, that of Justice Warren Khoo, in **China Construction (South Pacific) Development Co Pte Ltd v Leisure Park (Singapore) Pte Ltd** [2000] 1 SLR 622 established that architect`s interim certificates issued under the SIA Conditions are prima facie to be honoured as they enjoy `temporary finality`. Summary judgment is to be given on the certificates unless it can be shown in a summary way that the certificates had not been issued in the proper exercise of the architect`s certification powers under the contract.

In the present case, there was no contention that the architect`s certificates had been issued improperly. There was nothing before the court to suggest that they were issued other than in the ordinary course of business or that they were not bona fide. The architect did not certify any cross claim on the part of the defendant so as to allow her to set off such cross claim against the certificates issued in favour of the plaintiffs. Although the defendant alleged that variation works were not authorised, there was nothing before the court to show that the architect had issued or was on the verge of issuing a correction certificate which would embody this or any other objection which the defendant had to the plaintiffs` claim. There was no evidence either that representations were being made or had been made to the architect by the defendant in respect of any of the interim certificates the architect had issued including the final interim certificate for $200,478.33 which represented variation works. Thus, up to the date of the hearing, there was no basis on which the certificates could be impugned. It should be noted that the contract contemplated the possibility of variation works and the architect`s certificate authorising payment for such works would be prima facie evidence that the actual works carried out had in fact been authorised.

It appeared to me that the plaintiffs had on the facts and on the authority a very strong case for summary judgment. The only thing that was in the defendant`s favour was the fact that the plaintiffs` invoices had not been for the full amount due. I was not sure to what extent that helped the defendant in view of the parol evidence rule but considered that it must have been the reason why the learned assistant registrar gave the defendant conditional leave to defend.

The defendant in her appeal did not ask for unconditional leave to defend. Her request was that the condition should be changed so that instead of having to give security for the full amount of the plaintiffs` claim she would only have to furnish it for $109,000. She did not explain how she came to the figure of $109,000. It appeared to me that by making an appeal on this basis, she was recognising that her defence was shadowy and that it justified the imposition of the condition and that all that concerned her was the quantum. The defendant had the burden of showing why it would be correct to change the quantum of the payment. She did not discharge this burden. No submission was made on her behalf as to why $109,000 was a more appropriate figure than $460,907.58 nor was there any affidavit evidence on this point.

In my judgment, the law and the facts supported the decision which the learned assistant registrar

had made and I therefore dismissed the defendant`s appeal against that decision.

The defendant had asked by SIC 601482/2000 that she be given an extension of time of two months in which to comply with the order to furnish a banker`s guarantee. It was incumbent on her to give the court material on which it could exercise its discretion to extend time in her favour. No such material was, however, furnished. There was no indication that such an extension would enable her to obtain the banker`s guarantee. No evidence was given either of the attempts that she had made up to the date of the application to obtain such security or of the period of time that was required for such attempts to have a result. The defendant was the owner of a presumably valuable piece of land in the centre of town and she did not explain why that would not assist her in obtaining the necessary security. In the result, I considered that there was no basis for me to exercise my discretion in her favour. I therefore dismissed the application for an extension of time.

The defendant`s other summons-in-chambers whereby she applied for leave to amend her defence was dependent on her being able to proceed with that defence. By the time I heard the matter, the plaintiffs had already obtained judgment and this stood since I did not extend the time for furnishing of the security. It therefore appeared to me to be unnecessary to make any order on that summons-in-chambers.

Outcome:

Order accordingly.