IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CIV-2020-004-000768
[2022] NZDC 13261

BETWEEN	NETHNI MENDIS Plaintiff
AND	DARIN GEORGE PANUI First Defendant
AND	TROJAN BUILDING SERVICES LIMITED Second Defendant

Hearing: 5 July 2022

Appearances: Ms Mendis in Person
No Appearance by or for the Defendants

Judgment: 26 July 2022

RESERVED JUDGMENT OF JUDGE D J CLARK

Introduction

[1] On 26 May 2021 Judge Harrison ordered that this matter proceed by way of formal proof as the defendants had failed to file a statement of defence in response to Ms Mendis statement of claim.

[2] The application for formal proof is made pursuant to District Court Rule (DCR) 15.9. In accordance with the direction made by Judge Harrison, Ms Mendis filed an affidavit sworn on 11 February 2022 setting out the basis of her claim.

Background

[3] Ms Mendis owns a property at 59 Burundi Avenue, Manurewa, Auckland. She wished to develop the property, erecting two multi-story, three-bedroom units at the rear of the section. The property already had an existing dwelling already on the front of the section.

[4] In early 2018 the plaintiff started looking for a contractor and on 27 March 2018 an initial estimate was provided by the defendants in a range of $385,000 to $405,000.

[5] Correspondence was exchanged before a Master Builders Building Agreement (the contract) was entered into dated 5 September 2018.

[6] Ms Mendis was recorded as the owner in the contract. The first and second defendants were recorded at various places in the contract as the Registered Master Builder. I treat them both then as a party to the contract.

[7] Other features of the contract included that it was a fixed price contract for the sum of $466,430 with the commencement date expected to be in September 2018 with the completion date recorded as "April" 2019. A liquidated damages clause was also included wherein the defendants were required to pay liquidated damages in the sum of $1,100 per week in the event of late completion by the defendants. This was based on Ms Mendis calculation of lost rent she would have otherwise received from the units once completed.

[8] Ms Mendis also points out that the contract expressly stated enough time would be provided to the defendants to complete the first stage of the contract which consisted of the foundations and floor structure. The scheduled time for completion of this stage was 24 December 2018.

[9] Ms Mendis was concerned that because she had obtained a significant loan for the project it was important for her to ensure the cost of the project was fixed, and, it would be completed on time in order for her to start collecting rent as soon as possible.

[10] Following the signing of the contract Ms Mendis paid the deposit of $46,643. This was paid on 25 September 2018.

[11] Building commenced on 1 October 2018. After a few weeks of work Ms Mendis says that Mr Panui started making demands for additional payments which were not in accordance with the agreement. On 31 October 2018, Mr Panui emailed Ms Mendis stating that because of the costs he was incurring he was seeking a variation to when the first progress payment would be made. In an email on 2 November 2018 Mr Panui stated that he felt like *"walking away from this project and cutting my losses"*. He also commented that he would not be able to finish the project by the end of April 2019 and wanted the penalty clause removed from the contract.

[12] Ms Mendis responded stating she was happy to work with Mr Panui on these issues to try to resolve them but needed evidence as to why variations were being requested so early in the project and of the costs Mr Panui was referring to. Ms Mendis made it clear any payments she made needed to be approved by the bank.

[13] On 10 November 2018 Ms Mendis met Mr Panui at the property. No resolution was reached regarding the issues raised by Mr Panui. Ms Mendis stated that Mr Panui against threatened that unless the first progress payment of $46,643 was not paid immediately he would not continue the work. He also refused to go through any type of mediation process.

[14] From 10 November 2018 the defendants did not return to the property.

[15] On 3 December 2018 Mr Panui emailed Ms Mendis stating that he had put the build "on hold". The reasons he provided was that he needed proof that funds from Ms Mendis would be available to make payments for any future variations and an outstanding variation payment of $639.40 for a drainlaying contractor. He also required that all instructions from the architect needed to be by way of email.

[16] Ms Mendis responded on 3 December 2018 rejecting any basis for Mr Panui to make the above demands. She also stated she believed she had fulfilled her

obligations under the contract. Furthermore, she stated that she considered the "hold" on the works was unjustified and that unless he returned to work, he would be in default under the contract.

[17] Mr Panui then responded by way of email on 5 December stating that the project was on hold due to "health issues" and that he wanted to be released from the contract.

[18] On 10 December 2018 Ms Mendis emailed Mr Panui giving him five working days to:

(a) Either reorganise the management of the project to ensure the completion dates could be reached; and

(b) Affirm that he was not about to walk away from the current contract.

[19] On 17 December 2018 Mr Panui responded by way of email. He maintained Ms Mendis was unable to fund the project but provided no evidence to justify the same. He also confirmed that he should not have to fund the project but did not provide any evidence to support that claim.

[20] After not hearing from Mr Panui, on 4 January 2019 Ms Mendis emailed Mr Panui noting that the first stage should have been completed by 24 December, which it was not. Due to that failure and that he had not been onsite, he was in breach of contract. She then stated Mr Panui needed to treat her email as a Notice of Default under the terms of the contract and requested him to remedy any breaches within 10 working days pursuant to clause 119 of the contract.

[21] Ms Mendis did not hear anything from Mr Panui and on 19 January 2019 sent a further email noting that the 10 working days after the Notice of Default had passed and therefore gave notice that the contract was cancelled. She reserved all rights to make any claims for losses and damages incurred.

[22] Ms Mendis then sought to engage a new contractor. She managed to secure a fixed priced contract with Premier Residence Limited for $499,765. Premier

Residence Limited examined the drainage work which had been completed by the defendants and placed a value on that work of $30,965. Accordingly, it reduced its total price to $468,800.

[23] Premier Residence Limited undertook the construction completing the project on 18 June 2020. Ms Mendis secured tenants for the new units with both new tenancies starting on 14 July 2020. The units were rented for $1,150 per week (combined).

Losses Claimed by Ms Mendis

[24] Ms Mendis claims a range of losses as a result of the defendants' default in performing the contract and resultant cancellation of the same.

[25] Before I consider what damages Ms Mendis is entitled to claim, I firstly find that the defendants breached the terms of the contract by failing to perform the work in accordance with the terms of the same. Mr Panui seemed intent on breaching his obligations under the contract, reaching the point where he failed to return to the project at all. In the circumstances I find that Ms Mendis was entitled to cancel the contract and she did so in accordance with the terms of the contract.

[26] Having found that the defendants breached the contract Ms Mendis is entitled to damages and I turn to consider the same. The starting point is Ms Mendis is entitled to be put back into the same position as if the contract had been performed by the defendants.

[27] The first claim is for a refund of the deposit which was paid less the amount which Premier Residences Limited calculated was the value of the drainage work. In addition, Ms Mendis has claimed "loss of bargain" damages being the difference between the price of the contract with the defendants ($466,430.80) and the amount agreed to be paid to Premier Residences Limited being $499,765.

[28] The two heads of claim are conflated and do not necessarily represent a true measure of Ms Mendis' loss. The correct calculation is the total amount Ms Mendis

has paid and the difference between that sum and what she contracted to pay the defendants.

[29] The total amount she paid was the initial deposit of $46,643, plus the sum of $468,800 paid to Premier Residences Limited after the discount for the drainage was provided. This sum totals $515,443. From this sum is deducted the contracted amount with the defendants which was $466,430, being a difference of $49,013.

[30] The sum for $49,013 is the increased amount Ms Mendis has had to pay for the completion of the project. This sum takes into account the deposit she has paid and also the credit to the defendants for the drainage work. I award this sum accordingly.

[31] Mrs Mendis then seeks consequential losses as a result of the breach. I deal with these individually.

[32] The first is the cost of engaging a quantity surveyor to assess the value of the defendants' drainage work. That amount was $575, and I award this accordingly.

[33] Ms Mendis was then required to extend the contract insurance over the project which amounted to $1,335.17. I award this sum as well.

[34] Additional surveying was required. The cost for this work totalled $2,070 which I award.

[35] Soil and other rubble was left by the defendants on the building site which needed to be removed. This was undertaken at a cost of $1,600 and I award this sum as well.

[36] The final claim relates to loss of rent which Ms Mendis claims a total of $67,100. The sum is based on the agreement which required the units to be completed by April 2019, meaning the two newly built units would be ready for rental by 14 May 2019. She also points to the fact that there was a liquidated damages clause in the contract at $1,100 per week which supports the importance the project needed to be finished on time.

[37] She has then calculated the period between 14 May 2019 to 14 July 2020 when the units were able to be rented, being a total of 61 weeks. 61 weeks x $1,100 per week amounts to $67,100.

[38] It is immediately obvious that the build time it took Premier Residences Limited to complete the project was significantly longer than period for completion allowed for under the contract.

[39] It would appear it took Premier Residences Limited some 13 months to complete the project. The expected construction period for the defendants was approximately seven months.

[40] Ms Mendis wished to rely on the liquidated damages clause to reflect the damages claimed but a liquidated damages clause can only be used as a reasonable pre-contract estimate of the losses an owner is entitled if a project is not completed on time. In my view, based on differences in the construction periods it was never a genuine pre-estimate of losses as it was inevitable the project could not be completed within the seven month timeframe.

[41] Furthermore, there is no evidence as to why the project took 13 months to be completed verses the seven months agreed with the defendants. Whether it was to do with the fact the seven months was grossly under-estimated or whether the scope changed under Premier Residences Limited is unknown. If the scope had changed which extended the completion period, then clearly the defendants would not be liable for this extension.

[42] Notwithstanding the defendants were clearly in breach of their obligations under the contract, in my view the appropriate measure of damages is not for the full period that it took to complete the project (being the 61 weeks calculated by Ms Mendis), but a sum which is reasonable taking into account all circumstances.

[43] To this end I consider the circumstances to include; there was an unjustified breach, the contract was validly cancelled, the original project was estimated to be seven months but ended up being 13 months, I have no evidence whether a change of

scope may have contributed to the extended construction period, Ms Mendis did incur holding costs from her loan with the bank, and, there was a liquidated damages clause in the contract. Balancing these interests my view is that an appropriate measure of the damages for loss rental is a calculation of the difference between the contracted period the defendants committed to (seven months) and the actual time to build the units being 13 months, the difference being six months.

[44] Accordingly, I assess the appropriate calculation to be 26 weeks at a rate of $1,150 being the amount the units were rented out for. The gross sum amounts to $29,900.

[45] In terms of the amount that should be awarded however, Ms Mendis rightfully acknowledges that the amount is a gross sum and does not reflect the actual sum she would otherwise receive once tax is paid from the rental.

[46] In these circumstances the sum awarded should reflect a net sum with her actual loss being closer to two-thirds of the total rental sum. Accordingly, for the claim for loss rental, I award the sum of $20,000.

[47] The total amount of damages to be awarded then can be summarised as follows:

	$ Amount
Damages for breach of contract	$49,013.00
Quantity Surveyor to assess drainage work	575.00
Extension contract insurance	1,335.17
Additional surveying	2,070.00
Soil and rubble removal	1,600.00
Loss of rent	20,000.00
Total damages awarded	**$74,593.17**

[48] I award then as a total judgment sum the sum of $74,593.17. In addition to the judgment sum I award disbursements as fixed by the Registrar.

Signed at Auckland this 26th day of July 2022 at 4.15 pm

_____
Judge D J Clark
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 26/07/2022