Neutral Citation [2015] IEHC 322

THE HIGH COURT

[2014/999S]

BETWEEN

ULSTER BANK IRELAND LTD

PLAINTIFFS

AND

MARY GEARY & BREETA (OTHERWISE BRIDGET) GEARY

DEFENDANTS

JUDGMENT of Mr. Justice Fullam delivered the 21st day of May, 2015

1. This is a claim for summary judgment in the sum of €1 million against the defendants as guarantors of the company Hy-Many (Pontoon) Ltd. of which they were directors and shareholders. The company owned and operated the Pontoon Bridge Hotel in Co. Mayo. The hotel is a family business started by the parents of the defendants. The defendants were head-chef and general manager respectively of the hotel.

2. The plaintiffs claim is on foot of a continuing guarantee dated the 3rd March, 2005 with a limit of €1 million. Pursuant to facility letter dated 24th April, 2009 as amended and extended, in particular by facility letter dated 26th May, 2010 the plaintiffs advanced sums totalling €5.5 million to cover working capital and capital investment for the extension of the hotel.

3. The company defaulted on the loans.

4. On 16th June, 2011 the plaintiffs demanded payment from the company of the outstanding amount of €5,247,544.90. By letters dated the 21st June, 2011 and 6th November, 2013 the plaintiffs called on both defendants to discharge the said guarantee.

5. The defendants failed to discharge any part of the said guarantee.

6. The plaintiffs grounding affidavit of 4th June, 2014 sworn by Roy McKnight exhibits the Guarantee, Facility letters, and demands for payment from the company and from the defendants. Mr Mc Knight says he believes that the defendants have no *bona fide* defence to the Plaintiff's claim.

7. In their replying affidavits sworn on 21st July, 2014, which are identical for all practical purposes, the defendants allege that they were not aware that they were signing guarantees but on the contrary they believed that they were assigning the benefit of a life assurance policy taken out by each of them in the sum of €500,000.00. The defendants exhibit a letter dated 2nd December 2013 from their solicitors to the plaintiff alleging that the plaintiff's manager, Mr Pat Holmes, with whom they had a long business relationship, procured their signatures to certain documents by "*passing them off*" as assignments of life assurance policies. The penultimate paragraph of the letter states:

"We say that our clients were unscrupulously steered into signing documents and were never afforded time for careful consideration, independent advice and informed consent."

8. The matter came before the Master on 25th July, 2014. The Master refused the plaintiffs application for an adjournment in order to file a supplemental affidavit and struck out the plaintiffs claim awarding costs to the defendants.

9. On 29th July, the plaintiffs issued a motion seeking (1) the setting aside of the Masters order and (2) liberty to enter final judgment in the sum of €1 million against the defendants jointly and separately. The Notice of Motion was grounded on the affidavit of Ms. Emer Shields of the same date.

10. When the matter came before this Court, counsel for the defendants correctly accepted that the Master had no power to strike out a contested claim for a liquidated sum (see the decision of Kearns P. in Bank of Ireland v Dunne & Cawley unreported judgment 8th November, 2013.).

Liberty to Enter Final Judgment

11. The guarantee relied upon by the plaintiffs is a four page document. The title page reads:

> 'Dated 3rd March, 2005
>
> Mary Geary & Breeta Geary
>
> To
>
> Ulster Bank Ireland Ltd
>
> Guarantee
>
> for
>
> €1 million
>
> Account Hy-Many (Pontoon) Ltd.'

On the left-hand side of page 3, the words 'Personal Guarantor' in large capital type appear above the words; *"Signed, Sealed and Delivered by the above named Guarantor"*. The signatures of the defendants appear directly opposite these words over their hand-written printed names. The signature of the witness to the defendants' signatures is that of Pat Holmes, manager of the plaintiff's branch at Castlebar.

12. The facility letter dated 26th May, 2010 comprised three facilities, A, B and C. Facility A was an overdraft limited to €110,000.00 in respect of working capital. Facility B was a demand loan facility in the sum of €2,248,000.00. Facility C was a committed loan facility in the sum of €2,700,000.00. Facility B and C were in respect of renovation works to the Pontoon Bridge Hotel and associated costs. At page 3 of the facility under the heading of "Security" the letter states:

> *"3. Joint and separate letter of guarantee signed by Mary and Breeta Geary in the sum of €1 million."*

On the final page of the facility letter there is an Acceptance dated the 30th May, 2010 by the signatures of Ann Geary, Directors/Secretary and Mary Geary, Director.

13. It would appear from the defendant's affidavits that, in December 2004, a contractor engaged to carry out extension works to the hotel demolished a significant portion of the hotel without agreement or permission. This necessitated significant additional borrowing by the company from the plaintiff. The defendants say that the plaintiffs requested each of them to put in place policies of Life Assurance in sum of €500,000.00 in place for the facilities being sought. They say that an arrangement was made by Mr. Holmes to meet at his office on the afternoon of 3rd February, 2005. On the morning of the 3rd of February, the defendants met with a Mr. Padraig Quinn, Insurance Broker who provided quotations for life assurance cover of €500,000.00 in respect each defendant obtained from Irish Life of that date. Subsequently, the defendants obtained life cover as appears from the confirmation statements dated the 5th February in the case of the first defendant and the 10th February in the case of the second defendant. The cover notes are signed by William P. Holmes, General Manager Brokerage.

14. The defendants, accompanied by their mother Ann, met with Mr. Patrick Holmes on the afternoon. The defendants say that they had known Mr. Holmes and his family well and trusted and relied upon him in their dealings with him. However, they say that at no stage during their dealings with him did he point out to them that they were required to provide personal guarantees for borrowings nor did he explain any such guarantees. They say that they had no advance notification that a guarantee was required. They say that they were not shown the front page of the document and believe that Mr. Holmes must have turned over the document so that the signing page of it was presented for their signatures. They say that the date of the guarantee document is the 3rd of March, 2005 and they aver that they did not meet Mr. Holmes or any one else from the plaintiff company on the 3rd March.

In essence the defendants maintain that the guarantee was effectively "slipped through" amongst the insurance policy documentation and assignment documentation. They say that they never saw the first, second and fourth pages of the four page document. They say that they believed they were signing the assignment of life policies in favour of the Ulster Bank when they met with Mr. Holmes on the 3rd February.

15. In her grounding affidavit for the reliefs sought in the Notice of Motion, Ms. Shields confines her evidence to the chronology of the proceedings before the Master. Consequently the state of the evidence remains as it was before the Master. Therefore, notwithstanding the defendants' principal allegation of misrepresentation/deception , set out in the solicitor's letter prior to the institution of the summary proceedings and repeated on affidavit, the plaintiff has chosen not to address on affidavit the factual matrix of the defence raised. Instead the plaintiff simply says, by way of submission, that the defence of *non est factum* is a question of law which the court should determine at summary stage in the circumstances of this case as it is straightforward matter. The plaintiff submits that it is clear that the defendants cannot prove they were not negligent in signing the guarantee and therefore cannot bring themselves within the third limb of the test applied by Morris J. in Tedcastle Mc Cormack v Mc Crystal 15th March 1999. The plaintiff submits that the defendants have admitted on affidavit that they did not read the document and were only shown the page on which their signatures were required. They submit that it would be difficult to avoid seeing the words "personal guarantor" and "above named guarantor" opposite their printed names on the signature page.

The Law

16. The parties agree that the legal principles applicable in an application for summary judgment are those set out primarily in the judgment of Mr. Justice Hardiman in *Aer Rianta v. Ryanair* [2001] IR 607 in the Supreme Court and by Mr. Justice McKechnie in *Harrisrange v. Duncan* [2003] 4 IR 1.

17. Having reviewed the authorities, Hardiman J said at page 623:-

> *"In my view, the fundamental questions to be posed on an application such as this remain: is it "very clear" that the defendant has no case? Is there either no issue to be tried or only issues which are simple and easily determined? Do the defendant's affidavits fail to disclose even an arguable defence?"*

18. In *Harrisrange Ltd. V. Duncan* McKechnie J said at page 7:-

> *"9. From these cases it seems to me that the following is a summary of the present position:-*
>
> *(i) the power to grant summary judgment should be exercised with discernible caution;*
>
> *(ii) in deciding upon this issue the court should look at the entirety of the situation and consider the particular facts of each individual case, there being several ways in which this may best be done;*
>
> *(iii) in so doing the court should assess not only the defendant's response, but also in the context of that response, the cogency of the evidence adduced on behalf of the plaintiff, being mindful at all times of the unavoidable limitations which are inherent on any conflicting affidavit evidence;*
>
> *(iv) where truly there are no issues or issues of simplicity only or issues easily determinable, then this procedure is suitable for use;*
>
> *(v) where however, there are issues of fact which, in themselves, are material to success or failure, then their resolution is unsuitable for this procedure;*
>
> *(vi) where there are issues of law, this summary process may be appropriate but only so if it is clear that fuller*

argument and greater thought is evidently not required for a better determination of such issues;

(vii) the test to be applied, as now formulated is whether the defendant has satisfied the court that he has a fair or reasonable probability of having a real or bona fide defence; or as it is sometimes put, "is what the defendant says credible?", which latter phrase I would take as having as against the former an equivalence of both meaning and result;

(viii) this test is not the same as and should be not elevated into a threshold of a defendant having to prove that his defence will probably succeed or that success is not improbable, it being sufficient if there is an arguable defence;

(ix) leave to defend should be granted unless it is very clear that there is no defence;

(x) leave to defend should not be refused only because the court has reason to doubt the bona fides of the defendant or has reason to doubt whether he has a genuine cause of action;

(xi) leave should not be granted where the only relevant averment in the totality of the evidence, is a mere assertion of a given situation which is to form the basis of a defence and finally;

(xii) the overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just result whether that be liberty to enter judgment or leave to defend, as the case may be."

19. The parties are also agreed that the test in respect of the defence of *non est factum* is as set out by Morris J in *Tedcastle McCormack & Company Limited v. Mc Crystal* at page 7780 as follows:

"I am satisfied on the authority of Saunders v. Englia Building Society [1971] AC 1004 that a person seeking to raise the defence of non est factum must prove:

(a) that there was a radical or fundamental difference between what he signed and what he thought he was signing;

(b) that the mistake was as to the general character of the document as opposed to the legal effect; and

(c) there was a lack of negligence i.e. that he took all reasonable precautions in the circumstances to find out what the document was."

Decision

20. From the foregoing it is clear that the threshold the defendant has to meet in resisting an application for summary judgment is a low one, that in deciding on the issue the court should look at the entirety of the situation and consider the particular facts of each individual case. In doing so, the Court should assess not only the defendants response, but also in the context of that response, the cogency of the evidence adduced on behalf of the plaintiff, being mindful at all times on the unavoidable limitations which are inherent on any conflicting affidavit evidence.

21. It appears clear from the summary of McKechnie J that the court should not draw conclusions as to whether there are real issues of fact or law unless and until "the whole situation" is before the court. In this case the whole situation is not before the court as the plaintiff has not adduced any evidence to rebut the principal point raised by the defendants in their affidavits. As matters stand the defendant's allegations are uncontradicted. Those allegations are not mere assertions. The defendants have adduced evidence of seeking and obtaining life assurance cover in early February 2005 for separate policies in the amounts of €500,000. This is consistent with their averments that their purpose in attending the meeting with Mr Holmes was to assign the life assurance policies to the plaintiff as security for the company's borrowings. If the plaintiff had a different explanation, then presumably Mr. Holmes could have set it out on affidavit with relevant exhibits. This has not been done.

22. In the circumstances, having regard to the fact that the plaintiff has been on notice since December 2013 that the defendants' principal defence was that they were misled by the plaintiff's agent and the plaintiff, despite seeking an adjournment from the Master for the purpose, has not provided any evidence in refutation, I cannot be satisfied that I can exclude a fair or reasonable probability of the defendant having a real or bona fide defence. (see Laffoy J in *ACC Bank Plc v. Malocco* [2000] IR 191 at page 202).

23. The defendants raised a number of subsidiary points which also could have been explained or refuted by Mr. Holmes, in particular the assertion that he was in a fiduciary position to the two defendants.

24. Therefore, having regard to all the circumstances, I believe it would not be just to grant the plaintiff liberty to enter final judgment against the defendants.

25. I will remit the matter to plenary hearing where discovery may clarify the factual matrix underpinning the core point raised by the defendants.