THE HIGH COURT

COMMERCIAL

[2017 No. 2440 S.]

BETWEEN

PROMONTORIA (ARROW) LIMITED

PLAINTIFF

AND

CATHAL MALLON AND MICHAEL SHANAHAN

DEFENDANTS

EX TEMPORE JUDGMENT of Mr. Justice Twomey delivered on the 11th day of October, 2018

Application for summary judgment for €2.1 million against Mr. Mallon

1. The plaintiff ("Promontoria") is applying for summary judgment against the first named defendant ("Mr. Mallon") arising out of a loan facility provided by EBS Building Society ("EBS") to Mr. Mallon and the second named defendant ("Mr. Shanahan") on foot of a facility letter dated 28th June, 2006. The agreed facility was €1,800,000 and was for the purchase of a one acre site for development at Mill Lane, Shankill, Co. Dublin (the "property"). The facility letter of 28th June, 2006, was amended by further facility letters of 7th November, 2008 and 24th March, 2009, extending the term of the loan (the "Facility Agreement").

2. On 4th August, 2006, 2nd December, 2008 and 9th April, 2009, Mr. Mallon and Mr. Shanahan accepted the terms of the Facility Agreement as so amended by facility letters dated, 28th June, 2006, 7th November, 2008 and 24th March, 2009.

3. Pursuant to the powers of the National Asset Management Agency Act 2009, National Asset Loan Management Limited ("NALM") became legally and beneficially entitled to the facility and other rights connected therewith. On 11th December, 2015, Promontoria acquired the rights of NALM to the loan.

4. The plaintiff sent Mr. Shanahan and Mr. Mallon a letter of demand on 7th July, 2016, in the sum of €2,044,306.23, being the sum then due and owing under the Facility Agreement.

5. Summary judgment was granted in favour of Promontoria against Mr. Shanahan by McGovern J. on the 22nd March, 2018 on foot of these proceedings (*Promontoria v Mallon and Shanahan* [2018] IEHC 145). The proceedings against Mr. Mallon were adjourned and it is those adjourned proceedings which are now before this Court.

6. Mr. Mallon accepts that the money was borrowed and that it remains unpaid. However he raises two defences to this application for summary judgment against him:-

- First, that the loan was on the basis of limited recourse, being the value of the property and that that he did not believe that the loan he was entering amounted to a personal guarantee or a joint and several liability; and

- Secondly, that the matter should proceed to plenary hearing to allow discovery which will assist him in establishing his defence.

Law

9. The law regarding the granting of summary judgments is set out clearly in the judgment of McKechnie J. in *Harrisrange v. Duncan* [2003] 4 I.R. 1, where he sets out the twelve factors to be considered when a court is deciding to make an order for summary judgment. While all of those factors have been considered by this Court in this application, it is not necessary to set out all those factors here in this ex temp judgment. However the most relevant factors to the circumstances of this case are that the Court should ask whether the defence put forward by the defendant to the application for summary judgment is credible bearing in mind that the mere assertion by the defendant of a defence based on a given situation is not sufficient for the matter to be sent to plenary hearing.

10. With this in mind, it is to be noted first that the claim by Mr. Mallon that the loan was limited recourse flies directly in the face of the documentary evidence. This is because Clause 11 of the Facility Agreement states in very clear terms that the liability of Mr. Mallon is joint and several and Paragraph 12 of the standard terms and conditions applicable to that loan also expressly entitle the lender to *'call for immediate repayment'* of the loan. There is no reference anywhere to the loan being limited recourse. In addition, no evidence is provided by Mr. Mallon to contradict this evidence that the loan was not limited in recourse. Accordingly, in this respect Mr. Mallon's defence amounts to a mere assertion. Furthermore, as well as signing the initial facility letter dated 28th June, 2006 agreeing to the foregoing Clause 11 and Paragraph 12, Mr. Mallon signed a facility letter dated 7th November, 2008 (on the 2nd December, 2008) accepting that the terms of the loan (which include Clause 11 and Paragraph 12) *'shall remain unchanged'*. In addition , he signed a facility letter dated 24th March, 2009 (on the 9th April, 2009) accepting once again that the terms of the loan (including Clause 11 and Paragraph 12) remain unchanged. In these circumstances, this Court can have little hesitation in concluding that this aspect of Mr. Mallon's defence, namely that the loan was non recourse, is not credible.

11. The second claim made in his defence by Mr. Mallon is that he did not believe in signing the Facility Agreement that he was entering *'open ended joint and several personal guarantee (PG) terms with the EBS'*. This defence flies in the face of the documentary evidence (to which reference has already been made i.e. Clause 11). In addition, no evidence is provided by Mr. Mallon to support this claim and thus it also amounts to a mere assertion.

Furthermore, the claim that Mr. Mallon did not appreciate that he was entering a personal guarantee is somewhat confusing and not helpful to his defence, since the Facility Agreement contains no element of a personal guarantee and therefore Mr. Mallon was *not* entering a personal guarantee as he believed. This is because Mr. Mallon is the primary obligor under the loan (along with Mr. Shanahan), albeit that he does so on a joint and several basis.

In this regard, this Court has already concluded that the loan documentation expressly states that the borrowings were on a joint and several basis and that there was no evidence provided by Mr. Mallon to support a contrary conclusion. Accordingly, the claim that Mr. Mallon did not appreciate that he was entering a joint and several liability (or as he terms it a personal guarantee) is a bald assertion and does not amount to a credible defence to these summary proceedings.

12. Thirdly, Mr. Mallon claims that that the matter should proceed to plenary hearing to allow discovery which will assist him in establishing his defence. This begs the same question, as asked by McGovern J in his decision regarding the summary judgment granted agasint Mr. Shanahan (*Promontoria v Mallon and Shanahan* [2018] IEHC 145 at para 32), namely *"discovery of what?",* since as is clear from the decision of Baker J in *ACC v Dolan* [2016] IEHC 69 and the decision of Clarke J. in *GE Woodchester v Aktiv Kapital* [2009] IEHC 512, for a litigant to be entitled to discovery, there must be a rational basis for discovery and bald assertions of a particular state of facts do not give rise to a right to discovery to establish those facts. In this instance, Mr. Mallon has made bald assertions regarding the loan being limited recourse and it being a loan which was not joint and several and being a loan which did not amount to a personal guarantee. These bald assertions do not give rise to a right to discovery and so the allegation of a right to discovery in these circumstances is not a credible defence to the application for summary judgment.

Conclusion

13. Since Mr. Mallon does not have a credible defence to the application for summary judgment, this Court proposes to grant judgment and will hear counsel regarding the terms of the final order.