

THE HIGH COURT

[Record No. 2014 2500 S]

BETWEEN

AIB MORTGAGE BANK

PLAINTIFF

AND

SEAMUS MCBRIEN AND ANN MCBRIEN

DEFENDANTS

JUDGMENT of Mr. Justice Robert Eagar delivered on the 8th day of December, 2017

1. This is a judgment on an application for summary judgment by the plaintiff against the second named defendant in circumstances where the first named defendant did not oppose the application for summary judgment against himself.
2. The affidavit of Brian McGuinness, manager for the plaintiff, sets out that by letter of offer of mortgage dated the 17th August, 2007, the plaintiffs agreed to extend a mortgage loan in the sum of €518,000 to the defendants on a joint and several basis in relation to a residential property at 7 Shrewsbury Court, Ailesbury Road, Ballsbridge, Dublin 4. The term of the said mortgage loan was for 15 years and that interest was chargeable on the loan monies as provided for pursuant to the terms of the letter of mortgage offer. On the 6th September, 2007, the first and second named defendants signed an acceptance of the conditions of the offer. The signatures of both first and second named defendants were witnessed by their solicitor Liam Davis.
3. On the 23rd April, 2007, the form of undertaking agreed between the Incorporated Law Society of Ireland and the Irish Bankers Federation was signed by the first and second named defendants authorising Mr. Davis to give an undertaking in accordance with the form. On the 9th September, 2007, Mr. Davis was authorised by the first and second named defendants in a document entitled "Clients Retainer and Authority" and signed by both the first and second named defendants. There was no signature on the Family Home Protection Act consent on the basis that both were parties to the Agreement. On the 2nd October, 2007, the first and second named defendants signed a letter forwarded to AIB for the Manager, AIB 219 Crumlin Road, Dublin 12 confirming that they are fully aware of all possible implications which may arise as a result of not availing of life cover on the property at 7 Shrewsbury Court, Ailesbury Road, Ballsbridge, Dublin 4. Also signed by both the defendants was a AIB mortgages application form.
4. The affidavit of Brian McGuinness states that the defendant are businesspeople who both have an address at Corragh, Derrylin, Co. Fermanagh, Northern Ireland.
5. Mr. McGuinness says that the previously mentioned letter of mortgage loan was governed by the plaintiff's general terms and conditions governing mortgage loans, and he refers to a copy of same. It is clear that on Part 7 of the conditions that under the heading "Acceptance and Consent", the first named and second named defendants signed the conditions of the offer and agreed to mortgage the property to the lenders as security for the mortgage loan, both signed their names in the presence of their solicitor Liam Davis on 6th September, 2007.
6. Mr. McGuinness states that the defendants defaulted on their repayment on instalments of interests and/or capital required pursuant to the terms and conditions of the letter of mortgage offer and he referred to separate letters dated the 16th April, 2013, one of which was sent to the second named defendant at her home address at Coragh, Derrylin, Co. Fermanagh, which indicated that the defendants and each of them were in breach of the terms of the agreement by their failure to comply with the terms of repayment and requested in writing the payment within 21 days of the amount of €20,005 representing the amount due and owing in respect of arrears. He then refers to a letter dated the 28th July, 2014, from the plaintiff's bank to both of the defendants giving their address at 30, Chapel Road, Coragh, Derrylin, Co. Fermanagh, which he stated was a letter of demand. The letter states that on close of business on the 7th July, 2014, the aggregate sum of €373,134.36 representing the principal sum of €372,898.69 together with the interest of €235.70, was due and owing by both of them to the bank under the particulars of the offer of the mortgage loan. The letter further indicated that the plaintiffs were now exercising its contractual entitlement to demand early repayment of the mortgage loan balance which stood at €373,134.36. Mr McGuinness then exhibits the tracker mortgage statement from the opening balance on the 29th November, 2007, to the 2nd November 2015, where it is clear from the later statements of the tracker mortgage that loan repayments were not being paid.
7. The affidavit of the second defendant, Ann McBrien, says simply that she did not sign the letter of offer of the mortgage loan dated the 17th August, 2007, as the signature is not her signature. She also states that she did not sign any mortgage deed nor did she obtain any legal advice or give consent to the said mortgage. In those circumstances, Ms McBrien states that the plaintiff has no claim against her as she was never a party to a mortgage deed nor did she ever endorse her acceptance upon the letter of offer of mortgage dated 17th August, 2007.
8. The affidavit of Colette Rooney, manager of AIB Mortgage Bank states that, having reviewed the books and records of the plaintiff with regards to what Ms. McBrien avers to in her affidavit, the averments on the part of Ms. McBrien are not credible.
 1. the signature of Ms. McBrien on the letter of loan facility was witnessed by her own solicitor.
 2. Ms. McBrien's signature also appears on the mortgage entered between the parties on or around the 29th November, 2007, and again witnessed by her solicitor on that document.
 3. The defendant's solicitor completed an undertaking to the plaintiff in connection with the application by the defendants for bridging finance for the purchase of the mortgage proceedings, that undertaking was dated the 23rd April, 2007, and was signed by both Ms. McBrien and her husband.
 4. Upon the purchase of the property the defendants' solicitor completed a residential mortgage lending solicitors' undertaking in the Law Society approved form in favour of the plaintiff on the 9th September, 2007. In this undertaking the defendant's solicitor confirmed he was authorised by the defendants (this courts emphasis) to give the said undertaking and the signature of both Ms. McBrien and her husband appeared on the authority form at the end of the said undertaking.

5. On the 2nd October, 2007, the plaintiff received a letter signed by both Ms. McBrien and her husband confirming that they were aware of the possible implications which may arise as a result of them not availing of life cover on the mortgage.

6. The defendants also completed signed and returned to the plaintiff a mortgage application form in relation to said mortgage loan.

7. Numerous letters were written to the defendant in relation to the arrears arising on the account. While certain of these letters were addressed to both of the defendants at 7 Shrewsbury Court, Ailesbury Road, Ballsbridge, Dublin 4, being the address of the mortgage property she says that a number of letters were addressed directly to the second named defendant and only the second named defendant at her home address.

8. Numerous bank statements were also sent to the defendant in relation to the balance of the mortgage.

9. On the 16th December, 2013, an initial demand letter was sent to the second named defendant at her home address marked "personal".

Ms. Rooney swears that, notwithstanding that the defendants were sent and must have received all of this correspondence, at no time prior to the filing of her affidavit did Ms McBrien ever allege that she was a stranger to the loan and to the mortgage or that her signature had been forged. She said Ms. McBrien's allegations are not credible.

The Law

9. In *Aer Rianta c.p.t. v. Ryanair Ltd* [2001] 4 I.R. 607 McGuinness J. at p.614 referred with approval to an extract from the decision in *Banque de Paris v. de Naray* [1984] 1 Lloyd's Rep. 21 where the following was stated:-

"The mere assertion in an affidavit of a given situation which was to be the basis of a defence did not of itself provide leave to defend; the court had to look at the whole situation to see whether the defendant had satisfied the court that there was a fair or reasonable probability of the defendant's having a real or *bona fide* defence."

10. In *Irish Bank Resolution Corporation Limited (in special liquidation) v. Gerard McCaughey* [2014] 1 I.R. 749 Clarke J. stated at p.759 :-

"Insofar as facts are put forward, then, subject to a very narrow limitation, the court will be required, for the purposes of the summary judgment application, to accept that facts of which the defendant gives evidence, or facts in respect of which the defendant puts forward a credible basis for believing that evidence may be forthcoming, are as the defendant asserts them to be. The sort of factual assertions, which may not provide an arguable defence, are facts which amount to a mere assertion unsupported either by evidence or by any realistic suggestion that evidence might be available, or, facts which are in themselves contradictory and inconsistent with uncontested documentation or other similar circumstances..."

11. The most useful exposition of the test to be applied by a consideration of whether or not the court should pass summary judgment is set out by McKechnie J. in *Harrisrange Limited v. Michael Duncan* [2003] 4 I.R. 1. At pp. 7 to 8 of that judgment, McKechnie J. sets out the following in his summary of the 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."

12. In this case, the evidence for the plaintiffs constitutes averments that the conditions of the mortgage loan offer was signed by both respondents in the presence of Mr. Davis who is the solicitor for both Mr. McBrien and Ms. McBrien. There is also evidence that Ms McBrien was written to both at the Shrewsbury Road address, but also at her home address at Coragh, Derrylin, Co. Fermanagh on the 16th April, 2013, in relation to this account. Also both applicants were written to in the same correspondence of the 28th July, 2014, in relation to the balance owing. It is also noted that the mortgage account was in the name of both respondents.

13. The affidavit of Ann McBrien does not deal with any of these issues but merely says that she did not sign the letter of offer of the mortgage loan which was accepted by the first named defendant and herself on the 6th September, 2007 and that the signature therefore, is not her signature.

14. The Court notes, that she does not deal at all with the issues of her solicitor acknowledging her signature, she does not deal with the correspondence and it is noted that she does not say that the undertaking dated the 23rd April, 2007, signed by herself and her husband is not her signature. She does not deal with the preapproved form which was signed by her and her husband. She also does not deal with the letter to the manager of AIB dated 2nd October, 2007, in which she and her husband confirmed by their signatures, that they were fully aware of all possible implications which may arise as a result of not availing of life cover on their property mortgage relating to the property at 7 Shrewsbury Court, Ailesbury Road, Ballsbridge, Dublin 4.

15. In all the circumstances of the case the Court is satisfied that, in the words of McKechnie J. in *Harrisrange Limited v. Michael Duncan*,

"(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."

The Court gives judgment against both defendants in the sum of €377,699.15, together with the costs of the application to be awarded to the plaintiff.