[2019] IEHC_939

**THE HIGH COURT**

**[2016 No. 1663 S]**

**BETWEEN**

**BANK OF IRELAND MORTGAGE BANK**

**PLAINTIFF**

**AND**

**MIRIAM MULDOON**

**DEFENDANT**

**JUDGMENT of Mr. Justice Meenan delivered on the 18th day of December, 2019**

**Introduction**

1. This is an application by the defendant to set aside a judgment in the sum of €1,302,82.99, obtained by the plaintiff in default of appearance in the Central Office on 22 May 2017. The amount in respect of which the plaintiff obtained judgment arose on foot of four separate loan offers, as follows: -

   (a) 16 December 2005 - €650,000;

   (b) 16 June 2006 - €250,000;

   (c) 15 August 2006 - €352,750; and

   (d) 14 March 2007 - €500,000.

2. These loan offers were made to the defendant and her then husband, Mr. Tom Muldoon. The loans were subsequently drawn down by the defendant and her then husband.

3. The defendant and her then husband defaulted on repayments and, in consequence, the plaintiff exercised its rights under the loan agreements, demanding repayment. This was not forthcoming.

4. The defendant initiated family law judicial separation proceedings on 8 June 2010 and an order for judicial separation was made by the High Court on 31 July 2015 which provided that the defendant was to get possession of the family home and her ex-husband was to indemnify mortgage payments. Subsequently, the plaintiff's former husband was adjudicated bankrupt on 4 July 2015. On 1 September 2016, the plaintiff issued a summary summons against the defendant claiming the said amount.

**Order 13, rule 11, Rules of the Superior Courts (RSC)**

5. Order 13, r. 11 RSC provides: -

> "Where final judgement is entered pursuant to any of the preceding rules of this Order, it shall be lawful for the Court to set aside or vary such judgement upon such terms as may be just."

6. The wording of this rule indicates that the court has a broad discretion, in which the interests of both parties must be taken into account.

7. In order for a court to exercise its discretion, there is a requirement that the defendant demonstrate that he or she has a defence to the plaintiff's claim that has a reasonable prospect of success. This is a higher threshold than that required for a court to remit an action to a plenary hearing on an application for summary judgment. (See *AIB Plc v. Lyons* [2004] IEHC 129).

8. Further, as the judgment is obtained in default of appearance, there has to be some explanation as to why no appearance was entered. Generally, the explanation is surprise and/or mistake.

**Consideration of defendant's application**

9. Before examining the defences put forward by the defendant to the plaintiff's claim, it is necessary to consider the circumstances under which judgment was obtained. The summary summons was served on the defendant, who passed it on to her then Solicitor. That Solicitor did not enter an appearance on behalf of the defendant. However, having obtained judgment, a clerical error was noticed in that the date on the judgment was stated to be 22 March 2017 whereas it should have been 22 May 2017 as per a court stamp. The Solicitor for the plaintiff wrote directly to the defendant requesting her to provide a letter of consent to amend the date of the judgment. This letter of consent was provided and duly signed by the defendant on 11 October 2017.

10. Though the defendant consented in writing to amending the date of the judgment, the following is stated in her grounding affidavit: -

> "10. … that a further letter dated 5th October, 2017 from the plaintiff's solicitors stated that there was an error on the face of the judgment as the date was incorrectly stated as 22nd March, 2017 and requested consent to correct the error. It appears from correspondence in the file my then solicitors consented to the amendment, although I knew nothing whatsoever about this as I had not been contacted by my solicitors in this regard …"

11. In a further affidavit, the defendant stated: -

> "I say that I refute absolutely that I consented to the amendment to the date of the judgment as I knew nothing about it until I found the correspondence between my ex solicitor and the solicitors for the plaintiff in the file I obtained from my ex solicitor and therefore I did not consent to any amendment or any matter …"

12. It is clear that the defendant did sign the letter consenting to the amendment of the date of the judgment and has not challenged her signature. This is completely at odds with what the defendant swore in two affidavits and no explanation has been forthcoming for this. This is entirely unsatisfactory. It also follows that as of October, 2017, the defendant was fully aware that judgment had been obtained against her. The within motion did not issue until 31 October 2018. Though I have serious doubts that there was any mistake or surprise on the part of the defendant concerning the obtaining of the judgment in default, I will now examine the defences put forward by her.

13. In her grounding affidavit the defendant puts forward the following defences in respect of each of the four loans: -

(i) She has no recollection of signing the loan offer letter;

(ii) She was not asked to go to the plaintiff's bank to sign the loan offer letters; and

(iii) She was not advised to seek independent legal advice.

I will now consider these defences.

14. Save in respect of the loan offer letter of 14 March 2007, the defendant did not contest her signature. There was no legal requirement that the defendant be asked to go to the plaintiff's bank to sign the said loan offer letters.

15. As for the issue of independent legal advice each of the loan offer letters state, the following: -

**"This is an important legal document. You are strongly recommended to seek independent legal advice before signing it …"**

16. Even if this wording was not present, there is no obligation per se on the plaintiff to ensure that a person, such as the defendant, obtained independent legal advice before signing a letter of offer. Such may arise where there is an assertion that a contract was entered into under undue influence. This is not the case here. As in *IBRC Ltd. v. Quinn* [2011] IEHC 470, where Kelly J. quoted from, and affirmed, the judgment of Carroll J. in *In Re Hunting Lodges Limited* [1985] ILRM 85, which follows: -

> "The day has long since passed since married women were classified with infants and persons of unsound mind as suffering from a disability so far as responsibility for their acts was concerned…"

17. There are situations where, as in this case, there are joint borrowings where a lending financial institution is put on inquiry to consider the issue of undue influence of one of the parties on another. In relation to joint loans, in *GE Capital Woodchester Home Loans Limited v. Reade and Anor* [2012] IEHC 363 Laffoy J. held that there is a distinction between joint advances where spouses enter a transaction for their joint benefit and surety cases where a guarantee is given for the benefit of one of the parties only. A bank, such as the plaintiff, will be put on inquiry where there are joint borrowings and it is aware that the loan is being advanced for the purposes of one of the parties only. This is not the factual situation here.

18. However, the defendant has raised a significant issue concerning the letter of offer dated 14 March 2007. Following the breakdown of relations with her former Solicitor, the defendant requested the return of her files. On examining the documentation, it became immediately apparent to her that her signature had been forged on the letter of loan offer dated 14 March 2007. In support of this, the defendant relied upon the affidavit of Mr. Michael Moore, who has over twenty-five years' experience in the area of forensic document examination and handwriting comparisons. Mr. Moore reaches the conclusion,

following an extensive comparison of signatures, that the evidence strongly supports the proposition that the signature on the letter of loan offer of 14 March 2007 is not that of the defendant.

**Conclusion**

19. I am satisfied that I cannot conclude that the judgment in default, obtained by the plaintiff on 22 May 2017, was either a mistake or came as a surprise to the defendant. I am also satisfied that, even if there was such surprise and/or mistake on the part of the defendant, she has not established a defence that has a reasonable prospect of success. However, in respect of the amount claimed (together with interest) on foot of the letter of loan offer of 14 March 2007, I am satisfied that the defendant has made a strong case that her signature was forged and, thus, in this respect, has a defence to this aspect of the claim. I am also satisfied that the existence of such an alleged forgery only came to the attention of the defendant when she obtained her papers from her then Solicitor. Therefore, pursuant to O. 13, r. 11 of RSC, I will vary the amount of the judgment obtained by the plaintiff against the defendant and reduce it by so much as is attributable to the amount claimed (together with interest) on foot of the letter of loan offer dated 14 March 2007.

20. As for the amount (together with interest) being sought by the plaintiff in respect of the letter of loan offer letter dated 14 March 2007, I will remit this to plenary hearing with the defence limited to the issue of the validity of the defendant's signature to the said letter.

**Order for possession**

21. On 28 November 2017, the Circuit Court made an Order, on consent, that the plaintiff recover possession of certain lands which secured the said loans. These lands consisted of the family home. A stay of nine months was put on the Order.

22. On 6 November 2018, the defendant issued a motion seeking to have the time for appealing the Order of the Circuit Court extended. In her affidavit grounding this application, the defendant referred the matters which she set out in her affidavit to set aside the judgment obtained in default. In particular, she maintained that the signature on the loan offer letter, dated 14 March 2007, was not hers. The Master of the High Court extended the time for an appeal and the plaintiff has appealed this Order, which was heard at the same time as the defendant's application to set aside judgment.

23. As I have found that the defendant is not entitled to have the judgment in full set aside, but rather varied by the amount being claimed on foot of the loan offer of 14 March 2007, it follows that the defendant is in default and that the plaintiff is entitled to enforce the security for the loans. Thus, there is no defence to the plaintiff's claim and so no basis at law for extending time to appeal the Order of the Circuit Court. (See *Eire Continental Trading Company Ltd. v. Clonmel Foods Ltd*. [1955] 1 I.R. 170).

24. Therefore, I will grant the reliefs sought by the plaintiff and set aside the Order of the Master of the High Court extending the time for appeal.