Neutral Citation Number: [2010] IEHC 63

THE HIGH COURT

BANKRUPTCY

2009 5054/5055/5056

IN THE MATTER OF

P. F.

APPLICANT

AND

K.D., N.M. AND S. McN.

RESPONDENTS

JUDGMENT of Ms. Justice Dunne delivered on the 1st day of March, 2010

Three separate applications have been brought by P.F. seeking the dismissal of bankruptcy summonses issued by K.D., N.M. and S.McN., all of which were served on the said P.F. on the 21st May, 2009. (The said P.F. will be referred to herein as the "applicant" and the said K.D., N.M. and S.McN. will be referred to hereinafter as "the respondents").

The factual background of each individual case is the same and arises out of the same circumstances and for that reason it is convenient to deal with the matters in one judgment.

The applicant herein swore three affidavits in almost identical terms seeking the dismissal of the bankruptcy summonses herein pursuant to the provisions of s. 8 of the Bankruptcy Act 1988, which provides, *inter alia*, at subs. (5) as follows:-

> "5. A debtor served with a bankruptcy summons may apply to the court in the prescribed manner and within the prescribed time to dismiss the summons.
>
> 6. The court –
>
> (a) may dismiss the summons with or without costs, and
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> (b) shall dismiss the summons if satisfied that an issue would arise for trial."

The background to this matter appears from the affidavits of the applicant sworn herein on the 3rd June, 2009. It should be noted that each of the respondents has issued a bankruptcy summons in respect of a sum of €50,000 alleged to be due by the applicant to the respondents on foot of judgments entered on the 11th August, 2008. In his affidavit grounding this application the applicant states that the judgment referred to in the bankruptcy summons was one which purported to have been granted with his consent, and he has denied that there was a consent judgment, and he further denies that he is indebted to the respondents in any sum amounting to €50,000. He stated that at the time proceedings were issued against him he was represented by a firm of solicitors, Michael Glynn & Company Solicitors of 98 O'Connell Street, Limerick. He was aware that proceedings had been issued and was advised by his solicitor that they would be fully defended. He stated in his affidavit that he never heard anything else in respect of the proceedings until he was served with a notice of a *fi. fa.* in September, 2008. He deposed to the fact that since then he has tried to get an explanation as to why judgment was entered against him by consent but he has been unable to "get any assistance". He brought proceedings in the High Court seeking an order requiring his then solicitors, Michael Glynn & Company, to deliver his file to him. He states on affidavit that he never received any correspondence from the offices of Michael Glynn & Company in respect of the proceedings, and that he never gave his consent to the judgment. He added that a review of the file showed that no such correspondence exists. He added that he has a full defence to the proceedings to which I will refer further in the course of this judgment.

As I have said, the background to this matter relates to a judgment obtained against the applicant and another individual, J.O'N.. The applicant and the respondents and J.O'N. became involved for the purpose of developing a site in Co. Tipperary. Each was to contribute in different ways. A partnership agreement was prepared by Michael Glynn & Company Solicitors dated the 29th May, 2006. Land, the subject of the proposed development, was purchased and a company was incorporated on the 13th July, 2006, in which the partners were equal shareholders. Ulster Bank had provided loan facilities in relation to the proposed development and subsequently became concerned as to the financing of the development. Arrangements were made to refinance the agreement and with a view to that proposed refinancing an agreement was entered into on the 24th August, 2007, whereby the said J.O'N. and the applicant agreed to purchase the interests of the respondents in the partnership, their interest in D.M.P. Limited and a house on lands situate in Co. Tipperary. It is submitted by the applicant that that agreement was conditional on the consent of Ulster Bank being obtained to this arrangement. It is the contention of the applicant that the agreement of the 24th August, 2007, is not enforceable on the basis that it was conditional on the consent of Ulster Bank. That consent was not forthcoming. Notwithstanding that, payments were made on foot of the agreement and these payments were in the sum of €50,000 each. Those payments were made around the 10th September, 2007. It is contended that those payments were made from funds provided by J.O'N. as a sign that the agreement was entered into in good faith.

Each of the respondents herein has sworn a replying affidavit. Although not in identical terms, there are a number of significant similarities in the affidavits. Each individual respondent has set out how they became involved in the "D. Project", and they raise similar issues by way of response to the application herein.

The first point made is that the judgment on foot of which the bankruptcy summons is based was a consent judgment – it is contended that the applicant was fully on notice of the judgment and that it was appropriately obtained against him. It is pointed out that any issues surrounding communications between the applicant and his solicitors are not matters which

should result in the dismissal of the summons. This is dealt with in each of the affidavits of K.D., N.M. and S.McN..

Each of the respondents also makes reference to the correspondence between the solicitors for each of the respondents and the applicant requesting the payment of monies due on foot of the agreement dated the 24th August, 2007. Ultimately, proceedings issued and it was pointed out that following the issue of proceedings an agreement was made that there would be consent to judgment subject to a five week stay on execution of the judgment. This agreement arose as a result of communications between the parties' solicitors. On that basis, it is contended that it is implausible to suggest that the applicant's solicitor was acting without instructions or without any input from his client.

It is also pointed out that the applicant, having been served with a *fi fa* notice on the 1st September, 2008, took no steps to set aside the judgment until after the issue of the bankruptcy proceedings. On that basis it is contended that the judgment on foot of which the bankruptcy summons issued cannot, at this stage, be challenged.

Each of the respondents then goes on to deal with the background circumstances in relation to how the parties became involved, the nature and extent of the D. Project and the role of each of the parties in relation to that project. The affidavits go on to deal with the difficulties involved in relation to the project and then dealt with the agreement of the 24th August, 2007.

I do not think it is necessary to set out in detail the issues arising in relation to the matters that led to difficulties for the development of the D. Project, which led in turn to the agreement of the 24th August, 2007. A supplemental affidavit was sworn by the applicant herein dealing with those matters to some extent and again, I do not propose to go in to those matters at this point. Suffice it to say, that there is sufficient issue joined between the parties on these matters such as to lead me to the view that had the matter proceeded in the normal way before the Master of the High Court, sufficient issues were raised as to require that the proceedings would be adjourned to plenary hearing by consent or transferred to the Judge's List for hearing.

In any event, the applicant reiterates that the judgments entered against him were entered without his consent or knowledge. He stated that at the end of March, 2008 he decided to instruct a new solicitor, namely William Loughnane of Loughnane & Company. This was apparently because of the numerous difficulties which had arisen in relation to the entire project and in particular, the difficulties which had arisen with financing and with Ulster Bank. Some of the papers involved in the matter were received from the office of Michael Glynn & Company around the 11th April, 2008, and correspondence then took place between Mr. Loughnane and the office of Michael Glynn & Company Solicitors. In the meantime, the Sheriff served a *fi fa* on the applicant and it is stated by the applicant again that this was the first he knew of the judgment. Mr. Loughnane wrote to the County Registrar by letter dated the 18th September, 2008, in the following terms:-

> "We have now obtained our client's instructions in the matter and need some time to investigate fully how the High Court order was obtained. As far as we can establish it was obtained "by consent" but we are instructed that he was unaware that the matter was before the court and that he certainly did not instruct anyone to consent on his behalf. It may well be that we have good grounds to have the proceedings re-entered or appealed."

The applicant went on to explain that it was necessary to bring a motion before the High Court in order to obtain his complete file from Michael Glynn & Company. The applicant went on in that affidavit to indicate he had been advised by his solicitor that he would need to issue proceedings against Michael Glynn & Company for professional negligence and breach of contract. Finally, he went on to suggest that he had strong grounds for having the judgment set aside which would have to be dealt with at a trial. In those circumstances, he sought the relief claimed herein.

During the course of submissions in this matter I was referred to a decision of the High Court in the case of *Minister for Communications, Energy and Natural Resources v. M. & Or.,* (Unreported, High Court, McGovern J., 12th May, 2009) in which a bankruptcy summons was dismissed by reason of s. 8(6)(b) of the Bankruptcy Act 1998, on the grounds that an issue arose for trial. At p. 3 of his judgment McGovern J. referred to the relevant legal authorities and stated:-

> "In the matter of a bankruptcy summons by St. Kevin's Company against a debtor, the Supreme Court in an unreported ex-tempore judgment delivered on the 27th January, 1995, delivered by Hamilton C.J. expressed the view that the correct interpretation of s. 8(6)(b) of the Bankruptcy Act, was that the High Court should not undertake an investigation into the merits of the case once it was satisfied that an issue arose on the summons. In those circumstances the Supreme Court stated that it was mandatory for the court to dismiss the summons if it was satisfied that an issue arose between the parties, and the issue would have to be litigated separately outside the bankruptcy process…"

McGovern J. went on at p. 12 of the judgment to state:-

> "In my view this is a real and substantial issue and one which is, at least, arguable and which has some prospect of success.
>
> That being the case, it seems to me that I have to dismiss the summons by virtue of s. 8(6)(b) of the Bankruptcy Act 1988, and following the decision of the Supreme Court in St. Kevin's Company against a debtor. It is with some disquiet and misgivings that I reach this conclusion because there can be no doubt but that the applicants are very significantly indebted to the respondents on foot of the orders for costs which have been made against them and properly taxed and ascertained."

That case sets out the correct approach to be taken by this Court. The question to be determined is whether there is an issue that arises from the summons that requires to be litigated outside the bankruptcy proceedings. It is clear from that decision that this Court is precluded from undertaking an investigation of the merits of the case. The role of the court is to determine if there is an issue which is, at least, arguable and which has some prospect of success. The bankruptcy summons in this case in the particulars of demand sets out the following:-

> "The aforesaid (respondent) claims against the said (applicant) an amount in the sum of €50,000 being the sum due by the said (applicant) in respect of a judgment entered on the 11th day of August, 2008."

It is clear that the bankruptcy summons herein is predicated on that judgment. The applicant herein contexts and indeed, vigorously contests, the contention that he must have been aware of the obtaining of judgment against him in circumstances where certain communications took place between his then solicitors and the solicitors for the respondents. Proceedings have now been issued by the applicant seeking to have that judgment set aside. I accept that the respondents have strongly challenged the contention of the applicant in his sworn affidavits as to his knowledge of the "consent" judgment, nonetheless the position is that there is an issue to be tried that the judgment should not have been entered against the applicant herein. That issue is at least arguable and has some prospect of success.

In those circumstances, it is clear that I have no choice but to dismiss the bankruptcy summonses herein. The terms of s. 8(6)(b) of the Bankruptcy Act 1988, are clearly mandatory in their terms. Accordingly, I propose to dismiss the bankruptcy summons.

There was some delay on the part of the applicant herein in issuing proceedings seeking to set aside the judgment against him. That being so, in my view it is important that the applicant proceeds expeditiously with those proceedings. No doubt, a failure to do so could lead to the issue of further bankruptcy summonses if, following a reasonable period of time to allow those proceedings to be prosecuted, the applicant herein has failed to do so.