NEUTRAL CITATION NUMBER [2012] IEHC 345

THE HIGH COURT

[2010 No. 5967 S]

BETWEEN

WINTHROP ENGINEERING LIMITED

PLAINTIFF

AND

DAVID FLYNN LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Mac Eochaidh delivered on the 31st day of July 2012

1. This is an application by the plaintiff for liberty to enter final judgment in the sum of €52,500.

2. The defendant was engaged as the contractor to construct a hotel, office and apartment development pursuant to a Building Contract. The plaintiff was the nominated subcontractor for mechanical installation works on the project and the nomination of the plaintiff was communicated to the defendant by the project architects on 30th January, 2006.

3. Article 16 of the Building Contract provides:

> *"(b) The sums directed by the Architect to be paid to Nominated Sub- Contractors for work, materials or goods comprised in the sub-contracts shall be paid by the Contractor within five working days of receipt of payment on the Architect's certificate for the value of such work, materials or goods less only any retention money and cash discount which the Contractor may be entitled to deduct."*

4. The obligation on the defendant arising from Article 16 to pay the plaintiff is contingent on the receipt by the defendant from the developer of the monies certified by the architect to be owing to the plaintiff.

5. The parties agree that the plaintiff is owed the sum of €52,500 for services it provided in respect of the building works.

6. On 29th September, 2008, the defendant issued an invoice to the developer in the amount of €232,788.50 which included a claim in respect of the €52,500 owed to the plaintiff. The developer has not honoured this invoice.

7. Discussions took place between the parties to these proceedings, and on the 26th February 2009, an agreement was reached as to the amount of money owed to the plaintiff connected with the building project. The agreement of the 26th of February is at the heart of these proceedings because the plaintiff sues on that agreement and not on the Building contract. Taking account of a set-off not relevant to these proceedings, the sum said to be outstanding on that date was €192,500. About one month later an undated letter was written by the plaintiff to the defendant setting out what it believed had been agreed on 26th February, 2009. Briefly stated, the letter recorded that the overall sum owing to the plaintiff comprised €140,000 and a separate amount of €52,500. The plaintiff recorded that the sum of €140,000 was to be funded from an insurance claim and, critically, the letter says:

> *"[The defendant] will make payment to [the plaintiff] an amount of €140,000 within seven days of receipt of settlement monies from one or both insurers (regardless of the amount of settlement monies received). "*

8. This seems to me to say that the sum of €140,000 is to be paid by the defendant to the plaintiff following the receipt of (at least) some settlement monies from insurers.

9. At paragraph 2(c) of the same letter, the question of the payment of the second sum of €52,500 is addressed in the following terms:

> *"(c) [The defendant is endeavouring to secure judgment against Noel Burke Developments Limited [the developer] for the balance of retention monies owed by that company to [the defendant.] Within seven days from the date of discharge of this liability, [the defendant] will pay to [the plaintiff] the balance of £52,500 due." (emphasis added)*

10. Proceedings have been instituted by the defendant against the developer (Noel Burke Developments Limited) for judgment in the sum of €232,788.50, which sum includes the €52,500 owed to the plaintiff.

11. Paragraph 3 of the undated letter recording the agreement of 26th February, 2009, is in the following terms:

> *"In the event that payment of the amount of €192,500 has not been made in full within six months from the date of this agreement, [the plaintiff] shall be entitled to institute proceedings against [the defendant} for such portion of the amount of £192,500 as remains outstanding at that time."*

Kieran Brophy, a quantity surveyor acting on behalf of the defendant, in emails sent on 2nd April 2009 records that the agreement reached between the parties on 26th February 2009 is as set out in the undated letter, except in so far as an entitlement to sue if payment was not made within six months. Mr Brophy asserted in the emails that he had no recollection of any such term having been agreed.

12. In these proceedings, the plaintiff sues the defendant for breach of the agreement reached between them on 26th February, 2009. There is a dispute between the parties as to what was agreed on that day, but there appears to be no dispute that the defendant agreed to pay the plaintiff the sum of €52,500 on receipt of those monies from the developer. The defendant argues that the undated letter records an obligation to discharge this sum when Noel Burke Developments Limited discharges the same sum to the

defendant, and more particularly, that the defendant will pay the plaintiff that sum within seven days of receipt by it of the sum from Noel Burke Developments Limited. As none of the sum owing to the plaintiff has been received from the developer, the defendant asserts that it does not owe the money sought in this application.

13. The issue for decision on this application is whether the defendant has asserted a real defence to the plaintiffs claim.The judgment of McKechnie J. in *Harrisrange Ltd. v. Michael Duncan* [2003] 4 I.R. 1, summarises the principles governing the exercise of discretion on an application for summary judgment. I refer to the following passage:

> *"In ACC Bank plc. v. Malocco [2003] 3 IR. 191, the High Court (Laffoy J), in applying First National Commercial Bank plc. v. Anglin [1996] I IR. 75, went on to say at p. 201 that the whole situation should be looked at, which in turn necessarily involved 'an assessment of the cogency of the evidence adduced by the plaintiff in relation to the given situation which is to be the basis of the defence'. In the most recent case in this area, namely, Aer Rianta cpt. v. Ryanair Ltd. [2001] 4 IR. 607, there were two judgments delivered in the Supreme Court. In her opinion, under the heading of 'The Law and Conclusions', McGuinness J applied the test as suggested by Murphy J in First National Commercial Bank plc. v. Anglin. In his analysis of the law, Hardiman J surveyed what might be described as the historical cases as well as the most modern authorities on the topic. His conclusion was, I think, that leave to defend should be granted unless it was "very clear" that the defendant had no defence, not even one which could be described as arguable."*

14. The learned judge in *Harrisrange* set out twelve principles governing the power to grant summary judgment and I refer to three of them which are relevant to this application, namely:

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

15. I am satisfied that the defendant has established to the standard required that it has a real defence to these proceedings. Having regard to the Building Contract which only required the defendant to pay the plaintiff when the defendant was in receipt of monies from the developer, and having regard to the emails sent on behalf of the defendant in relation to the letter purporting to record the agreement of 26th February, 2009, pointing out that the defendant's representative had no recollection of a discussion of a right to sue after six months if monies were not paid, it seems to me that the defendant cogently argues that it has a real or *bona fide* defence to these proceedings. In addition, the dispute between the parties as to whether the six month term was was ever agreed is not one suitable for determination on this application and persuades me that the matter should be adjourned to plenary hearing.

16. For the sake of completeness I should add that evidence adduced by the parties as to a promise of work for the plaintiff to be arranged by the defendant as a form of settlement of this dispute is not relevant to this application and does not operate, whether by estoppel or otherwise to prevent the defendant from seeking to assert a defence to the proceedings and a trial on the merits of the plaintiff’s claim

17. I refuse the relief sought in the notice of motion and I adjourn the application to to plenary hearing in accordance with Order 37 RSC and I will hear the parties as to directions for pleadings etc as, if the matter had been commenced by plenary summons.