Neutral Citation [2012] IEHC 409

THE HIGH COURT

[2012 No. 12 S.P.]

BETWEEN

MARION O'NEILL AND PATRICK O'SULLIVAN

PLAINTIFFS

AND

FERGUS APPELBE

DEFENDANT

JUDGMENT of Ms. Justice Dunne delivered the 12th day of October 2012

The plaintiffs herein issued and served a special summons on the defendant seeking to have a judgment mortgage declared well charged against the defendant's interests in lands and premises compromised in two folios, Folio 23312 and Folio 17110, both in Co. Cork.

The matter was returned before the Master of the High Court and while the matter was before the Master of the High Court and before the proceedings were admitted to the Chancery Special Summons list, an affidavit was filed on the 12th April, 2012, by the defendant stating that the judgment mortgage registered in respect of Folio 23312 "is behind a charge registered in favour of Susan Appelbe", the defendant's daughter. Surprisingly, for reasons which are difficult to understand, the plaintiffs on the adjourned date of the 17th April, 2012, sought and obtained an order from the Master of the High Court deleting any reference to Folio 23312 and the lands described therein from the special summons. That order was granted and the matter was then transferred into the Chancery Special Summons List. It seems that the plaintiffs and their legal advisers were under a misapprehension as to their entitlement to obtain a well charging order where there was a prior charge registered against the property.

Following a consideration of this question, it was realised that the plaintiffs were entitled to pursue the relief sought in respect of the judgment mortgage registered on Folio 23312. On that basis, the plaintiffs now wish to vacate the order made by the Master of the High Court herein on the 17th April, 2012. In other words the plaintiffs now seek to undo the application that they made and to vacate the order that they obtained.

The relief sought before this Court is in the following terms:-

> "An order vacating the order of this Honourable Court dated the 17th April, 2012, that amended the special summons herein by deleting any reference to Folio 23312 and/or to the land described in the said Folio 23312 where reference is made to the said Folio 23312 therein."

The defendant has filed a replying affidavit. He made the point that at the hearing before the Master of the High Court, the plaintiffs "abandoned their claim against Folio 23312, Co. Cork. They did so when they requested the court to adjourn the element of the summons referring (sic) and to proceed with the other element of the summons relating to Folio 17110, Co. Cork. The Honourable Court refused the application. The plaintiffs then formally withdrew the case insofar as it related to Folio 23312, Co. Cork".

The defendant went on to assert that the plaintiffs are not entitled to the reliefs sought herein and that such relief would not be in accordance with the rules or practice and procedure of this Court.

There is no evidence before the Court of any prejudice to the defendant in the event that the relief sought is granted but inevitably the plaintiffs would be put to further expense in issuing further proceedings in the event that this application is refused. If the plaintiffs are obliged to do this and are ultimately successful in having the lands and premises comprised in Folio 23312 well charged, the defendant would probably bear the costs of such additional proceedings.

It has to be said that this is an unusual application. Normally, one would expect an application to this Court seeking to vacate an order of the Master to be brought by way of appeal. Order 63, r. 9, of the Rules of the Superior Courts (as amended) provides for appeals from the Master of the High Court in the following terms:-

> "... any party aggrieved by an order, including an order as to costs, made by the Master may ... apply to the Court to discharge such order or to make the order refused."

Clearly the plaintiffs could not be described as parties "aggrieved by an order" in circumstances where they sought and obtained the order now sought to be vacated. In fairness to the plaintiffs, the provisions of O. 63, r. 9, of the Rules of the Superior Courts have not been invoked by the plaintiffs in bringing this application. I presume that the application has been brought to this Court on the basis that the proceedings have now been transferred into the Chancery Special Summons list and are due to be heard imminently. To that extent, it appears that the motion before the court is not either in fact or in form an appeal from the order of the Master but an application to undo that which was done at the request of the plaintiffs in the Court in which the proceedings are now listed for hearing.

Neither party was able to assist the court in relation to the jurisdiction of the court to vacate an order sought and obtained by a party. However, it is matter of fact that from time to time orders are obtained by parties which they subsequently seek to vacate. It is not unusual for a party who has for example obtained an order of costs against the other party at the time of ruling a settlement between the parties to seek to vacate orders for costs previously obtained at interlocutory stages of the proceedings. Noteworthy in those circumstances would be the fact that such an application is usually made on the basis of consent between the parties.

It may be unusual and it may well be unsatisfactory that a party who has sought to amend their pleadings by the addition or removal

of a cause or causes of action or an element of a claim applies subsequently to reinstate the status quo ante but are there circumstances in which it may be appropriate to do so? There may be good reasons for doing so but the circumstances giving rise to such applications will, no doubt, be rare and it would be necessary to guard against unnecessary applications being made to court brought about as a result of a party seeking an order and then subsequently seeking to undo the order sought and obtained by them. There is a paucity of authorities on this issue.

I note the views expressed by O'Sullivan J. in the case of *Smyth v. Tunney* [2004] 1 I.L.R.M. 464, in relation to the court's jurisdiction to permit a party to retract a notice of discontinuance. Delaney and McGrath in *Civil Procedure in the Superior Courts* (2nd Ed.) commented at para. 15-22 as follows:-

> "No provision is made in 0. 26 for the retraction of a notice of discontinuance but it was held in *Smyth v. Tunney* [2004] I I.L.R.M. 464, that the court has an inherent jurisdiction to permit a party to retract such a notice. O'Sullivan J. held that the court had an inherent jurisdiction to do so on the basis that the rules are enabling rather than prescriptive in nature:
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> > 'Rather than accepting counsel on behalf of the first and third defendants' submission that in the absence of explicit provisions conferring jurisdiction on the court or acknowledging it, there is no such jurisdiction, I have come to the opposite conclusion namely that in the absence of an explicit provision depriving the court of jurisdiction, I would infer its existence.'"

He relied on a passage from a Canadian decision in the case of *Adam v. Insurance Corporation of British Columbia* where it was stated by Esson J.A. as follows:-

> "I think it is going too far to say that ... the court has no jurisdiction to allow a notice of discontinuance to be set aside. The Supreme Court has a wide inherent jurisdiction over its own process. There must be a discretionary power to relieve against the consequences of discontinuance, that is, that the action is forever at an end except for the matter of costs."

One of the matters considered by him in weighing up the question of how to exercise discretion was whether or not the commencement of a new action would give rise to a problem with the Statute of Limitations. In the present case, no such difficulty arises and as I indicated previously, the defendant has not pointed to any possible prejudice that could arise in the event of this application being granted. It is noteworthy that in the case of *Adam v. Insurance Corporation of British Columbia,* Esson J.A. also observed: "In any event, it is my view that where, as here, the grounds are simply a change of heart, based on some greater consideration of the law or the facts, as to the possibility of success, that is not enough". That approach may be contrasted to some extent with the approach taken by Keane J. who was considering an application to amend pleadings in the case of *Krops v Irish Forestry Board Limited* [1995] 2 I.R. 113. In that case no issue as to the Statute of Limitations period arose but there had been some element of delay on the part of the plaintiff. Keane J. as the authors of Delaney and McGrath noted at para 15-25, "took the view that this should not deprive him of the relief sought:

> 'To deprive the plaintiff on the grounds that he made a tactical decision of the perceived benefit of reversing that decision solely on the grounds that he cannot blow hot and cold or that the third defendant is entitled to treat the plaintiff's claim against it as finally concluded (save for the matter of costs) seems to me to be closer to punishing or disciplining the plaintiff for a decision taken when the notice of discontinuance was served ... rather than ensuring that the real issues between these parties be dealt with at the trial.'"

I am mindful of the fact that it is undesirable that a party should "blow hot and cold" or that a party who has made an application to a court which is granted and obtained should shortly afterwards seek to reverse or undo the application that had been granted. It is important to ensure that court time is not wasted.

I am nonetheless satisfied that the court has an inherent jurisdiction to consider the application brought by the plaintiffs herein. In that regard it seems to me that in exercising the court's discretion as to whether or not to allow the plaintiffs the relief sought herein, it is necessary to consider where the balance of justice lies. I emphasise the fact that the defendant has not identified any prejudice that could flow from granting the relief sought herein. By contrast the plaintiffs will be obliged to issue separate proceedings to pursue the relief sought by them against the defendant in respect of the property compromised in Folio 23312. At the end of the day, it seems to me that the balance of justice favours the plaintiffs in granting the reliefs sought to ensure that all the real issues between the parties will be dealt with at the trial of these proceedings. The role of the court is not "to punish or discipline" the plaintiffs in respect of what was clearly a misapprehension on their part. Had the position been that the defendant could identify some element of prejudice, for example, that he would lose the benefit of a defence under the Statute of Limitations or in any other way that could be demonstrated, the position might have been different. In the absence of any prejudice, the balance of justice appears to favour the plaintiffs and I will make the order sought.