

THE HIGH COURT

[2015 No. 1715 S.]

BETWEEN

ACC LOAN MANAGEMENT DESIGNATED ACTIVITY COMPANY

PLAINTIFF

AND

EUGENE MCCOOL

DEFENDANT

JUDGMENT of Ms. Justice Reynolds delivered on the 16th November, 2017

1. In these proceedings, the plaintiff seeks summary judgment against the defendant in the sum of €228,005.36 arising out of a loan agreement entered into between the parties on the 30th May, 2006. Under the terms of the agreement, the plaintiff agreed to advance to the defendant a loan comprising a principal sum of €630,000.00 for a period of two years.

Factual Background

2. By facility letter dated 30th May, 2006 the defendant was offered a loan facility in the amount of €630,000.00 repayable for a term of two years from the date of draw down (which occurred on 15th August, 2006), together with interest thereon.

3. The purpose of the loan facility was to re-structure existing loan facilities with the plaintiff and the security provided was an extension of the plaintiff's first legal mortgage and charge over properties located at 49 and 51 Shanard Road, Santry, Dublin 9.

4. By letters of variation dated 21st August, 2008, 6th October, 2008 and 14th July, 2009, the term of the loan was extended until 14th July, 2010.

5. The defendant defaulted on his repayment obligations and by letter of demand dated 23rd September, 2013, the plaintiff demanded the sum of €872,722.98.

6. A receiver was appointed on 21st September, 2013 over the two properties secured under the loan facility. That receiver was subsequently replaced by a further receiver on the 20th December, 2013.

7. Whilst the properties were under the Receiver's control, he collected rent from tenants occupying them and those monies were applied to the defendant's account in 2014.

8. The Receiver sold the properties and the proceeds of sale were also applied to the defendant's account in 2015.

9. No payment has been made by the defendant since July 2015 and the plaintiff claims that the sum of €228,005.36, together with continuing interest thereon, remains due and owing.

Liberty to Defend

10. The defendant does not dispute that the monies were drawn down in the sense that the facility was a re-financing of previous facilities and further accepts that the monies have not been repaid in full.

11. The defendant seeks liberty to defend the proceedings and argues that he has established arguable grounds of defence in respect of:-

(a) the proper construction of the facility letter of May, 2006 in circumstances where the defendant alleges that the loan term is erroneously described as two years as opposed to twenty years;

(b) the inclusion of surcharge interest to the account and further the alleged miscalculation of the sum due and owing;

(c) the alleged unwarranted appointment of the Receiver over the properties and the wrongful actions of the Receiver.

The Legal Principles

12. The relevant legal principles in an application of this nature are well settled and are not in dispute. In order to succeed in defending a claim for summary judgment, a defendant must satisfy the court that he has a fair or reasonable probability of having a real or *bona fide* defence, as set out by the Supreme Court in *Aer Rianta Cpt. v. Ryanair Ltd.* [2001] 4 I.R. 607 and in *Harrisrange Ltd. v. Duncan* [2003] 4 I.R. 1.

The First Issue

13. The first issue for consideration is the correct construction of the terms upon which the defendant's facilities were refinanced in May 2006. The defendant's case is that this was erroneously set up as a short term investment loan by the plaintiff in circumstances where the defendant posits that his requirement was for a long term commercial loan facility.

14. However, it is clear from the terms of the facility letter that the purpose of the facility was to restructure two existing facilities which the defendant had with the plaintiff for a term of two years, the security for which was an extension of the plaintiff's first legal mortgage and charge over properties located at 49 and 51 Shanard Road, Santry, Dublin 9.

15. There is no dispute but that the defendant executed the facility letter, the terms of which were clear on its face. Furthermore, the defendant subsequently executed three letters of variation restructuring the facility. The defendant contends that he did not read the terms of the loan facility or take any legal advice in relation to same, albeit that it is clear that he had solicitors acting for him in respect of other commercial transactions at that time. Indeed it is notable that the defendant took no steps to point out the alleged error to the plaintiff at the time that he became aware of same but in fact proceeded to execute three letters of variation restructuring the facility.

16. The plaintiff contends that the defendant was well aware of the terms of the loan agreement and is therefore bound by them. In this regard, the plaintiff relies upon the decision of Clarke J. in *ACC Bank plc. v. Kelly* [2011] IEHC 7. In those proceedings, the plaintiffs were involved in quite significant business dealings and had substantial borrowings with the bank. In referring to commercial banking transactions, Clarke J. noted as follows:-

“Many people in such circumstances do take professional legal advice whether from accountants or lawyers. There is no obligation, of course, so to do. But someone who signs commercial banking documents without taking legal advice from them runs a risk which they must accept. They will be bound by the terms which they sign up to.”

17. In the instant case, the defendant accepts that he did not read the terms of the facility letter nor indeed the terms of the three further letters of variation nor did he seek any legal advice in relation to these matters. However, it is clear that the defendant, in signing them without adequately reading them, must in the words of Clarke J. “accept the consequences”.

The Second Issue

18. Whilst the plaintiff had originally sought to recover surcharge interest in respect of the loan account, this is no longer being pursued in the context of the within application. The plaintiff has restricted its claim for judgment to the principal sum and standard interest only which has accrued on the facility.

19. However, the defendant now takes issue with the manner in which the plaintiff has calculated the outstanding sum due and owing, including interest, on the loan account.

20. Unfortunately, this is merely a bald assertion by the defendant who represented himself at the hearing of the within proceedings and was at no stage raised in the lengthy and comprehensive affidavits filed by him in the proceedings. Indeed, the manner in which the amount due and owing has been calculated is set out in considerable detail by way of affidavit evidence on behalf of the plaintiff and the defendant has failed to engage with that evidence in any meaningful way to substantiate his claim on this issue.

21. Further it is clear that at no stage did he raise any specific queries with the plaintiff in this regard and on the evidence therefore, I am not satisfied that the defendant has established that he has a real or *bona fide* defence in this regard.

Third Issue

22. The defendant asserts that the decision of the plaintiff to appoint a receiver in respect of the two properties over which the facility at issue was secured was wrongful and “totally unwarranted”. As already stated, the Receiver was appointed in 2013 and the properties thereafter sold, the proceeds of which were applied to the defendant’s account. The defendant asserts that the Receiver failed to engage in proper procedures and practices in facilitating an alleged fire sale of the properties and asserts that the true value of the properties would have cleared the outstanding loan balance.

23. Further, the defendant asserts that the plaintiff’s agents removed valuable furniture and contents from the two properties without notice, resulting in alleged loss to the defendant.

24. In the circumstances, the defendant contends that he has a counterclaim to the within proceedings in respect of the alleged losses.

25. It is clear from the evidence that the defendant failed to take any steps at the time of the appointment of the Receiver in 2013 to address the issues he has raised. Further, the plaintiff contends that the defendant’s complaints in this regards are wholly unsubstantiated and exhibits contemporaneous independent valuations of each of the properties which show that the properties were in fact sold above the market value and the proceeds of same credited against the defendant’s liabilities to the plaintiff.

26. The defendant asserts that he made “numerous complaints to the Bank” in respect of the matters foregoing although fails to exhibit any supporting documentation in this regard. The plaintiff on the other hand asserts that the defendant was given ample opportunity to remove his possessions from the secured properties over which the Receiver had been appointed prior to their disposal.

27. It is clear from the evidence that the Receiver had written to the defendant on numerous occasions affording him an opportunity to make contact and arrange a time to collect relevant property from the secured properties prior to sale.

28. As already stated, it is difficult to attach any credibility to the defendant’s claims in this regard in circumstances where he failed to take any steps at the relevant time to deal with these issues but now seeks to raise them by way of counterclaim to the within proceedings.

29. With regard to the defendant’s allegation that the Receiver was wrongfully appointed, the original mortgage from 2003 clearly states that “the Bank may from time to time appoint under seal or under hand of a duly authorised officer or employee of the Bank any person or persons to be receiver and manager or receivers and managers ...”. In the circumstances, it was at all times open to the Bank to appoint a receiver to realise its security in respect of the said mortgage.

30. The defendant has argued that the Receiver wrongfully pursued a quick sale of the properties, albeit that there is no evidence to support this contention. In any event, it is clear from the authorities and in particular *ACC Bank plc. v. McEllin and others* [2013] IEHC 454, that it is the Bank’s decision as to when to act.

Conclusion

31. In all the circumstances, the Court must conclude that the affidavit evidence furnished by the defendant fails to raise any *bona fide* defence in relation to the claim advanced by the plaintiff.

32. The Court is satisfied that the matter should not go to full plenary hearing and summary judgment should be entered against the defendant.