Neutral Citation: [2015] IEHC 127

THE HIGH COURT

[2014/287 S]

BETWEEN

CELESTINE MCNALLY

PLAINTIFF

AND

LINDA ANN LANNIGAN & NICOLA O'REILLY FAHY

DEFENDANTS

JUDGMENT of Ms. Justice Murphy delivered on the 27th day of February, 2015

1. The plaintiff seeks judgment on foot of a summary summons in the amount of €109,840.84 being rent due by Vonax Ltd. in respect of a lease of premises on the ground floor of 19 Maypark, Malahide Road, Donnycarney in the city of Dublin. The said lease, dated 24th April 2008 provided that the liability of the tenant, Vonax Ltd., be guaranteed by James O'Reilly, Linda Ann Lannigan and Nicola O'Reilly Fahy. It was a specific term of the lease that the guarantors waive any right to require the landlord to proceed against the tenant or to pursue any other remedy whatsoever which may be available to the landlord before proceeding against the guarantor.

2. The following matters are not in dispute between the parties. A lease of the premises at 19 Maypark, Malahide Road, Dublin 5 was concluded on the 24th April 2008 between the plaintiff and Vontax Ltd. Guarantors of the tenant's liabilities were James O'Reilly, Linda Ann Lannigan and Nicola O'Reilly Fahy. The term was for a period of nine years and nine months commencing on 28th February 2008 and the rent was to be €70,000 per annum. The defendants, as directors of the tenant company, went into possession sometime before Valentines Day. In March 2009 the weekly rent was reduced to €600 though the terms and conditions of this reduction are not agreed between the parties. On 15th November 2010 a letter was sent by the plaintiff's solicitors to all three guarantors claiming that the arrears of rent then due were in the sum of €109,840.84 and pointing out that the arrears had been steadily increasing and the fact of their liability as guarantors jointly and severally for the entire amount. A demand was made for the full monthly rent as well as concrete and binding proposals to reduce the arrears. Further letters were sent to the three guarantors on 30th November 2010 by the plaintiff's solicitor placing the guarantors on notice that unless a substantial payment was received together with a firm proposal for monthly reduction of outstanding arrears by the 14th December 2010 such action as might be advised would be taken. Further letters were sent to the three guarantors on 22nd December 2010 notifying them that proceedings would be issued, that by reason of the amount they would have to be issued in the High Court and asking whether the defendants had a solicitor who would accept service of those proceedings. On 31st December 2010 the premises were handed back to the plaintiff. There was no response to the correspondence sent in November and December.

3. A summary summons issued against the three guarantors on 1st February 2011, an appearance was entered by the defendants on 31st March 2011 and on the 30th March 2011 respectively. An appearance was entered by the third guarantor James O'Reilly on 12th January 2012. Arising from a misunderstanding relating to letters of demand the plaintiff was advised that a notice of discontinuance should be issued against these two defendants and that she should proceed solely against James O'Reilly. In due course judgment for the sum of €109,840.84 was granted by the Master of the High Court against Mr. James O'Reilly on 29th January 2013.

4. A fresh letter of demand was sent to these two defendants on 20th December 2013. No response was received to that letter. A new summary summons was issued on 24th January 2014 against the two defendants. The first named defendant entered an appearance in her personal capacity on 5th February 2014 and the second named defendant similarly entered an appearance in her personal capacity a week later on 12th February 2014. A motion for summary judgment issued on 3rd March 2014 grounded on the affidavit of the plaintiff, Celestine McNally and the motion was returnable for 1st April 2014. On the 8th May 2014 a solicitor came on record for the defendants and filed an affidavit of the first named defendant sworn on her own behalf and on behalf of and with the authority of the second named defendant. In this affidavit the defendants raise for the first time a possible defence to the plaintiff's claim for summary judgment. The thrust of the proposed defence is that the plaintiff, in breach of the terms and conditions of the lease, entered into and took possession of part of the demised premises, being a passage to the rear of the garden known as the corridor and an additional portion to the right of the garden known as the storage area. According to the defendants this caused considerable logistical difficulties in the daily operation of the business. Secondly, the defendants complain that in or about early March 2008, unilaterally and without permission, the plaintiff entered the demised premises and took possession of the business telephone and fax machine which were an integral aspect of the business. This, they claim, resulted in inconvenience and a loss of business. They name in particular one customer who traded as Inter-fone Flowers. A further element of the proposed defence/cross-claim is stated to be the plaintiff's alleged interference with the trading reputation and goodwill of Wood's Flowerpot with a view to diverting customers to rival businesses. In her affidavit on behalf of the defendants, Ms. Lannigan exhibits a promotional leaflet for Mother's Day which involved another flower shop in the local area. The plaintiff does not dispute this but characterises it as a promotion for her restaurant in tandem with a local flower shop rather than any attempt to interfere with the defendants' business. Further she states that such promotions were available to the defendants but were declined.

5. The Law

The Court has been furnished with two authorities on the issue of summary judgment *Aer Rianta c.p.t v. Ryanair Ltd.* [2001] 4 I.R 2001 607 and *Moohan & Bradley T/a Bradley Construction v. S&R Motors Donegal Ltd.* [2008] I.R 2008 650. It appears to the Court that there is no distinction between the two authorities as to the test which must be applied by the Court. The Court is satisfied that the test is:-

> Whether looking at the whole situation, the defendant had satisfied the court that there was a fair and reasonable probability that they have a real and *bona fide* defence. It is not necessary for the defence to establish that they have a defence which would probably succeed what they must establish on an examination of the whole situation that it was probable that they have a *bona fide* defence.

The test is common to both authorities submitted. The Court found the *Moohan & Bradley v. S&R Motors* to be a more helpful

authority in that the factual circumstance in that case most closely mirrors the situation in this case. In that case the plaintiffs were seeking summary judgment in respect of sums due on foot of Architect Certificates. The defendants asserted faulty workmanship on the part of the plaintiff and sought to have the proceedings stayed to enable the issues to be referred to arbitration. Here there is no dispute about the sum due on foot of the agreed rent but the defendants are seeking to set off against such sum an as yet unquantified sum arising from alleged breaches by the plaintiff of the tenancy agreement. The law seems clear that a party, in principle, is entitled to a set off in equity in relation to any cross-claim arising out of the same contract. Thus if a landlord is owed money on foot of a lease the tenant is *prima facie* entitled in equity, to a set off in respect of any breaches by the landlord of the terms of the lease such as might have resulted in loss to the tenant. The problem for these defendants however, is that while they were both directors of the tenant company, they are not sued in that capacity. They come before the Court as guarantors of the tenant's liability to pay the rent. In that capacity, they have no entitlement to a set off of alleged breaches of the tenancy agreement. Any such breaches are a matter of contract between the tenant and the landlord.

6. There is no dispute between the parties on the amount of the rent. There is no dispute that the rent is due. The defendants do not contest their status as guarantors of the tenant's obligations under the lease. In those circumstances, the Court cannot be satisfied that there is "*a fair and reasonable probability that they have a real and* bona fide *defence*" to the plaintiff's claim.

7. Even if the defendants had been sued in their capacities as directors of the tenant company, the Court is not persuaded that, on looking at the whole situation, they would have had a fair and reasonable probability of a real and *bona fide* defence. The complaints which they now raise about alleged breaches of their tenancy were first raised in May 2014, three and a half years after they handed back the premises. Despite letters of demand dating from the 15th November 2010, no complaint was made about breaches of the tenancy agreement. The service of a summary summons in the early months of 2011 brought forth no complaints that the plaintiff had been in breach of the lease agreement.

8. Even more significant, in the Court's view, is the fact that the now alleged breaches of the covenant of quiet enjoyment of the demised premises and the removal of telephone and fax lines took place in early March 2008, weeks before the indenture of lease was signed on the 24th April of that year. Had there been a real issue in respect of those items one would have expected it to have been raised and resolved prior to the formal conclusion of the lease agreement. There is no evidence before the Court that there was any such dispute. On the other hand, there is clear evidence that the demised premises are as contended for by the plaintiff. The map attached to the original indenture of lease shows that the area which the defendants claim were part of the demised premises, were not in fact so included.

9. In these circumstances the Court is compelled to the view that the last minute emergence of complaints of breaches of the lease agreement is more grasping at straws than an indication of the likely existence of a *bona fide* defence.

10. The plaintiff in all the circumstances is entitled to summary judgment.