



THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 103

RECORD NO. 446/2016

**Hogan J.
Mahon J.
Hanna J.**

BETWEEN/

START MORTGAGES LIMITED

RESPONDENT/

PLAINTIFF

- AND -

PAUL TIERNEY

APPELLANT/

FIRST DEFENDANT

- AND -

AILEEN TIERNEY

SECOND DEFENDANT

JUDGMENT of Mr. Justice Mahon delivered on the 29th day of March 2017

1. The respondents issued High Court proceedings by way of special summons on the 1st September 2007 seeking possession of Kileek, St. Margarets, Swords, Co. Dublin (being the property comprised in Folio DN142452F Co. Dublin) on foot of a mortgage contract entered into on the 8th December 2006 relating to a loan of €245,000 advanced by the respondent to the appellant and Mrs. Tierney. Repayments servicing the said loan fell into arrears with the consequence that as of the end of November 2014 arrears stood at €161,958. 61, with a total outstanding balance of €349, 587.75. Possession of the property was granted to the respondents by order of the High Court (Dunne J.) on the 13th October 2008 (with a stay on execution for a period of four months). The said order records as follows:-

"Whereupon and upon reading the documents specified in the schedule hereto and upon hearing said counsel and there being no attendance by or on behalf of the second defendant.

By consent it is ordered that the defendants do forthwith upon service of this order upon them deliver up to the plaintiff or to some person duly authorised by it in writing in that behalf possession of ... Kileek, St. Margarets, Swords, Co. Dublin."

2. On the 25th July 2016 an application was made to the High Court pursuant to Order 12, r. 26 and / or Order 13, r. 11 of the Rules of the Superior Courts on behalf of the appellant, (Mr. Tierney) to set aside the order of possession made on the 30th October 2008. That application was refused by the High Court (McDermott J.). Mr. Tierney has appealed against that order. His wife, Mrs. Tierney (the second defendant), is not a party to these proceedings and the said order of the High Court dated the 13th October 2008 remains in effect as against her.

3. The focus of Mr. Tierney's appeal is his contention that he was never served with the proceedings seeking possession of Kileek. He further maintains that he was unaware of the proceedings in the High Court on the 13th October 2008, or the order for possession of the property and remained unaware of same until telephoned by Mrs. Tierney on the 9th February 2016 to inform him that the Sheriff had arrived to execute the possession order. Mr. Tierney's application to set aside the order for possession is dated the 22nd March 2016, some five weeks later. In his grounding affidavit sworn on the 16th of March 2016, Mr. Tierney maintained that prior to the 9th February 2016 he was unaware of "difficulties" with the mortgage, or of any contact, negotiations or settlements with the respondent. He said that he had relied on his wife to make repayments on behalf of both of them.

4. In relation to the order of the High Court of the 13th October 2008, and contrary to what is stated therein, Mr. Tierney maintains that he was not present in the court (nor was he aware of the proceedings). Furthermore, Mr. Tierney contends that, again, contrary to what is stated in the body of the order, he did not consent to an order for possession. Mrs. Tierney maintains that, contrary to what is contained in the body of the order she was, in fact, present in court on the 13th October 2008 but, again, contrary to what is in the order, she did not consent to an order for possession being made.

The service of the proceedings

5. It is common case that the special summons and grounding affidavit were served on Mrs. Tierney alone at 2.20 p.m. on the 10th October 2007 at Kileek, and that she agreed with the summons server that she would accept service on her husband's behalf as he was not in the house, although she then indicated that he was in the house, but was indisposed.

6. The service of the summary summons did not, on its face, comply with Order 9, r. 4 which provides as follows:-

"When husband and wife are both defendants in any proceedings, they shall both be served unless the Court shall otherwise order."

7. No order for any other mode of service was made, or sought, nor was any application made to deem the service effected on the 10th October 2007 good (in respect of Mr. Tierney).

8. In his affidavit of the 6th March 2009, Mr. Padraic Costello, summons server, averred that he served a copy of the order for possession on Mr. and Mrs. Tierney by handing a true copy of the said order to each at Kileek on the 20th February 2009, and that he also served them with a demand for possession of the said property. Mr. Tierney maintains that he was not so served, while Mrs. Tierney accepts that she was served with the documentation but did not, in turn, provide it to Mr. Tierney.

9. While Order 9, r. 4 provides specifically that the service of a summons in an action where a husband and wife are both defendants be effected on them both, a failure to serve in this manner is not necessarily fatal to the proceedings. In this case the summons server took what, to many, would appear to have been a practical and common sense approach to effect service by serving Mrs. Tierney with the document on her explicit agreement to pass on the relevant documentation to her husband.

10. Failure to serve the summons in the manner proscribed by Order 9, r. 4 is capable of correction. An application could have been made for substituted service on Mr. Tierney or for an order deeming service on him through the intermediary of Mrs. Tierney to be good service. Neither step was taken. A deficiency in service could also have been corrected if Mr. Tierney was present in court in the course of the repossession proceedings heard by Dunne J. on the 13th of October 2008.

11. There was no averment in the affidavit of Siobhan Coen (the respondent's company secretary), or indeed in any other affidavit sworn on behalf of the respondent, to the effect that Mr. Tierney was seen to have been physically present in court on the day in question. Therefore what is at issue is whether or not the order of the 13th October 2008 erroneously, possibly because of human error in its drafting, states that Mr. Tierney, rather than Mrs. Tierney, was present in court. Errors can and do occur in the drafting of court orders. What is more puzzling is how the order also came to record that the order for possession was being made on consent in circumstances where, apparently, if Mrs. Tierney is to be believed, no such consent was indicated at all.

12. Order 41, r. 15 of the Rules of the Superior Courts provides:-

"In any cause or matter where the defendant has appeared by solicitor, no order for entering judgement shall be made by consent unless the consent of the defendant is given by his solicitor. Where the defendant has not appeared, or has appeared in person, no such order shall be made unless the defendant attends before the Court and gives his consent in person, or unless his written consent is attested by a solicitor acting on his behalf."

13. There is no written judgment or other written note available from the learned High Court judge. What has been made available to the Court, apparently with the agreement of both parties, is a helpful summary of the judgment prepared by Mr. Rowan B.L., counsel for the respondent, and sent to his solicitors in the immediate aftermath of the proceedings in the High Court. It is clear from that memorandum at the learned High Court judge placed considerable importance on the following:-

(i) No issue had ever been taken with the service of the order of Dunne J. on Mr. Tierney. He noted that *"Mrs. Tierney is the spouse of Mr. Tierney and resides at the property since before the order to the present day"*.

(ii) A reasonable effort had been made to serve Mr. Tierney.

(iii) The lack of any suggestion that Mr. Tierney had a good defence to the respondent's claim, or any other basis on which to defend the proceedings.

14. The learned High Court judge, according to Mr. Rowan's memorandum stated:-

"The test of due and reasonable diligence must be considered on each case. There is a statement of the person serving the documents that it was the place of residence of the defendants. I am satisfied that in hearing this application the plaintiff completely satisfied the due and reasonable diligence was exercised in service. Mrs. Tierney was happy to receive the document in ease of Mr. Tierney, due and reasonable diligence was exercised. There was no challenge made to the process for a number of years afterwards."

15. Specific reference is made in Mr. Rowan's memorandum to the learned High Court judge's attention being brought to the provisions of Order 9, r. 2. Order 9, r. 2 provides as follows:-

"Service of any summons on the defendant shall, except in the cases in the following rules of this order specified, be effected by personal service if it be reasonably practicable. Where it shall appear by affidavit that such defendant is personally within the jurisdiction and that due and reasonable diligence has been exercised in endeavouring to effect such personal service, service of such summons may be effected by delivering a copy thereof at the defendant's house or place of residence, or at his or her office, warehouse, counting house, shop, factory, or place of business, to the wife, husband, child, father, mother, brother, or sister of the defendant, or to any servant or clerk of the defendant (the person to whom such copy shall be delivered being of the age of sixteen years or upwards) and showing to such person the original or duplicate original of such summons."

16. There is no reference in Mr. Rowan's memorandum to the learned High Court judge's attention having been brought to the provisions of Order 9, r. 4, or that he considered that particular provision at all.

17. In *O'Tuama and Ors. v. Greg Casey and Ors.* [2008] IEHC 49, an issue arose in relation to the renewal of a summons in defamation proceedings. In the course of his judgment, Clarke J. stated:-

"When the motion originally came before the court there was an issue between the parties as to whether the judgment could be properly said to have been obtained either regularly or irregularly. The jurisprudence of the courts in this regard is clear, see for example Irwin & Co v. Austin & Sons [1907] 41 ILTR 190, Maher v. Dixon [1995] 1 ILRM 218 and Delaney & McGrath on Civil Procedure in the Superior Courts (2nd Edition) at paragraphs 4-33 to 4-47. Thus, where judgment is obtained irregularly, the court will normally set aside the judgment without enquiring into the merits of the proposed defence. The logic of this position is that the judgment should not have been obtained in the first place and a plaintiff who has obtained judgment irregularly should not have any benefit by reason of having obtained judgment in that fashion. On the other hand, where judgment is obtained regularly, the court may, nonetheless, be persuaded to set aside the judgment so as to permit the defendant to defend the proceedings but will only do so after considering the possible merits of the defence which the defendant would wish to put forward. ..."

18. In this case it is argued that the order of Dunne J. on the 13th October 2008 was a judgment obtained irregularly.

19. A serious issue exists in this case as to whether Mr. Tierney was adequately served with the proceedings, or even, if not properly served, whether he became aware of the proceedings either in advance of the decision of Dunne J. on the 13th October 2008 or at any stage within a reasonable time thereafter. Had he become so aware, there was clearly a strong onus on him to apply to the High Court to have that order of possession set aside. There is also the question as to whether it is appropriate in all the circumstances that this Court should look behind the order of Dunne J. for the purposes of determining its accuracy. It would appear that McDermott J. was not inclined to do so.

20. In general terms, I find it somewhat difficult to believe that in circumstances where a married couple are not separated, and where the family home is concerned, and is, indeed, at stake, a wife would not keep her husband fully informed of legal proceedings relating to the family home and share documentation served on her in that respect, and *vice versa*. On the other hand, it is conceivable that such might happen on rare occasions because of a desire on the part of one spouse to keep bad news from the other spouse, particularly in circumstances where the former had been responsible for the mortgage repayments.

21. A particular feature of these proceedings is that their subject matter is the family home of Mr. and Mrs. Tierney, and as such it enjoys a significant level of constitutional and legal protection. Generally, courts are reluctant to grant a possession order in relation to a family home in the absence of consent, for obvious reason, although it does necessarily happen from time to time. A property, simply because it is the family home, is not immune from repossession.

22. In this case the particular provision of the Rules of the Superior Courts was not complied with in circumstances where, it seems to me, there was insufficient reason at the time not to do so. Another attempt might have been made to effect personal service on Mr. Tierney, or failing that, an application could have been made to deem service on Mrs. Tierney to have been good service on her husband. This was not done. It is appropriate in those circumstances that a court should err on the side of caution and insist that proper service be effected.

23. Mr. Tierney has sworn on affidavit that he was not present in the High Court on the 13th October 2008, nor did he consent to the making of the possession order. While somewhat sceptical of his contention that the order of the High Court drawn up in relation to those proceedings was in error to the extent claimed I nevertheless have a sufficient concern that this indeed occurred.

Conclusion

24. Albeit with some reservation I believe the appeal should be allowed for the reasons given and in the special circumstances of this case.