THE HIGH COURT

[2022] IEHC 640

[2021-186-CA]

BETWEEN

MARS CAPITAL IRELAND NO. 2 DESIGNATED ACTIVITY COMPANY

PLAINTIFF

AND

JOHN MC KEEVER AND MICHELE MC KEEVER

DEFENDANTS

JUDGMENT of Ms. Justice Bolger delivered on the 14th day of November, 2022

1. This is the second named defendant's appeal from an order of the Circuit Court of Judge O'Sullivan dated 16 November 2021 refusing her motion to dismiss the proceedings. For the reasons set out below, I refuse this appeal.

Background

2. The plaintiff issued possession proceedings against the defendants by Civil Bill on 30 August 2018. Previous possession proceedings were brought in 2014 by the plaintiff's predecessor in title in relation to the same property and loans and came before the Circuit Court on a number of occasions. On 28 November 2017, the plaintiff sought an adjournment and Judge Griffin allowed the adjournment but marked it peremptory against the plaintiff. When the matter came back before the Circuit Court on 27 February 2018, the plaintiff sought, once again, to adjourn the matter. A transcript of the DAR of that application has been exhibited by the plaintiff and confirms that the second-named defendant (hereinafter "the defendant") asked Judge O'Donoghue to dismiss the case against her as it had been

made peremptory against the plaintiff by Judge Griffin. Judge O'Donoghue acceded to her application and, when the plaintiff's counsel sought to make submissions, Judge O'Donoghue said he could not look into Judge Griffin's order and the matter was essentially dealt with by Judge O'Donoghue on that very brief, but clearly proper, basis.

3. The plaintiff submitted to this Court that it chose not to appeal that decision as it considered there was no merit in doing so. In *Start Mortgages v. Ryall* [2022] IEHC 200 I said at para. 23 that there must be consequences for a party against whom an adjournment is granted on a peremptory basis, who seeks a further adjournment. Therefore the plaintiff's decision not to appeal the decision of Judge O'Donoghue seems to have been a wise one.

4. The plaintiff issued the within possession proceedings in August 2018. By notice of motion dated 5 December 2019, the defendant sought an order dismissing the proceedings.

The defendant's submissions

5. The defendant is a lay litigant. She does not identify the grounds or the jurisdiction for her application to dismiss in her notice of motion, but, in her grounding affidavit she makes the following two points:-

(1) The plaintiff's grounding affidavit is inadmissible because it was witnessed by a solicitor who cannot perform legal duties outside of his employment as an in-house solicitor for a different organisation. The defendant relies on an email from a regulation assistant of the Law Society of Ireland confirming that the solicitor in question, who was employed as an in-house solicitor, could only provide legal services for his employer and could not perform any duties outside his employment.

(2) *Res judicata* and/or the rule in *Henderson v. Henderson* applies to preclude the plaintiff's proceedings because they seek to bring the same case as they brought previously and which the defendant says they lost and failed to appeal. The defendant describes the second proceedings as an abuse of process. She relies on a number of decisions, not all of which seem to be relevant to the issues identified by her in her appeal. She relies, in particular, on the decision of the Court of Appeal in *Carney v. Bank of Scotland* [2017] IECA 295 which she says requires the court to see whether, in all the circumstances of the case, the plaintiff's conduct was an abuse of process. The defendant contends that the plaintiff's conduct here in bringing her to court several times over four years, between 2014 when they instituted the possession proceedings and 2018 when her application to dismiss was allowed, and never trying to bring the case to a full hearing, was such an abuse of process.

The defendant identifies the stress of dealing with the litigation as the prejudice she has suffered. She also submits that her ECHR right to a fair and expeditious trial has been breached. She argues that the plaintiff's obtaining of the DAR was a further abuse of process and that this prejudiced her because she says the transcript should not have been put into evidence. The defendant raises issues about the conduct of the plaintiff's legal team in, she claims, giving her the incorrect link to remote hearing. The defendant accepted that neither Judge Griffin nor Judge O'Donoghue had conducted any assessment of the issues in the substantive possession proceedings, but she said this was because the plaintiff did not avail of the opportunity they had to have all the issues addressed. Finally, the defendant sought to rely on the decision of Supreme Court in *Bank of Ireland v. O'Malley* [2019] IESC 84 where a failure to particularise a loan was criticised by the Supreme Court. The defendant accepted

that this was not an issue or ground identified by her in her affidavit grounding her application to dismiss and was not, therefore, before the court.

The plaintiff's submissions

6. The plaintiff described the court's jurisdiction to dismiss proceedings as limited to the high bar jurisdiction conferred by O. 19, r. 27 and 20 of the Rules of the Superior Courts, i.e. on the basis that the claim is unnecessary, scandalous, frivolous or vexatious. As this is an appeal from the Circuit Court, the court does not enjoy an additional inherent jurisdiction to strike out the proceedings. Therefore, the court must be satisfied that the plaintiff has no case. The plaintiff argues that the defendant has fallen well short of satisfying that onerous test.

7. In relation to the issue around the solicitor's oath on the plaintiff's grounding affidavit, the plaintiff relies on O. 25, r. 8 of the Rules of the Circuit Court, which states as follows:-

> "The Judge may receive any affidavit sworn for the purpose of being used in any action or matter, notwithstanding any defect by misdescription of parties or otherwise in the title or jurat, or any other irregularity in the form thereof, and in that event direct a memorandum to be made on the document that it has been so received". They also rely on how the similar Rules of the Superior Courts were applied by Kelly J. in *Kearney v. Bank of Scotland* [2015] IECA 32**.**

8. In relation to the defendant's arguments on *res judicata* and the rule in *Henderson v. Henderson*, the plaintiff relies on the decision of the Court of Appeal in *Murphy v. Roadstone* [2015] IECA 35, which they argued demonstrates the need for the earlier decision to have been a proper determination of the issues. The plaintiff submits that no such determination took place here and relies on the very brief transcript of the DAR recording of the application

to Judge O'Donoghue to dismiss the proceedings. They argued that the court made no decision on which issue estoppel could arise. They point to the order of Judge O'Sullivan which, as well as refusing the application to dismiss, allowed the second named defendant to file an affidavit dealing with the prejudice suffered by her as a result of delay and required the plaintiff to produce legal authority in respect of swearing of affidavits. The plaintiff contends that this shows that Judge O'Sullivan considered these issues, identified by the defendant in her application to dismiss, to be potentially worthy of further consideration but in the context of a potential plenary hearing rather than in a motion to dismiss.

Decision

(1) Claimed flaws in the defendant's affidavit

9. The defendant relies on an email from the Law Society confirming that the solicitor who swore the plaintiff grounding affidavit did not have authority to discharge duties beyond his own duties as in-house solicitor for a separate and unrelated organisation. The defendant did not seek to challenge that solicitor's professional qualifications, but did challenge his authority to act beyond his assigned employment duty. I am not satisfied that this alone would permit the plaintiff's grounding affidavit to be questioned, but even if it does, the affidavit is clearly saved by O. 25, r. 8 of the Circuit Court Rules (set out above). I, therefore, refuse the appeal on that ground.

(2) *Res Judicata* and the rule in *Henderson v. Henderson*

10. The defendant relies heavily on the decision of the Court of Appeal in *Carney v. Bank of Scotland* [2017] IECA 295 where (at paragraph 7) Finlay Geoghegan J. described the original proceedings that the defendant claimed gave rise to *res judicata* and/or the rule in *Henderson v. Henderson* as "a significant interlocutory application hearing" following which

an interlocutory order was granted which the defendant appealed, but the appeal was never heard and the defendant never filed a defence. The defendant brought a motion for judgment in default of defence and the Circuit Court judge made a final order granting an injunction and liberty to the plaintiff to re-enter the proceedings. That decision was appealed and, according to Finlay Geoghegan J., was "fully heard" by the High Court and final orders were made. The Court of Appeal had little difficulty in dismissing the subsequent proceedings that the same plaintiff sought to bring, on the basis that they related to matters that "could and should have been raised by way of defence" in the earlier proceeding.

11. The application in this matter to Judge O'Donoghue was for an adjournment, which he refused. He then allowed the defendant's application to dismiss the proceedings. This was of an entirely different nature to the proceedings in *Carney* or, indeed, in *Murphy v. Roadstone*, a view supported by the fact that the transcript of the application comprises of so few words. There was no assessment of the plaintiff's original application for possession. The only application made by the plaintiff was an unsuccessful application for an adjournment.

12. The Court of Appeal in *Murphy v. Roadstone* identifies, at para. 31, the objective underlying the doctrine of *res judicata* as twofold, namely:-

> "the first being that public policy favours the finality and conclusive nature of judicial decisions and the second being the right of an individual to be protected from a vexatious multiplication of suits at the instance of an opponent. See (*Foley .v. Smith* [2004] I.R. 538 at p.542)".

I do not consider that a decision of the Circuit Court to dismiss proceedings, after an adjournment application was refused, equates to the final and conclusive nature of judicial decisions as referred to by the Court of Appeal, at least insofar as the issue of the plaintiff's

substantive proceedings for possession is concerned. If I am wrong in that, it is very clear that the application made by the plaintiff for an adjournment does not come within the concept of "vexatious multiplication of suits at the instance of an opponent" that the Court of Appeal properly said a litigant should be protected from. As stated by Hardiman J. in *AA v. Medical Council* [2003] 4 IR 302:

> "Rules or principles so described cannot, in their nature, be applied in an automatic or unconsidered fashion. Indeed, it appears to me that sympathetic consideration must be given to the position of a plaintiff or applicant who, on the face of it, is exercising his right of access to the courts for the determination of his civil rights or liabilities."

13. To allow the defendant's application to dismiss because of a one-line dismissal of earlier proceedings in circumstances where she raises no issue with the underlying loan or her failure to make any repayments on it since October 2014, would be an inappropriate, automatic and/or unconsidered application of rigid rules which would not equate to doing justice between the parties.

14. I do not accept the defendant's criticism of the transcript being put before this Court given that the defendant seeks to rely on the decision made by Judge O'Donoghue which the defendant accepts is accurately recorded in the transcripts.

15. I therefore refuse this appeal. The plaintiff can proceed with its possession proceedings in the usual way and the defendant will have the opportunity to make whatever defence she chooses to make.

Indicative view on costs

16. My indicative view on cost is that, as the defendant has not succeeded in her appeal from the decision of the Circuit Court refusing her application to dismiss, costs should follow the event in accordance with s. 169 of the Legal Services Regulation Act 2015. I will put the matter in for mention at 10:30am on the 14 December to allow the parties to make whatever submissions they wish to make in relation to costs on final order. I do not require written submission but, if either of the parties wish to make written submissions, they should be lodged with the court at least 24 hours before the matter is back before me.