

THE HIGH COURT

[2015/1186 S.]

BETWEEN

THE GOVERNOR & COMPANY OF THE BANK OF IRELAND

PLAINTIFF

AND

SEÁN HEALY

DEFENDANT

EX TEMPORE JUDGMENT of Ms. Justice O'Regan delivered on the 8th day of November, 2019

Issues

1. This is an application of the defendant brought by way of notice of motion of the 21st of November, 2018, where he seeks certain reliefs as against the plaintiff being the Governor and Company of the Bank of Ireland.
2. At the opening the defendant abandoned claims 1, 2 and 3 of his notice of motion aforesaid, so the matter has proceeded on the basis of para. 4 which is an application to set aside the *ex parte* order made by Mr. Justice Moriarty on the 7th of March, 2016, when the plaintiff was afforded liberty to amend the summons that changed the name of the plaintiff to the Governor and Company of the Bank of Ireland.
3. The initial summons of the 22nd of June, 2015, recorded Bank of Ireland Mortgage Bank as the relevant plaintiff. The defendant's application is grounded upon his initial affidavit of the 21st of November, 2018, together with his supplemental affidavit of the 6th of November, 2019. The matter is resisted on behalf of the plaintiff by virtue of a replying affidavit of David Whelan of the 8th of April, 2019, where at para. 10 he states that the plaintiff is resisting the set aside application.

Background

4. By way of background I note from the papers and exhibits furnished to me that the original loan agreement was signed by the defendant on the 16th of May, 2007, with the Governor and Company of Bank of Ireland. The credit balance then was €2.61m. There is a letter of demand from the current plaintiffs bearing date the 2nd of March, 2015, and thereafter the summons was served in the name of the original plaintiff as aforesaid.
5. An appearance was entered by the defendant on the 23rd of February, 2016, and subsequently there was an application by the plaintiff to the court by way of *ex parte* docket of the 1st of March, 2016, which culminated in the order now sought to be set aside bearing date the 7th of March, 2016.
6. There was in fact a further application to amend the proceedings because of further errors discovered on behalf of the plaintiff, by way of notice of motion of the 24th of July, 2018, and that was resisted by the plaintiff on the 3rd of November, 2018. The plaintiff was successful in that an order was made on the 5th of November, 2018, and now stands appealed to the Court of Appeal by virtue of an application made by the defendant on the 16th of November, 2018.

7. From the outset it is noted that the application in respect of the order of the 7th of March, 2016, was moved by the plaintiff on foot of O.28, r.12 of the Rules of the Superior Court, which provides that: -

“The Court may at any time, and on such terms as to costs or otherwise as the Court may think just, amend any defect or error in any proceedings, and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings.”

8. This order has been the subject matter of prior judicial consideration for example in *Croke v. Waterford Crystal Limited & anor* [2004] IESC 97, Mr. Justice Geoghegan held that the provision was intended to be a liberal rule. This fact is confirmed in *Delaney and McGrath, 3rd Edition at para. 5-158*.

9. The defendant in his application suggests that the correct rule should have been O.15, r.2 which provides: -

“Where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff, the Court may, if satisfied that it is has been so commenced through a *bona fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff on such terms as may be just.”

10. In that regard, the plaintiff has a difficulty with regard to the *bona fide* mistake that may have resulted in the application by virtue of the *ex parte* docket and he says from a review of the DAR recording on the date, the *bona fide* mistake was not sufficiently detailed.

Agreed points

11. Insofar as the matter is concerned in fact, there are a number of agreed points, namely:

- (1) it is agreed between the parties that the original plaintiff and the substituted plaintiff are separate entities;
- (2) it is also agreed that given the fact that the application was made by an *ex parte* application there is a right vested in the defendant to seek to set aside that order; and
- (3) it was not argued that fair procedure would not apply and therefore the jurisprudence relied upon by the defendant in regard to each of those matters is not countered.

The defendant's general submissions

12. In resisting the application, the defendant argued that although there was not a time limit within which a party might apply to set aside an *ex parte* order, nevertheless counsel for the plaintiff relied on substantial jurisprudence to suggest that there is effectively a time limit that should be implied into this type of application. However, considering this is a

new point of law (because counsel could not find any jurisprudence on the topic), I believe the issue would benefit from a more robust and engaged argument between parties rather than in the instant circumstances where the defendant resisted that argument based upon his assertion that he is a lay litigant, which he is. Accordingly, if at all possible, this decision should be made without determining this discreet issue.

13. Outstanding therefore between the parties is that the defendant complains there was a non-service of the *ex parte* docket on him and he should have been advised of this - he was a party to the proceedings and should have been entitled to put his position forward. In my view the appearance was not served, it certainly was entered, but insofar as service was concerned I believe it was not served for the following reasons, namely: -
 - (a) an affidavit of service was not produced before the court;
 - (b) the plaintiff on inquiry indicated that it was not until after the order of the 7th of March, 2016, that they became aware of the appearance being entered; and
 - (c) the defendant says that it would have been recorded on Courts.ie and he shouldn't be condemned for non-service because he is a lay litigant.
14. That matter feeds into the fact that the defendant suggests that there was concealment in the matter by non-service.
15. The defendant's outstanding issue is:
 - (1) he suggests that O.15, r.2 should apply and he relies on various case law in relation to that;
 - (2) he has identified various letters and documents not brought to the court's attention on the 7th of March, 2016, which clearly come from the original bank rather than the substituted bank; and
 - (3) he says that his right to participate has been denied to him.

The plaintiff's general submissions

16. On the other hand, the plaintiff counters as follows:

- (1) the plaintiff notes that anyone can issue a writ and this was in fact an option available to the plaintiff at the time - either discontinue the existing proceedings and start again or apply as they did under O.28, r.12;
- (2) the plaintiff also points out the fact that no prejudice has been suffered by the defendant and indeed the prejudice asserted by the defendant was his right of audience and right to be heard before the court which I am satisfied is now being satisfied by virtue of his notice of motion and the hearing of his application; and
- (3) the plaintiff also relies on the loan and demand which are exhibited and clearly between the Governor and Company of the Bank of Ireland and the defendant.

17. On that basis the plaintiff also relies on the documents exhibited by the defendant to show that there was a clear error in a number of documents given the original loan and the demand, and that there was no transfer of this loan.

Decision

18. In all of those circumstances I am satisfied that the matter can be resolved without the necessity of addressing time limits on the making of a set aside application. Although it was indicated that the defendant could raise these points at the hearing of the application to enter final judgment the matter has been fully aired before me at this time and therefore it is appropriate that the matter would be dealt with by order of this Court at this time.
19. Based on all of the foregoing, I am satisfied that it is undoubtedly the case that the current plaintiff is the correct plaintiff, in particular given the loan and the demand.
20. I am also satisfied that the High Court has ample authority to make an order under O.28, r.12 of the type made on the 7th of March, 2016. I am further satisfied that if all of the documents that are now before me were before the judge when making the order of the 7th of March, 2016, that order would certainly have been made.
21. In the circumstances the application to set aside the order of the 7th of March, 2016, is refused and the subsequent application in the notice of motion *vis-à-vis* concealment is also refused - the defendant has not established that there has been concealment and in my view the *ex parte* application was probably moved on an *ex parte* basis in March, 2016 because of a lack of notification of the appearance being entered. Whether that is correct or not is immaterial. The defendant has now had a hearing on the issue and I have expressed my views as aforesaid.