

THE HIGH COURT

[2024] IEHC 321

[Record No. 2018/2727P]

BETWEEN

THOMAS HAYES

APPLICANT

AND

PROMONTORIA (OYSTER) DAC AND LUKE CHARLETON AND ANDREW

DOLLIVER

RESPONDENTS

JUDGMENT of Mr Justice Kennedy delivered on the 4th day of June 2024.

1. The Plaintiff's Notice of Motion seeks default judgment on the basis of the Defendants' alleged lack of evidence. The grounding affidavit claims that documents discovered by the Defendants are fabricated and that, as a credit servicing firm, the First Defendant has no "*right to sue, nor issue demands in their own name*". The Defendants deny those allegations and argue that there is no basis for the application. This judgment is solely concerned with the application. It does not resolve the factual or legal merits of the claim or of any defences.
2. The proceedings concern a property at Caheruan, Kill, Co. Waterford, Folio WD20939F ("the Property"), and the validity of the Second and Third Defendant's appointment as receivers thereto. The Defendants claim that, by letter dated 21 January 2009, Ulster Bank Ireland

Limited (“the Bank”) offered (and the Plaintiff accepted) overdraft and loan facilities (in the respective amounts of €33,800 and €300,000), by way of a renewal of facilities extended in 2005. The Defendants have exhibited a Deed of Mortgage dated 4 February 2005 and the 21 January 2009 Facility Letter, both of which appear to bear the Plaintiff’s signature.

3. The Plaintiff denies having taken out the mortgage or loan from the Bank. He alleges that his former advisors (an accountant and/or a solicitor) fraudulently mortgaged the Property in his name. Neither of those individuals are parties to the proceedings, although it appears that the Accountant has been the subject of regulatory and/or criminal investigation or prosecution. Because the Plaintiff’s advisors have not had the opportunity to respond to his allegations in these proceedings, I propose to refer to them as the Accountant and the Solicitor respectively.

4. The Plaintiff’s claims have evolved significantly. The Plenary Summons sought, *inter alia*, a declaration that:

“the deed of charge of mortgage was executed by the Plaintiff subject to undue influence”.

By contrast, the Statement of Claim states that, on or about February 2005, and on the advice of his Solicitor and Accountant:

“The Plaintiff was led to believe that he borrowed, 300,000 euro from Ulster Bank for a property investment project in Maynooth Co Dublin. This loan was secured by a charge on lands owned by the plaintiff, folio WD 20939F.”

5. The grounding affidavit exhibits an April 2014 “*précis of evidence*”, prepared in the context of a Chartered Accountants Ireland investigation in respect of the Accountant. The precis was based on an interview with the Plaintiff. The document is heavily redacted and is of negligible evidential value in the current context (where a detailed affidavit from the Plaintiff, backed up with appropriate exhibits, might have been more useful) but the gist of the Plaintiff’s 2014 evidence appears to have been that, in 2005, the Accountant arranged for him to borrow €300,000 from Ulster Bank which was, he understood, to be used to buy three apartments. In the event, the original project was oversubscribed and he and his advisors agreed to invest his

funds in another project, the Dundrum project. While the latter was also oversubscribed, he understood that €200,000 of the funds borrowed would pay for two apartments in that project and the remaining €100,000 was to be returned to him (the precis suggests that he originally informed the investigators in 2014 that the €100,000 was returned to him. However, he now says that that was not the case, and he has apparently corrected his statement in that regard). The investment was not properly accounted for, and he apparently took issue with regard to the advice he had received.

6. By contrast, the Plaintiff's 16 August 2023 affidavit denies that he signed (or even saw) the 2005 Deed of Mortgage prior to its discovery by the Defendants in these proceedings. He disputes its authenticity. He has written to the Defendants and to the Garda National Economic Crime Bureau ("the GNECB"), alleging that the Defendants had disclosed a "*fraudulent Deed of Mortgage*". He speculates that his Solicitor may have transferred the monies raised to the Plaintiff's brothers (or a company under their control), saying that they were:

"the most likely beneficiaries of most or all the money...This lines up with investments made by my brothers at the time".

7. The Plaintiff says that "*the Fabricated Deed of Mortgage is Criminal!*" and that "*all documented evidence provided by [the Defendants] are Fabricated Photocopy's, designed to make it appear as if, I received 300,000 euro from Ulster Bank*" [*sic*]. He speculates that, if the Bank did advance €300,000, his Accountant and Solicitor, "*as well as many other Co-conspirators, ARE RESPONSIBLE FOR THE FRAUD AND THEFT*" thereof.

8. By contrast, the Defendants say that the Plaintiff entered into a Deed of Mortgage dated 4 February 2005 in favour of the Bank, charging the Property as security for the Plaintiff's present and future indebtedness. The charge was registered with effect from 31 March 2005. The Bank issued a summary summons against the Plaintiff on 17 May 2011, seeking €301,901.14 and €45,055.37. Although the summons was renewed in 2012 and 2013, it seems

that the claim was not, ultimately, pursued (a fact invoked by the Plaintiff in his favour, although it is not relevant to the current application and, in any event, the ongoing criminal investigation, in respect of the advisors, may well explain the decision).

9. The First Defendant claims to have become entitled to the Bank's interest in the Property by virtue of a Global Deed of Transfer dated 19 December 2016 and it was registered as the owner of the burden on the folio as of 9 March 2017. Following the deed of transfer, the company providing loan administration and asset management services to the First Defendant wrote to the Plaintiff to introduce itself and it subsequently outlined the steps required to redirect payment to the First Defendant. However, the Plaintiff allegedly failed to make required repayments and immediate repayment of €370,703.62 and €44,471.09 was demanded. On 29 September 2017, the Second and Third Defendants were appointed as receivers. The Third Defendant wrote to the Plaintiff, informing him of the appointment in the usual terms but there is a dispute as to whether the Plaintiff received this and other correspondence.

10. Claiming to have only had sight of the Instrument of Appointment on 19 May 2023 (when it was produced on discovery), the Statement of Claim alleges that the Instrument of Appointment is invalid and that the receivers' Instrument of Appointment was fabricated by the Defendants' law firm. However, his subsequent letter to that firm, dated 13 June 2023, does not make that allegation, but rather states his intention to cross-examine the Defendants' deponents, who "*should be able to tell us who Fabricated the copies*". The Plaintiff's 16 August 2023 affidavit reiterates the claims that the documents were fabricated (without evidence other than sweeping assertions).

11. The Plaintiff's affidavit of 16 August 2023 alleges that, on 23 December 2022, there was "*an attempt made to steel [the Property]*" [*sic*]. He made the same claim in a 6 January 2023 letter to the GNECB, alleging that the Solicitor had attempted to transfer ownership of the Property to a company registered at the same address and inferring that his brothers (the

tenants) were “*involved*”. His May 2023 letter to the GNECB alleged that the Defendants and their solicitors were aiding his Solicitor “*in his attempts to complete his Fraud and Theft*”.

12. The Plaintiff issued these proceedings on 27 March 2018. The Plenary Summons was not served but the Defendants learnt of them and of the registration of a *lis pendens* when they attempted to sell the Property. They entered an appearance and requested a Statement of Claim. The Plaintiff claimed to be unable to deliver a Statement of Claim due to “*a Criminal investigation which is on going...in relation to the theft of 300,000 euro*”.

13. The Defendants again sought delivery of a Statement of Claim, by letter of 17 July 2019, and issued a motion on 3 December 2019, seeking to dismiss the action for want of prosecution and to vacate the *lis pendens*. On 13 October 2021, Sanfey J. vacated the *lis pendens* and directed the delivery of a Statement of Claim, granting the Defendants costs. The Statement of Claim was delivered on 8 November 2021. The *lis pendens* having been vacated, the Defendants sold the Property in August 2022 on foot of the charge. The purchaser’s registration is apparently “*currently pending as a dealing*” on the folio. On 11 January 2023, Stack J. directed the First Defendant to discover certain documents, with costs to the Defendants (because the discovery ordered was much reduced from what had been sought and was similar to that offered by the Defendants). It should be noted that, while challenging the authenticity of the discovery produced by the First Defendant, the Plaintiff has not alleged any breach of the order of Stack J., nor has he asserted any entitlement to seek further and better discovery. Since the order of Stack J. was exclusively directed to the First Defendant, it is not clear how any alleged breach would be relevant to the other Defendants in any event.

14. The First Defendant’s discovery was produced for inspection on 19 May 2023, although the First Defendant’s affidavits note that “*copies of all of the relevant documents*” had already been provided to the Plaintiff at earlier junctures, including in the motion to vacate the *lis*

pendens. The Plaintiff had, therefore, seen the relevant documents “*in or about December 2019 or early 2020*”. Subsequently, on 16 August 2023, the Plaintiff issued his current motion.

The Parties’ Submissions

15. The Plaintiff’s submissions focused on his claims of fraud. He submitted that the Defendants’ documents, in particular the Deed of Mortgage, “*have to be fabricated, have to be forgeries*”, because he “*did not get a mortgage*”. He acknowledged that he had intended to apply for a mortgage for the purposes of investing in a property project, and, indeed, that he was under the impression for a period that he had been successful. However, he denied signing the Deed of Mortgage exhibited in these proceedings. He also alleged that the funds which he had believed that he had drawn down had been misappropriated, by his Accountant and/or his Solicitor. Whilst he had not retained a handwriting expert, and he conceded that the signature resembled his genuine signature, he insisted that he “*did not sign*” the Deed of Mortgage.

16. The Plaintiff also referred to the former Chartered Accountants Regulatory Board and/or criminal investigations into the Accountant for alleged fraud, and attempted to rely on the redacted “*CARB report*” to demonstrate that monies had not been invested on his behalf by the Accountant as intended, arguing that this proved that he had neither drawn down the mortgage nor signed the deed. He also relied on the fact that the Bank had not pursued the summary proceedings previously brought against him and on letters from financial institutions to demonstrate that there was no mortgage in his name.

17. The Plaintiff acknowledged that the alleged fraud could not be attributed to the Defendants in these proceedings, and that the Accountant, the Solicitor and the Plaintiff’s own family were the “*culpable*” parties. Nevertheless, he insisted that his land was being “*taken*” on foot of the alleged fraud and that he was simply trying to protect his property. He denied receiving any correspondence from the Defendants and complained that unverified,

photocopied documentation had been furnished to him instead of original documents, although he made no specific application in that regard.

18. The Defendants submitted that the motion had no basis in law. A plaintiff could not simply apply for default judgment, without making out its own case, simply on the basis of its characterisation of its opponent's evidence. Even if a more generous interpretation of the motion were adopted (of being a motion to strike out the Defence/Counter Claim for being frivolous and vexatious and/or bound to fail), the Defendants submitted that the Plaintiff had been not made out any such case. When it was suggested that the motion could be interpreted as an application for summary judgment, the Defendant submitted there is no procedure for "short-circuiting" plenary proceedings in such a way, and, moreover, that such an avenue is not open to a plaintiff in proceedings in which the reliefs sought include declarations and injunctions. The Defendants further argued that the application must fail on its merits, regardless of the basis on which it was brought. The Plaintiff was essentially claiming that the Defendants' evidence is so poor, their pleadings are so weak, and the Plaintiff's so strong, that he must prevail and was thus entitled to judgment without having fully set out his case. The Defendants denied the suggested weakness on their part but noted that there was no onus on them to prove their defence at this juncture. They had set out, at the very least, *prima facie* evidence in their favour, insofar as they can rely on the folio, which records a charge owned previously by the Bank and subsequently by the First Defendant, and behind which the Court cannot look. They challenged the strength of the Plaintiff's "*somewhat confused and somewhat contradictory*" case, submitting that the pleadings have been unclear and evolving throughout the proceedings. Moreover, any claim that can be gleaned from the pleadings would appear to relate primarily to non-parties; they submitted that the limited evidence adduced does go to any claim against the Defendants and certainly would not justify default judgment.

19. Even if the motion were to be regarded as an application for summary judgment, it was submitted, such an application would typically be sought in circumstances where a plaintiff has set out its entire case and sought a defence. The Defendants submitted that the Plaintiff has not set out sufficient evidence to warrant summary judgment, indeed he has admitted that he does not possess all necessary evidence, nor does he know in full what his case is.

20. The Defendants welcomed the Plaintiff's clarification that he did not intend to level allegations against the Defendants of having committed or abetted fraud, but the Defendants nevertheless noted that the folio records the charge as being registered in 2005, long before any of the Defendants had become involved. In terms of the "fabricated" Instrument of Appointment of the receivers, they argued that, irrespective of the validity of the charge on the Property, the First Defendant has and had the capacity to appoint receivers in circumstances where it understood the Plaintiff to have defaulted on his obligation to make repayments (and it was noted that the Plaintiff has, at no point, contested the understanding that repayments were not being made). Accordingly, there was no basis nor incentive for the First Defendant to "fabricate" an Instrument of Appointment, and no cause to doubt the word of both appointer and appointee. Therefore, insofar as any allegations of fraud were levelled against the Defendants, they maintained that the evidence presented did not satisfy whatever bar need be cleared in order to obtain judgment in default.

Findings

21. At the trial of these proceedings, the Plaintiff is entitled to pursue any claims based on the alleged fraud, fabrication of documents, lack of evidence or in respect of legal issues such as whether, as a credit servicing firm, the First Defendant has any right to sue. However, all such claims must be properly pleaded in accordance with the Rules of the Superior Courts. For example, detailed particulars would be required in respect of any plea of fraud, forgery or

fabrication in particular, if the Plaintiff were to pursue any such claims at trial. The Plaintiff will have to establish the basis on which the alleged fraud on the part of his own advisors gives him a basis to pursue a claim against the Defendants, in circumstances in which he has very properly acknowledged that they were not party to any such fraud. For example, if the Plaintiff's case is that his advisors applied for loans on his behalf but diverted the funds from their intended purpose, then he will need to explain the basis on which the Bank or the Defendants are liable for the alleged misappropriation by his own representatives and advisors. In general, the burden of proof will be on the Plaintiff to substantiate his claims and detailed factual and expert testimony would be required, including a report from an independent handwriting expert. Detailed submissions would also be required in respect of the legal issues, including, in particular, Section 31 of the Registration of Title Act 1964, which the Defendants rely upon as a complete answer to the claim (in that, save in exceptional circumstances, the Register is conclusive evidence of title to property).

22. Accordingly, at trial, both sides will have the opportunity to call evidence and make submissions and to cross examine each other's witnesses. At trial, the Plaintiff will be able to advance his contention that the correspondence with the Ulster Bank and the Central Bank supports his contention that he never entered into a mortgage. It is not obvious to me that those documents provide conclusive evidence in that regard, bearing in mind their date and in circumstances in which the Defendants had actually sold the Property as long ago as August 2022. There is no basis in the current circumstances to curtail that process and to deprive the Defendants' of their constitutional rights to defend themselves in these proceedings in the usual way.

23. Furthermore, the Plaintiff's affidavits, pleadings and submissions consist of assertions which, in many cases, appear contradictory and inconsistent with each other and with earlier evidence, pleadings and submissions. For example, the documents which he claims to have

seen for the first time on discovery in May 2023 do in fact appear to have been exhibited in 2019, in the course of the application to vacate the *lis pendens*. Accordingly, it is remarkable that the Plaintiff's current position was not fully ventilated in that context or in the Statement of Claim which was delivered in November 2021. The Plaintiff may be able to explain the apparent inconsistencies in his oral testimony at trial and under cross examination. In any event, as matters stand, the Plaintiff has failed to establish a *prima facie* case, even if there were a procedural basis for his application. On the basis of the limited evidence tendered to date, I am not convinced by his claim that, because the monies advanced were not allocated to their intended purposes, that means that no monies were advanced or that there was no mortgage.

24. To the contrary, the Defendants clearly have a strong arguable defence on the basis of their affidavits, the documents exhibited thereto and the registration of the mortgage. There is no basis to deprive the Defendants of their right to contest these proceedings at trial. Nor could it be contended that the Defendant's case is in any respect frivolous, vexatious or bound to fail. Even without the evidence of registration, I would be disposed to dismiss the application. I have seen no credible basis to impugn the appointment of the receivers. However, the fact of registration alone would appear to be fatal to the current interlocutory application. The Defendants are *prima facie* entitled to rely on the folio, as recording a charge owned previously by the Bank and subsequently by the First Defendant, and behind which the Court generally cannot look.

25. The application will be refused.