

THE HIGH COURT

[2022] IEHC 410
[2017/2603S]

BETWEEN

THE GOVERNER AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF

AND

ANN O'CONNOR AND NIGEL O'CONNOR

DEFENDANTS

JUDGMENT of Ms. Justice Bolger delivered on the 4th day of July, 2022

1. This is the plaintiff's application to enter final judgment against the defendants in the proceedings issued by way of special summons dated 1 December 2017. For the reasons set out below I am refusing this application.
2. The parties agree that the appropriate test to determine if the court should enter summary judgment or allow the matter to go to plenary hearing is whether it is very clear that the defendant has no defence. The relevant authorities on this test include the decisions of the Supreme Court in *Aer Rianta CPT v. Ryanair Limited* [2001] 4 IR 607 and *IRBC v. McCaughey* [2014] 1 IR 749 and the principles set out by McKechnie J in *Harrisrange Limited v. Duncan* [2003] 4 IR 1 which were discussed by me in my recent decision in *Primeline VNE Limited v. Centz Retail Holdings Limited* [2022] IEHC 365.
3. The defendants in these proceedings are the personal representatives in the estate of the late Christy O'Connor. They have issued separate proceedings against the plaintiff in relation to the property that is the subject matter of these proceedings, but the parties have agreed that the existence of those proceedings do not impact on this court's assessment of whether the defendants have a defence and in turn whether the plaintiff is entitled to enter final judgment. The parties agree that whether or not this matter should proceed to a plenary hearing largely revolves around factual matters put before this court by way of the various affidavits sworn by and on behalf of the parties.

Background

4. The summary summons seeks judgement in respect of loans taken out by the late Mr. O'Connor to purchase a number of rental properties. There is no dispute that the monies are due. The dispute which the defendants maintain give rise to a counterclaim relates to the plaintiff's handling of the sale of one of those properties. The defendants maintain that the property was placed on the market by the plaintiff at an undervalue based on what the defendants claim was a forged valuation which led to a loss in the value of the property and reduced their debt less than the proceeds of sale should have. They also claim that the plaintiff's decision to place the property on the market at an undervalue impacted negatively on the defendants' separate attempts to sell two adjoining properties also covered by the loans.

5. The three properties are number 10, 11 and 12 Mount Wolseley Court in Tullow, County Carlow. When the loans were defaulted upon, a receiver was appointed over number 10 to take over managing that sale. The sale of numbers 11 and 12 were managed by the defendants. The proceeds of all three sales were applied to reduce the debt due to the plaintiff.
6. The defendants had asked the plaintiff to cooperate in relation to orderly sales of all three properties with a view to maximising the net proceeds of sale, and to agree to the appointment of Mr. Mathew Conry of REA Dawson in Tullow to sell all three properties. The plaintiff refused to allow the defendants to sell number 10 and instead they took advice on its value from two local auctioneers including Mr. Conry of REA. Valuations were furnished on 6 October 2017. DNG valued the property at €205,000 and identified different local comparative transactions, the highest of which was €210,000. REA's valuation of €240,000 was signed by Mr. Conry, once as valuer and once as firm director, and identified a local comparative property of 21 Mount Wolseley Court which REA said it had sold on 29 January 2016 for €250,000.
7. On 24 October 2017, the receiver's representative emailed Mr. Conry of REA asking him to provide his valuation on an updated valuation template to replace what he had provided on an old valuation template. Whilst that email is exhibited, as is the email to which Mr. Conry attached his first valuation in the plaintiff's affidavit, the disputed valuation which the plaintiff said was received from REA does not include any cover letter or cover email. The plaintiff's deponent simply said that the receiver received this valuation from REA and that it was dated 20 October 2017, which the plaintiff deponent said they presumed was a typo. This goes to the core of the defence the defendants claim to have as the defendants maintain this valuation was a forgery and that Mr. Conry or REA did not prepare or furnish it. The defendants place heavy emphasis on the reference in the disputed valuation to the same local comparator property i.e. 21 Mount Wolseley Court but in the disputed valuation this is stated to have been sold on 29 November 2015 for €200,000. The disputed valuation places a far lower valuation of between €190,000 to €200,000 on number 10. It also recommended sale by auction whereas the earlier valuation of recommended sale by private treaty.
8. There is no evidence of the plaintiff having made any enquiries of REA about the different sale price identified for the same local comparative property, the unexplained reduction in the valuation from €240,000 to between €190,000 and €200,000 or the change in advice on how the property should be sold. Ms. Larkin on behalf of the receiver states at para. 38 of her affidavit that the valuation report of 20 October 2017 was taken at face value by the receiver and his staff, and that the value it gave of between €190,000 and €200,000 was more in line with the valuation report prepared by DNG and with the comparators referred to in each of the valuation reports. She says that the valuation report of 28 October 2017 was therefore taken to have superseded Mr. Conry's valuation report of 6 October 2017.

9. The plaintiff relies on an email of 9 January 2018 it sent to Mr. Conry attaching a copy of the disputed valuation and asking him to confirm the number of bathrooms in the house. Mr. Conry replied and confirmed that there were three bathrooms even though the disputed valuation had only referred to one bathroom (as had the earlier undisputed valuation). The plaintiff argued that this email constitutes a confirmation by Mr. Conry that the disputed version was his valuation.
10. Ms. Larkin on behalf of the plaintiff says in her affidavit that the receiver prepared a strategy report in relation to number 10 on or about 22 November 2017 which is not exhibited, but Ms. Larkin says that the report recommended appointing REA to market the property for sale by private treaty with a guide price of €205,000. The plaintiff approved the strategy set out in the strategy report and number 10 was placed on the market on 20 April 2018 with that guide price of €205,000. The price was clearly determined by the receiver and approved by the plaintiff and was not recommended or formulated by Mr. Conry.
11. The defendants contend that this guide price was an undervalue and it undermined their attempts to sell numbers 11 and 12 and led to the sale that had been agreed at that time, for number 12 for €252,000, to be withdrawn. The defendants have not exhibited any documentation evidencing that alleged agreement for the sale of number 12. They simply aver that they had secured that agreement shortly before number 10 was put on the market which was then withdrawn and the sale was lost. In January 2021 the defendants agreed a sale of number 11 for €255,000 and in March 2021 they agreed a sale of number 12 for €240,000. The net proceeds of both sales were set against the debt due to the plaintiff.
12. Mr. Conry provided the plaintiff with two separate best-price declarations for number 10 on 28 June 2019 and 3 July 2018, both of which set out the only four offers that had been made on the property over the previous two to three months while it was on the market. The plaintiff decided to accept the offer of €215,000 that Mr. Conry had advised was the best price reasonably obtainable. The sale for number 10 closed on 20 December 2018.
13. The plaintiff argues that the fact that numbers 11 and 12 eventually sold for figures well in excess of the €215,000 it had secured for number 10 and in excess of the first REA valuation for number 10 (of €240,000) means that any possible adverse effect of its marketing strategy and the guide price for number 10 was neutralised, and the defendants therefore have no counterclaim against the plaintiff and no defence to these proceedings. The defendants argue that expert evidence on property prices at that time will be required in order to establish the negative impact it says the plaintiff's marketing strategy and guide price (of €215,000) for number 10 had on their attempts to sell the other two properties. The defendants intend to subpoena Mr. Conry. They had prepared an affidavit for him to swear in this application but he declined to do so. The content of that draft affidavit, which have been exhibited, does not constitute evidence and has not been relied on by the court in this application.

14. The defendants also intend to seek discovery against the plaintiff, the receiver, and the two valuers engaged by the plaintiff in relation to number 10.

Decision

15. The court must be satisfied that the defendants have no defence before a summary judgment can be entered. The possibility of the defendants' position being improved by discovery and/or oral testimony (including from a reluctant witness who may be subpoenaed) must be considered, albeit that there must be a reasonable and viable prospect of such an improvement rather than merely a speculative or optimistic expectation.
16. The plaintiff accepts that if the defendant can establish that number 10 was undervalued, that may constitute a defence but denies on the evidence that number 10 was undervalued.
17. The defendants maintain that the second REA valuation is a forgery. Whilst the guide price of €205,000 was formulated by the receiver, it was clearly done in reliance on the disputed valuation which Ms. Larkin says (at para. 38 of her affidavit) superseded REA's earlier valuation, and which she says was more in line both with DNG's valuation and the comparatives referred to in each of the valuer's reports (which must include the property at 21 Mount Wolseley Court for which a different sale price was identified in the first and second REA valuation report). That disputed valuation is therefore highly relevant to the receiver's recommendation to the plaintiff to put number 10 on the market with a guide price of €205,000.
18. The origin and accuracy of that disputed valuation may give rise to a defence for the defendant. There are documents relating to that report, such as whatever it was sent with, i.e. a cover letter or an email, which have not been exhibited and which may be available to the defendant by way of discovery. There is also the strategy report referred to by Ms. Larkin but not exhibited. There is the possibility of Mr. Conry's evidence under subpoena and the evidence of other witnesses including the other valuer from DNG and an expert on property prices in Tullow at that time and at the time numbers 11 and 12 were sold, being made available to the court at trial.

Conclusion

19. I am of the view that the defendant may have a defence to the plaintiff's claim and may be able to improve their position by discovery and/or oral testimony at trial and so I am not satisfied to allow the plaintiff to enter final judgment. I refuse the plaintiff's application and I refer the matter for plenary hearing.

Indicative view on costs

20. My indicative view on costs is that whilst the plaintiff has not succeeded in its application, it may still be possible that the trial judge will decide that the defendants had no viable counterclaim or defence to these proceedings. That seems to me to require that the costs of this application be reserved to the trial judge for a determination upon the resolution of the plenary hearing. I will hear the parties further should they wish to seek an alternative order in relation to costs.

21. I will put the matter in for mention at 10 am on 21 July to hear the parties on costs and final orders. I do not require written submissions but if either party wishes to make them then they should be filed in court at least 24 hours before the matter is back before me.