

KYPROS S KYPRIANIDES

Appellant-Defendant

—
KYPROS
S. KYPRIANIDES
v
SYMEON IOANNOU

SYMION IOANNOU,

Respondent-Plaintiff

(Civil Appeal No 4591)

— —

Practice Specially endorsed writ under order 2 rule 6 of the Civil Procedure Rules Summary judgment -Application for leave to defend Conditional leave to defend granted Order 18 rule 1 (a) and rule 6 Discretion of the trial Judge Grounds on which the Court of Appeal may interfere with the exercise by the Judge of his discretion under Order 18 The Court of Appeal will not interfere unless there has been some errors of principle or misapprehension of fact on the part of the Judge or unless he has given undue weight to a particular aspect of the facts Leave to defend Requisites of defendant's affidavit It must give sufficient facts and particulars to show that there is a bona fide defence It " must condescend upon particulars " General demurs and vague allegations will not suffice The Civil Procedure Rules Order 18 rules 1 2 and 6 The English Rule (RSC) Order 14 The burden is on the defendant to satisfy the Court that he has a bona fide defence to the action Order 18, rule 1 (a)

Judgment Summary judgment Application for Opposition to— Defendant's affidavit Requisites of Burden on the defendant to satisfy the Court that he has a good defence to the action See above

Discretion Exercise of discretion by the trial Courts Grounds upon which the Court of Appeal will interfere with the exercise of such discretion particularly under order 18 (supra) —See under practice above

Appeal Court of Appeal Interlocutory appeal from an order giving conditional leave to defend Discretion of the Judge— Principles upon which the Court of Appeal will interfere with such discretion - See under Practice above

This is an appeal from the order of a District Judge granting conditional leave to the appellant-defendant to defend

the case in the action, instituted by the respondent-plaintiff, by way of a writ of summons specially indorsed under the Civil Procedure Rules, Order 2, rule 6 claiming £105 on a bond in customary form within the provisions of section 80 of the Contract Law, Cap. 149. The order appealed from is as follows :

“Leave to defend granted on condition that defendant shall, within 20 days, deposit the amount of the claim, plus £18 costs, in Court”.

The appellant's point is that on the affidavit filed by him. (*Note* : The affidavit is set out in the judgment of the Supreme Court, *post*), the trial Judge ought to have granted him unconditional leave to defend since the defence raised thereby was a defence of illegality viz. that the “alleged bond was null and void as it arises from an illegal transaction”, (a gambling transaction).

The Supreme Court in dismissing the appeal :

Held, (1) (a) Order 18, rule 1 (a) of the Civil Procedure Rules provides that summary judgment for the plaintiff may be given on his application “unless the defendant shall satisfy the Court that he has a good defence to the action on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend”. And rule 6 provides that leave to defend “may be given” unconditionally or subject to conditions.

(b) It will thus be seen that the burden is on the defendant to satisfy the Court that he has a good defence, and in deciding this matter the Judge has to exercise his discretion.

(c) In the present case the Judge, having exercised his discretion after hearing counsel and considering the material facts, and the affidavits put before him granted conditional leave to defend.

(d) It is well settled that where a Judge has exercised his discretion under order 18 (*supra*) and imposed conditions as a term of giving a defendant leave to defend the Court of Appeal will not interfere with the exercise of his discretion unless there has been some error of principle or misapprehension of fact on his part, or unless he has given undue weight to a particular aspect of the facts (*Gordon v. Craddock* [1963] 2 All E.R. 121).

(2) (a) This appeal may be decided on a very short point, that is, that the defendant's-appellant's affidavit (*note* : It is set out in the judgment, *post*), does not give sufficient facts to show that there is a good defence, nor does it disclose such facts as may be deemed sufficient to entitle him to defend.

(b) As decided in a number of English cases on the corresponding English Rules (R.S.C. Order 14), sufficient facts and particulars must be given to show that there is a *bona fide* defence. A mere general denial that the defendant is indebted will not suffice (*Wallingford v. Mutual Society* [1880] 5 App. Cas. 685, at p. 704) The defendant's affidavit must "condescend upon particulars" and should as far as possible, deal specifically with the plaintiff's claim and affidavit, and state clearly and concisely what the defence is, and what facts are relied upon as supporting it.

(c) In this particular case the affidavit sworn by counsel for the defendant (*post*) simply states that his "instructions are that the alleged bond is null and void and not recoverable in law as it arises from an illegal transaction". No facts or particulars are given. In the following paragraph counsel states "there is no valuable or lawful consideration in respect of the alleged bond and represents money paid on gambling". There again no specific facts are given to show that there is a *bona fide* defence.

(3) For these reasons the appeal is dismissed with costs. We allow the defendant-appellant a further 15 days from to-day to comply with the conditions imposed by the trial Judge.

Appeal dismissed with costs. Order allowing the defendant a further 15 days to comply with conditions imposed by the trial Judge.

Cases referred to :

Gordon v. Cradock [1963] 2 All E.R. 121, followed ;

Wallingford v. Mutual Society [1880] 5 App. Cas. 685, at p. 704 *applied*.

Appeal.

Appeal against the judgment of the District Court of Nicosia (Ioannides, D.J.) dated the 1st July, 1966, (Action No.

1966
Oct. 14

KYPROS
S. KYPRIANIDES
v.
SYMΦON IOANNOU

1157/66) granting conditional leave to the appellant-defendant to defend the case.

A. Georghiades, for the appellant.

J. Mavronicolas with *D. Theocharides*, for the respondent.

The judgment of the Court was delivered by :

JOSEPHIDES, J. : This is an appeal from the order of a District Judge granting conditional leave to the appellant-defendant to defend the case. The order of the learned Judge was as follows :

“ Leave to defend granted on condition that defendant shall, within 20 days, deposit the amount of the claim, plus £18 costs, in Court ”.

The plaintiff's claim was stated to be based on a bond in customary form for the sum of £105 plus interest. The writ of summons was a specially indorsed writ, under Order 2, rule 6.

After service of the writ on the defendant, which was substituted service on his wife as he was absent from Cyprus, appearance was entered on his behalf and subsequently the plaintiff applied for summary judgment under the provisions of Order 18, rules 1 and 2. The application for summary judgment was supported by an affidavit giving particulars of the claim and stating that the bond had been examined by defendant's advocate and copy thereof handed to him. In fact, the bond has been inspected by us, and it would appear that it is a bond in customary form within the provisions of section 80 of the Contract Law, Cap. 149.

Defendant's counsel filed an opposition to the plaintiff's application for summary judgment and in support thereof he relied on the following affidavit sworn by him :

“ 1. I am the defendant's counsel retained in the above case.

2. My instructions are that the alleged bond is null and void and not recoverable in law as it arises from an illegal transaction.

3. There is no valuable or lawful consideration in respect of the alleged bond and represents money paid on gambling.

4. In the circumstances my client has a good defence which goes to the whole of the alleged plaintiff's claim.

5. My client at present is outside Cyprus".

The learned Judge, after hearing counsel, granted conditional leave to defend as quoted earlier in this judgment. He gave no reasons for his decision.

The appellant's main argument before us was that by his affidavit he raised a defence of illegality for which the Judge ought to have granted him unconditional leave to defend. The material part of rule 1 (a) of Order 18 provides that summary judgment for the plaintiff may be given on his application "unless the defendant shall satisfy the Court that he has a good defence to the action on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend". And rule 6 provides that leave to defend "may be given" unconditionally or subject to terms.

It will thus be seen that the burden is on the defendant to satisfy the Court that he has a good defence, and in deciding this matter the Judge has to exercise his discretion. In this case the Judge, having exercised his discretion after hearing counsel and considering the material in the form of affidavits put before him, granted conditional leave to defend. It is well settled that where a Judge has exercised his discretion under Order 18 and imposed conditions as a term of giving a defendant leave to defend, the Court of Appeal will not interfere with the exercise of his discretion unless there has been some error of principle or misapprehension of fact on his part, or unless he has given undue weight to a particular aspect of the facts (*Gordon v. Cradock* [1963] 2 All E.R. 121).

The appellant's point is that on the affidavit filed by him the trial Judge should have granted him unconditional leave. We think that this appeal may be decided on a very short point, that is, that the defendant's affidavit does not give sufficient facts to show that there is a good defence, nor does it disclose such facts as may be deemed sufficient to entitle him to defend.

As decided in a number of English cases on the corresponding English Rules (R.S.C. Order 14), sufficient facts and particulars must be given to show that there is a *bona fide* defence. A mere general denial that the defendant is inde-

1966
Oct. 14
—
KYPROS
S. KYPRIANIDES
D.
SYMFOY IOANNOU

1966
Oct. 14
—
KYPROS
S. KYPRIANIDES
"
SYMION IOANNOU

bted will not suffice (*Wallingford v. Mutual Society* (1880), 5 App. Cas., 685, at page 704). The defendant's affidavit must "condescend upon particulars", and should, as far as possible, deal specifically with the plaintiff's claim and affidavit, and state clearly and concisely what the defence is, and what facts are relied upon as supporting it.

In this particular case the affidavit sworn by counsel for the defendant simply states that his "instructions are that the alleged bond is null and void and not recoverable in law as it arises from an illegal transaction". No facts or particulars of the illegality are given. In the following paragraph counsel states "there is no valuable or lawful consideration in respect of the alleged bond and represents money paid on gambling". There again no specific facts are given to show that there is a *bona fide* defence. For these reasons the appeal is dismissed.

JOSEPHIDES, J. : Are you claiming costs ?

Mr. Mavroucolas : Yes, Your Honour.

JOSEPHIDES, J. : The appeal is dismissed with costs. As the conditions imposed by the learned Judge on the 1st July, 1966, have not been complied with, we allow the defendant a further 15 days from today to comply with those conditions. If the defendant shall fail to comply, the plaintiff may sign final judgment against him for the amount indorsed on the writ with interest and costs. Order accordingly.

*Appeal dismissed with costs.
Order allowing defendant a
further 15 days to comply
with conditions imposed by
trial Judge.*