

1969

July 3

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CHARILAOS
KYRIAKOULLIS
v.
NATIONAL BANK
OF GREECE
& OTHERS

[VASSILIADES, P., JOSEPHIDES AND LOIZOU, JJ.]

CHARILAOS KYRIAKOULLIS,

Appellant-Plaintiff,

v.

NATIONAL BANK OF GREECE,

Respondent-Defendant,

and

1. BARCLAYS BANK D.C.O.,

2. CO-OPERATIVE CENTRAL BANK LTD.,

Respondents-Third parties.

(Civil Appeal No. 4729).

Banking—Cheque—Dishonoured for lack of funds in drawer's account—Claim by payee against collecting bank for the full amount of the face value of the cheque as damages for loss suffered by reason of the defendant bank's alleged negligence to inform him in due course that said cheque had been dishonoured—So as to enable him to take in time the necessary action for the protection of his interest—Claim rightly dismissed—Findings of trial Court on the question of negligence amply supported by the evidence on record.

Practice—Costs—Third-party proceedings—Conduct of successful third party contributed to creation of circumstances giving rise to litigation—Order for costs in his favour set aside.

Cases referred to:

Despotis v. Tseriotou (reported in this Part at p. 261 *ante*);

Patsalides v. Afsharian (1965) 1 C.L.R. 134;

Hadji Petri v. Hadji Georghou (reported in this Part at p. 326 *ante*);

Marfani and Co., Ltd. v. Midland Bank Ltd. [1968] 2 All E.R. 573.

The facts of the case sufficiently appear in the judgment of the Court whereby it dismissed the appeal by the plaintiff

against the dismissal by the trial Court of his action for damages by reason of alleged negligence on the part of the defendant Bank (respondent) to inform him in due course that the cheque which he—the plaintiff-payee—had entrusted to the said Bank for collection had been dishonoured.

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Appeal.

Appeal by plaintiff against the judgment of the District Court of Nicosia (Demetriades & Stravrinakis D.JJ.) dated the 4th May 1968 (Action No. 277/68) whereby his claim for £288.— for damages for negligence and/or breach of contractual and/or statutory duty was dismissed.

Chr. Mitsides with *Chr. Chrysanthou*, for the appellant-plaintiff.

G. Talianos, for the respondent-defendant.

P. Laoutas for *L. Clerides*, for the respondent (third party No. 2)

Cur. adv. vult.

The judgment of the Court was delivered by:

VASSILIADES, P.: The appellant (plaintiff in the action) is an insurance agent in Nicosia. He was a customer of the Nicosia branch of the National Bank of Greece (the defendants in the action), where he had several accounts, he said. On June 17, 1966, he presented to the defendant bank a cheque for £288 for collection and deposit in his account No. 400919. The value of this cheque is the subject matter of the present appeal. The cheque was drawn by a certain Andreas Kyprianou on the Limassol branch of the Co-operative Central Bank Ltd., whose head-office is in Nicosia. It was written on the Bank's printed cheque-form No. 19802; and it was payable to the plaintiff.

The National Bank of Greece, (to whom, for convenience we shall refer hereafter, as the 'defendant Bank') handled the cheque for collection, in the ordinary course of such business as customary in Cyprus, channelling it on the 18.6.66, for clearance, presentation and collection through the Cyprus Central Bank's Clearing House, where the Co-operative Central Bank Ltd., (to whom we shall hereafter refer as the Co-operative Bank) was represented by Barclays Bank, D.C.O., Nicosia.

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The cheque, channelled through the Co-operative Bank, reached their Limassol branch, on which it was drawn, on June 22, 1966. There, it was first debited to the account of the drawer as it appears on the extract of the account, produced at the trial as exhibit 18 (page 20 of the exhibits). On the following day, however, June 23, 1966, the same exhibit contains a counter-entry in the drawer's said account for the same cheque, indicating that the drawee bank decided to decline payment and dishonour their customer's cheque for lack of credit in his account. In fact on June 22, when the cheque reached the drawee bank, the drawer's account presented a debit balance of £79.682 mils which, after the first entry for this cheque on the debit side of the account (exhibit 18) reached the amount of £367.682 mils, red balance. Two more entries in the drawer's said account both dated 22.6.66, explain the reason why the drawee bank decided to dishonour the cheque, making the counter-entry on June 23 as stated above. On the same day 23.6.66, the cheque started on its return journey through the Co-operative, Nicosia, and the Barclay's Bank, reaching the defendant bank on June 29, who notified the payee that his cheque was returned dishonoured on June 30, 1966.

In the meantime the drawer of the cheque is said to have absconded the island. Three years later, at the hearing of the appeal on June 25, 1969, appellant-plaintiff's advocate could not inform the Court whether his client took any steps to find out when and how the drawer of this cheque left the Island; or to find out his present whereabouts. Nor could he say whether any steps have been taken for the collection of the amount of the cheque. On the other hand the plaintiff claimed the amount from the defendant Bank and filed the present action against them on January 24, 1967, for the value of this and two other such cheques, contending that he was entitled to recover the amount of their face value as damages for loss suffered by reason of the defendant Bank's negligence to inform him in due course that they had been dishonoured, so as to enable him to take in time the necessary action for the protection of his interest, before his debtor had time to abscond. At this stage we are only concerned with one of the cheques in question, as the rest of the claim for the value of the other two cheques, was not pursued further.

The defendant Bank declined liability, contending that they had handled the cheque in the ordinary course of business and denying the allegations of negligence, on which the

plaintiff's claim seemed to rest. At the same time the defendant Bank joined as third parties the Barclay's and the Co-operative Bank, through whom the cheque was channelled to and from the drawee bank, so that they would explain any undue delay or bear the consequential liability. In the course of the appeal, however, the claim against the Barclay's Bank was abandoned as it became obvious that no complaint for any delay could be made regarding their handling of the cheque.

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The trial Court in a careful and well considered judgment, found for the defendant Bank on the issue of negligence and undue delay on which the claim was based; and on which the action was fought.

“We find, therefore, — (the judgment reads, p. 72 of the record) that there was no delay amounting to negligence in the processing of the cheque by the (Co-Operative Bank). However, even if we assume that there was negligence on the part of the (Co-Operative Bank) in failing to post the dishonoured cheque on the same day it arrived at their offices, or that they are guilty of breach of any duty in paying the cheque in question, the question that arises is whether the defendant (National Bank of Greece) is vicariously liable for the negligence and/or breach of duty of the (Co-Operative Bank).

The plaintiff does not complain about the non-payment of the first cheque, Exhibit 1 (the cheque now in question) and such an allegation does not appear in the pleadings. Therefore, we cannot entertain this issue. His complaint is that there was delay in the process of the cheque. The pleadings cover negligence on the part of the defendant or their servants or representatives and if (the Co-Operative Bank) were acting as servants, representatives or agents of the defendant, then the negligence of (the Co-Operative Bank) can be imputed to the defendant bank.

.....

Bearing in mind the facts of the present case, we do not think that (the Co-Operative Bank) were acting as agents of the defendants, at any rate before the cheque was dishonoured. Therefore, if (the Co-Operative Bank) was negligent in handling the cheque before it was dishonoured the defendants cannot be held vicariously liable for such negligence. After it was dishonoured, that is on 23.6.1966,

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“it was sent back to Nicosia on the same day, and again in doing so they were not negligent.

.....
Regarding the first cheque (the cheque now in question) the plaintiff’s allegation is that he would have reported the matter to the Police or he would have taken measures to prevent the departure of the drawer from Cyprus if he had notice of dishonour in time and without any delay. In the first place we doubt if the reporting of the matter to the Police would have had any practical results and in the second place we wonder if he would have obtained an absconding order. On this point the plaintiff in giving evidence stated that he did not know when the drawer left the island and there is nothing concrete to prove that he actually did go abroad.....

.....
In conclusion and in view of the above we find that the plaintiff suffered no damage on the assumption that there was negligence or breach of contractual duty by the defendant or by the (Co-Operative Bank). The plaintiff accepted cheques obviously post-dated and by doing so he also accepted the risks entailed in accepting such cheques.

In the result plaintiff’s claim is dismissed with the following order as to costs:

- (a) The defendant to pay the costs of both third parties;
- (b) The plaintiff to pay the costs of the defendant which costs will include those the defendant will have to pay under (a) above.”

From this judgment the plaintiff appealed mainly on the ground that the findings of the trial Court regarding negligence and regarding plaintiff’s loss, from such negligence, are erroneous. As regards the order for costs, the appellant complains that in view of their conduct in the matter, and particularly of their decision at first to pay the cheque on the 22nd June, 1966, (as reflected in the entry of debiting its value to the account of the drawer) and then to change their mind and dishonour the cheque (as reflected in the corresponding counter-entry on the 23rd June, 1966) the Co-Operative Bank are not entitled to costs which under the Court’s order fall ultimately on the appellant.

At the hearing of the appeal before us, learned counsel for the appellant-plaintiff was soon able to appreciate the difficulties which he was facing in challenging the trial Court's findings on the issue of negligence, in view of the evidence on record. He then tried to shift his ground to the position arising from the way in which the Limassol Branch of the Co-Operative Bank handled appellant's cheque. He submitted that the Co-Operative Bank was under an obligation to the plaintiff as payee of the cheque, to decide forthwith on presentation, whether to pay or dishonour their customer's cheque drawn upon them. They first decided to honour the cheque, counsel argued, and made in their customer's account the entry consequent upon such decision, debiting the account with the value of the cheque. This was equivalent to payment, counsel contended; and the bank cannot subsequently go back on their decision and dishonour the cheque, making a counter-entry in their customer's account on the following day. Instead of the counter-entry cancelling payment, counsel continued, the Bank should balance the entry on the debit side, by an entry in favour of the holder of the cheque (the defendant Bank) or of the payee (the plaintiff).

We have no difficulty whatsoever in dealing with the claim based on negligence on the part of either the defendant Bank or the third party still before us (the Co-Operative Bank). Negligence is mainly a question of fact; and the findings of the trial Court in that connection are amply supported by the evidence on record. Indeed, a different finding would hardly be justified. We have certainly not been persuaded that the trial Court's finding should be disturbed. (*Despotis v. Tseriotou* (reported in this Part at p. 261 *ante*); *Patsalides v. Afsharian* (1965) 1 C.L.R. 134; *HadjiPetri v. HadjiGeorghou* (reported in this Part at p. 326 *ante*)). This is sufficient to dispose of the appeal against the part of the judgment dealing with the claim based on negligence.

Coming now to the submission made on behalf of the appellant-plaintiff that the entries in the account of the drawer of the cheque with the Limassol branch of the Co-Operative Bank, gave to the appellant a good cause of action against the defendant bank for the amount of the cheque, we have no difficulty in deciding that such claim is untenable on the pleadings in this case. In support of the claim, learned counsel for the appellant referred us mainly to *Marfani & Co., Ltd. v. Midland Bank Ltd.*, [1968] 2 All E.R. p. 573. That was a case

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where the plaintiffs' employee "by an ingenious and elaborate fraud", obtained payment to himself of a cheque for £3,000 drawn by the plaintiffs on a Bank in favour of a third person. To obtain payment of the cheque, which was crossed, the employee opened an account in the payee's name in another Bank through whom he cashed the cheque. A claim by the plaintiffs as owners of the cheque against the second Bank, based on alleged negligence in dealing with the matter, failed. The relevant statutory provisions in England, section 4(1) of the Cheques Act, 1957, were referred to in dealing with that claim. The case is clearly distinguishable on its facts; and lends no support whatever, to appellant's claim in the present case. The appeal must fail.

As regards, however, the order for costs, we think that there is substance in appellant's complaint as far as the costs allowed to the Co-Operative Bank, are concerned. In the circumstances of this case, we do not think that the Court's discretion in the question of costs should be exercised in their favour, notwithstanding the fact that the claim against them as a third party, failed. There can be no doubt that when the cheque in question was first presented to the Limassol Branch of the Co-Operative Bank they decided to honour it, making the necessary entry in their customer's account. Their change of mind within the next twenty-four hours, even if it had no other effect regarding their obligation upon the cheque, it, at least, contributed to the creation of circumstances which gave rise to this litigation. We do not think that they should get any costs in the third party proceedings, where they were reasonably joined.

In the result, the appeal will be dismissed, excepting as regards the order for costs in favour of the Co-Operative Bank regarding which the appeal will be allowed to the extent of setting aside the order for costs in their favour.

Appeal dismissed with costs for the respondent-defendant Bank. No order for costs for the Co-Operative Bank either in the District Court or in the appeal.

*Appeal dismissed; order
for costs as aforesaid.*