

1981 February 3

[TRIANTAFYLIDIS, P., L. LOIZOU, HADJIANASTASSIOU, JJ.]

ANDREAS KOULERMOU,

Appellant-Defendant,

v.

ANDREAS GROUTIDES,

Respondent-Plaintiff.

(Civil Appeal No. 6030).

Civil Procedure—Practice—Agreement for withdrawal of action with liberty to file a new action, within 12 months, otherwise cause of action would not survive—Second action filed within said period but withdrawn—Having regard to the true meaning and effect of the said agreement a third action could not be filed, after expiry of above periods after the second action was discontinued—Rules 1 and 2 of Order 15 of the Civil Procedure Rules. 5

Construction of documents—Agreement for withdrawal of action with liberty to file a new action within 12 months otherwise cause of action would not survive—Rights of parties regarding filing of new action turning on real effect and construction of the agreement. 10

On January 10, 1974 the respondent-plaintiff brought an action against the appellant-defendant claiming damages for false representations; and on February 19, 1975 Counsel appearing for him made the following statement (hereinafter referred to as the “agreement”): 15

“Action withdrawn without prejudice. Plaintiff to be at liberty to file a new action within 12 months from today, otherwise no cause of action survives whatsoever. If plaintiff files a new action within 12 months and is successful then the costs of this action will be paid by the plaintiff”. 20

Counsel for the appellant-defendant stated that he was in agreement with the above and the action was dismissed. On 25

March 14, 1975, the respondent filed another action ("the second action") against the appellant which he withdrew* on February 2, 1976.

5 On March 9, 1976 he filed a third action, the subject-matter of these proceedings, which was contested by the appellant on the ground that the respondent was precluded, by virtue of the above agreement, from pursuing against him the third action, which was filed after the expiry of a period of twelve months as from February 19, 1975. The trial Court ruled against the appellant and, having treated the second action as discontinued, it went on to rely on the provisions of rules 10 1 and 2 of Order 15 of the Civil Procedure Rules, in order to find that, in the circumstances of this case, the respondent could file the third action after discontinuing his second action. Hence this appeal.

15 *Held*, that it was the intention of the parties, on February 19, 1975, that any new action which would be pursued to its final determination in relation to the alleged cause of action of the respondent had to be filed within a period of twelve months from that date, and not that the respondent would be 20 entitled to defeat the explicit purpose and terms of the agreement of February 19, 1975 by acting in such a manner; that, therefore, the provisions of Order 15, rules 1 and 2, of the Civil Procedure Rules, could not be applied in favour of the respondent in the particular circumstances of this case and this Court finds that 25 as a result of the true meaning and effect, as above, of the agreement of February 19, 1975, the respondent was not entitled to file the third action which has to be dismissed in so far as it relates to the appellant; accordingly the appeal must be allowed.

30 *Appeal allowed.*

Appeal.

35 Appeal by defendant 1 against the judgment of the District Court of Nicosia (Stavrinakis, P.D.C. and Orphanides, S.D.J.) dated the 10th November, 1979 (Action No. 1220/76) whereby it was held that the plaintiff was not precluded by an agreement reached between the parties from bringing an action against defendant 1.

* See the relevant record at pp. 680-681 *post*.

L. Papaphilippou, for the appellant.

Chr. Kitromelides, for the respondent.

Cur. adv. vult.

TRIANAFYLLIDES P. read the following judgment of the Court. The appellant, who was a defendant before the trial Court, appeals against the judgment of such Court in action No. DCN 1220/76, by means of which it was held that the respondent, as the plaintiff in the action, was not precluded by an agreement reached between the parties on February 19, 1975, from bringing that action against the appellant.

The history of the relevant events in this case is briefly as follows:

On January 10, 1974, the respondent brought action No. 183/74 against the appellant, in the District Court of Nicosia, claiming damages for false representations.

On February 19, 1975, when certain interlocutory applications were fixed for hearing, counsel for the respondent made the following statement:

“Action withdrawn without prejudice. Plaintiff to be at liberty to file a new action within 12 months from today, otherwise no cause of action survives whatsoever. If plaintiff files a new action within 12 months and is successful then the costs of this action will be paid by the plaintiff”.

Counsel for the appellant stated that he was in agreement and, as a result, the action was dismissed.

On March 14, 1975, the respondent filed another action, No. 1169/75, before the District Court of Nicosia, against the appellant, claiming the same relief as in the previous action.

An appearance was entered by the appellant, but no other steps were taken by either side and, eventually, on February 2, 1976, this new action was withdrawn, and the relevant Court record reads as follows:

“For Applicant/Plaintiff: Mr. Lemonaris for Mr. Talarides.
For Respondent/Defendant: Mr. Papaphilippou.

Mr. Lemonaris: After careful consideration of the case

I have come to the conclusion that it is better to withdraw the action and file a fresh one without prejudice to plaintiff's rights.

5 *Mr. Papaphilippou*: I have nothing to say but I claim costs. I have agreed with Mr. Leptos for £30.— costs to be paid by the plaintiff, including the costs of all applications.

10 *Court*: Action dismissed and all related applications thereof are also dismissed with £30.— costs, against the plaintiff and in favour of the defendant ”.

15 Then, on March, 9, 1976, action No. 1220/76 was filed in the District Court of Nicosia against the appellant and two other defendants. Later on, defendant No. 3 died, and the proceedings against him were discontinued. So, there remained in the action the appellant and defendant 2.

20 The appellant contended that the respondent was precluded, by virtue of the aforementioned agreement of the parties of February 19, 1975, from pursuing against him the third action No. 1220/76, which was filed after the expiry of a period of twelve months as from February 19, 1975. The trial Court, however, ruled against the appellant and, having treated the second action, No. 1169/75, as discontinued, it went on to rely on the provisions of rules 1 and 2 of Order 15 of the Civil Procedure Rules, in order to find that, in the circumstances of this case, the respondent could file a fresh action, namely the third action, No. 1220/76, after discontinuing his second action.

In our opinion, the basic consideration in this case is the real effect and true construction of the agreement that was reached, as aforesaid, on February 19, 1975.

30 After very careful consideration of this matter we have, eventually, reached the conclusion—admittedly not without some initial difficulty—that it was the intention of the parties, on February 19, 1975, that any new action which would be pursued to its final determination in relation to the alleged cause of action of the respondent had to be filed within a period of
35 twelve months from that date.

An Action, No. 1169/75, was, indeed, filed within the period of twelve months, but that action was discontinued, and even

though, after that, another action might have been filed, before the expiry of the period of twelve months, no such action was filed; and, eventually, another action, No. 1220/76, was filed on March 9, 1976, after the expiry of the aforesaid period. We do not think that it was ever the intention of the parties that the respondent would be entitled to defeat the explicit purpose and terms of the agreement of February 19, 1975, by acting in such a manner. 5

It was the essence of the aforementioned agreement—the legality of which has not been questioned in the present proceedings—that the cause of action concerned would survive only for a period of twelve months after the date of such agreement and that an action in respect of such cause of action which would be pursued to its final determination, and not merely be discontinued, could be filed only within the said period. 10 15

In the circumstances we think that the provisions of Order 15, rules 1 and 2, of the Civil Procedure Rules, could not be applied in favour of the respondent in the particular circumstances of this case and we find that, as a result of the true meaning and effect, as above, of the agreement of February 19, 1975, the respondent was not entitled to file action No. 1220/76 which has, therefore, to be dismissed in so far as it relates to the appellant. 20

In the result this appeal is allowed accordingly but, in line with the approach as to the costs adopted by the trial Court, we are not prepared to make any order as to the costs of this appeal. 25

Appeal allowed. No order as to costs.