

[FISHER, C.J. AND STUART, P.J.]

NICOS G. ICONOMIDES

v.

GEORGHIOS HAJI NICOLA

ARISTODIMOS PHINIEUS EXPARTE APPLICANT.

FISHER,
C.J.
&
STUART,
P.J.
1923
June 15

PROCEDURE—RULES OF COURT—ORDER 17 R. 3—FRAUD.

APPEAL by plaintiff from an order of a District Court given on the application of the exparte applicant which, *inter alia*, ordered that a judgment in favour of the exparte applicant in an action should have priority over the judgment of the plaintiff in a subsequent action, both instituted against the present defendant.

For Appellant *Triantafyllides*.

For Respondent (exparte applicant) *Chrysafinis senior*.

Respondent (defendant) absent.

Judgment : In this case the District Court speak in their judgment of a mistake induced by the plaintiff, and of constructive fraud, and as a consequence hold that the plaintiff, who has done nothing out of order so far as the Rules of Court are concerned, must be put in a position which renders it highly problematical, at the least, whether he will get anything out of his judgment.

There is no suggestion of collusion between the plaintiff and defendant so as to bring the case within O. 17, r. 3 on p. 711, or the case of *Sava v. Christodoulou*, C.L.R., II., 3. The plaintiff innocently had a date fixed for the hearing of the issue. The Registrar of the District Court after some intimation from the respondent's advocate, (under what authority does not appear) made a note on the writ in consequence of which the Judge, who heard the issue, whether with or without notice to the advocate of the plaintiff and under what authority does not appear, made a note by which it was directed that plaintiff should not get a copy of his judgment until after a copy of that in 1462 had been issued. This note was paid attention to, but inasmuch as 1462 was settled, the copy judgment was given to plaintiff on the day laid down by the note. The appellant then proceeded to put himself in the position from which the respondent sought to oust him.

(There seems to have been irregularity all along although, as it seems to me, the respondent knowing, as he did, of the appellant's writ could have taken steps to put himself right in a manner laid down by Rule of Court and not by manœuvring, so to speak, behind the scenes). He then came to the Court again and applied (as in application).

FISHER,
C.J.
&
STUART,
P.J.
—
NICOS G.
ICONOMIDES
v.
GEORGHIOS
HAJI
NICOLA
ARISTO-
DIMOS
PHINIEUS
—

Now he knew of appellant's writ, and to safeguard himself he did two things; he went to the Registrar and had the note made, which I have referred to (and it may be he did not mention 1461 then because he had a sound guarantor in that case), and he subsequently settled 1462 by taking a mortgage not only for that debt but also for one not yet due. The position therefore, is really this: The plaintiff, in view of defendant's financial position and dealings with his property, innocently got the date fixed, infringing no rule, and when he was told by respondent's advocate, who knew of the plaintiff's writ, of the two other actions, he being under the impression that his own action would lead to nothing, said he would speak to his advocate (*see* evidence). Appellant's advocate meanwhile obviously did not refrain from action relying on what appellant had said, nor was he "misled by the appellant" because he took the steps I have mentioned. It is clear from his own admission that he can get his money out of the guarantor in 1461, it seems, he might have included it in the mortgage settling 1462. Therefore the guarantor is the person really interested in the success of these proceedings.

Allegations of fraud must be definitely stated and proved. In this case there is nothing to show that the plaintiff did anything but endeavour by legitimate means to recover his money.

Appeal allowed.

FISHER,
C.J.
&
GRIM-
SHAW,
ACTING P.J.
—
1923
October 11

[FISHER, C.J. AND GRIMSHAW, ACTING P.J.]

REX

v.

VRASHIMI JOUVANNI SARROU.

JURISDICTION—CHANGE IN PUNISHMENT—LAW 12 OF 1914 SEC. 17 (2)—LAW 29 OF 1923.

A District Court tried accused on a charge of attempted rape. The offence was committed before the passing of Law 29 of 1923, also accused was committed for trial before the District Court before that Law was passed.

QUERY: Did the passing of that law which increased the penalty from two years to five years oust the jurisdiction of the District Court in proceedings already commenced.

The District Court convicted accused, who appeals against that conviction.

For Appellant *Paschalis* and *Chacallis*.

For Crown *Assistant King's Advocate*.

Judgment: Affirming conviction and sentence of the District Court.

Appeal dismissed.