[TRIANTAFYLLIDES, P., STAVRINIDES, HADJIANASTASSIOU, JJ.]

1974
Jan 24

YIANNIS LOUCA,

Appellant - Defendant,

YIANNIS LOUCA

v.

v.

NIKI MILIOTOU,

NIKI MILIOTOU

Respondent - Plaintiff.

(Civil Appeal No. 5242).

Civil Procedure—Pleadings—Amendment—Discretion of the Court—Principles upon which the Court of Appeal interferes with the exercise of such descretion—Amendment of the statement of claim sought in order to adapt claim in the light of the contents of statement of defence—Delay—But no transformation of the nature of the claim of such a nature as to enable the Court of Appeal to say that the trial Court was wrong in principle in allowing the said amendment—Appeal dismissed.

Pleadings—Amendment—Discretion—Principles upon which the Court of Appeal interferes with the exercise of such discretion.

Appeal—Amendment of pleadings—Discretion of the trial Court—Approach of the Court of Appeal to appeals concerning the exercise of judicial discretion by trial Courts.

Cases referred to :

Ascherberg Hopwood and Crew Ltd. v *Casa Musicale Sonzogno Di Piero Ostali Societa in Nome Colletivo and Others* [1971] 1 All E.R. 577; and on appeal [1971] 3 All E.R. 38;

Clarapede & Co. v. *Commercial Union Association* [1883] 32 W.R. 262, at p 263, per William Brett, M.R.;

Perestrello E Companhia Limitada v. *United Paint Co. Ltd.*, [1969] 3 All E.R. 479;

G. L. Baker, Ltd. v. *Medway Building and Supplies, Ltd.* [1958] 3 All E.R. 540, at p. 546, per Jenkins, L.J.;

Lazarou (No. 1) v. *The Police* (1969) 2 C.L.R. 53.

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YIANNIS LOUCA

v.

NIKI MILIOTOU

The facts sufficiently appear in the judgment of the Court, dismissing this appeal by the defendant in the action against an order of the trial Court whereby leave was given to the plaintiff to amend her statement of claim.

Appeal.

Appeal by defendant against the order of the District Court of Famagusta (Savvides, P.D.C. and Demetriou, S.D.J.) dated the 24th October, 1973, (Action No. 3319/72) whereby leave was given to the plaintiff to amend her statement of claim.

L. Papaphilippou, for the appellant.

J. Kaniklides, for the respondent.

The judgment of the Court was delivered by :-

TRIANTAFYLLIDES, P. : This is an appeal against an order by means of which the respondent, who is the plaintiff in an action before the trial court, was given leave to amend her statement of claim.

The history, in brief, of the matter is as follows :-

The claim in the action is for the recovery by the respondent of possession of her premises, of which the appellant (the defendant in the action) is the tenant, and it is based on an alleged termination of a written contract of lease between the parties.

By the statement of defence the appellant alleged that the contract was void as not being in compliance with the provisions of section 77 of the Contract Law, Cap. 149, and, furthermore, that the relations of the parties to the litigation were governed by a settlement reached in an earlier action, No. 1964/67, by which there was created a new tenancy which had not ceased to exist.

By the amendment in question of the statement of claim it was sought, at the time when the action came up for hearing, to amend the claim so that there would be included an averment that, in case the contract was void, the appellant is a trespasser, because he is bound to deliver vacant possession in accordance with the said settlement and is not otherwise entitled to remain in possession of the premises.

The main ground on which counsel for the appellant argued this appeal is that the amendment should not have been permitted, in the exercise of the discretion of the court below, because it was applied for too late, in spite of the fact that counsel for the respondent was aware all along of the true situation, as he had appeared for one of the parties in the aforesaid previous action and, therefore, the amendment had not become necessary because of something which had come to the knowledge of counsel for the respondent through the pleadings. It was, further, submitted in support of the appeal that the amendment results in a transformation of the basis of the action.

We have been referred to, *inter alia, Perestrello E Companhia Limitada* v. *United Paint Co., Ltd.* [1969] 3 All E.R. 479, where the delay in applying for an amendment, plus the transformation of the basis of the action, were treated as relevant considerations in disallowing the amendment, and to *Newby* v. *Charpe,* 8 Ch. D. 39, where it was observed that an amendment converting a claim based on a subsisting lease into a claim on the footing of eviction ought not to be allowed. We have perused the reports in both these two cases and we are satisfied that the judgments therein were based on their special circumstances and that they do not constitute case-law directly applicable to the issue with which we are concerned on the present occasion.

In this case there can be little doubt that the expediency of amending the statement of claim became evident in view of the contents of the statement of defence; and, also, it might be observed, in this respect, that it seems that counsel for the respondent, though he had answered the allegations set out in the statement of defence by means of his reply thereto, thought that the safer course was to apply, too, for leave to amend accordingly the statement of claim, so as to enable the trial court to adjudicate on the basis of the totality of the matters relevant to the issue before it, and without either of the parties being taken by surprise, or being prejudiced, later on.

In *G.L. Baker, Ltd.* v. *Medway Building and Supplies, Ltd.* [1958] 3 All E.R. 540, 546, Jenkins LJ stated :-

"....I start by saying that there is no doubt whatever that the granting or refusal of an application for such leave is eminently a matter for the discretion of the learned judge with which this court should not in ordinary circumstances interfere unless satisfied that the learned judge has applied a wrong principle or can be said to have reached a conclusion which would work a manifest injustice between the parties."

The *Baker* case was mentioned in *Ascherberg Hopwood and Crew Ltd.* v. *Casa Musicale Sonzogno Di Piero, Ostali Societa in Nome Collettivo and Others* [1971] 1 All E.R. 577, and on appeal [1971] 3 All E.R. 38. In the first instance decision in the *Ascherberg* case reference was made (at p. 581) to *Clarapede & Co.* v. *Commercial Union Association* [1883] 32 WR 262, 263, where Sir William Brett MR stated :-

" '....However negligent or careless may have been the first omission, and, however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs' ".

In the light of the relevant *dicta* in, *inter alia,* the above cases we do not think that the fact that counsel for the respondent—(even if he was otherwise cognizant of the particular situation)—failed to apply for an amendment until just before the hearing of the action should make us interfere with the exercise of the discretion of the court below in allowing the amendment.

Nor do we think that there really has occurred a transformation of the nature of the claim of the respondent, as plaintiff, in such a manner as to enable us to say that allowing the amendment was wrong in principle; this is not a case where a plaintiff is trying without good reason, or after considerable delay, to transform his cause of action; this is an instance in which the plaintiff is trying to adapt her claim in the light of the contents of the statement of defence in order to be enabled to obtain the relief which she seeks in the action; and we think that this was a course which the court below was

entitled, in the exercise of its discretion, to allow her to take.

We are not dealing with this matter directly ourselves; we are only considering whether the exercise of such discretion, in the first instance, should be interfered with by us on appeal, and we have not been satisfied that we should do so in the circumstances of this particular case.

Another issue which has been raised by the appellant's side is that the affidavit in support of the application for amendment has been sworn by counsel who is appearing in the proceedings for the respondent and who has made the said application: It is correct that in *Lazarou (No. 1)* v. *The Police* (1969) 2 C.L.R. 53, the swearing of affidavits in support of applications, or otherwise in proceedings, by counsel appearing therein was described as an undesirable practice, and we do subscribe to this view, but we do not think that we should go as far as to set aside the order appealed from for this reason.

Another matter which is stated in the notice of appeal, namely that counsel for the respondent has in between the previous action and the present action changed sides in appearing for the parties thereto, has, very rightly, in our opinion, not been treated by the appellant as being in itself a ground of appeal; it is a matter of professional etiquette, and we are not pronouncing, one way or the other, whether there exists in fact a breach thereof.

This appeal is, therefore, dismissed, but, in the circumstances, there should not be made any order as to its costs.

Appeal dismissed.
No order as to costs.