

[G. R. No. 16666. April 10, 1922]

ROMULO MACHETTI, PLAINTIFF AND APPELLEE, VS. HOSPICIO DE SAN JOSE, DEFENDANT AND APPELLEE, AND FIDELITY & SURETY COMPANY OF THE PHILIPPINE ISLANDS, DEFENDANT AND APPELLANT.

D E C I S I O N

OSTRAND, J.:

It appears from the evidence that on July 17, 1916, one Romulo Machetti, by a written agreement, undertook to construct a building on Calle Rosario in the city of Manila for the Hospicio de San Jose, the contract price being P64,000. One of the conditions of the agreement was that the contractor should obtain the "guarantee" of the Fidelity and Surety Company of the Philippine Islands to the amount of P12,800 and the following endorsement in the English language appears upon the contract:

" MANILA, July 15, 1916.

"For value received we hereby guarantee compliance with the terms and conditions as outlined in the above contract. "Fidelity & Surety Company of the Philippine Islands.

(Sgd.) "OTTO VORSTER,
"Vice-President."

Machetti constructed the building under the supervision of architects representing the Hospicio de San Jose and, as the work progressed, payments were made to him from time to time upon the recommendation of the architects, until the entire contract price, with the exception of the sum of P4,978.08, was paid. Subsequently it was found that the work had not been carried out in accordance with the specifications which formed part of the contract and that the workmanship was not of the standard required, and the Hospicio de San Jose

therefore refused to pay the balance of the contract price. Machetti thereupon brought this action, the complaint being filed May 28, 1917. On January 28, 1918, the Hospicio de San Jose answered the complaint and presented a counterclaim for damages for the partial noncompliance with the terms of the agreement above- mentioned, in the total sum of P71,350. After issue was thus joined, Machetti, on petition of his creditors, was, on February 27, 1918, declared insolvent and on March 4, 1918, an order was entered suspending the proceeding in the present case in accordance with section 60 of the Insolvency Law, Act No. 1956.

The Hospicio de San Jose on January 29, 1919, filed a motion asking that the Fidelity and Surety Company be made cross-defendant to the exclusion of Machetti and that the proceedings be continued as to said company, but still remain suspended as to Machetti. This motion was granted and on February 7, 1920, the Hospicio filed a complaint against the Fidelity and Surety Company asking for a judgment for P12,800 against the company upon its guaranty. After trial, the Court of First Instance rendered judgment against the Fidelity and Surety Company for P12,800 in accordance with the complaint. The case is now before this court upon appeal by the Fidelity and Surety Company from said judgment.

As will be seen, the original action in which Machetti was the plaintiff and the Hospicio de San Jose defendant, has been converted into an action in which the Hospicio de San Jose is plaintiff and the Fidelity and Surety Company, the original plaintiff's guarantor, is the defendant, Machetti having been practically eliminated from the case.

We think the court below erred in proceeding with the case against the guarantor while the proceedings were suspended as to the principal. The guaranty in the present case was for a future debt of unknown amount and even regarding the guaranty as an ordinary *fianza* under the Civil Code, the surety cannot be held responsible until the debt is liquidated. (Civil Code, art. 1825.)

But in this instance the guarantor's case is even stronger than that of an ordinary surety. The contract of guaranty is written in the English language and the terms employed must of course be given the signification which ordinarily attaches to them in that language. In English the term "guarantor" implies an undertaking of guaranty, as distinguished from suretyship. It is very true that notwithstanding the use of the words "guarantee" or "guaranty" circumstances may be shown which convert the contract into one of suretyship but such circumstances do not exist in the present case; on the contrary it appears affirmatively that the contract is the guarantor's separate undertaking in which the

principal does not join, that it rests on a separate consideration moving from the principal and that although it is written in continuation of the contract for the construction of the building, it is a collateral undertaking separate and distinct from the latter. All of these circumstances are distinguishing features of contracts of guaranty.

Now, while a surety undertakes to pay if the principal *does* not pay, the guarantor only binds himself to pay if the principal cannot pay. The one is the insurer of the debt, the other an insurer of the solvency of the debtor. (Saint vs. Wheeler & Wilson Mfg. Co., 95 Ala., 362; Campbell vs. Sherman, 151 Pa. St., 70; Castellvi de Higgins and Higgins vs. Sellner, 41 Phil., 142; U. S. vs. Varadero de la Quinta, 40 Phil., 48.) This latter liability is what the Fidelity and Surety Company assumed in the present case. The undertaking is perhaps not exactly that of a *fianza* under the Civil Code, but it is a perfectly valid contract and must be given the legal effect it ordinarily carries. The Fidelity and Surety Company having bound itself to pay only in the event its principal, Machetti, cannot pay it follows that it cannot be compelled to pay until it is shown that Machetti is unable to pay. Such inability may be proven by the return of a writ of execution unsatisfied or by other means, but is not sufficiently established by the mere fact that he has been declared insolvent in insolvency proceedings under our statutes, in which the extent of the insolvent's inability to pay is not determined until the final liquidation of his estate.

The judgment appealed from is therefore reversed without costs and without prejudice to such right of action as the cross-complainant, the Hospicio de San Jose, may have after exhausting its remedy against the plaintiff Machetti. So ordered.

Araullo, C. J., Malcolm, Villamor, Johns, and Romualdez, JJ., concur.