

[G. R. No. L-9353. May 21, 1957]

**MANILA SURETY AND FIDELITY COMPANY, INC., PLAINTIFF AND APPELLANT,
VS. BATU CONSTRUCTION AND COMPANY, CARLOS N. BAQUIRAN, GONZALO P.
AMBOY AND ANDRES TUNAC, DEFENDANTS AND APPELLEES.**

D E C I S I O N

PADILLA, J.:

In a complaint filed in the Court of First Instance of Manila, the plaintiff, a domestic corporation engaged in the bonding business, hereafter called the company, alleges that the Batu Construction & Company, a partnership the members of which are the other three defendants, requested it to post, as it did, a surety bond for P8,812 in favor of the Government of the Philippines to secure the faithful performance of the construction of the Eacarra Bridge, Project PR-72(3), in Ilocos Norte, undertaken by the partnership, as stipulated in a construction on contract entered into on 11 July 1950 by and between the partnership and the Government of the Philippines, on condition that the defendants would "indemnify the COMPANY for any damage, loss, costs, charges, or expenses of whatever kind and nature, including counsel or attorney's fees, which the COMPANY may, at any time, sustain or incur, as a consequence of having become surety upon the above-mentioned bond; said attorney's fees shall not be less than fifteen (15%) per cent of the total amount claimed in any action which the COMPANY may institute against the undersigned (the defendants except Andres Tunac) in Court," and that "Said indemnity shall be paid to the COMPANY as soon as it has become liable for the payment of any amount, under the above-mentioned bond, whether or not it shall have paid such sum or sums of money, or any part thereof," as stipulated in a contract executed on 8 July 1950 (Exhibit B); that on 30 May 1951 because of the unsatisfactory progress of the work on the bridge, the Director of Public Works, with the approval of the Secretary of Public Works and Communications, annulled the construction contract referred to and notified the plaintiff Company that the Government would hold it (the Company) liable for any amount incurred by the Government for the completion of the bridge, in excess of the contract

price (Exhibit D); that on 19 December 1951 (should be 23 November 1951), Ricardo Fernandez and 105 other persons brought an action in the Justice of the Peace Court of Laoag, Ilocos Norte, against the partnership, the individual partners and the herein plaintiff Company for the collection of unpaid wages amounting to P5,960.10, lawful interests thereon and costs (Exhibit E); that the defendants are in imminent danger of becoming insolvent, and are removing and disposing, or about to remove and dispose, of their properties with intent to defraud their creditors, particularly the plaintiff Company; and that the latter has no other sufficient security to protect its rights against the defendants. Upon these allegations, the plaintiff prays that, upon the approval of a bond and on the strength of the allegations of the verified complaint, a writ of attachment be issued and levied upon the properties of the defendants; and that after hearing, judgment be rendered "ordering the defendants to deliver to the plaintiff such sufficient security as shall protect plaintiff from any proceedings by the creditors on the Surety Bond aforementioned and from the danger of insolvency of the defendants; and to allow costs to the herein plaintiff," and "for such other measures of relief as may be proper and just in the premises." Attached to the complaint are a verification and affidavit of attachment; and copies of the surety bond marked Annex A; of the indemnity contract marked Annex B; and of the letter of the Acting Director of Public Works to the plaintiff dated 30 May 1851, marked Annex C. Andres Tunae admits in his answer the allegations in paragraphs 1, 2, 3 and 4 of the complaint, but denies the allegations in paragraphs 5, 6, 7, 8 and 9 of the complaint, because he has never promised to put up an indemnity bond in favor of the plaintiff nor has he ever entered into any indemnity agreement with it; because the partnership or the Batu Construction & Company was fulfilling its obligations in accordance with the terms of the construction contract; because the Republic of the Philippines, through the Director of Public Works, had no authority to annul the contract at its own initiative; because the Justice of the Peace court of Laoag, Ilocos Norte had no jurisdiction to hear and decide a case for collection of P5,960.10; and because the defendants were not in imminent danger of insolvency, neither did they remove or dispose of their properties with intent to defraud their creditors. By way of affirmative defenses, he alleges that the signing by Carlos N. Baquiran of the indemnity agreement for and in behalf of the partnership Batu Construction & Company did not bind the latter to the plaintiff and as the partnership is not bound, he (Andres Tunac), as a member thereof, is also not bound; that he not being a party to the said agreement, the plaintiff has no cause of action against him; that in the event the partnership is bound by the indemnity agreement he invokes his right of exhaustion of the property of the partnership before the plaintiff may proceed against his property. And as a counterclaim he alleges that the

plaintiff brought the action against him maliciously and in bad faith for the purpose of annoying him and damaging his professional reputation, he having a flourishing and successful practice as engineer in Ilocos Norte, thereby compelling him to defend himself; that to secure the issuance of a writ of attachment the plaintiff made false representations; and that the issuance of the writ upon such false representations of the plaintiff caused him damages in the sum of P10,000 including expenses of litigation and attorney's fees. Upon the foregoing he prays that the complaint be dismissed as to him and the defendant Batu Construction & Company, with costs against the plaintiff; that the latter be ordered to pay him the sum of P10,000; and that he be granted such other remedies as may be just, equitable and proper.

Gonzalo P. Amboy denies in his answer the allegations of the complaint, except those that may be deemed admitted in the special defenses, and alleges that he is not in imminent danger of insolvency and is not removing and disposing or about to remove and dispose of his properties, because he has no property; that there has been no liquidation of the expenses incurred in the construction of the Bacarra Bridge, Project PR-72(3), to determine whether there would be a balance of the contract price which may be applied to pay the claim for unpaid wages of Ricardo Fernandez et al sought to be collected in civil case No. 198 of the Justice of the Peace Court of Laoag, Ilocos Norte, and not until after such liquidation shall have been made could his liability and that of his co-defendants be determined and fixed; that if after proper liquidations there be a deficit of the contract price the defendants are willing to pay the claim for unpaid wages of Ricardo Fernandez et al. Upon these allegations he prays that the issuance of the writ of attachment prayed for by the plaintiff be held in abeyance until after civil case No. 198 of the Justice of the Peace Court of Laoag, Ilocos Norte, shall have been disposed of.

Carlos N. Baquiran admits in his answer the allegations, in paragraphs 1, 2, 3, 4, 5, 6 and 11 of the complaint but alleges that he has no sufficient knowledge to form a belief as to the truth of the claim of Ricardo Fernandez et al. set forth in paragraph 7 of the complaint, for there has never been a liquidation between the defendants and the Bureau of Public Works. He further denies specifically paragraphs 8, 9 and 10 of the complaint. By way of special defenses he alleges that there has been no liquidation by and between the defendants and the Bureau of Public Works on Project PR-72(S) to determine whether the total amount spent for the construction of the bridge exceeded the contract price; that after the determination: of the respective liabilities of the parties in civil case No. 198 of the Justice of the Peace Court of Laoag, Ilocos Norte, if any there be against the defendants herein, and such liability could not be paid out of the balance of the contract

price of Project PR-72(3), the defendants are ready and willing to assume their respective responsibilities. Upon these allegations he prays that the complaint of the plaintiff be dismissed; that the issuance of the writ of attachment prayed for be denied; and that he be granted such other relief as may be just and equitable, with costs against the plaintiff.

At the hearing, the plaintiff presented its evidence. After the plaintiff had rested its case, defendant Gonzalo P. Amboy moved for the dismissal of the complaint, on the ground that the remedy provided for in the last paragraph of article 2071 of the new Civil Code may be availed of by the guarantor only and not by a surety.

Acting upon this motion to dismiss the trial court made the following findings:

* * * That on July 8, 1950, the defendant Batu Construction & Company, as principal, and the plaintiff Manila Surety & Fidelity Co. Inc., as surety, executed a surety bond for the sum of P8,812.00 to insure faithful performance of the former's obligation as contractor for the construction of the Eacarra Bridge, Project PR-72 (No. 3) Ilocos Norte Province, On the same date, July 8, 1950, the Eatu Construction & Company and the defendants Carlos N. Baquiran and Gonzales P. Amboy executed an indemnity agreement to protect the Manila Surety & Fidelity Co. Inc., against damage, loss or expenses which it may sustain as a consequence of the surety bond executed by it jointly with Batu Construction & Company.

On or about May 30, 1951, the plaintiff received a notice from the Director of Public Works (Exhibit B) annulling its contract with the Government for the construction of the Bacarra Bridge because of its failure to make satisfactory progress in the execution of the works, with the warning that any amount spent by the Government in the continuation, of the work, in excess of the contract price, will be charged against the surety bond furnished by the plaintiff. It also appears that a complaint by the laborers in said project of the Batu Construction & Company was filed against it in Manila Surety & Fidelity Co., Inc. vs. Batu Construction and Co., et al. and the Manila Surety and Fidelity Co., Inc., for unpaid wages amounting to P5,960.10.

and, being of the opinion that the provisions of article 2071 of the new Civil Code may be availed of by a guarantor only and not by a surety, dismissed the complaint, with costs against the plaintiff.

From this order the plaintiff Company has appealed to this Court, because it proposes to raise only a question of law. After the order dismissing the complaint had been entered,

on 16 and 20 July 1953, the defendants Gonzalo P. Amboy and Andres Tunac moved for leave to prove damages they allegedly suffered as a result of the attachment levied upon their properties. On 15 August 1953 the Court heard the evidence on damages. On 23 September 1953 the Court found and held that the defendant Gonzalo P. Amboy is entitled to recover from the plaintiff damages equivalent to 6 per cent interest per annum on the sum of P35 in possession of the Provincial Treasurer of Ilocos Norte, which was garnished pursuant to the writ of attachment, from the date of garnishment until its discharge; but that the claims for damages of Andres Tunac and Gonzalo P. Amboy allegedly suffered by them in their business, moral damages and attorney's fees were without basis in law and in fact. Hence their recovery was denied. The Court dissolved the writ of attachment. From this last order only the plaintiff Company has appealed.

The main question to determine is whether the last paragraph of article 2071 of the new Civil Code taken from article 184S of the old Civil Code may be availed of by a surety. A guarantor is the insurer of the solvency of the debtor; a surety is an insurer of the debt. A guarantor binds himself to pay if the principal is unable to pay; a surety undertakes to pay if the principal does not pay.¹ The reason which could be invoked for the non-availability to a surety of the provisions of the last paragraph of article 2071 of the new Civil Code would be the fact that guaranty like commodatum² is gratuitous. But guaranty could also be for a price or consideration as provided for in article 2048. So, even if there should be a consideration or price paid to a guarantor for him to insure the performance of an obligation by the principal debtor, the provisions of article 2071 would still be available to the guarantor. In suretyship the surety becomes liable to the creditor without the benefit of the principal debtor's excussion of his properties, for he (the surety) may be sued independently. So, he is an insurer of the debt and as such he has assumed or undertaken a responsibility or obligation greater or more onerous than that of guarantor. Such being the case, the provisions of article 2071, under guaranty, are applicable and available to a surety. The reference in article 2047 to the provisions of Section 4, Chapter 3, Title I, Book IV of the new Civil Code, on solidary or several obligations, does not mean that suretyship which is a solidary obligation is withdrawn from the applicable provisions governing guaranty.

The plaintiff's cause of action does not fall under paragraph 2 of article 2071 of the new Civil Code, because there is no proof of the defendants' insolvency. The fact that the contract was annulled because of lack of progress in the construction of the bridge is no proof of such insolvency. It does not fall under paragraph 3, because the defendants have not bound themselves to relieve the plaintiff from the guaranty within a specified

period which already has expired, because the surety bond does not fix any period of time and the indemnity agreement stipulates one year extendible or renewable until the bond be completely cancelled by the person or entity in whose behalf the bond was executed or by a Court of competent jurisdiction. It does not come under paragraph 4, because the debt has not become demandable by reason of the expiration of the period for payment. It does not come under paragraph 5 because of the lapse of 10 years, when the principal obligation has no period for its maturity, etc., for 10 years have not yet elapsed. It does not fall under paragraph 6, because there is no proof that "there are reasonable grounds to fear that the principal debtor intends to abscond. It does not come under paragraph 7, because the defendants, as principal debtors, are not in imminent danger of becoming insolvent, there being no proof to that effect.

But the plaintiff's cause of action comes under paragraph 1 of article 2071 of the new Civil Code, because the action brought by Ricardo Fernandez and 105 persons in the Justice of the Peace Court of Laoag, province of Ilocos Norte, for the collection of unpaid wages amounting to P5,960.10, is in connection with the construction of the Bacarra Bridge, Project PR-72(3), undertaken by the Batu Construction & Company, and one of the defendants therein is the herein plaintiff, the Manila Surety and Fidelity Co., Inc., and paragraph 1 of article 2071 of the new Civil Code provides that the guarantor, even before having paid, may proceed against the principal debtor "to obtain release from the guaranty, or to demand a security that shall protect him from any proceedings by the creditor or from the danger of insolvency of the debtor," when he (the guarantor) is sued for payment. It does not provide that the guarantor be sued by the creditor for the payment of the debt. It simply provides that the guarantor of surety be sued for the payment of an amount for which the surety bond was put up to secure the fulfillment of the obligation undertaken by the principal debtor. So, the suit filed by Ricardo Fernandez and 105 persons in the Justice of the Peace Court of Laoag, province of Ilocos Norte, for the collection of unpaid wages earned in connection with the work done by them in the construction of the Bacarra Bridge, Project PR-72(3), is a suit for the payment of an amount for which the surety bond "was put up or posted to secure the faithful performance of the obligation undertaken by the principal debtors (the defendants) in favor of the creditor, the Government of the Philippines.

The order appealed from dismissing the complaint is reversed and set aside, and the case remanded to the court below for determination of the amount of security that would protect the plaintiff Company from any proceedings by the creditor or from the danger of insolvency of the defendants, the principal debtors, and direction to the defendants to

put up such amount of security as may be established by competent evidence, without pronouncement as to costs.

The writ of attachment having been issued improvidently because, although there is an allegation in the verified complaint that the defendants were in imminent danger of insolvency and that they were removing or disposing, or about to remove or dispose, of their properties, with intent to defraud their creditors, particularly the plaintiff Company, still such allegation was not proved, the fact that a complaint had been filed against the defendants and the plaintiff Company in the Justice of the Peace Court of Laoag, Ilocos Norte, for the collection of an amount for unpaid wages of the plaintiffs therein who claimed to have worked in the construction of the bridge, being insufficient to prove it, and because the relief prayed for in the complaint for security that shall protect it from any proceedings by the creditor and from the danger of the defendants becoming insolvent is inconsistent with the state of insolvency of the defendants or their being in imminent danger of insolvency, the order awarding 6 per cent on the sum of P35 in possession of the Provincial Treasurer owned by the defendant Gonzalo P. Amboy garnished by virtue of the writ of attachment, from the date of the garnishment until its discharge, and denying recovery of the amounts of damages claimed to have been suffered by the defendants, is affirmed, the defendants not having appealed therefrom.

Bengzon, Montemayor, Reyes, A., Bautista Angela, Labrador, Conception, Reyes, J. B. L., Endencia and Felix, JJ., concur.

¹Machetti vs. Hospicio

²Article 1933, new Civil Code.