101 Phil. 879

[G. R. No. L-10132. July 18, 1957]

LA TONDEÑA, INC., PLAINTIFF AND APPELLANT, VS. ALTO SURETY & INSURANCE CO., INC., ET AL., DEFENDANTS AND APPELLEES.

D E C I S I O N

REYES, J.B.L., J.:

This appeal involves a question of priority between creditors that the Court of First Instance of Manila resolved in favor of the appellee Alto Surety and Insurance Co., Inc.

It appears that on April 21, 1949, one Primitivo P. Ferrer executed in favor of La Tondeña, Inc., a second chattel mortgage upon certain properties described in the complaint, to guarantee payment of certain amounts. Some of these properties were already subject to a first mortgage in favor of one Pedro Ruiz. All mortgages were duly registered.

On August 18, 1949, Pedro Ruiz sought foreclosure of the first mortgage in his favor, alleging default by the mortgagor Ferrer; and in view of the latter's refusal to surrender the properties mortgaged, Ruiz started action in court (Case No. 10880 of the Court of First Instance of Pangasinan) and asked for their replevin. However, Ferrer secured their release by means of a redelivery bond for P20,000, guaranteed by the Alto Surety and Insurance Co. The case having been tried, the court rendered judgment on December 1, 1950, sentencing Ferrer to pay Ruiz (P6,590.00 plus interest and attorneys' fees. As Ferrer defaulted, the Alto Surety paid for him on June 19, 1952.

While this first case was still pending, La Tondeña, Inc. instituted court proceedings against Ferrer on November 15, 1949 (No. 9658 of the Court of First Instance of Manila to foreclose its second mortgage and to recover various other suras; and on June 7, 1950, judgment was rendered sentencing Ferrer to pay P7,122.49 plus interest and costs on account of the mortgage debt, with a decree for its foreclosure if not paid within ninety days. Ferrer was also sentenced to pay P6,608.00 on the other cause of action. In view of

the foreclosure decree the Provincial Sheriff of Pangasinan levied on the mortgaged properties and advertised them for sale. The sale was postponed from time to time, until on December 13, 1950, upon request of Ferrer and to save him the custody fees, plaintiff directed the sheriff to release the properties from levy, on condition that Ferrer would satisfy the judgment by March 81, 1951, and should he fail to do so, La Tondeña would be at liberty to proceed with the foreclosure.

On March 13, 1951, the Alto Surety filed complaints (Civil Cases Hos. 241 and 242 of the Court of First Instance of Baguio) against Ferrer to recover bond premiums and indemnities paid for his account, and secured writs of preliminary attachment. Then on April 23, 1951 the Provincial Sheriff, at the behest of Alto Surety, attached the very properties mortgaged by Ferrer to La Tondeña, Inc., and which had been the subject of the writ of execution released as heretofore narrated.

Ferrer not having paid his debt to La Tondeña at the end of March 1951, as stipulated, the mortgagee obtained an alias writ of execution of the judgment in its favor on May 26. But as the properties had been in the meantime attached by Alto Surety, and Alto Surety refused to lift its attachment, the foreclosure sale could not proceed. La Tondeña then filed with the Sheriff a third party claim to the property; the Alto Surety in turn issued an indemnity bond in favor of the Sheriff, guaranteed by the Associated Insurance Company, to maintain its levy; and on May 19,1952, the goods were sold at auction at the instance of Alto Surety and purchased by the same for P3,507.50.

Thereupon La Tondeña, Inc. filed the present complaint for damages against Alto Surety, the Associated Insurance Co., and the Provincial Sheriff of Pangasinan. After due trial, the Court of First Instance dismissed the complaint on the ground that (1).the release of the levy originally made by the Sheriff in the foreclosure proceedings of La Tondeña's mortgage, extinguished its lien on the goods, and deprived it of preference; (2) that the judgment of foreclosure was novated and extinguished by extension of time and release of execution levy granted by La Tondeña to Ferrer; and (3) that since Alto Surety had paid off the claims of the first mortgagee, Pedro Ruiz, the surety company became subrogated to the rights of the first mortgagee, and therefore Alto Surety's rights became superior to those of the second mortgagee La Tondena, Inc. The latter appealed the judgment to this Court on points of law exclusively.

1. As to the alleged extinction of the lien of La Tondeña because of its release of the execution levy, the court below appears to have missed the fact that La Tondeña held a

mortgage lien, independent of that arising from the levy. It is true that if the creditor, instead of foreclosing the mortgage, files an ordinary action against the mortgagor, the creditor is deemed to have abandoned the mortgage (Bachrach Motor Co. vs. Icarañgal, 68 Phil. 287; Manila Trading and Supply Co. vs. Co Kim, 71 Phil. 448 and cases cited). But that is not the case now, for La Tondeña here precisely sued for the foreclosure of the mortgage in its favor, and can not have intended to abandon its mortgage.

It is apparent that, not having been waived actually or constructively, the mortgage lien held by La Tondeña could not be deemed released merely because the execution levy was discharged without the credit being satisfied. Had La Tondeña not secured a writ of execution on its foreclosure judgment, undeniably the attachment levied at the behest of Alto Surety would have been subordinate to the registered mortgage in favor of La Tondeña and would not supersede it. We see no reason why Alto Surety should be in a better position when an execution levy is made and later lifted than in the case where no such levy at all is had.

The theory that the judgment lien merged or absorbed (and thereby extinguished) the mortgage lien ignores the fact that the judgment lien depends upon the levy but that of the mortgage is based upon its registration; and that the very purpose of the mortgage lien is precisely to assure that a judgment for the amount of the debt will remain collectible and will be satisfied from the proceeds of the mortgaged property; hence, the purpose of the mortgage lien would be defeated unless it is allowed to stand as long as the foreclosure judgment is in force and is. not satisfied. Until then it can not be contended as appellees do, that the mortgage has become *functus officio.* Wherefore, as stated in American Jurisprudence, Vol. 37, p. 79, section 596,—

> "Alto there is some conflict on the question, the weight of authority favors the doctrine that a decree of foreclosure does not merge the lien of the mortgage until it has been consummated by sale and satisfaction. The decree does not, it has been said, destroy the lien of the mortgage but, rather, judicially determines the amount thereof."

2. The ruling of the court below, that the act of La Tondeña, Inc. in dissolving the execution levy and giving . its debtor until March 31, 1951, wherein to pay, constitutes a novation that extinguished the original judgment, is contrary to the rulings of this Court in Zapanta vs. De Rotaeche, 21 Phil. 154 and Inchausti vs. Yulo, 34 Phil. 978. In both cases,

this Court ruled that in order to extinguish or discharge an obligation by novation the intent of the parties to do so (*animus novandi*) must be either expressed or else clearly apparent from the incompatibility "on all points" of the old and the new obligations (Art. 1204, Civil Code of 1889; Article 1292, new Civil Code); and that the act of giving a debtor *more time* to pay an obligation is not a novation that will extinguish the original debt. As in the De Rotaeche case, the subsequent arrangement between La Tondeña and the judgment debtor Ferrer clearly recognized that the judgment of foreclosure continued to be in force, because the arrangement was that if Ferrer did not pay until March 31st, 1951, La Tondeña, Inc. would ask for the execution of the judgment.

> "In the present case, the contract referred to does not expressly extinguish the obligations existing in said judgment. Upon the contrary it expressly recognizes the obligations existing between the parties in said judgment and expressly provides a method by which the same shall be extinguished, which method is, as expressly indicated in said contract, by monthly payments. The contract, instead of containing provisions 'absolutely incompatible' with the obligations of the judgment, expressly ratifies such obligations and contains provisions for satisfying them. The said agreement simply gave the plaintiff a method and more time for the satisfaction of said judgment. It did not extinguish the obligations contained in the judgment, until the terms of said contract had been fully complied with. Had the plaintiff continued to comply with the conditions of said contract, he might have successfully invoked its provisions against the issuance of an execution upon the said judgment. The contract and the punctual compliance with its terms only delayed the right of the defendant to an execution upon the judgment. The judgment was not satisfied and the obligations existing thereunder still subsisted until the terms of agreement had been fully complied with. The plaintiff was bound to perform the conditions mentioned in said contract punctually and fully, in default of which the defendant was remitted to the original rights under his judgment." (Zapanta vs. Be Rotaeche, *supra*.)

That an extension of time does not constitute extinctive novation is evident from the fact that extension had to be made a special ground for the extinguishment of the contract of guaranty in Article 1851 of the old Code (Article 2079 new Civil Code) notwithstanding that Article 1847 (now 2076) applies or guaranty the same grounds that extinguish all

other obligations, naturally including novation. If the extension of the period for payment were included in novation, Article 1851 (now 2079), making it a separate ground of discharge would be unnecessary.

3. The last argument for the appellees is that, by paying off the first mortgage of Pedro Ruiz, Alto Surety became legally surrogated to the rights of the first mortgagee. This stand fails to take into account that such subrogation only occurs upon *payment* of the first mortgage (Civil Code of 1889, Article 1210; new Civil Code, Article 1302), and that Alto Surety did not begin paying off the first mortgage until March 1952, nor complete its payment until June 19, 1952, while its attachment was levied *one year before*, in April of 1951. The complaint upon which Alto Surety obtained the attachment in question was not for the foreclosure of first mortgage, and in fact, did not even allege that the first mortgage had been paid by Alto Surety. Hence, the subrogation in its favor *did not exist* when the attachment was levied, nor make the latter superior to the lien of the second mortgagee, La Tondeña, Inc., *as of the time be the attachment*; nor would it justify the refusal of the appellees to allow the foreclosure sale to proceed, or their rejection of the third party claim filed by the second mortgagee on September 5, 1951. As of the latter date, La Tondeña, Inc. was already entitled to seize and sell the security (of course, subject to the first "mortgage), and the attaching creditor, Alto Surety, had only a lien subordinate to that of its opponent. The refusal to surrender the mortgaged property being evidently wrongful, the appellees are liable for damages.

As to the extent of such damages, there is no evidence en record other than the third party claim of La Tondeña, asserting that the goods attached by Alto Surety were worth not less than P7,500; the indemnity bond subscribed by both Alto Surety and Associated Insurance and Surety Co., in the sum of P7,500; and that the attached goods were sold at the instance of Alto Surety, and purchased by it at P8,507 (Exhibt 14-Alto). Since the appellant did not petition for an increase of the indemnity bond, it is inferable that it was agreeable that the goods attached were not worth more. Considering that La Tondeña was not entitled to the ownership of the disputed goods, but only claimed the right to seize and sell them at public auction *subject to the first mortgage*, and there being no other pertinent evidence, we believe that there is no basis at present for assessing the the appellant's damages. As this failure appears due to the concentration of the parties on the main legal question of preference, equity justifies a reopening of the case to admit evidence on the particular issue of damages.

In view of the foregoing, the decision appealed from is reversed, and the attachment

levied on the goods in question by the appellee Alto Surety and Insurance Co. is declared illegal and void. The records are ordered remanded to the court of origin with instructions to re-open the case and receive evidence on the question of damages caused by the illegal attachment. Costs in this instance shall be taxed against the appellees, Alto Surety and Insurance Co. and Associated Insurance Co. So ordered.

Paras, C. J., Bengzon, Padilla, Montemayor, Bautista Angelo, Labrador, Concepcion, and *Endencia,, JJ.*, concur.

Date created: October 13, 2014