

CRISTETO H. ANGALA, PETITIONER, VS. HON. BIENVENIDO A. TAN, ETC., ET AL., RESPONDENTS.

G.R. No. L-10562. August 31, 1959

Ponente: PARAS, J.

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PARAS, J.:

Appeal from an order of the Court of First Instance of Manila, denying petitioner's motion for default and granting respondent company's motion to dismiss.

DECISION

The petitioner filed a complaint in the Court of First Instance of Manila against Lucio R. Gallardo and respondent Associated Insurance & Surety Co., Inc., the latter only in its capacity as guarantor of its codefendant Gallardo. Having received summons on December 10, 1955, respondent company filed a motion to dismiss on December 16, 1955, without serving copy of the petitioner. On January 10, 1956, said respondent received a copy of petitioner's motion for the admission of an amended complaint, set for hearing on January 14, 1956. Respondent company filed an opposition on January 13, 1956, when it informed the court of the pendency of its motion to dismiss filed on December 16, 1955. Discovering that the petitioner was not served with a copy of said motion to dismiss, the court ordered respondent company to effect said service upon the petitioner who was granted five days therefrom within which to file an opposition. On January 16, 1956, the petitioner filed his opposition and, on the following day, a motion to declare respondent company in default. In due time the court denied petitioner's motion for default and granted respondent company's motion to dismiss. Upon denial of his motion for reconsideration, the petitioner has elevated the case to this Court of Appeals by certiorari.

The petitioner insists that respondent Judge of the Court of First Instance of Manila erred in entertaining respondent company's motion to dismiss without proof of service upon the petitioner and in not declaring respondent company in default after it had failed to file and answer to the original complainant was an appeal. Although respondent company could have been declared in default by December 26, 1955, the failure of the petitioner timely to file a motion to that end, coupled with the fact that he filed on January 10, 1956 a motion for the admission of an amended complaint and, on January 16, 1956, on opposition to respondent company's motion to dismiss, amounted to a waiver of petitioner's right to further move for said respondent's default.

Neither was error committed by respondent Judge in dismissing petitioner's complaint. In paragraphs 3 and 5 of the original complaint it is alleged that respondent company had guaranteed respondent Lucio Gallardo's obligation and that despite extensions given the latter no mention was made that such extensions were with respondent company's consent said obligation remained unsettled. On the basis of said allegations, respondent company should be released because, under article 2079 of the Civil Code, an extension granted to a debtor by the creditor without the consent of the guarantor extinguishes the guaranty.

Wherefore, the appealed order is hereby affirmed with cost against the petitioner. So ordered.

Bengzon, Padilla, Montemayor, Bautista Angelo, Labrador, Endencia, and Barrera, J., concur.
Concepcion, J., no part.

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