

GENERAL INDEMNITY CO., INC., PLAINTIFF AND APPELLEE, VS. ESTANISLAO ALVAREZ, DEFENDANT AND APPELLANT.

G. R. No. L-9434. March 29, 1957

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

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

Appeal taken by defendant Estanislao Alvarez from a summary judgment rendered by the Court of First Instance of Manila.

On February 18, 1954, appellee General Indemnity Co., Inc., filed a complaint (C. C. No. 22005) in the Court of First Instance of Manila against appellant Estanislao Alvarez for the recovery of the sum of P2,000 representing the amount of a loan allegedly taken by the appellant from the Philippine National Bank, the payment of which appellee guaranteed with an indemnity bond, and for which appellant, as counter-guaranty, executed in plaintiff's favor a mortgage on his share in a parcel of land (Annex "A" of the complaint). The complaint further alleged that the appellant failed to pay said loan, together with interests, to the Philippine National Bank, as a result of which the bank deducted the amount thereof from plaintiff's deposit. Plaintiff likewise claimed the amount of P426.07 as attorney's fees which the defendant agreed to pay under the mortgage annexed to the complaint.

On March 29, 1954, appellant Estanislao Alvarez, answered, admitting the fact of the loan and the execution of the mortgage Annex "A" of the complaint, but denying knowledge of the alleged payment made by plaintiff to the Philippine National Bank; and as affirmative defense, appellant averred that the loan in question was secured by him only in accommodation of one Hao Lam, and that plaintiff agreed not to take any steps against appellant and the mortgage executed by him in plaintiff's favor until the latter had failed to obtain payment from said Hao Lam.

Eight months later, or on November 24, 1954, plaintiff filed a motion for summary judgment, claiming that appellant's answer, which admitted the genuineness and due execution of the mortgage annexed to its complaint, presented no real and meritorious defense and that it was entitled to a summary judgment in its favor, based on the affidavit of its comptroller Pedro R. Mendiola supporting the motion, which states:

"That he is the Comptroller of the General Indemnity Co., Inc., plaintiff in the above-entitled case;

That he has personal knowledge of the indebtedness of the defendant as of January 31, 1954, in the sum of P2,130.36 plus daily interest of ₱0.69 from February 1, 1954 until fully paid, and the additional amount of P426.07 as attorney's fees;

That he know of his own personal knowledge that several demands have been made upon the defendant for the payment of the above-mentioned obligation to the plaintiff, but notwithstanding said demands, defendant has failed and refused and still fails and refuses to pay the same." (Rec. on Appeal, pp. 19-20)

The lower court found the motion for summary judgment well-taken and on March 29, 1955, rendered judgment in favor of plaintiff for the amount of P2,130.38, plus daily interest of ₱0.69 from February 1, 1954 until payment, and the additional sum of P426.07 attorney's fees, and costs. Defendant filed a motion for reconsideration to have

this judgment set aside and the case set for hearing, but said motion was denied, and so he appealed to this Court.

Insofar as appellant argues that the affirmative defense in his answer that he secured the loan in question only to accommodate a third party and that appellee promised not to proceed against him until it had failed to collect from said third party, tenders genuine issues on the time and manner of payment of the indebtedness in question, appellee is correct in saying that said defense is immaterial to its right of recovery, since the mortgage deed executed by appellant in its favor (the genuineness and due execution of which appellant admitted in his answer) shows appellant to be the actual and only debtor, and appellant is precluded from varying this representation by parol evidence.

However, there is merit in appellant's contention that there exists a controversy in the complaint and answer as to whether or not appellee had actually paid appellant's obligation to the Philippine National Bank, a matter which should be decided in the affirmative before appellee, as surety, can claim reimbursement from appellant, the principal debtor. Appellee asserts that this issue was brought up by appellant for the first time on appeal and should, therefore, be ignored; but contrary to appellee's assertion, this question was brought up by appellant in his answer, when he specifically denied the allegation of the complaint that the Philippine National Bank deducted from appellee's deposit the amount of the loan in question, by the following allegation:

"3. * * * that he does not have sufficient knowledge or information to form a belief as to the truth of the allegations regarding payments made by plaintiff to the P.N.B." (Answer, Rec. App., p. 16)

And as the affidavit of plaintiff's comptroller Pedro R. Mendiola, supporting the motion for summary judgment, simply relates to the amount of the loan in question and appellant's failure to pay the same to appellee inspite of repeated demands, but does not touch on the alleged payment made by appellee to the bank, there was no necessity for appellant to submit counter-affidavits to show that such payment had not been made. Appellee likewise contends that it is immaterial to its cause of action against appellant whether or not it had actually paid the Philippine National Bank, citing Art. 2071 of the New Civil Code to the effect that a guarantor may proceed against the principal debtor, even before having paid, when the debt has become demandable. The last paragraph of this same article, however, provides that in such instance, the only action the guarantor can file against the debtor is "to obtain release from the guaranty, or to demand a security that shall protect him from any proceeding by the creditor and from the danger of insolvency of the debtor." An action by the guarantor against the principal debtor for payment, before the former has paid the creditor, is premature.

The judgment appealed from is hereby set aside and the lower court is ordered to set anew this case for trial on the sole issue of whether or not appellee General Indemnity Co., Inc., had already paid the loan in question to the Philippine National Bank, after which a new judgment shall be rendered. Costs against appellee General Indemnity Co., Inc. So ordered.

Paras, C. J., Bengzon, Padilla,, Reyes, A., Bautista Angelo, Labrador, Concepcion, Endencia and Felix, JJ., concur.

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