

RODOLFO GUERRERO, PETITIONER, VS. THE HON. COURT OF APPEALS AND ALTO SURETY & INSURANCE CO., INC., RESPONDENTS.

G.R. No. L-22366. October 30, 1969

Ponente: CASTRO, J.

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CASTRO, J.:

Appeal by certiorari from the decision of the Court of Appeals in CA-G.R. 29164-R, entitled "Alto Surety & Insurance Company, Inc., plaintiff-appellee, vs. Rodolfo Guerrero, defendant-appellant."

Sometime in September 1963 Jose Robles borrowed the sum of P25, 000 from Chan Too, to ensure payment of which the Alto Surety & Insurance Co., Inc. (hereinafter referred to as ALTO) executed a bond for 25, 000 in favor -of Chan Too, whereby it bound itself jointly and severally with Robles for the payment of the loan to Chan Too. In consideration for the issuance of the said bond, Robles, Vicente Legarda and the herein petitioner Rodolfo Guerrero executed an "Agreement of Counter-Guaranty with Mortgage and Pledge," undertaking jointly and severally to indemnify ALTO for any damage, loss, payments of whatever kind or nature, including attorney's fees, which might be incurred by the latter as a result of the bond issued. The counter - guaranty agreement contains this further provision:

"c) Maturity of OUR OBLIGATION AS CONTRACTED HEREWITH: - The said indemnities will be paid to the SURETY COMPANY as soon as demand is received from the creditor, or as soon as it becomes liable to make payment of any sum under the terms of the above-mentioned Bond, its renewals, extensions or substitutions, whether the said sum or sums or part thereof, have been actually paid or not."

Robles failed to pay his indebtedness to Chan Too, so the latter instituted civil case 29357 in the Court of First Instance of Manila against Robles and ALTO. Judgment was rendered on December 6, 1956 on the basis of a compromise agreement executed by the parties, the pertinent portions of which read as follows:

"1. - That defendant Jose Robles recognizes his liability to the herein plaintiff, Chan Too, for the following amounts:

Principal Obligation ----- P25,000.00

Interest at 12% per annum

from Dec. 19, 1953 to

Dec. 18, 1954 ----- 3,000.00

Interest at same rate

from Dec. 19, 1954 to

Dec. 18, 1955 ----- 3,000.00

Interest at same rate

from Dec. 19, 1955 to

Dec. 18, 1956 ----- 2,750.00

Attorney's fees ----- 2,000.00

TOTAL ----- P35,750.00

* * *

"3. - That the total amount of 35, 750. 00 mentioned in paragraph 1 hereof shall be paid by the said defendant Jose Robles in the following manner:

P15,000.00 to be paid on or before Jan. 10,1957

P15,000.00 to be paid on or before Feb. 10, 1957

P5,750.00 to be paid on or before March 10, 1957

* * *

"4. - That in case of failure on the part of said defendant Jose Robles to pay unto the plaintiff any of the amounts mentioned in paragraph 3 hereof on the dates therein agreed upon the terms of payment given to said defendant in said paragraph 3 shall become null and void and the outstanding balance shall ipso facto become entirely due and payable and plaintiff in such event shall be entitled to an ex-parte writ for the execution of the judgment rendered in this case on the basis of this agreement;

"5. - That the defendant Alto Surety Insurance Co., Inc. recognizes its liability to plaintiff jointly and severally with defendant Jose Robles in the sum of P25, 000.00 plus P300.00 by way of attorney's fees;

* * *

"7. - That should the principal defendant Jose Robles fail to comply with any of the terms and conditions for payment mentioned in paragraph 3, then

(a) plaintiff is entitled to an ex-parte execution of the judgment rendered hereon in the sum of P25,000.00 against defendant Alto Surety & Insurance Co., Inc.; and

(b.) cross-plaintiff Alto Surety Insurance Co., Inc. is likewise entitled to an ex-parte execution of the judgment rendered on the cross-claim against cross-defendant Jose Robles."

Robles defaulted in his obligations, so the corresponding writ of execution was issued.[1]

On January 30, 1958 ALTO instituted the present action against the petitioner Rodolfo Guerrero, on the basis of the "Agreement of counter-Guaranty with Mortgage and Pledge," for the recovery of the sum of P25,000, with interest at the rate of 12% per annum from the date of the filing of the complaint, plus 15% of the said amount as attorney's fees .

On October 17, 1960 judgment was rendered

"1. Ordering defendant to pay plaintiff Alto Surety & Insurance Co., Inc., the amount of P20,725.00, the balance of the original obligation, less the amount of P10,500.00, corresponding to payments made by Jose Robles to the plaintiff, or a total of P10,225.00, with interest thereon at the rate of 12% per annum from the date of the filing of the complaint until fully paid;

"2. Plus the additional sum equivalent to 15% of the above amount by way of attorney's fees; and

"3. To pay the costs."

and dismissing the defendant's counter-claim.

This judgment was amended on January 9, 1931 to read as follows:

"WHEREFORE, the Court renders judgment as follows:

"(1) Ordering the defendant to pay plaintiff Alto Surety-& Insurance Co., Inc., the amount of P20,725.00, the balance of the original obligation, with interest at the rate of 12% per annum on the amount of P10,400.00 from the date of the filing of the complaint until fully paid;

"(2) Plus the additional sum equivalent to 15% of the above amount by way of attorney's fees; and

"(3) To pay the costs."

On appeal, the Court of Appeals erroneously affirmed the judgment a quo (as unamended) of October 17, 1960. This appeal by certiorari now before us is from the decision of the said Court.

Proceeding now to a consideration of the petitioner's stance, we note that the sole foundation of his position is that he was released from his obligation under the counter-guaranty agreement by virtue of novation because the compromise agreement entered into by Chan Too, Jose Robles and ALTO in civil case 29357, to which the petitioner claims he was a party, had the legal effect of binding all the parties exclusively to the terms thereof.

The petitioner's sole argument is based on palpably erroneous assumptions.

The petitioner erroneously assumes that he was a party case in civil case 29357 where the compromise agreement was executed, in accordance with which judgment was rendered. Discovering that he has ensnared himself in his own net of fiction, he now attempts to disentangle himself by contending that when ALTO - entered into the compromise agreement in civil case 29357, it thereby waived its right to proceed against him. Were he really a party to the said civil case 29357, his argument might perhaps merit attention. It is patent from the record, however, that the only parties in the said civil case were Chan Too as plaintiff and Jose Robles and ALTO as defendants. This being the situation, the compromise agreement in that case served to determine the rights and obligations of only parties therein, namely Chan Too as creditor and Robles and ALTO as debtor and surety respectively.

The petitioner likewise erroneously assumes that the present case was instituted by ALTO on the basis of the judgment rendered in civil case 29357. ALTO instituted this action against the petitioner on the basis, not of the compromise agreement nor of the judgment rendered in accordance therewith, but of the separate and distinct "agreement of counter-guaranty" which he had executed jointly and severally with Robles and Vicente Legarda.

While the said agreement is captioned "counter-guaranty," a close perusal of its terms reveals that it is actually one of indemnity. Notably, the agreement explicitly provides that the obligation to indemnify ALTO arises "as soon as demand is received from the creditor" or "as soon as it (ALTO) becomes liable to make payment of any sum under the terms of the above-mentioned Bond, or any renewals, extensions or substitutions, whether the said sum or sums or part thereof, have been actually paid or not." (emphasis supplied) On June 21, 1956 ALTO demanded from the petitioner fulfillment of his obligations under the agreement since it had before then received from Chan Too a demand for payment by virtue of the bond it had issued. Another demand letter was sent on May 29, 1957 to the petitioner after judgment was rendered in the action by Chan Too against Jose Robles and ALTO. The filing of the complaint (by Chan too in civil case 29357) itself constituted a judicial demand on ALTO, and in

accordance with the abovesited provision of the "agreement of counter-guaranty" the obligation of the petitioner thus then matured.

The contract here involved which was executed by the petitioner is a contract of indemnity not only against actual loss but against liability as well, and it will not avail the petitioner any that, full payment had not yet been made by ALTO to Chan Too.

In *Associated Insurance & Surety Co., Inc. vs. Chua*,^[2] we distinguished between a contract of indemnity against loss and a contract of indemnity against liability, thus:

"The agreement here sued upon is riot only one of indemnity against loss but of indemnity against liability. While the first does not render the indemnitor liable until the person to be indemnified makes payment or sustains loss, the second becomes operative as soon as the liability of the person indemnified arises irrespective of whe-ther or not he has suffered actual loss."

In *Alto Surety & Insurance Co., Inc. vs. Andan, et al.*,^[3] the plaintiff sued the defendants for payment of their liability under the indemnity contract which they had executed jointly and severally in favor of the plaintiff in consideration of the issuance of a bail bond by the latter in a criminal case. The plaintiff was held liable on its bond; without having paid its liability thereon, it sued the said defendants under the indemnity-contract. The defendant Andan resisted the plaintiff's action, contending that as the plaintiff had not yet paid its liability under the bond, it had no cause of action against him. The lower court sustained the defendant's position and dismissed the case. We reversed, holding that

"The dismissal of the complaint by the trial court is erroneous because the defendants undertook to indemnify 'the Company' as soon as demand received from the Creditor, or as soon as it becomes liable to make payment of any sum under the terms of the above-mentioned bond * * * whether the said sum or sums or part thereof, have been actually paid or not."

There being no modicum of doubt, in this case before us, that the obligation of the petitioner has matured, the release of his obligation by virtue of novation must be proved by clear and convincing evidence. In the absence of an express release, nothing less than a showing of complete incompatibility between the two obligations - the "agreement of counter - guaranty" and the compromise agreement - would justify a finding of novation by implication. The express mandate of the law that for an obligation to be extinguished by another "it is imperative that it be so declared in unequivocal terms, or that the old and the new obligations be on every point incompatible with each other,^[4] "blazes the direction to be taken by courts in appraising the defense of novation. This Court has held time and time again that novation is never presumed.^[5] The necessity to prove the same by clear and convincing evidence is accentuated where, as in this case, the obligation of the debtor has already matured.

We fail to see any incompatibility between the two obligations that would sustain the defense of novation. The fact that in the compromise agreement and subsequently in the execution sale, ALTO chose first to realize its credit from Robles, did not imply waiver of its right to process against any of the solidary debtors or some or all of them simultaneously, and the demand made against one of them is no obstacle to demands which may subsequently be directed against the others so long as the debt or any part of it remains outstanding and unpaid.^[6]

Upon all the foregoing, inescapable conclusion is that the compromise agreement on the basis of which judgment was rendered in civil case 29357, did not serve to release the petitioner from his obligation of indemnity to ALTO.

ACCORDINGLY, the judgment of the Court of Appeals is set aside; the judgment of the court a quo (CFI), as amended, dated January 9, 1961, is revived, at petitioner's cost.

Concepcion, C.J., Reyes, J.B.L., Dizon, Makalintal, Zaldivar, Sanchez, Fernando, Teehankee, and Barredo, JJ., concur.

[1] Properties of Robles were sold at public auction, from which the sum of P1,425 was realized and thereafter received by ALTO in partial satisfaction of its cross-claim. Robles had made payments to ALTO in the total sum of P4,275. On the other hand, the aggregate payments made by ALTO to Chan Too by virtue of the judgment rendered in civil case 29357 was P10,400, leaving a balance of P14, 600.

[2] L-15656, January 31, 1963, 7 SCRA 52, 54 (per Makalintal, J.).

[3] 100 Phil. 403 (per Padilla, J.).

[4] Art. 1292, Civil Code.

[5] Martinez vs. Cavives, 25 Phil. 581; Young vs. Villa, et al., 93 Phil. 21.

[6] Art. 1216, Civil Code.

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