

WISE & CO., INC., PLAINTIFF AND APPELLEE, VS. DIONISIO P. TANGLAO, DEFENDANT AND APPELLANT.

G. R. No. 42518. August 29, 1936

Ponente: AVANCEÑA, C.J.

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AVANCEÑA, C.J.:

In the Court of First Instance of Manila, Wise & Co. instituted civil case No. 41129 against Cornelio C. David for the recovery of a certain sum of money. David was an agent of Wise & Co. and the amount claimed from him was the result of a liquidation of accounts showing that he was indebted in said amount. In said case Wise & Co. asked an i obtained a preliminary attachment of David's property. To avoid the execution of said attachment, David succeeded in having his Attorney Tanglao execute on January 16, 1932, a power of attorney (Exhibit A) in his favor, with the following clause:

"To sign for me as guarantor for himself in his indebtedness to Wise & Company of Manila, which indebtedness appears in civil case No. 41129, of the Court of First Instance of Manila, and to mortgage my lot (No. 517-F of the subdivision plan Psd-20, being a portion of lot No. 517 of the cadastral survey of Angeles, G. L. R. O. Cad. Rec No. 124), to guarantee the said obligations to the Wise & Company, Inc., of Manila."

On the 18th of said month David subscribed and on the 23d thereof, filed in court, the following document (Exhibit B):

"COMPROMISE

"Come now the parties, plaintiff by the undersigned attorneys and defendant in his own behalf and respectfully state:

"I. That defendant confesses judgment for the sum of six hundred forty pesos (P640), payable at the rate of eighty pesos (P80) per month, the first payment to be made oh February 15, 1932 and successively thereafter until the full amount is paid; that plaintiff accepts this stipulation.

"II. That as security for the payment of the said sum of P640, defendant binds in favor of, and pledges to the plaintiff, the following real properties:

- House of light materials described under tax declaration No. 9650 of the municipality of Angeles, Province of Pampanga, assessed at P320.

- Accesoría apartments with a ground floor of 180 sq. m. with the first story of cement and galvanized of iron roofing located on the lot belonging to Mariano Tablante Geronimo, said accesoría is described under tax declaration No. 11164 of the municipality of Angeles, Pampanga, assessed at P800.

- Parcel of land described under Transfer Certificate of Title No. 2307 of the Province of Pampanga recorded in the name of Dionisio Tanglao of which defendant herein holds a special power of attorney to pledge the same in favor of Wise & Co., Inc., as a guarantee for the payment of the claim against him in the above entitled cause. The said parcel of land is bounded as follows: NE. lot No. 517 'Part' de Narciso Garcia; SE. Calle Rizal; SW. lot No. 517 'Part' de Bernardino Tiongco; NW. lot No. 508 de Clemente Dayrit; confaining 431 sq. m. and described in tax declaration No. 11977 of the municipality of Angeles, Pampanga, assessed at P423.

"That this guaranty is attached to the properties above mentioned as first lien and for this reason the parties agree to register this compromise with the Register of Deeds of Pampanga, said lien to be cancelled only on the payment of the full amount of the judgment in this case.

"Wherefore, the parties pray that the above compromise be admitted and that an order issue requiring the Register of Deeds of Pampanga to register this compromise previous to the filing of the legal fees."

David paid the sum of P343.47 to Wise & Co., on account of the P640 which he bound himself to pay under Exhibit B, leaving an unpaid balance of P296.53.

Wise & Co. now institutes this case against Tanglao for the recovery of said balance of P296.53.

There is no doubt that under Exhibit A, Tanglao empowered David, in his name, to enter into a contract of suretyship and a contract of mortgage of the property described in the document, with Wise & Co. However, David used said power of attorney only to mortgage the property and did not enter into the contract of suretyship. Nothing is stated in Exhibit B to the effect that Tanglao became David's surety for the payment of the sum in question. Neither is this inferable from any of the clauses thereof, and even if this inference might be made, it would be insufficient to create an obligation of suretyship which, under the law, must be express and cannot be presumed.

It appears from the foregoing that defendant Tanglao could not have contracted any personal responsibility for the payment of the sum of P640. The only obligation which Exhibit B, in connection with Exhibit A, has created on the part of Tanglao, is that resulting from the mortgage of a property belonging to him to secure the payment of said P640. However, a foreclosure suit is not instituted in this case against Tanglao, but a purely personal action for the recovery of the amount still owed by David.

At any rate, even granting that defendant Tanglao may be considered as a surety under Exhibit B, the action does not yet lie against him on the ground that all the legal remedies against the debtor have not previously been exhausted (art. 1830 of the Civil Code, and decision of the Supreme Court of Spain of March 2, 1891). The plaintiff has in its favor a judgment against debtor David for the payment of the debt. It does not appear that the execution of this judgment has been asked for and Exhibit B, on the other hand, shows that David has two pieces of property the value of which is in excess of the balance of the debt the payment of which is sought of Tanglao in his alleged capacity as surety.

For the foregoing considerations, the appealed judgment is reversed and the defendant is absolved from the complaint, with the costs to the plaintiff. So ordered.

Villa-Real, Abad Santos, Imperial, Diaz, Recto, and Laurel, JJ., concur.

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