

PAUL REISS ET AL., PLAINTIFFS AND APPELLEES, VS. JOSE M.A MEMIJE, DEFENDANT AND APPELLANT.*G.R. No. 5447. March 01, 1910*

Ponente: CARSON, J.

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Defendant appellant entered into a contract with one Buenaventura Kabalsa for the repair of a house in the city of Manila. The contractor undertook to furnish the necessary materials, including a considerable amount of lumber, to be used in the repairs. The contractor being a man of no commercial standing in the community was unable to secure credit therefor, and was compelled to pay cash for all purchases. Having no money and no credit he was unable to continue the purchase of the necessary lumber, plaintiffs, with whom he was dealing, absolutely refusing to allow any lumber to leave their yard without payment in advance. The work on the house being delayed for the lack of the necessary materials, defendant accompanied the contractor to plaintiffs' lumber yard, and after satisfying plaintiffs as to his own financial responsibility, and that as a property owner and an attorney in active practice in the city of Manila, he was good for the amount of lumber needed in the repair of his house, he entered into an agreement with them whereby they were to deliver the necessary lumber to the contractor for use in the repair of his house.

In pursuance of and in accordance with the directions of the defendant, plaintiffs delivered to Kabalsa a considerable amount of lumber which was used in the repairs upon defendant's house, and judgment in this action was rendered in favor of the plaintiffs for the proven amount of the unpaid balance of the purchase price of this lumber.

Appellant makes various assignments of error, and contends : First, that the trial court erred in declining to allow an amendment to defendant's answer for the purpose of formally denying plaintiffs' allegations as to defendant's guaranty of payment of the purchase price of the lumber; second, that the trial court erred in failing to set out in its decision the finding of facts upon which the judgment rests; third, that the evidence of record does not sustain a finding that the defendant did in fact assume responsibility for the payment of the purchase price of the lumber delivered to his contractor; and fourth, that even if it be held that he did so, then since the alleged promise, as set up by plaintiffs in their evidence, merely guaranteed payment for the lumber and was not in writing, proof thereof was not admissible in evidence, and defendant was not bound thereby, under the provisions of section 335 of the Code of Civil Procedure.

The alleged errors of procedure may be dismissed without much discussion. We think a reading of the judgment itself clearly discloses that the trial judge did in fact make the necessary findings of fact, and that he expressly held that, admitting all the evidence offered by both parties, the evidence of record establishes the existence of defendant's promise to pay for the lumber, and discloses the existence of a balance due on account of the lumber delivered to defendant's contractor. Without considering whether, under the pleadings, the defendant's evidence should have been stricken out of the record and his motion to amend his answer denied, as appears to have been the opinion of the trial court, we agree with the trial court that even if the evidence be admitted and the complaint

amended, the weight of all the evidence, including the evidence thus admitted, supports the plaintiffs' allegations touching defendant's promise to pay for the lumber in question, and establishes his contention that this lumber was in fact delivered to the defendant's contractor, and by him used in the construction of the house under the directions of the defendant, and that the amount for which the judgment was given in the court below was the amount of the unpaid purchase price of the lumber thus delivered. If, therefore, it was error of the trial court to rule that defendant's evidence should be stricken from the record and that defendant's answer should not be amended in accordance with a motion for that purpose made three weeks after judgment was rendered, it was at most error without prejudice.

The only question that remains is defendant's contention that his alleged guaranty of payment of the purchase price of the lumber furnished at his request to his contractor Kabalsa not being in writing, it is unenforceable in this action.

Section 335 of Act No. 190 is as follows:

"In the following cases an agreement hereafter made shall be unenforceable by action unless the same, or some note or memorandum thereof, be in writing, and subscribed by the party charged, or by his agent; evidence, therefore, of the agreement can not be received without the writing, or secondary evidence of its contents:

* * * * *

"2. A special promise to answer for the debt, default, or miscarriage of another;"

* * * * *

An immense amount of litigation has arisen in England and the United States over the construction of similar provisions which are found in most, if not all, of the so-called statutes of fraud which have been enacted in those jurisdictions, and many courts and text writers have acknowledged their inability to find anything like uniform rules of construction in the conflicting decisions which have been rendered, applying the statute to the infinite variety of facts which have presented themselves; so that it has been said by some that the law upon the subject is in a state of hopeless confusion.

The true test as to whether a promise is within the statute has been said to lie in the answer to the question whether the promise is an original or a collateral one. If the promise is an original or an independent one; that is, if the promisor becomes thereby primarily liable for the payment of the debt, the promise is not within the statute. But, on the other hand, if the promise is collateral to the agreement of another and the promisor becomes thereby merely a surety, the promise must be in writing. (*Gull vs. Lindsay*, 4 Exch. 45; and other cases cited under note 2, p. 906, *Encyclopedia of Law*, vol. 29.)

Just what is the character of a promise as original or collateral is a question of law and fact which must in each case be determined from the evidence as to the language used in making the promise, and the circumstances under which the promise was made; and, since as a general rule the parties making a promise of this nature rarely understand the legal and technical difference between an original and a collateral promise, the precise form of words used, even when established by undisputed testimony is not always conclusive. So that it is said that "While, as a matter of law, a promise, absolute in form, to pay or to be 'responsible' or to be the 'paymaster,' is an original promise, and while, on the other hand, if the promisor says, 'I will see you paid,' or 'I will pay if he does not,' or uses equivalent words, the promise standing alone is collateral, yet under all the circumstances of the case, an absolute promise to pay, or a promise to be 'responsible,' may be found to be collateral, or promises deemed *prima facie* collateral may be adjudged original." (*Encyclopedia of Law*, 2d ed., vol. 29, p. 907, and many cases there cited.)

If goods are sold upon the sole credit and responsibility of the party who makes the promise, then, even though they be delivered to a third person, there is no liability of the third person to which that of the party promising can be collateral, and consequently such a promise to pay does not require a memorandum in writing; and on the same principle it has been held that when one advances money at the request of another (on his promise to repay it) to pay the debt of a third party, as the payment creates no debt against such third party, not being made at all upon his credit, the liability of the party on whose request and promise it was made is original and not collateral, and not within the Statute of Frauds. (Pearce vs. Blagrove, 3 Com. Law, 338; Prop'rs. of Upper Locks vs. Abbott, 14 N. H., 157.) But it has been said that if the person for whose benefit the promise is made was himself liable at all, the promise of the defendant must be in writing. (Matson vs. Wharam, 2 T. R., 80.) And the text writers point out that if this rule be understood as confined to cases where a third party and the defendant are liable in the same way, and to do the same thing, one as principal and the other as surety, it may be accepted as the uniform doctrine of all the cases both in England and in the United States. (Browne on the Statute of Frauds, par. 197, and cases there cited.) In such cases, the defendant is said to come in aid to procure the credit to be given to the principal debtor, and the question, therefore, ultimately is "upon whose credit the goods were sold or the money advanced, or whatever other thing done which the defendant by his promise procured to be done;" and where the defendant stands in the relation to the third party of surety to principal "if any credit at all be given to the third party, the defendant's promise is required to be in writing as collateral." (Browne on the Statute of Frauds, p. 227, and notes 2 and 4.) But it must be clearly recognized that these principles are applicable only where the parties are liable in the same way to do the same thing, one as principal and the other as surety, for if the credit is given to both jointly, since neither can be said to be surety for the other to the creditor, their engagement need not be in writing.

As has been said before, it is frequently a matter of difficulty to determine to whom the credit has actually been given, whether to the defendant alone, in which case the debt is his own and his promise is good without writing; or in part to the third party, in which case the defendant's promise being collateral to and in aid of the third party's liability, requires a writing to support it, or to both jointly, in which case as has been said their engagement need not be in writing. This must be determined from the language and expressions used by the parties promising, and from an examination of the circumstances showing the understanding of the parties. The unexplained fact that charges were made against a third party on the plaintiffs' books, or that the bill was presented to the original debtor in the first instance, unqualified by special circumstances, tends to prove that the credit was given in whole or in part to him, and that the defendant's promise is a collateral one. (Larson vs. Wyman, 14 Wend. (N. Y.), 246; Pennell vs. Pentz, 4 E. D. Smith (N. Y.), 639.) But it is evidently quite impossible to specify any one fact or set of facts on which the question as to whom the plaintiff gave credit is to be determined. In the language of Buchanan, C. J., in Elder vs. Warfield (7 Harris & J. (Md.), 397), "the extent of the undertaking, the expression used, the situation of the parties, and all the circumstances of the case should be taken into consideration."

Application of these principles has been made in many cases where owners of buildings going up under contract enter into agreements upon the faith of which subcontractors or others have continued to supply labor or material after the principal contractor has become either actually or probably unable to pay. In these cases, the question is whether the services for which the action is brought against the owner of the building were performed solely upon the credit of his promise, to be himself responsible and to pay for the materials and labor furnished, or whether the subcontractors and laborers continued to furnish labor and materials to the principal contractor relying upon his obligation guaranteed by the promise of the owner. (Gill vs. Herrick, 111 Mass., 501; Walker vs. Hill, 119 Mass., 249; Clifford vs. Lühring, 69 Ill., 401; Rawson vs. Springs-teen, 2 Thomp. & C. (N. Y.), 416; Belknap vs. Bender, 6 Thomp. & C. (N. Y.), 611; Jefferson County vs. Slagle, 66 Pa. St., 202. See Eshleman vs. Harnish, 76 Pa. St., 97; Haverly vs. Mercur, 78 Pa. St., 257; Weyand vs. Critchfield, 3 Grant (Pa.), 113; Lakeman vs. Mountstephen, L. R. 7 H. L., 17.)

Taking into consideration all the circumstances of the case at bar, we are satisfied that the credit for the lumber delivered by the plaintiffs to defendant's contractor was extended solely and exclusively to the defendant under the verbal agreement had with him, and therefore, that the provisions of the statute did not require that it should be made in writing. Defendant admitted on the stand that his contractor had no commercial credit or standing in the community, and it appears that plaintiffs, after investigation, absolutely refused to extend him any credit whatever upon any conditions and that the defendant was well aware of that fact. From the testimony of the contractor himself, it seems clear that when the agreement for the delivery of lumber was made, the credit was extended not to the contractor but to the defendant. It appears that both plaintiffs and defendant exercised especial precautions to see that all the lumber was delivered on defendant's lot, and that before each bill of lumber was delivered, defendant carefully examined the invoice, which by agreement was submitted to him, and that no lumber was delivered without his approval. The precise language in which the verbal agreement was made does not appear from the evidence, and while it is true that one of the plaintiffs in his deposition, made in the United States, refers to the agreement as one whereby defendant "guaranteed" payment for the lumber, we are satisfied from all the evidence that the word was not used by this witness in its technical sense, and that he did not mean thereby to say that defendant guaranteed payment by the contractor, but rather that after satisfying plaintiffs as to his own financial responsibility, he obligated himself to pay for the lumber delivered to his contractor for use in his house. The only evidence in the whole record which tends to put our conclusion in this regard in doubt, is the testimony of plaintiffs' acting manager during plaintiffs' absence in the United States who stated that he sent a statement of account and a bill for the lumber to the contractor; but this fact, which under ordinary circumstances would be strong evidence that the credit was originally extended to the contractor and merely guaranteed by the defendant, was satisfactorily and sufficiently explained by proof that the plaintiffs were compelled to leave for the United States quite unexpectedly, with no opportunity to go over the accounts with their acting manager, who was left in charge, so that the latter having no knowledge whatever as to plaintiffs' agreement with defendant, and learning that lumber had been delivered to the contractor, supposed that it had been sold to him, and only discovered his mistake on later investigation and correspondence with his principals, after the contractor had notified him as to the true nature of the transaction.

The judgment appealed from should be affirmed with the costs of this instance against the appellant. So ordered.

Arellano, C. J., Torres, Mapa, Johnson, and Moreland, JJ., concur.

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