

FISHER,
C.J.
&
STUART, J.
1923
June 4

[FISHER, C.J. AND STUART, J.]

CONSTANTINIDES

v.

IZZET MEHMED AND

HAJI YORGHY HAJI SAVA.

GUARANTOR—DEBT OF PRINCIPAL DEBTOR SECURED BY MORTGAGE—CREDITOR'S
ABSTENTION FROM ENFORCING MORTGAGE—DISCHARGE OF SURETY.

The Plaintiff lent money to the first Defendant on mortgage of immoveable property and the second Defendant guaranteed the payment of the debt. The Plaintiff at the request of the guarantor began proceedings in the Land Registry Office to enforce the mortgage and subsequently at the request of the first Defendant without the consent of the guarantor discontinued these proceedings. More than a year later on he sued the principal debtor and the guarantor for the original debt.

HELD: *That the guarantor was discharged.*

This was an appeal from a judgment of the District Court of Nicosia in so far as it dismissed the action as against the second Defendant. The facts appear from the head-note and the judgment.

*N. Paschalis (P. Christofides with him) for the Appellant. Giving time to the principal debtor does not discharge guarantor. Mejellé Art. 655. Re Hector Eleutheriades, C.L.R., IX., 42. Sale of the mortgaged property was claimed in this action and ordered by the judgment. He cited *Petty v. Cook*, L.R., 6, Q.B., 790, and *Bell v. Bankes*, 3 M. and G., 258, 3 Scott, N.R., 497.*

*Clerides, for the Respondents. Execution stayed against principal debtor without consent of guarantor discharges latter. Enforcement of mortgage only possible by registered mortgagee, guarantor cannot step into position of mortgagee. Stay of sale obviously prejudicial to guarantor. Action not brought until 20 months after stay when conditions entirely altered. Art. 655 of the Mejellé involves consent of guarantors. Guarantor guaranteed payment of what was not recoverable on sale of mortgaged property. He cited *Rees v. Berrington*, 3 Rev. Rep. pp., 3, 7, and *Croydon Commercial Gas Co. v. Dickinson*, L.R., 2 C.P.D., 46.*

*N. Paschalis in reply cited *Orme v. Young*, 17 Rev. Rep. 611.*

Judgment: In our opinion a person who guarantees a debt secured by mortgage, in effect, guarantees the debt to the extent that the mortgage security may prove insufficient. It is clear that the relationship between the creditor and the guarantor in a case such as we have to

deal with here is one which involves the right of the latter to be consulted with respect to every transaction with the principal debtor. The creditor can do nothing to enlarge or prejudicially alter the obligation of the guarantor without his full knowledge and consent.

In this case the creditor having begun to enforce the mortgage at the instance of the guarantor, desisted from so doing without the consent of the guarantor, and as a result nothing was recovered by those proceedings and the creditor sued the principal debtor and the guarantor for the entire debt. The District Court in giving judgment said "On the request of the debtor only and without consent or knowledge of the guarantor he (the Plaintiff) stays the sale and gives extension of time to the debtor to pay." Though it is now stated that the guarantor had knowledge it is not pretended that he ever consented: and consent is the important matter. Meanwhile the price of land had fallen very considerably. Persistence in enforcing the mortgage might have resulted in the extinction of the guarantor's liability. It must at all events have diminished it. As it is the creditor has altered entirely the relationship between himself and the guarantor and the footing on which the liability of the latter was based and on which his obligation was undertaken. The guarantor is therefore discharged.

Appeal dismissed with costs.

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