

FILED

SID J. WHITE

SEP. 6 1980

CLERK, SUPREME COURT

By _____
Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

ARMANDO E. LACASA, P.A.,
Petitioner,

vs.

MURRY DIAMOND,
Respondent.

Case No. 74,501
DCA Case No. 88-1479

PETITIONER'S INITIAL BRIEF ON THE MERITS

ARMANDO E. LACASA, PA.
3929 Ponce De Leon Blvd.
Coral Gables, Florida
(305) 443-3329

TABLE OF CONTENTS

| | Page |
|--|------|
| I. STATEMENT OF THE CASE AND FACTS..... | 2 |
| 11. ISSUES ON APPEAL..... | 4 |
| A. WHETHER THE DISTRICT COURT OF APPEAL ERRED WHEN IT REVERSED THE TRIAL COURT ON THE ISSUE OF FRAUDULENT CONVEYANCE WITHOUT FIRST REVIEWING THE RECORD OR THE MERITS OF THE CASE..... | 4 |
| B. WHETHER THE TRIAL COURT WAS CORRECT IN DENYING THE MOTION TO EXECUTE THE MORTGAGE FROM THE AMERICAN LEGION TO LACASA AFTER FINDING THAT THERE WAS NO EVIDENCE TO SUPPORT THE ALLEGATION OF FRAUD ON CREDITORS..... | 4 |
| 111. SUMMARY OF THE ARGUMENT..... | 4 |
| IV. ARGUMENT..... | 6 |
| V. CONCLUSION..... | 13 |
| VI. CERTIFICATE OF SERVICE..... | 15 |

TABLE OF CASES

| | |
|--|----|
| <u>Banner Construction Corporation v. A.F. Arnold,</u> 128 So.2d 893 (Fla. 1st DCA 1961) | 9 |
| <u>Brandenburg Investment Corp. v. Farrell Realty,</u> 463 So.2d 558 (Fla. 2d DCA 1985)..... | 7 |
| <u>Gyorok v. Davis,</u> 103 So.2d 701 (Fla. 3d DCA 1966)..... | 9 |
| <u>In Re Harry Kaiser Associates, Inc.,</u> 14 B.R. 107 (Bkrctcy. Fla. 1981)..... | 10 |
| <u>Johnson v. Roberts,</u> 79 So.2d 225 (Fla. 1955)..... | 7 |
| <u>Marsh v. Marsh,</u> 419 So.2d 629 (Fla. 1982)..... | 7 |
| <u>Matter of Flanzbaum,</u> 10 B.R. 420 (Bkrctcy. Fla. 1981)..... | 10 |
| <u>Matter of Kasuba,</u> 10 B.R. 390 (Bkrctcy. Fla. 1981)..... | 10 |
| <u>Money v. Powell,</u> 139 So.2d 702 (Fla. 2d DCA 1962)..... | 9 |
| <u>Stephens v. Kies Oil Co.,</u> 386 So.2d 1289 (Fla. 3d DCA 1980)..... | 10 |
| <u>United States v. Fernon,</u> 640 F.2d 609 (5th Cir. 1961)..... | 9 |
| <u>Wieczoreck v. H & H Builders, Inc.,</u> 450 So.2d 867 (Fla. 5th DCA 1984) <u>cert. question answered,</u> 475 So.2d 227 (Fla. 1985)..... | 9 |
| <u>Zirin v. Charles Pfizer & Co., Inc.,</u> 128 So.2d 594 (Fla. 1961)..... | 14 |

AUTHORITIES

| | |
|---|---|
| U.S. Const. amend. V..... | 6 |
| U.S. Const. amend XIV, s 1..... | 6 |
| Art. I, § 9, Fla. Const..... | 6 |
| § 726.105(1)(a), Fla. Stat. (1987)..... | 8 |
| § 726.105(2)(h), Fla. Stat. (1987)..... | 8 |

PRELIMINARY STATEMENT

Reference to the Petitioner will be by the use of its formal name or "Petitioner". Reference to the Co-Petitioner, American Legion Community Club of Coconut Grove will be by the use of the term "Legion". Reference to the Respondent will be by the use of its formal name or "Respondent". Reference to the record on appeal will be by the use of the term "R". Reference to the transcript of the hearing on May 6, 1988 will be by the use of the term "Tr".

STATEMENT OF THE CASE AND FACTS

The statement of the case and facts as set forth in Co-Petitioner, American Legion Community Club of Coconut grove, Inc's. (hereinafter "Legion") initial brief is accepted by the Appellee, Armando E. Lacasa, P.A. (hereinafter "Lacasa") except as supplemented herein.

1. On April 25, 1989 the District Court below filed its opinion in Diamond v. American Legion Community Club of Coconut Grove, Inc. and Armando E. Lacasa, P.A., 544 So.2d 239 (Fla. 3d DCA 1989). The court was asked to consider two issues: a lis pendens question involving the Legion and a fraudulent conveyance question involving Lacasa. The District court ruled on the lis pendens issue and certified the lis pendens question to be of great public importance.

The district court below then avoided the fraudulent conveyance question on the ground that its resolution of the lis pendens issue made it unnecessary to reach the other points raised on appeal. Then, without considering any aspect of Lacasa's case, the district court reversed the entire decision of the trial court and instructed the trial judge to allow Diamond to levy against Lacasa's mortgage. Rehearing was denied and this appeal followed.

2. The following is a summation of the facts surrounding the fraudulent conveyance question:

In the settlement agreement between Giorgio Del Rossi

a

(hereinafter "Del Rossi") and the Legion dated December 21, 1987, the parties agreed to settle all pending litigation concerning the property in question (R. 493-509). Del Rossi agreed to convey the property back to the American Legion, and the Legion agreed to terminate all litigation with Del Rossi and to pay to Armando E. Lacasa, P.A. the sum of One Hundred and Twenty Five Thousand (\$125,000.00) Dollars representing Lacasa's legal fees (R. 496-497). This payment took the form of a mortgage and promissory note because as Jim Moore, Esq., the attorney representing the Legion (hereinafter "Moore") testified at trial, the Legion did not have the funds to pay Lacasa's fees at the time (Tr. 467).

The amount of mortgage was based on several factors including: a) Lacasa's mortgage would be subordinate to two prior existing mortgages (Tr. 445-446); b) payments on the mortgage note would not commence until Diamond began to make his lease payments on the subject property (Tr. 470); and c) Lacasa had been representing Del Rossi in the litigation for over two years and had advanced all the costs. (Tr. 445)

Diamond, who holds a \$1.5 Million Dollar judgment against Del Rossi, argued that he was entitled to levy on the mortgage to Lacasa on the ground that the agreement was a fraud on Del Rossi's creditors (Tr. 403-404). At trial, Moore, Lacasa and Del Rossi testified that no portion of the proceeds of the mortgage and promissory note were ever intended to go or would go to Del Rossi (Tr. 449, 459, 465). Also, W. Alan Kelly, the

Department Commander serving as Chairman of the reorganization of American Legion Post 70, testified that the One Hundred and Twenty Five Thousand (\$125,000.00) Dollar mortgage was to his knowledge legal fees (Tr. 461).

Del Rossi testified that Lacasa had advised him of the merits of his case with the Legion and based on that advise, he chose to settle (Tr. 435, 458). Del Rossi also testified that he told Lacasa to "arrive at an agreement with the Legion for your (Lacasa's) attorney's fees" (Tr. 458). Though Del Rossi had a contingency fee arrangement with Armando E. Lacasa P.A. whereby Lacasa was entitled to a fee of 40% of whatever Del Rossi recovered from the litigation, this agreement was abandoned by the parties because Del Rossi chose to settle the case as he did.

Finally, Del Rossi indicated at trial that he was grateful to Lacasa for the manner in which Lacasa represented him during the litigation. Del Rossi said:

"It was not...in his (Lacasa's) benefit to settle...because he would get more money if he wins. It was to my (Del Rossi's) benefit and I appreciate what Lacasa did for me in that moment" (Tr. 437) .

Del Rossi also testified that he did not have a full command of the English language and that it was difficult for him to express himself accurately. (Tr. 433).

The trial court found no evidence to indicate that Del Rossi would benefit from any of the funds of the mortgage to Lacasa or that Lacasa would pay to Del Rossi any such funds (Tr. 473).

Further, the Court denied Diamond's motion to execute on the mortgage after finding no connection with the lawsuit between Diamond, the Legion, and Del Rossi (Tr. 474).

ISSUES ON APPEAL

- A. WHETHER THE DISTRICT COURT OF APPEAL ERRED WHEN IT REVERSED THE TRIAL COURT ON THE ISSUE OF FRAUDULENT CONVEYANCE WITHOUT FIRST REVIEWING THE RECORD OR MERITS OF THE CASE.
- B. WHETHER THE TRIAL COURT WAS CORRECT IN DENYING THE MOTION TO EXECUTE THE MORTGAGE FROM THE AMERICAN LEGION TO LACASA AFTER FINDING THAT THERE WAS NO EVIDENCE TO SUPPORT THE ALLEGATION OF FRAUD ON CREDITORS.

SUMMARY OF THE ARGUMENT

1. On appeal the findings of fact of the trial judge are presumed correct and an appellate court may not retry and reweigh the evidence and witness testimony given before the trial court unless the lower court's finding is clearly against the weight of the evidence or an erroneous application of the law. But even before this presumption of correctness of the trial court's finding attaches there has to be a hearing. The constitutional right to due process requires that every one have his day in court.

Here, the district court below reversed the decision of the trial court regarding the fraudulent conveyance issue without reviewing the merits of the case. The court instructed the trial judge to allow the Respondent to levy against the Petitioner's

mortgage. The district court's disposition of the fraudulent conveyance question ignored the Petitioner, Armando E. Lacasa, P.A.'s constitutional right to due process by depriving him of his mortgage without a fair hearing. Also, the district court reversed the trial court decision ignoring the presumption of correctness that it carries.

2. At trial, Diamond never presented evidence to support his allegation that Del Rossi fraudulently transferred the mortgage to Lacasa. The mortgage was conveyed by the Legion directly to Lacasa as payment for his legal fees pursuant to the settlement agreement between the parties. Lacasa proved that the mortgage was never the property of Del Rossi nor was it ever intended to be for the benefit of Del Rossi. Therefore no transfer from Del Rossi to Lacasa ever took place, fraudulent or otherwise.

If the Legion mortgage to Lacasa is construed as a transfer by this court then Diamond must be held to prove it was fraudulent. Under Florida law, fraud must be established by proof of either: (a) an intent to defraud, or (b) that inadequate consideration was given in exchange for a transfer of assets thereby creating the presumption of fraud.

After considering all the evidence before him, the trial judge in this case concluded that there was nothing to support Diamond's allegation that the mortgage from the American Legion to Lacasa was an attempt to defraud the creditors of Del Rossi.

As the trial court concluded, Diamond's allegation of fraud regarding the American Legion mortgage was founded entirely upon speculation and innuendo.

Given the judge's superior vantage point in hearing the evidence presented at trial, it cannot be said that his ruling was an erroneous application of the law. The decision of the trial court should be affirmed.

ARGUMENT

A. THE DISTRICT COURT OF APPEAL ERRED AS A MATTER OF LAW WHEN IT REVERSED THE TRIAL COURT'S DECISION REGARDING THE FRAUDULENT CONVEYANCE QUESTION WITHOUT FIRST REVIEWING THE CASE.

In its opinion the district court reversed the decision of the trial court on the question of fraudulent conveyance and instructed the trial judge to grant the Respondent's motion for a writ of execution against the Petitioner's mortgage. This action was taken by the district court without a full review of the merits of the case or of the records of the proceedings below. Such an arbitrary and summary disposition by the district court constitutes a denial of the Petitioner's right to due process of law under the Fifth and Fourteenth Amendments of the United States Constitution, and under the Article 1 Section 9 provision of the Florida Constitution.

Further, it is axiomatic the trial court's findings of fact and legal determinations are clothed with a presumption of correctness, and it is not the prerogative of the appellate court

to substitute its judgment for that of the trial court. Marsh v. Marsh, 419 So.2d 629 (Fla. 1982), Johnson v. Roberts, 79 So.2d 225 (Fla. 1955), Brandenburg Investment Corp. v. Farrell Realty, 463 So.2d 558 (Fla. 2d DCA 1985).

B. THE TRIAL COURT WAS CORRECT IN DENYING DIAMOND'S MOTION TO EXECUTE THE MORTGAGE FROM THE LEGION TO LACASA SINCE DIAMOND FAILED TO PROVE THAT THE MORTGAGE WAS AN ATTEMPT TO DEFRAUD CREDITORS.

1. At trial it was proven that Del Rossi did not transfer anything of value to Lacasa.

Diamond's argument on appeal regarding the mortgage to Lacasa is based on the allegation that Del Rossi perpetrated a fraudulent conveyance to Lacasa to avoid his creditors. A review of the pertinent trial testimony clearly and conclusively shows that Del Rossi instructed Lacasa to settle with the Legion for an end to the litigation so that he could avoid any future lawsuits against him regarding the property. Del Rossi told Lacasa to seek his legal fees as part of any settlement with the Legion and Del Rossi sought no money award from that settlement. Also, since the mortgage was conveyed to Lacasa, not to Del Rossi, Del Rossi never had control of the mortgage and could not transfer, convey or assign it in any way.

It was proven at trial that Del Rossi had no involvement in the negotiations between the Legion and Lacasa, and that Del Rossi took no part in determining the amount or manner of payment of Lacasa's legal fees. Finally, the testimony of Moore, Kelly

and Lacasa clearly indicated that Del Rossi was never intended to benefit, nor would ever benefit from the mortgage conveyed to Lacasa (Tr. 449, 459, 465).

At trial, the court held that Diamond presented no evidence to support the allegation that Del Rossi fraudulently conveyed the mortgage to Lacasa. As the trial court noted, Diamond's case was nothing more than "innuendo". Further, after the court heard all the evidence it concluded without hesitation that Del Rossi, the Legion and Lacasa had a right to settle as they did. The trial judge stated, "There wasn't any evidence to indicate that this lawyer (Lacasa) is going to pay any money over to Del Rossi...". (Tr. 473)

2. Since Lacasa proved at trial that he gave adequate consideration for the mortgage by representing Del Rossi in this case for over two years, Diamond failed to establish that the conveyance was fraudulent.

Notwithstanding the fact that Del Rossi took no part in the conveyance of the Legion mortgage to Lacasa or that he transferred nothing to Lacasa, the court below found that the evidence presented in this case proved that Lacasa gave consideration in exchange for his legal fees. Diamond bases his appeal on Florida's fraudulent conveyances statute, § 726.105 (1) (a), Fla. Stat. (1987), which deems a transfer made by a debtor fraudulent against creditors if the debtor transferred the property with the intent to hinder, delay or defraud his creditors. The statute provides that intent may be shown by identifying certain badges of fraud present in the transaction. § 726.105 (2) (h), Fla. Stat. (1987).

Badges or indicia of fraud are the tools a court uses to determine whether a transfer constitutes a fraudulent conveyance. Banner Construction Corporation v. A.F. Arnold, 128 So.2d 893 (Fla. 1st DCA 1961), United States v. Fernon, 640 F.2d 609 (5th Cir. 1961). Badges of fraud include the insolvency of the transferee: lack of consideration for the conveyance: retention by the debtor possession of the property: the relationship between the transferee and the transferrer: and the pendency of litigation. Wieczoreck v. H & H Builders, Inc., 450 So.2d 867 (Fla. 5th DCA 1984). And while several badges of fraud when considered together afford a basis for setting aside a conveyance as fraudulent, one badge of fraud standing alone may be insufficient in itself to constitute the requisite fraud to set aside the conveyance. Id. at 874, citing Banner, 128 So.2d at 896.

As his only proof of intent regarding the Legion mortgage, Diamond argued that Lacasa gave no consideration in exchange for the Legion mortgage paying his legal fees. To support his argument Diamond cited numerous cases involving fraudulent conveyances. In Gyorok v. Davis, 103 So.2d 701 (Fla. 3d DCA 1966), the debtor conveyed his interest in real property to his sister and received no money in exchange. In Gyorok, the debtor had a judgment against him for child support arrearages. The defendant in Money v. Powell, 139 So.2d 702 (Fla. 2d DCA 1962), conveyed his undivided one half share in real property to his wife four days after injuring the plaintiff in an auto accident.

The wife gave no consideration for the transfer and the defendant continued to exercise dominion over the property. The debtor in Stephens v. Kies Oil Co., 386 So.2d 1289 (Fla. 3d DCA 1980), transferred his gas station to his nephew for no consideration after becoming indebted to the plaintiff in that case.

Finally, in Matter of Kasuba, 10 B.R. 390 (Bkrtcy. Fla. 1981), and in Matter of Flanzbaum, 10 B.R. 420 (Bkrtcy. Fla. 1981), the debtors in these cases fraudulently transferred their property to corporations which they controlled and which were owned either by the debtor or his relatives. And in In Re Harry Kaiser Associates, Inc., 14 B.R. 107 (Bkrtcy. Fla. 1981), the debtor, a corporation, transferred certain assets to one of its shareholders.

The cases relied on by Diamond all share a common nexus; each had a full complement of badges of fraud (inter-family transfers, no consideration, retention of control, pending litigation) and that is what distinguishes them from the case at bar.

Again, a review of the trial testimony will show that Lacasa represented Del Rossi in the litigation with the Legion for more than two years and advanced all of the costs involved. At trial, Moore the attorney for the Legion, acknowledged that the Legion's case had certain shortcomings and that the legion "might not retrieve title to the property" (Tr. 466). So when Del Rossi chose to settle the case by returning title of the property to the legion in exchange for a cessation of all legal action by the

Legion, and for the payment of his legal fees, he essentially prevented Lacasa from litigating, possibly winning, the case.

If the case had not been settled out of court, and if Del Rossi would have prevailed against the Legion, then Lacasa would have been entitled to a fee in excess of one million (\$1,000,000) Dollars based on the contingency fee arrangement with Del Rossi (Tr. 436). However, since Del Rossi chose to settle the case without a pecuniary award for himself, it became necessary to abandon the contingency fee agreement he had with his attorney, so that Lacasa could calculate his fee on a different basis.

Lacasa testified at trial that when he and the Legion arrived at the One Hundred Twenty Five Thousand (\$125,000) Dollar figure representing legal fees, it took into consideration (1) the time spent and costs advanced by Lacasa in the case; (2) the fact that the Legion could not pay Lacasa a lump sum amount due to its lack of funds; (3) the fact that Lacasa's mortgage would be subordinate to the Taylor mortgage (R. 473-474) and to Diamond's leasehold position (Tr. 445); and (4) the fact that payment's on the mortgage note to Lacasa were dependent on the revenue brought in from Diamond's performance of his lease (Tr. 445).

Next, Diamond makes an issue out of the fact that at trial Del Rossi said that he was grateful for the way Lacasa represented him. (Tr. 437) Diamond argues that gratuity is not consideration for a conveyance. The Petitioner does not dispute this point. However, a review of the transcript will show that

a

Del Rossi was merely expressing satisfaction with his attorney's loyalty and candor when Lacasa advised him to settle with the American Legion. Del Rossi's comment reads:

"It was maybe not in his (Lacasa's) benefit to settle because he would get more money if he wins. It was for my benefit and I appreciate what Mr. Lacasa did for me in that moment."

Del Rossi conceded that he had a limited grasp of the English language and if his answers were unclear he apologized. (Tr. 433)

The Petitioner submits that it is not unusual for someone to thank another for rendering a service that is paid for. When one goes to a restaurant does one not thank the amicable waiter after paying the check? Or the talented doctor who cured that aching back? Or the diligent accountant who saved you a bundle on your taxes?

Lacasa testified that he would have taken a lower amount in legal fees if he could have been paid up front. (Tr. 445) But the circumstances dictated that the mortgage was the only way Lacasa could be compensated for his services. Lacasa earned his fee by virtue of his work and expenses in this case. He is entitled to the mortgage from the Legion because that is the only way he can collect them.

CONCLUSION

The district court erred in refusing to consider the merits of the fraudulent conveyance question and then reversing the trial court on the same question. This constitutes a denial of the Petitioner's constitutional right to a fair hearing. Also, this action ignores the long-standing principle that a trial court's findings of fact are presumed correct and should not be disturbed on review unless manifestly against the weight of the evidence.

This court may remand the Petitioner's case to the district court with an instruction to review the merits. However, the Petitioner respectfully submits that it is appropriate for this court to hear the case on the merits, arrive at a decision, and terminate the litigation here. This would be consistent with the policy enunciated by the court in Zirin v. Charles Pfizer & Co., Inc., 128 So.2d 594 (Fla. 1961) which stated:

"Needless steps in litigation should be avoided wherever possible and courts should always bear in mind the almost universal command of constitutions that justice should be administered without 'sale, denial, or delay.' Piecemeal determination by our appellate court should be avoided and when a case is properly lodged here [it should terminate here]."

If so, this court should consider that from his direct and superior vantage point, the trial judge was able to weigh the facts and evidence presented at trial. The judge found no evidence to indicate that Del Rossi, Lacasa and the American

3 Legion were scheming to defraud Murray Diamond. Further, Lacasa proved that he gave sufficient consideration in exchange for the mortgage from the Legion as payment of his legal fees thereby rebutting the presumption of fraud ascribed herein by the Respondent. For these reasons the ruling of the trial judge should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Initial Brief On The Merits was mailed this 5th day of September 1989, to:

JAMES M. MOORE, ESQ.
Taylor, Brion, Buker & Greene
1111 South Bayshore Drive
Eleventh Floor
Miami, Florida 33131

and to,

JOEL S. PERWIN
Podhurst, Orseck, Parks, Josefsberg
Eaton, Meadow & Olin, P.A.
Suite 800, City National Bank Building
25 West Flagler Street
Miami, Florida 33130

ARMANDO E. LACASA, P.A.
3929 Ponce De Leon Boulevard
Coral Gables, Florida 33134
(305) 443-3329

By 

Armando E. Lacasa, Esq.
Florida Bar No. 232203