

orig.

IN THE SUPREME COURT OF FLORIDA

CASE NO, 74,501

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

vs.

MURRAY DIAMOND,
Respondent.

FILED

SID J. WHITE

OCT 4 1989

CLERK SUPREME COURT

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REPLY BRIEF OF PETITIONER ARMANDO E. LACASA, P.A.
TO ANSWER BRIEF OF MURRAY DIAMOND

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ARGUMENT

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

The district court below reversed the decision of the trial court and instructed the trial judge to grant the Respondent's motion to execute on the Petitioner's motion without considering the merits of the case. The district court was asked to consider a lis pendens issue and a fraudulent conveyance issue. The court ruled in favor of the Respondent on the lis pendens issue and certified conflict with other district courts on the same question. As to the fraudulent conveyance question, the court said the following:

"Our resolution of this issue (lis pendens) makes it unnecessary to reach the other points raised on appeal."

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 district court's opinion, in no uncertain terms specifically ignored the merits of the Petitioner's case on appeal. The district court then deprived the Petitioner of his property, the mortgage, by allowing the Respondent to execute against it. This is by definition a denial of due process. In his initial brief on the merits, the Petitioner, Lacasa referred to the Fifth and Fourteenth Amendments of the United States

Constitution and to Article 1 Section 9 of the Florida Constitution in support of this position. The Fourteenth Amendment, Section 1 states in pertinent part:

"...[N]or shall any state deprive any person of life, liberty or property, without due process of law..."

Due process of law includes the right to a fair hearing. In Lake v. Lake, 103 So.2d 639 (Fla. 1958), this court said, "it can be stated without hesitancy, qualification, or reservation, that every man is entitled to his day in court. He is vouchsafed a fair trial and he is secured a **fair hearing on appeal** which he may take as a matter of right." (emphasis added) Id. The Petitioner respectfully submits that a hearing, in which the merits of a case are ignored, but which results in a reversal of the trial court's decision founded on the merits, is not a fair hearing and is not within the framework of due process of law.

In his answer brief, the Respondent seems to suggest that a district court of appeal may reverse a trial court without a fair hearing. (Respondent's brief at 8) Next, the Respondent confuses the issue of whether the district court erred on this point by arguing that a court is not obligated to write an opinion disclosing its reasons for a reversal. (Respondent's brief at 8-9) On both arguments, the Respondent is incorrect.

Notwithstanding, the Respondent cites Whipple v. State, 431 So.2d 1011 (Fla. 2d DCA 1983) (Per Curiam), to support his argument that an appellate court is not obligated to write an

opinion to explain its reversals. Diamond quoted the Whipple court extensively but omitted the court's own statement, which appears within the quoted text, that it writes "...opinions in all reversals...". Id. at 1015.*

B. THE TRIAL COURT CORRECTLY DENIED THE MOTION TO EXECUTE THE MORTGAGE FROM THE AMERICAN LEGION TO LACASA AFTER FINDING NO EVIDENCE OF A FRAUDULENT CONVEYANCE.

The Respondent's argument that the Petitioner's mortgage is the product of a fraudulent conveyance can be summarized as follows:

§§726.105 (1) (a) and (b) Fla. Stat. (1987) deem a transfer made by a debtor fraudulent as to creditors if the transfer was made with the intent to defraud creditors. This intent can be inferred by identifying certain badges or indicia of fraud surrounding the transaction. Lack of consideration in exchange for a transfer is a badge of fraud. Lacasa had a 40% contingency fee agreement with Del Rossi. The settlement agreement between the American Legion and Del Rossi gave Del Rossi a general release of all liability to the Legion, and the payment of his legal fees, but no cash award. Therefore, Lacasa was entitled to 40% of nothing despite his years of representing Del Rossi, and advancing the costs of litigation, in a property worth several million dollars, and his mortgage is gratuitous.

* In Rosenthal v. Scott, 131 So.2d 480 (Fla. 1961), on remand 132 So.2d 347 (Fla. 1961), this Court said that it is the custom and practice of the court to write an opinion where the judgment is reversed. This is logical since it allows the court under review to recognize its error and to make the necessary corrections in the future. Id. at 481-482.

The Petitioner does not take issue with the Respondent's presentation of the law in Florida regarding fraudulent conveyances. A debtor's conveyance without consideration is a badge of fraud. Matter of Trinity Baptist Church of Bradenton Florida, Inc., 25 B.R. 529 (Brktcy. Fla. 1982).

However, Petitioner pointed out in his initial brief that lack of consideration is only one of several badges of fraud recognized in Florida. And it is a well settled principle of law that a single badge of fraud standing alone may only generate little more than a suspicious circumstance, **insufficient in itself to constitute the requisite fraud to set aside a conveyance.** Wieczoreck v. H & H Builders, Inc., 450 So.2d 867, 874 (Fla. 5th DCA 1984) certified question answered, 475 So.2d 227 (Fla. 1985), Banner Construction Corporation v. Arnold, 128 So.2d 893 (Fla. 1st DCA 1961), Matter of Acquafredda, 26 B.R. 909 (Brktcy. Fla. 1983).

Diamond argues that he is entitled to execute on Lacasa's mortgage solely on the basis that it is unsupported by consideration. No other badges of fraud have been alleged in the tribunals below. However, the uncontradicted evidence is that Lacasa gave consideration in exchange for his legal fees. The nature of this consideration was presented in the Petitioner's initial brief on the merits and is fully documented in the record on appeal. Diamond's contention that Del Rossi received nothing from Lacasa to obligate him to pay legal fees is contrary to the whole of the evidence adduced at trial.

CONCLUSION

It is respectfully submitted that the decision of the district court be reversed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Reply Brief was mailed this 3d day of October, 1989, to:

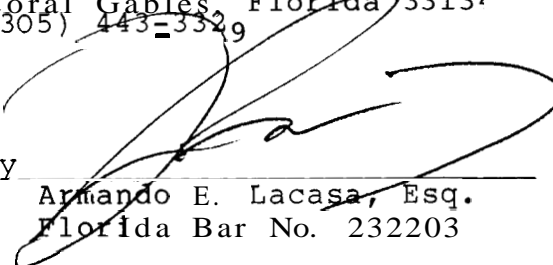
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