IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,501

FLORIDA BAR NO. 316814

ARMAND0 E. LACASA, P.A.,

Petitioner,

vs.

MURRY DIAMOND,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM A DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

RESPONDENT'S ANSWER BRIEF ON THE MERITS

PODHURST, QRSECK, JQSEFSBERG,
EATON, MEADOW, OLIN & PERWIN, P.A.
25 West Flagler Street, Suite 800
Miami, Florida 33130
(305) 358-2800

BY: JOEL S. PERWIN

TABLE OF CONTENTS

LAWOFFICES. PODHURSTORSECK JOSEFSBERG EATON MEADOW OLIN 6 PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR
25 WEST FLAGLER STREET - SUITE 800. MIAMI, FLORIDA 33130-1780
13051 358-2800

TABLE OF CASES

LAWOFFICES. PODHURSTORSECKJOSEFSBERC EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR
25 WEST FLAGLER STREET - SUITE 800, MIAMI. FLORIDA 33130-1780
(305) 358-2800

TABLE OF CASES

LAW OFFICES, PODHURSTORSECK JOSEFSBERG EATON MEADOWOLIN 6 PERWIN, P.A.- OF COUNSEL, WALTER H. BECKHAM, JR
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

TABLE OF CASES

LAWOFFICES. PODHURSTORSECKJOSEFSBERGEATON MEADOW OLIN & PERWIN. P.A. - OF COUNSEL. WALTERH. BECKHAM. JR.
25 WEST FLAGLER STREET . SUITE BOO. MIAMI. FLORIDA 33130-1780
13051358-2800

TABLE OF CASES

AUTHORITIES

LAWOFFICES. PODHURSTORSECKJOSEFSBERGEATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

I
STATEMENT OF THE CASE

A comprehensive statement of the procedural history of the instant case may be found in respondent Diamond's Answer Brief on the Merits in Case No. **74,215,** *American Legion Community Club of Coconut Grove, Inc. v. Diamond,* which is pending before the Court upon certification from the District Court of Appeal, Third District. Both that case and the instant case arise from the district court's opinion in *Diamond v. American Legion Community Club of Coconut Grove, Inc.,* **544** So.2d **239** (Fla. 3d DCA **1989)** (per curiam). In that decision, **as** Petitioner Armando E. Lacasa, P.A. (hereinafter "Mr. Lacasa") has noted (brief at 1), the district court decided a question involving the effect of a lis pendens (a question raised by the American Legion, Department of Florida, and not by Mr. Lacasa, and in which Mr. Lacasa has no interest), and then certified the lis-pendens question to this Court. That is the issue pending in Case No. **74,215.** At the same time, though without discussing the question specifically, the district court also accepted appellant Diamond's challenge to an order of the trial court forbidding Diamond to levy against a mortgage held by Mr. Lacasa, and remanded the case with instructions to "grant Diamonds writ of execution against the mortgage." **544** So.2d at **240.**

Although this summary aspect of the district court's holding was not certified for consideration by this Court, and by definition cannot expressly and directly conflict with any decisions of other district **courts,**[1/] Mr. Lacasa filed a notice to invoke this Court's discretionary jurisdiction, and the Court subsequently denied Diamond's motion to require Mr. Lacasa to submit a jurisdictional brief before reaching the **merits.**[2/]

[1/] *See Department* of *Health and Rehabilitative Services v. National Adoption Counseling Service, Inc.*, **498** So.2d **888** (Fla. **1986); *Reaves v. State,* 485 So.2d 829, 830** (Fla. **1986).**

[2/] We hereby renew and incorporate by reference the arguments raised in our motion to require a jurisdictional brief, as a predicate for respectfully contending that the Court should not reach the merits of Mr. Lacasa's arguments. Mr. Lacasa is not involved with the issues which were certified by the district court, and the district court's opinion

II
STATEMENT OF THE FACTS

As they relate to the issue involving Mr. Lacasa, the pertinent facts are the following. In August of 1983, during the pendency of the instant litigation, the American Legion Community Club of Coconut Grove, Inc., conveyed title to the property at issue, subject to Mr. Diamond's lease, to Del Rossi Enterprises, Inc. (hereinafter "Del Rossi Enterprises") (R. 473-74), of which Giorgio Del Rossi was the president and sole shareholder (Tr. 457).[3/] In June of 1985, the American Legion, Department of Florida (hereinafter "American Legion"), filed its action against Del Rossi Enterprises in Dade County Circuit Court, to quiet title to the property (Case No. 84-25832).[4/] The complaint alleged that the American Legion Community Club of Coconut Grove had conveyed the property to Del Rossi Enterprises upon false pretenses, and with no authority from the American Legion to do so *(see* Tr. 434). It was in this action that the American Legion filed the lis pendens which is at issue before this Court in Case No. 74,215.

Del Rossi Enterprises was represented in Case No. 84-25832 by Mr. Lacasa, who filed a counterclaim for money damages on behalf of Del Rossi Enterprises, and undertook the representation under a written 40% contingency-fee agreement with Del

---

relative to Mr. Lacasa's issues does not (and cannot) conflict with decisions of this Court or other district courts. Moreover, as the following discussion will make clear, the issues here are well-settled and straightforward, and do not require this Court's involvement. Accordingly, we would respectfully request that the Court exercise its discretion to decline review of the issues raised by Mr. Lacasa.

[3/] "R." refers to the Record on Appeal. "Tr." refers to the three separately- and consecutively-paginated volumes of testimony constituting Volumes IV-VI of the Record on Appeal. For the purposes of the instant proceeding, we are concerned with Volume VI, constituting Tr. 394-473.

[4/] The trial court took judicial notice of the entire file in Case No. 84-25832 (Tr. 416-17), and all of the following facts are undisputed.

Rossi Enterprises (Tr. **432, 457).**[5/] The agreement required Del Rossi Enterprises to pay an attorney's fee to Mr. Lacasa only if Del Rossi Enterprises secured a money judgment or settlement on its counterclaims against the American Legion (Tr. **432, 458).** In short, as in any contingency-fee arrangement, Mr. Lacasa had a contractual right to be paid only if his client collected some money.

On December **11, 1985,** in the instant case, respondent Murry Diamond secured a Final Judgment in his third-party complaint against Del Rossi Enterprises, against Giorgio Del Rossi individually, and against two other corporations, in the amount of **$1,500,000.00** (Tr. **382-83, 491).** That judgment was not appealed, and was duly recorded in the official records of Dade County, thus becoming a lien on the realty owned at that time by Del Rossi Enterprises. The litigation of the instant case then proceeded, and in November of **1987,** at Mr. Diamond's request, the Clerk of Court issued an Alias Execution, followed by appropriate instructions for levy, notice of sheriffs sale, and other relevant documents, seeking to sell the property, then still held by Del Rossi Enterprises, to satisfy the December **11, 1985** judgment against Del Rossi Enterprises in the amount of $1.5 million. The sale was scheduled for January **27, 1988** (see R. **393-99).**

About a month before the scheduled sale, on December **21, 1987,** the American Legion and Del Rossi Enterprises entered into a settlement agreement of all pending claims in Case No. **84-25832,** including the counterclaims by Del Rossi Enterprises for money damages. Under that settlement, Del Rossi Enterprises agreed to convey the property to the American Legion in return for a promissory note and mortgage in which the American Legion promised to pay $125,000.00--but not to Del Rossi Enterprises; to the contrary, the agreement provided for payment to Del Rossi Enterprises' attorney, Mr.

[5/] The written fee agreement was introduced into evidence (see Tr. **439),** but was not included in the Record on Appeal. As we note *infra*, the parties all stipulated to its contents.

Lacasa (R. **493-501).** The promissory note, and the accompanying mortgage, provided that the American Legion was obligated to pay the **$125,000.00** to Mr. Lacasa only out of Diamond's rental payments on the property, except that if Diamond should default on his lease, the American Legion still would be responsible to Mr. Lacasa on the note (R. **496-97; see** Tr. **448-49).**

The evidence concerning the circumstances of this settlement agreement is uncontradicted, and was provided primarily through Giorgio Del Rossi and his attorney, Mr. Lacasa. Mr. Del Rossi testified that he settled the case with the American Legion because it was very clear to him that the American Legion's action against him was meritorious--that is, that Del Rossi Enterprises would not retain any rights in the property--and thus that it would not be fruitful to continue with the suit (Tr. **434-35).** In addition, Mr. Del Rossi was well aware at the time of the settlement that Murry Diamond had a **$1.5-million** judgment against Del Rossi Enterprises (Tr. **453);** and he knew that even if he did prevail in the action against the American Legion, and therefore kept the land, Diamond could execute against the property, and force its sale, in satisfaction of that judgment (Tr. **431).** Thus, Del Rossi Enterprises settled the suit under circumstances in which it lost the land, and compromised all of its counterclaims, without itself receiving any money on those counterclaims.

Therefore, **as** Mr. Del Rossi and Mr. Lacasa acknowledged at trial, Del Rossi Enterprises got no money **as** a result of the settlement with the American Legion (Tr. **433-34, 449).** For this reason, **as** the trial court noted, and **as** both Mr. Del Rossi and Mr. Lacasa admitted, Del Rossi Enterprises had no obligation to pay any attorneys' fees to Mr. Lacasa under the contingency-fee agreement:

> THE COURT You didn't have to pay him one nickel attorneys' fees?
>
> THE WITNESS [Mr. Del Rossi]: Yes, Your Honor (Tr. **437).**

As Mr. Lacasa later put it, Del Rossi Enterprises did receive a benefit from the settlement, in that it "settled an issue that could have become more controversial as far as [Mr. Del Rossi], was concerned--it did avoid a judgment, perhaps for fraud--but under the contingency-fee contract, Mr. Lacasa acknowledged, he was not entitled to "a percentage of the value of him avoiding fraud, litigation," but only to "forty percent of any money or anything of value that he receives" (Tr. 450). Thus, everyone admitted that as a result of the settlement as framed, Del Rossi Enterprises did not owe Mr. Lacasa any money for attorneys' fees.

Nevertheless, the settlement between Del Rossi Enterprises and the American Legion provided that the American Legion would pay Mr. Lacasa--the attorney whom Del Rossi Enterprises owed nothing--$125,000.00 (out of Diamond's prospective rental payments to the American Legion). Mr. Del Rossi freely admitted that this part of the consideration was executed for Mr. Lacasa's benefit (Tr. 437), and Mr. Lacasa freely admitted that the entire deal could have been accomplished without any provision to pay him such a gratuity (Tr. 443). But from the American Legion's perspective, although it knew that part of the settlement was a payment to Del Rossi Enterprises' attorney (Tr. 461, 467), the American Legion was indifferent as to who got the money, as long as the American Legion got the land (Tr. 468).

Thus, the end result of this settlement was that Mr. Del Rossi--who knew that Diamond had a judgment against himself and his company for $1.5 million--agreed to convey the land (against which Diamond might otherwise levy pursuant to his judgment lien) back to the American Legion, and arranged to have the money (against which Diamond might also otherwise levy) conveyed directly to his attorney--whom everyone admitted had no contractual right to any attorneys' fees. Two days later, the trial court in Case No. 84-25832 entered a final judgment pursuant to the settlement between the American Legion and Del Rossi Enterprises.

Subsequently, the trial court in the instant case entertained Diamond's claims against both the land and the Lacasa mortgage. On the latter question, Diamond argued that he was entitled to levy against the mortgage securing Mr. Lacasa's attorneys' fees, in satisfaction of his judgment against Del Rossi Enterprises, because the agreement to pay those fees was a fraud upon Del Rossi Enterprises' creditors, including Diamond (Tr. **418-21, 473-74).** He argued that the agreement to pay attorneys' fees to Mr. Lacasa was patently fraudulent, because it was entered into without any consideration, because Del Rossi Enterprises did not owe Mr. Lacasa any attorneys' fees.

The trial court rejected this argument. It ruled that, in the absence of any evidence that Mr. Lacasa intended to kick-back any part of his attorneys' fees to Del Rossi Enterprises, "these people had a right to settle the way they settled," and "[i]t has no bearing in my opinion in connection with the lawsuit between Mr. Diamond and the Legion and Mr. Del Rossi" (Tr. **473-74).** The trial court subsequently entered an order denying Diamond's motion for a writ of execution on the Lacasa mortgage (R. 515), and the appeal to the district court followed. **As** Mr. Lacasa has pointed out, the district court reversed the trial court's order on the question of the Lacasa mortgage, remanding the case with instructions to "grant Diamond's writ of execution against the mortgage." **455** So.2d at **240. As** Mr. Lacasa also has pointed out, the district court did not disclose its reasoning in support of this aspect of its holding.

III
SUMMARY OF THE ARGUMENT

First, the district court did not err in summarily reversing the trial court's order denying Diamond's motion to levy against the Lacasa mortgage, without issuing a written opinion to explain its reasoning. The district court was not required to issue an opinion on the subject, and its ruling must stand or fall on its merits.

Second, the district court was right to reverse and remand with instructions to permit Mr. Diamond to levy against the Lacasa mortgage, because the uncontradicted evidence establishes, as a matter of law, that the mortgage was the product of a fraudulent conveyance. Under § 726.105(1)(a) and (b), Fla. Stat. (1987), a fraudulent conveyance may be proved not only by a showing of fraudulent intent, but also by showing that the conveyance was made without adequate consideration. Upon a showing of inadequate consideration, the burden of proof shifts to the transferor to demonstrate that the conveyance was not fraudulent. And by adequate consideration, the statute means the transfer of property or the satisfaction of a legal obligation--not simply affection, respect or gratitude.

In the instant case, the evidence is uncontradicted that as a result of the settlement between the American Legion and Del Rossi Enterprises for reconveyance of the land, Del Rossi Enterprises did not owe Mr. Lacasa any money in attorneys' fees. Mr. Lacasa had a written contingency-fee agreement, which entitled him to a fee only out of any monetary recovery obtained by his client. In the instant case, there was none. Thus, as Mr. Del Rossi and Mr. Lacasa frankly admitted in their sworn testimony, the arrangement of the mortgage for Mr. Lacasa's benefit was a pure gratuity, which satisfied no legal obligation of any nature. The conveyance thus was made for no consideration, and in the absence of any rebuttal, was fraudulent as a matter of law.

In response to this contention, Mr. Lacasa has offered two arguments, supported by no authority at all. First, Mr. Lacasa has argued that there was consideration for his mortgage, because he performed valuable legal work which resulted in Del Rossi Enterprises' settlement with the American Legion, which assertedly constitutes adequate consideration. However, Mr. Lacasa was legally entitled to a fee for that legal work only out of any monetary recovery secured for Del Rossi Enterprises, and he secured none. Thus, although Del Rossi Enterprises may have been grateful for Mr. Lacasa's

work in the case, it owed him no compensation for that work, and the mortgage was supported by no consideration.

Second, Mr. Lacasa has argued that the conveyance could not be considered fraudulent if it merely represented a gratuity which Del Rossi Enterprises engineered in appreciation of Mr. Lacasa's legal services, but only upon proof of collusion between Mr. Lacasa and Del Rossi Enterprises, by which Mr. Lacasa was to kick back some of the mortgage money to Del Rossi Enterprises, thus defrauding Del Rossi Enterprises' creditors. No authority has been offered for this conclusion, and it is simply incorrect. Although such collusion would be fraudulent, the transaction at issue was fraudulent without such collusion, because it had the effect of improperly preventing Del Rossi Enterprises' creditors, like Diamond, from satisfying all or part of their debts. We will review the authorities for this proposition, including several analogous cases under the bankruptcy laws. Because the uncontradicted evidence establishes that the Lacasa mortgage was the product of a fraudulent conveyance, the district court was correct to reverse and remand the trial court's order on the subject, with instructions to permit Diamond to levy against that mortgage.

IV
ARGUMENT

A. THE DISTRICT COURT OF APPEAL DID NOT ERR WHEN IT REVERSED THE TRIAL COURT ON THE ISSUE OF FRAUDULENT CONVEYANCE WITHOUT FIRST REVIEWING THE RECORD OR THE MERITS OF THE CASE.

Mr. Lacasa's entire argument on this first point is that the district court should have issued a written opinion explaining its reasoning, and was forbidden to engage in a "summary disposition" of the question "without a full review of the merits of the case . . . ." The only authorities cited for this proposition are three decisions holding that a trial court's factual findings are clothed with a presumption of correctness. As Mr.

Lacasa is aware, however, "the legal sufficiency of the evidence is at all times, when duly presented, a question for the Court to settle."[6/] Especially in a case like this one, in which the facts are undisputed, a "misinterpretation of the legal effects of the facts . . . can result in reversible error."[7/] In the instant case, the question is whether the uncontradicted evidence has the legal effect of proving a fraudulent conveyance. Moreover, even when the point at issue is purely factual, there is a role for the appellate court, in determining whether substantial competent evidence supports the factfinder's conclusions.[8/] Thus, regardless of the issue, the appellate court of course plays a role in the process.

In this context, Mr. Lacasa's position necessarily reduces to the contention--for which Mr. Lacasa has offered no supporting authority--that the district court was required to write an opinion disclosing its reasoning on the point in question, and committed reversible error in declining to do so. It is well established, however, that the district court was under no such obligation:

> Appellant correctly observes that the decision to write an opinion rests with the assigned panel of three judges.
>
> * * * * *
>
> The fact is that most appellate judges enjoy opinion writing and would prefer to spend a much larger portion of their judicial time in researching and drafting than is possible under

---

[6/] *Cormier v. Williams*, 148 Fla. 201, 4 So.2d 525, 526 (1941). *Accord, Green v. Putnam*, 93 So.2d 378, 380 (Fla. 1957); *Uhrig v. Redding*, 150 Fla. 480, 8 So.2d 4, 5 (1942) (per curiam); *Hamilton v. Title Ins. Agency of Tampa, Inc.,* 338 So.2d 569, 572 (Fla. 2d DCA 1976).

[7/] *Richards v. Dodge*, 150 So.2d 477, 481 (Fla. 2d DCA 1963). *Accord, Clements v. Plummer*, 250 So.2d 287, 289-90 (Fla. 1st DCA 1971); *Caranci v. Miami Glass & Engineering Co.,* 99 So.2d 252, 254 (Fla. 3d DCA 1957).

[8/] *Holland v. Gross*, 89 So.2d 255 (Fla. 1956); *Adco Sign Corp. v. Lach*, 368 So.2d 108 (Fla. 4th DCA 1979); *Manufacturers National Bank of Hialeah v. Canmont International, Inc.*, 322 So.2d 565 (Fla. 3d DCA 1975).

> the existing case load. But appeals are filed here [in the second district] as a matter of right, and in a court where each judge must participate in excess of 900 appeals per year, this luxury cannot be enjoyed.
>
> * * * * *
>
> We recognize that counsel would appreciate a reasoned opinion in deference to the **quality** of their advocacy. However, we also realize that "justice delayed is justice denied."

Whipple v. State, 431 So.2d 1011, 1015-16 (Fla. 2d DCA 1983) (per curiam). There is no merit to Mr. Lacasa's contention that the district court committed reversible error by summarily deciding the issue of his mortgage, without explanation.

> B. THE DISTRICT COURT WAS CORRECT TO REVERSE THE TRIAL COURTS ORDER DENYING DIAMOND'S MOTION TO EXECUTE AGAINST THE LACASA MORTGAGE, BECAUSE THE EVIDENCE IS UNCONTRADICTED THAT THE MORTGAGE WAS THE PRODUCT OF A FRAUDULENT CONVEYANCE.

*I. Diamond's **Argument**.*

As a matter of law, based upon the uncontradicted evidence, the mortgage given by the American Legion to Mr. Lacasa was a patent fraud upon the creditors of Del Rossi Enterprises, including Diamond. Under § 726.105(1)(a) and (b), Fla. Stat. (1987)--and also under its predecessor statutes and the common-law rule--a conveyance is fraudulent not only if it is made with "actual intent to hinder, delay, or defraud any creditor of the debtor," but also if it is made "[w]ithout receiving a reasonably equivalent value in exchange for the transfer or obligation" (if, **as** in the instant case, ***see*** Tr. 431, the debtor is not otherwise able to pay the debt). That means that while proof of a fraudulent intent will void the transaction, such intent need not always be shown: "When the legal effect of a conveyance is to defraud creditors, no matter what the actual intention may be have been, it is fraud in law." ***Stelle v. Dennis,***

104 Fla. 384, 140 So. 194 (1932), *quoted in Livesay Industries, Inc. v. Livesay Window Co.*, 305 F.2d 934, 940 (5th Cir. 1962) (Florida law).[9/]

As the statute explicitly provides, it is axiomatic that a debtor's conveyance without consideration is a badge of fraud.[10/] As the statute also provides, a showing of no consideration or inadequate consideration makes the issue of intent irrelevant.[11/] To the contrary, a debtor's conveyance without consideration is presumptively fraudulent, and the plaintiffs proof of inadequate consideration constitutes a prima facie showing of fraud, shifting the burden of proof to the defendant: "A voluntary conveyance by one who is indebted is presumptively fraudulent when attacked by a judgment creditor upon a debt existing at the time of its execution." *McKeown v. Allen*, 37 Fla. 490, 20 So. 556 (1896), *quoted in Folsom v. Farmers' Bank of Vero Beach*, 136 *So.* 524, 527 (1931).

9/ *Accord, Matter of Trinity Baptist Church of Bradenton, Fla., Inc.*, 25 B.R. 529 (Bkrtcy. Fla. 1982); *Matter of Flanzbaum*, 10 B.R. 420 (Bkrtcy. Fla. 1981); *Stelle v. Dennis*, 104 Fla. 384, 140 So. 194 (1932); *Logan v. Logan*, 22 Fla. 561 (1896).

10/ *See Cleveland Trust Co. v. Foster*, 93 So.2d 112 (Fla. 1957); *Ostend Realty Co. v. Biscayne Realty & Ins. Co.*, 99 Fla. 1221, 128 So. 643 (1930); *Russ v. Blackshear*, 88 Fla. 573, 102 So. 749 (1925); *Craig v. Gamble*, 5 Fla. 430 (1854); *Barrow v. Bailey*, 5 Fla. 9 (1853); *Nissim Hadjes, Inc. v. Hasner*, 408 So.2d 819 (Fla. 3d DCA 1982); *Gyorok v. Davis*, 183 So.2d 701 (Fla. 3d DCA 1966). *Accord, Schoenthal v. Irving Trust Co.*, 287 U.S. 92, 53 S. Ct. 50, 77 L. Ed. 185 (1932); *Beall v. Pinckney*, *150* F.2d 467 (5th Cir. 1945) (Florida law); *Florida Fruit Canners v. Walker*, 90 F.2d 753 (5th Cir.) (Florida law), *cert. denied*, 302 *U.S.* 738, 58 S. Ct. 140, 82 L. Ed. 570 (1937); *Warmuth v. O'Daniel*, 159 F. 86 (6th Cir. 1908); *Polk County National Bank v. Scott*, 132 F. 897 (5th Cir. 1904); *Matter of Reininger-Bone*, 79 B.R. 53 (Bkrtcy. M.D. Fla. 1987); *Matter of Acquafredda*, *26* B.R. 909 (Bkrtcy. Fla. 1983); *In Re Harry Kaiser Associates, Inc.*, 14 B.R. 107 (Bkrtcy. Fla. 1981); *Matter of Flanzbaum, 10* B.R. 420 (Bkrtcy. Fla. 1981); *Matter of Kassuba*, *10* B.R. 309 (Bkrtcy. Fla. 1981).

11/ *Florida Fruit Canners v. Walker*, 90 F.2d 753 (5th Cir.), *cert. denied*, 302 *U.S.* 738, 58 S. Ct. 140, 82 L. Ed. 570 (1937); *Wethersbee v. Dekle*, 107 Fla. 517, 145 So. 198 (1933); *McKeown v. Allen*, 37 Fla. 490, 20 So. 556 (1896).

Accord, United States v. Kaplan, 277 F.2d 405 (5th Cir. 1960) (Florida law); *United States v. Ressler*, 433 F. Supp. 459 (S.D. 1977) (Florida law); *Sample v. Natulby*, 120 Fla. 161, 162 So. 493, 495 (1935) ("It is well settled that voluntary conveyances by debtors of their real estate are not absolutely fraudulent per se, but are prima facie or presumptive evidence of fraud, which may be rebutted or explained, and the burden of proof to show that the deed was not fraudulent falls upon those claiming under it"); *Weathersbee v. Dekle*, 107 Fla. 517, 145 So. 198 (1933); *Kelsey v. Farmers' Bank of Vero Beach*, 102 Fla. 899, 136 So. 524 (1931); *Gyorok v. Davis*, 183 So.2d 701 (Fla. 3d DCA 1966). And by "equivalent value," as § 726.104(1) provides, the legislature meant that "in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied . . . ." That means something of value--and affection, respect, love, or gratitude will not suffice.[12/]

In the instant case, the evidence is uncontradicted that as a result of the settlement for reconveyance of the land, Del Rossi Enterprises did not owe Mr. Lacasa one penny in attorneys' fees; and Mr. Del Rossi flatly testified that he arranged for the American Legion's obligation of $125,000.00 (through a mortgage secured by Diamond's prospective rental payments) solely out of gratitude for Mr. Lacasa's efforts (Tr. 437). Under the authorities cited above, that transfer of Del Rossi Enterprises' settlement money to Mr. Lacasa, in return for which Del Rossi Enterprises re-conveyed the land to the American Legion, was made without any consideration whatsoever between Del Rossi Enterprises and Mr. Lacasa. We think that the circumstances easily support an inference--which no one rebutted--that the conveyance was made with a specific intent to defraud Murry Diamond. *See Livesay Industries, Inc. v. Livesay Window Co.*, 305 F.2d

---

[12/] *See Polk County National Bank v. Scott*, 132 F. 897 (5th Cir. 1904) (Florida law); *McKeown v. Allen*, 37 Fla. 490, 20 So. 556 (1896).

934, 940 (5th Cir. 1962) (Florida law) ("There was no semblance of justification or excuse for [the transfers] otherwise. Their only purpose was to defraud appellants").

But even apart from the issue of intent, the transfer was patently without consideration. In the trial court's words, as everyone admitted, "[y]ou didn't have to pay him one nickel's fees" (Tr. 437). To the contrary, Del Rossi Enterprises' direction that the consideration go to Mr. Lacasa was entirely gratuitous, and thus presumptively fraudulent. That shifted the burden of proof to Del Rossi Enterprises and Mr. Lacasa, and they only confirmed the gratuity. For this reason, Diamond was entitled to judgment as a matter of law. ***See Stephens v. Kies Oil Co.,*** 386 So.2d 1289, 1290 (Fla. 3d DCA 1980) ('The badges of fraud . . . standing alone, unrebutted and uncontradicted would entitle [the plaintiff] to a directed verdict"), ***citing Gyorok v.*** *Davis,* 183 So.2d 701 (Fla. 3d DCA 1966).

Thus, the trial court erred as a matter of law in failing to conclude that the transaction directed by Del Rossi Enterprises to Mr. Lacasa was fraudulent; to the contrary, it should have invalidated that transaction, declaring that title to the mortgage did not pass to Mr. Lacasa.[13/] The trial court should have granted Diamond's motion for writ of execution against the mortgage (R. 404-17), which is the appropriate remedy through which to reach assets which in fact were consideration to Del Rossi Enterprises, but which were fraudulently conveyed to Mr. Lacasa.[14/]

[13/] ***See Kahn v. Wilkins,*** 36 Fla. 428, 18 ***So.*** 584 (1896); ***Bellamy v. Bellamy's Administrator,*** 6 Fla. 62 (1855); ***Smith v. Mones,*** 459 So.2d 462 (Fla. 3d DCA 1984). ***See also Miele v. United States,*** 637 F. Supp. 998 (S.D. Fla. 1986); ***Matter*** of ***Romano,*** 51 B.R. 813 (Bkrtcy. Fla. 1985); ***In Re Manring Auto Sales, Inc.,*** 19 B.R. 128 (Bkrtcy. Fla. 1981).

[14/] ***See Bally Case & Cooler, Inc. v.*** *H.* ***Kaiser Associates, Inc.,*** 514 F. Supp. 352, 354 (S.D. Fla. 1981) (Florida law); ***Florida Guaranteed Securities, Inc. v. McAllister,*** 47 F.2d 762, 764 (S.D. Fla. 1931); ***Virginia-Carolina Chemical Corp. v. Smith,*** 121 Fla. 720, 164 So. 717, 721 (1935); ***Money v. Powell,*** 139 So.2d 702, 704 (Fla. 2d DCA 1962).

Of course, on remand, the trial court will have to decide the extent of that remedy--that is, the percentage of the **$125,000.00** consideration to Del Rossi Enterprises upon which Diamond has the right to execute. It has not escaped our notice that the irony of this case is that if the consideration of **$125,000.00** was in fact consideration to Del Rossi Enterprises and not to Mr. Lacasa, then it follows--contrary to the testimony of Mr. Del Rossi and Mr. Lacasa--that there was in fact a monetary return to Del Rossi Enterprises as a result of the settlement, and it might be argued that Mr. Lacasa was in fact entitled to a **40%** attorneys' fee under his fee agreement with Del Rossi Enterprises. Thus, Del Rossi Enterprises might argue on remand that the burden of Diamond's argument is that only 60% of the **$125,000.00** is available to satisfy Diamond's judgment against Del Rossi Enterprises, because the other **40%** represents an attorneys' fee to Mr. Lacasa.

We will confront that argument on remand if necessary. We will contend that the entire **$125,000.00** should be available in partial satisfaction of Diamond's judgment against Del Rossi Enterprises, because Del Rossi Enterprises and Mr. Lacasa both participated in a fraudulent transaction. But at the least, we will argue, Diamond certainly has the right to levy against 60% of the **$125,000.00** consideration. None of this, however, is appropriate for consideration at this stage of the litigation. The trial court ruled that Diamond had no rights against the **$125,000.00,** and that ruling properly has been reversed. On remand, the parties will have ample opportunity to argue about the extent of Diamond's recovery.

2. Mr. Lacasa's Response.

As against these contentions, Mr. Lacasa has offered two responses, but has offered no authority in support of either. First, Mr. Lacasa has argued that there was consideration for the mortgage, because Mr. Lacasa did some valuable legal work which resulted in Del Rossi Enterprises' settlement with the American Legion, which

constitutes adequate consideration for the mortgage given to Mr. Lacasa.[15] As we noted, however, and as everyone admitted at trial and in the district court, Del Rossi Enterprises had no contractual or legal obligation to pay Mr. Lacasa for his work. To the contrary, Del Rossi Enterprises had a written contingency-fee agreement with Mr. Lacasa, which obligated it to pay Mr. Lacasa *only* if Mr. Lacasa's efforts produced a monetary judgment or settlement. As Mr. Lacasa has admitted (district-court brief at 2), the payment was not to satisfy an obligation, but because Mr. Del Rossi "was grateful . . ."--that is, Mr. Del Rossi was "expressing satisfaction with his attorney's loyalty and candor" (petitioner's brief at 12).[16]

As § 726.104(1), Fla. Stat. (1987) provides, a conveyance is presumptively fraudulent under § 726.105(1)(a) and (b) unless, "in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied . . ."

---

[15] As Mr. Lacasa points out (brief at 10), he had "represented Del Rossi [Enterprises] in the litigation with the Legion for more than two years and advanced all of the costs involved"; and (brief at 11), "[i]f the case had not been settled out of court, and if Del Rossi [Enterprises]would have prevailed against the Legion, then Mr. 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 [Enterprises] (Tr. 436)."

[16] Despite having repeatedly admitted this point (that the payment was a mere gratuity) both in the trial court and in the district court, Mr. Lacasa has hedged his bets a bit in his petitionier's brief (p. 11), in arguing that "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" (our emphasis). See also petitioner's brief at 3 ("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). For our purposes, the key word of the first-quoted sentence is "necessary." As the uncontradicted evidence shows, it was not at all "necessary" to go outside the four corners of the contingency-fee contract, and to negotiate a fee for Mr. Lacasa's benefit. Del Rossi Enterprises had absolutely no contractual duty to do so, but rather *chose* to do so. Del Rossi Enterprises' direction of a payment to Mr. Lacasa was not "necessary"; as Mr. Lacasa repeatedly has admitted, in sworn testimony and elsewhere, and now is estopped to deny, the mortgage which he received was a pure gratuity.

By this language, the statute requires a ***legal*** obligation--not a moral obligation. ***See Polk*** County ***National Bank v. Scott,*** 132 F. 897 (5th Cir. 1904) (Florida law) (affection, love or gratitude not enough); ***McKeown v. Allen,*** 37 Fla. 490, 20 So. 556 (1896) (same). The statute acknowledges that the debtor may have had a non-fraudulent motive for making the conveyance--that he may have been grateful for some prior favor or service--but it nonetheless considers the transaction fraudulent in the absence of legal consideration. Thus, the debtor's sister in Gyorok *v. Davis*, 183 So.2d 701 (Fla. 3d DCA 1966) may have performed a lifetime of sibling services to justify her brother's gratitude, but the conveyance nonetheless was a fraud on creditors, in the absence of any legal obligation. The same is true of the conveyance to the wife in Money ***v. Powell,*** 139 So.2d 702 (Fla. 2d DCA 1962), or to the nephew in ***Stephens v. Kies Oil Co.,*** 386 So.2d 1289 (Fla. 3d DCA 1980).

And the same is true of the conveyance in this case. Whether or not Mr. LaCasa had performed legal services which benefited Del Rossi Enterprises, he "transferred no property to Del Rossi Enterprises in return for the money which he received, and the mortgage neither "secured" nor "satisfied "an antecedent debt." As Mr. Lacasa repeatedly has admitted, there was no debt; he received the money as a pure gratuity, in appreciation of his efforts--for which efforts Del Rossi Enterprises owed him absolutely nothing under the attorneys'-fee contract.

The payment was entirely voluntary, and "[a] voluntary conveyance by one who is indebted is presumptively fraudulent when attacked by a judgment creditor upon a debt existing at the time of its execution." ***McKeown v. Allen,*** 37 Fla. 490, 20 So. 556 (1896), ***quoted*** in ***Folsom v. Farmers' Bank of Vero Beach,*** 136 ***So.*** 524, 527 (1931). Mr. LaCasa has not cited a single authority to forestall this conclusion. The unanimous authorities hold that as a matter of law, the conveyance was made for no consideration, and thus was fraudulent.

Second, Mr. LaCasa has argued that the conveyance could not be fraudulent if it represented a mere gratuity which Del Rossi Enterprises engineered in appreciation of Mr. LaCasa's legal services, but only if it reflected a collusive effort between Mr. LaCasa and Del Rossi Enterprises under which Mr. LaCasa was to kick back some of the money to Del Rossi Enterprises, thus defrauding Del Rossi Enterprises' creditors. Again, not a single authority is offered for this conclusion, and it is flatly incorrect. To be sure, such collusion would indeed be fraudulent, but the transaction at issue was fraudulent without such collusion. As we have noted, under § 726.105(a) and (b), a conveyance is fraudulent if it is made with "actual intent to hinder, delay, or defraud any creditor of the debtor," *or* if it is made "[w]ithout receiving a reasonably equivalent value in exchange for the transfer or obligation . . . ." The statute thus focuses upon the effect of the transaction upon creditors--*not* upon the extent to which the debtor has secreted the assets for himself. As the court noted in *Stelle v. Dennis,* 104 Fla. 384, 140 So. 194 (1932) (our emphasis), "[w]hen the legal *effect* of a conveyance is to defraud creditors, no matter what the actual intention may have been, it is fraud in law." Whether or not Del Rossi Enterprises profited in some way from its direction of the funds to Mr. LaCasa, by virtue of a secret kick-back or otherwise, the transfer was fraudulent because it had the *effect* of improperly preventing Del Rossi Enterprises' creditors, like Diamond, from satisfying all or part of their debts.

As the citations in footnote 10 make clear, this principle comes up frequently in the bankruptcy context, and the bankruptcy cases offer a ready analogy. The bankruptcy laws have adopted the Uniform Fraudulent Conveyance Act in 11 U.S.C. § 548; and § 548(2) defines a conveyance as fraudulent (when made by an insolvent) when the transferor "received less than a reasonably equivalent value in exchange for such transaction . . . ." *See Bullard v. Aluminum Co. of America,* 468 F.2d 11, 13 (7th Cir. 1972). Under this section, any conveyance which the bankrupt directs to be made not

to himself, but to a third person, is fraudulent: "Transfers made to benefit third parties are not made for 'fair' consideration." ***Matter of Khristian & Porter Aluminum Co.,*** 584 F.2d 326, 337 (9th Cir. 1978).[17/] Thus, a conveyance by the bankrupt is presumptively fraudulent whenever "the primary and important benefits of [the] transaction run to parties other than the bankrupt." ***Bullard v. Aluminum Co.*** of ***American,*** 468 F.2d at 14. Such transactions are fraudulent not because the bankrupt has somehow arranged to keep the assets for itself, but simply because the bankrupt has deprived a creditor of a lawful right to levy against them, by gratuitously conveying the property to someone else.

That is precisely what happened in this case. Knowing that its creditor, Diamond, would levy upon any recovery which Del Rossi Enterprises might receive from the American Legion, Del Rossi Enterprises arranged for the conveyance to Mr. LaCasa, with the obvious intent, and certainly the effect, of defrauding Del Rossi Enterprises' creditors. We have cited substantial authority for that proposition, and Mr. Lacasa has cited no authority to the contrary. Whether or not Del Rossi Enterprises arranged for a kick-back from Mr. Lacasa, the conveyance was made without any consideration, and thus was presumptively fraudulent. Neither Del Rossi Enterprises nor Mr. Lacasa offered any evidence to rebut the presumption--indeed, they admitted that the transfer was a mere gratuity--and thus, as a matter of law, the trial court was required to declare the transaction fraudulent. Therefore, the district court was correct to remand with instructions to permit Mr. Diamond to levy against the Lacasa mortgage.

[17/] ***Accord, Bullard v. Aluminum Co.*** of ***America,*** 468 F.2d 11, 14 (7th Cir. 1972) ("[T]ransfers made to benefit third parties are not considered as made for 'fair' consideration"); ***Mayo v. Pioneer Bank & Trust Co.,*** 270 F.2d 823, 829 (5th Cir. 1959), ***cert. denied,*** 362 U.S. 962, 80 S. Ct. 878, 4 L. Ed.2d 877 (1960); ***United States Towing Co. v. Phillips,*** 242 F.2d 627, 632 (5th Cir.), ***cert. denied,*** 355 U.S. 861, 78 S. Ct. 93, 2 L. Ed.2d 68 (1957); ***Matter*** of ***Uiterwyk Corp.,*** 75 B.R. 33 (Bkrtcy. M.D. Fla. 1987); ***Matter of Burkey,*** 68 B.R. 270 (Bkrtcy. M.D. Fla. 1986).

V
CONCLUSION

It is respectfully submitted that, as against the arguments raised by Mr. Lacasa, the order of the district court should be affirmed.

VI
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 12th day of September, 1989, to: ARMANDO E. LACASA, ESQ., 3929 Ponce de Leon Boulevard, Coral Gables, Florida 33134; and to JAMES M. MOORE, ESQ., Taylor, Brion, Buker and Green, 1111 South Bayshore Drive, 11th Floor, Miami, Florida 33131.

Respectfully submitted,

PODHURST, ORSECK, JOSEFSBERG,
EATON, MEADOW, OLIN & PERWIN, P.A.
25 West Flagler Street, Suite 800
Miami, Florida 33130
(305) 358-2800

By: _____
JOEL S. PERWIN

57182\BR\MERITS