

IN THE SUPREME COURT OF GUAM

TOWN HOUSE DEPARTMENT STORES, INC.

Plaintiff-Appellant

vs.

HI SUP AHN, CHUNG OK AHN, HI CHUNG AHN

JOHN L. AHN, and DAVID L. AHN

Defendants-Appellees

OPINION

Filed: December 28, 2000

Cite as: 2000 Guam 32

Supreme Court Case No. CVA00-006

Superior Court Case No. CV2022-98

Appeal from the Superior Court of Guam

Argued and submitted on October 25, 2000

Hagåtña, Guam

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BEFORE: BENJAMIN J. F. CRUZ, Chief Justice, PETER C. SIGUENZA, JR., Associate Justice, and JOHN A. MANGLONA, Designated Justice

SIGUENZA, J.:

[1] After a bench trial, Town House Department Stores, Inc. (“Town House”) appeals the judgment of the Superior Court of Guam not to set aside certain transfers of real property as fraudulent. After review of the record, with consideration of and due deference to the lower court’s findings of fact, we find that the trial court erred when it concluded that the challenged conveyances were not fraudulent and therefore (1) reverse its judgment; (2) order that judgment be entered for Town House; and (3) remand for further proceedings.

I- BACKGROUND

[2] On December 9, 1994, Hi Sup Ahn, as president of T&K Development Corp. (“T&K”), executed a sales contract for the purchase of furniture from Town House at the price of three hundred twenty thousand dollars (\$320,000.00). Between February and November, 1995, Town House had contacted Ahn regarding T&K’s failure to make payments on the sales contract and informed him that continued failure to pay would result in the repossession of the furniture and referral to an attorney for any deficiency. Around the same time, Hi Sup and Chung Ok Ahn had been experiencing serious financial difficulties.¹ On December 29, 1995, the sales contract was restructured due to T&K’s inability to make the monthly payments. Hi Sup Ahn executed the revised contract on behalf of T&K. He additionally executed a

¹The record showed that between February and August 1995, Ahn was in default of his mortgage with the United States Department of Housing and Urban Development; however, the default was subsequently cured in September of 1995.

personal guaranty of T&K's contract with Town House.

[3] Throughout 1996, Hi Sup Ahn continued to experience financial difficulties and was unable to make payments on several loans and mortgages. By August of 1996, Hi Sup and Chung Ok Ahn were indebted for approximately five hundred forty two thousand dollars (\$542,000.00).² On August 9, 1996, Ahn informed Town House that T&K would be unable to make payments according to its payment schedule. Ten days later, on August 19, 1996, the Ahns conveyed all of their real property, consisting of interests in their Barrigada Heights residence and seven lots located in Ipan, to their three adult children Hi Chung Ahn, John L. Ahn, and David L. Ahn. The conveyances were accomplished by deeds of gift.

[4] On January 29, 1997, Town House filed a Complaint on the guaranty in *Town House Department Stores, Inc. v. Hi Sup Ahn*, Superior Court of Guam Civil Case No. CV 0098-97. It successfully obtained a deficiency judgment against Hi Sup Ahn on June 30, 1998. The operative facts there were that Town House seized the furniture and sold it to another. Town House sued for the deficiency and the court awarded it the sums of \$136,184.44 in deficiency and \$22,115.41 in interest plus reasonable costs and attorneys' fees. On October 10, 2000, during the pendency of the instant appeal, the case was reversed and remanded by this court for a determination of whether the re-sale price was fair and reasonable. *Town House Dep't. Stores, Inc. v. Ahn*, 2000 Guam 29, ¶ 15.

[5] On August 26, 1998, Town House filed the instant matter, a Complaint to Set Aside Fraudulent Conveyances. Bench trial commenced on December 9, 1999. The parties proceeded to present evidence on the issue of whether the Ahns conveyed property in gift to their children in an attempt to defraud Town

²See mortgagee listed *supra* note 1. In addition, the Ahns were also indebted to the United States Department of Agriculture, Farm Service Agency, Lee Roy King and Lee King Too.

House, as creditor. After the presentation of Town House's case, the Ahns moved for a directed verdict which was denied by the court. In its written Decision and Order on the motion, the court found that Town House had made a *prima facie* showing of a fraudulent conveyance. *See Town House v. Ahn*, CV2022-98 (Super. Ct. Guam Feb. 29, 2000) (Decision and Order).

[6] In its Findings of Fact and Conclusions of Law, the court found, in addition to the facts outlined above, that the children of the Ahns collectively decided to assist their parents by taking over the mortgage payments on the properties conveyed to them and that, as of the date of trial, they have continued to make payments on the mortgages directly to the mortgagees. *See Town House v. Ahn*, CV2022-98 (Super. Ct. Guam Feb. 29, 2000) (Findings of Fact and Conclusions of Law). The court specifically found that the transfer was intended to prevent foreclosure on the properties by the parties holding mortgages. The court then concluded that judgment for the Ahns was appropriate. It observed that, pursuant to 20 GCA §§ 6101 and 6103, a creditor who requests a transfer or conveyance to be set aside bears the burden of proving that the transfer or conveyance was an attempt to delay or defraud the creditor but that the intent to avoid foreclosure is not a fraudulent conveyance where the property is conveyed prior to a judgment against the grantor. The court found that the Ahns intended to transfer the properties in an effort to avoid foreclosure by the several mortgagees and not the avoidance of a potential lawsuit for deficiency by Town House.

[7] Town House appeals from the judgment of the lower court.

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II- DISCUSSION

[8] Jurisdiction over the matter is obtained pursuant to Title 7 GCA §§ 3107 and 3108 (1994). Prior to oral argument, on October 12, 2000, the Ahns filed an Emergency Motion to Dismiss for Mootness. The Ahns, after being ordered by this court to properly brief the issues, submitted a Second Motion to Dismiss which was filed on October 17, 2000. Town House filed its Opposition on October 20, 2000.

A- MOOTNESS

[9] We first proceed to dispose of the Ahns' Motion to Dismiss on the grounds that the instant appeal has been rendered moot by virtue of this court's decision in *Town House v. Ahn*, 2000 Guam 29 (Superior Court Case No. CV0098-97). "A claim becomes moot only when the issues are no longer live or the parties lack a legally cognizable interest in the outcome." *United States v. Ripinsky*, 20 F. 3d 359, 361 (9th Cir. 1994) (citations and internal quotations omitted). Mootness can arise at any stage of litigation. *See Calderon v. Moore*, 518 U.S. 149, 150, 116 S. Ct. 2066, 2067 (1996) (citations omitted). "[C]ourts may not give opinions upon moot questions or abstract propositions." *Id.* Thus, an appeal should be dismissed as moot when, by virtue of an intervening event, the appellate court cannot grant effectual relief whatever in favor of the appellant. *Id.*

[10] The instant appeal arises from an adverse decision by the Superior Court which held that various conveyances of real property were not fraudulent as against a creditor, Town House. The intervening event that the Ahns claim rendered the case moot is this court's decision in the action seeking a deficiency judgment against the Ahns. This court reversed and remanded that case for the trial court to address the

issue of whether the re-sale price was fair and reasonable. *See Town House v. Ahn*, 2000 Guam 29 at ¶ 15. The specific issue raised in that appeal was whether the trial court erred in not making a specific finding that the goods were resold at a price which was fair and reasonable. *Id.* at ¶ 5. A review of the briefs filed in that matter reveal that this was the only challenge to the judgment below. Nowhere was the issue of whether or not the Ahns were liable for the debt ever discussed.

[11] It may be arguable that if the requirements of Guam R. Civ. P. Rule 70(a) were not satisfied then the validity of Town House's claim is consequently at issue. However, as outlined below and for purposes of determining whether a transfer is fraudulent, a party must show that one is a creditor of the debtor at the time of the conveyance. *See Adams v. Bell*, 5 Cal. 2d 697, 701, 56 P. 2d 208, 209 (Cal. 1936); *Stach Constr. Co. v. Jackson*, 594 P.2d 1289, 1291 (Or. Ct. App. 1979). It is not necessary that the claim at said time be reduced to judgment. *Adams*, 5 Cal. 2d at 701. Similarly, the judicially determined validity of Town House's claim against the Ahns for purposes of challenging an alleged fraudulent transfer is ostensibly not an issue for the lower court's consideration in Superior Court Case No. CV0098-97. The controversy between the parties in the instant appeal is the validity of the transfers of property at the time Town House had a claim against the Ahns. The reversal and remand of the earlier case did nothing but restore the parties to the circumstances they occupied before the lawsuits, *i.e.*, creditor and debtor. As such, this court's decision of the instant appeal is unaffected.³

³It is a remote possibility that on remand the trial court may decide that the precepts of Rule 70(a) are not satisfied and that Town House had no valid claim against the Ahns. Notwithstanding that such a finding may be beyond the scope for which remand was predicated, its effect upon this court's disposition of the instant appeal may be substantial. Today, we have decided that the conveyances at issue were invalid and that judgment be ordered to that effect. However, the Ahns would not be without recourse pursuant to Rule 60(b) of the Guam Rules of Civil Procedure.

[12] Therefore, we hold that this court's remand of the earlier case between the parties has not rendered the instant appeal moot. The effect of the remand is to place the parties in the same positions that they had occupied before any judgment was granted. Town House is thus still a creditor of the Ahns and still has standing to challenge a transfer of property as fraudulent.

B- FRAUDULENT CONVEYANCES

[13] Turning to the merits of the instant appeal, our standard of review following a bench trial is that the trial court's "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." See *Yang v. Hong*, 1998 Guam 9, ¶ 4 (citations omitted); *Hemlani v. Nelson*, 2000 Guam 20, ¶ 8, *Estate of Benavente v. Maquera*, 2000 Guam 9, ¶ 7; *Craftworld Interiors, Inc. v. King Enterprises, Inc.*, 2000 Guam 17, ¶ 6; *Magnuson v. Video Yesteryear*, 85 F.3d 1424, 1427 (9th Cir. 1996). However, its conclusions of law are reviewed *de novo*. *Yang*, 1998 Guam 9 at ¶ 4.

[14] The two Guam statutory provisions at issue in this case provide as follows:

§ 6101. Transfers, etc., defraud creditors.

Every transfer of property or charge thereon made, every obligation incurred, and every judicial proceeding taken, with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor, and their successors in interest, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor.

Title 20 GCA § 6101 (1994) and

§ 6103. Question of fraud, how determined.

In all cases arising under 21 GCA § 41101 [*Void Instruments, purchases*], or under the provisions of this Chapter, except as otherwise provided in 7 GCA § 50500 [*Transfers, Etc., Defraud Creditors*], the question of fraudulent intent is one of fact and not of law; nor can any transfer or charge be adjudged fraudulent solely on the ground that it was not made for a valuable consideration; provided, however, that any transfer or encumbrance of property made or given voluntarily, or without a valuable consideration, by a party while insolvent or in contemplation of insolvency, shall be fraudulent, and void as to existing creditors.

Title 20 GCA § 6103 (1994).

[15] These provisions were adopted from California's proscription against fraudulent transfers as it existed before the enactment of the 1939 Uniform Fraudulent Conveyance Act, which was subsequently replaced in 1986. *See generally, Cortez v. Vogt*, 60 Cal. Rptr. 2d 841, 849 n. 13, 52 Cal.App. 4th 917, 930 n. 13 (Cal. Ct. App. 1997). Specifically, 20 GCA §§ 6101 and 6103 were derived from former Sections 3439 and 3442 of the California Civil Code, respectively. Thus, California precedent, while not controlling, is helpful in the application of these statutes. *See Custodio v. Boonprakong*, 1999 Guam 5, ¶ 11; *Sumitomo Constr. v. Zhong Ye, Inc.*, 1997 Guam 8; *People v. Quenga*, 1997 Guam 6..

[16] It has been held that the distinction between sections 3439 and 3442 is that the question of actual intent is controlling in actions brought under the former, whereas the question of actual intent is immaterial to actions brought under the latter. *See Millard v. Epstein*, 58 Cal.App. 2d 612, 614, 137 P. 2d 717, 718 (Cal. Dist. Ct. App. 1943) (citations omitted). Additionally, section 3442 is inapplicable to a conveyance made for a valuable consideration. *See Millard*, 58 Cal.App. 2d at 614. Generally, these statutes should be liberally construed to effect their purpose:

[t]hat purpose undoubtedly is to prevent debtors from placing property which legitimately should be available for the satisfaction of demands of creditors beyond their reach, or in other words, to compel a person engaging in business to take the hazards and risks thereof as well as the chances for profit. If misfortune should overtake him, he must face it himself, and not attempt to saddle it onto those who have extended him credit and trusted in his commercial integrity.

Borgfeldt v. Curry, 25 Cal.App. 624, 626, 144 P. 976, 977 (Cal.Dist.Ct.App. 1914).

[17] With these general considerations in mind, we proceed to assess the lower court's conclusion that the conveyances were not fraudulent as to Town House.

1. Fraudulent Transfers under 20 GCA § 6101

[18] It is undisputed that Town House was a creditor of Ahn at the time the conveyance was made. The guaranty making the Ahns liable to Town House was executed on December 29, 1995. The alleged fraudulent conveyances occurred *via* deeds of gift to the Ahns' children in joint tenancy on August 19, 1996. Town House's suit on the deficiency was filed on January 29, 1997. The fact that the liability had not been reduced to a judgment at the time of the conveyance is immaterial. *See Adams*, 5 Cal. 2d at 701, 56 P. 2d at 209.

[19] For purposes of determining whether to set aside a conveyance of property pursuant to 20 GCA § 6101, the question of actual intent to defraud the creditor is the essential element of a cause of action. *See Millard*, 58 Cal.App. 2d at 614, 137 P. 2d at 718. Thus, it must be "affirmatively shown by sufficient evidence that the transfer was made by the transferor with the intent to delay or defraud his creditors or other persons owning and holding demands against him." *See Hanscome-James-Winship v. Ainger*, 71 Cal.App. 735, 740, 236 P. 325, 327 (Cal.Dist.Ct.App. 1925).

[20] Here, the trial court found that the transfer was made to avoid foreclosure by the several mortgagees and not the specific avoidance of the claim of Town House. We do not see how such a conclusion can be reached in spite of the existence of facts and circumstances showing: (1) that the Ahns were warned of possible repercussions from T&K's continued delinquency on account and of the possibility of legal action for any deficiency after repossession and sale of the goods under the contract; (2) that on August 9, 1996, the Ahns informed Town House that T&K would be unable to make payments; (3) that ten days later, the Ahns transferred all of their real property to their three children, effectively divesting whatever assets they may have had to pay on their personal guaranty; and (4) that all this occurs against a backdrop that includes the fact that the Ahns had been experiencing financial difficulties with other creditors.

[21] It is evident that the timing of the transfers, the situation of the Ahns with respect to their creditors, and the effective inability of Town House to ever recover from the Ahns on the guaranty are compelling evidence that it was the Ahns' purpose to defeat Town House's recovery under the guaranty by conveying essentially all their assets to their children. The trial court's decision on the Motion for Directed Verdict specifically found that, on these facts, a *prima facie* showing of the alleged fraudulent conveyance was made. *See Town House v. Ahn*, CV2022-98 (Super. Ct., Feb. 29, 2000) (Decision and Order).

[22] However, the only evidence to rebut this objective evidence and to justify the lower court's finding with respect to the lack of fraudulent intent were the defendants' contentions that the transfers were made to avoid foreclosure of the properties by the respective holders of mortgages on the properties. It is a more appropriate characterization of the transfer that in return for their assumption of the mortgage payments

the children will get legal title of the properties.

[23] Our concern with the lower court's conclusion is that there was no evidence that any of the mortgagees had any pending foreclosure proceedings against any of the properties secured by their respective mortgages. Nor was there evidence of how the assumption of the monthly mortgage payments by the Ahns' children would have absolved their parents' obligations of the underlying debts. The only conclusion that the evidence could support is that the only thing accomplished by the transfers was the frustration, hindrance and delay of Town House's ability to satisfy its claim against the Ahns.

[24] The self-serving contentions of subjective intent are not enough to have overcome the objective evidence of intent to defraud that had been presented by Town House and support the lower court's finding that the transfers were not intended to defraud Town House.

2. Fraudulent Transfers under 20 GCA § 6103

[25] Even assuming *arguendo* that the evidence was ambiguous with respect to the actual intent to defraud, we would still find, however, that the alternative means of avoiding the conveyance provided in 20 GCA § 6103, is properly invoked to render the conveyances at issue here as void. Although it is necessary that it be affirmatively shown by sufficient evidence that the transfer was made by the transferor with the intent to delay or defraud his creditors or other persons owning and holding demands against him to set aside a conveyance under 20 GCA § 6101; such a showing is immaterial if the conveyance is set aside pursuant to 20 GCA 6103. *See Hanscome*, 71 Cal.App. at 740-41, 236 P. at 327 (discussing Cal. Civ. Code §§ 3439 and 3442).

[26] Under that provision, where a grantor was insolvent or in contemplation of insolvency at the time of conveyance and the absence of valuable consideration is shown then a presumption that the conveyance was fraudulent as against creditors of the grantor arises. *Id.* If such a showing is made then the burden is on the grantor to prove that the conveyance was supported by a valuable consideration. *See Id.* “A person is insolvent who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due. . . .” Title 13 GCA § 1201(23) (1993). Consideration is “any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor. . . .” Title 18 GCA § 85501 (1992).

[27] In this case, the trial court’s findings of fact more than adequately demonstrate that, at the time of the conveyances, the Ahns were either insolvent or in contemplation of insolvency. The court found that, at various times between February 1995 and August 1996, the Ahns had been in default of or unable to make payments on loans and mortgages to the United States Department of Housing and Urban Development, the United States Department of Agriculture (Farm Service Agency), Lee Roy Tarantino and Lee King Too and the creditor here, Town House.

[28] However, the next inquiry of whether the conveyances were made without valuable consideration is inapposite the trial court’s conclusion. The court below did not make an express finding of valuable consideration for the conveyance. Nor does the record contain the deed and its recitation of consideration; however, assuming an expressed consideration “for love and affection” typical in deeds of gift, while good,

it is not valuable consideration. *See Hanscome*, 71 Cal. App. at 741, 236 P. at 327. Thus, a presumption arose that the conveyance was fraudulent as against Town House.

[29] The Ahns insist that the transfer was supported by a valuable consideration in that the trial court found that their children collectively decided to assist their parents by taking over the mortgage payments on the properties and that they had serviced the debts. But as discussed above, the lower court does not elaborate how such a transfer would have accomplished the objective of avoiding foreclosure, nor was there evidence that the properties were facing foreclosure proceedings. There could not have been a novation because there was no evidence that the mortgagees had assented to the arrangement.⁴ Further, there was no evidence that the children took any steps to become personally liable for or substitute in the place of their parents *vis-a-vis* their creditors. No conclusion that a valuable consideration was exchanged for the transfer of title to the properties is supported by the record.

[30] Thus, pursuant to 20 GCA § 6103, the conveyances were fraudulent as against Town House and they should be set aside.

C. Preference of Creditors

[31] Finally, we turn to the Ahns' argument that their conveyances represented a preference of one set of creditors, the holders of mortgages, over another as allowed pursuant to 20 GCA §§ 5103 and 5104. Those statutes provide:

⁴In fact, such a transfer usually results in substantial breach of the terms of a mortgage, acceleration of the underlying debt and foreclosure.

§5103. Contracts of debtor valid. In the absence of fraud, every contract of a debtor is valid against all his creditors, existing or subsequent, who have not acquired a lien on the property affected by such contract.

Title 20 GCA § 5103 (1992) and

§5104. Payments in preference. A debtor may pay one creditor in preference to another, or may give to one creditor security for the payment of his demand in preference to another, except as provided in the insolvency law of Guam.

Title 20 GCA § 5104 (1992). These statutes permit the payment of one creditor over another or the provision as security for payment of his demand in preference to another. However, there is no evidence that such a transaction occurred here.

[32] In *Millard v. Epstein*, 58 Cal. App. 2d 612, 137 P. 2d 717 (Cal. Dist. Ct. App. 1943), the debtor conveyed her undivided one-half interest in real property to the co-tenant, her sister. The transfer was made to repay an outstanding debt owed to her sister. The appellate court there noted that the law

expressly permits a debtor to pay one creditor in preference to another . . . and while under certain circumstances, a transfer resulting in a preference may be set aside for the benefit of all creditors in bankruptcy proceedings, such transfer may not be set aside in an action of this kind solely because a preference may have resulted.

Id. at 616, 137 P. 2d at 719. (citing to California Civil Code § 3432 upon which 20 GCA § 5104 is based). The trial court found that the conveyance was made for a valuable consideration and the appellate court refused to find otherwise. *Id.* At 615-16, 137 P. 2d at 718-19.

[33] As distinguished from this case, the debtor in *Millard* conveyed the property to repay an outstanding debt. Here, the transfer of the properties did not go to the Ahns' mortgagees; either as payment on or additional security for an outstanding obligation. Rather, the properties went to the children and the children were not creditors of their parents. Moreover, as discussed above, the evidence suggests an

element of fraud, both in actuality and as a presumption pursuant to 20 GCA §§ 6101 and 6103, respectively. Thus, 20 GCA § 5103 provides no impediment to Town House's claim. Similarly, 20 GCA § 5104 is inapplicable because the evidence does not demonstrate a preference of one creditor over another.

III- CONCLUSION

[34] Based on the foregoing, we **DENY** the Ahns' Motion to Dismiss Appeal for Mootness and **VACATE** the judgment of the lower court and **ORDER** that judgment be entered in favor of Town House and that the conveyances be set aside. The case is further **REMANDED** for further proceedings consistent with this opinion.

PETER C. SIGUENZA, JR.
Associate Justice

JOHN A. MANGLONA
Designated Justice

BENJAMIN J. F. CRUZ
Chief Justice