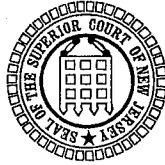


SUPERIOR COURT OF NEW JERSEY

CHAMBERS OF  
FRANK M. CIUFFANI  
JUDGE



MIDDLESEX COUNTY COURT HOUSE  
P.O. BOX 964  
NEW BRUNSWICK, NEW JERSEY 08903 - 0964

September 20, 2011

**LETTER OPINION**

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**FILED**

**SEP 20 2011**

Frank M. Ciuffani, P.J., Ch.

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**Re: CITIMORTGAGE, INC. vs. JOSE M. ROSADO and ERICK LUIS ROSADO**  
**Middlesex County Docket No. C-161-10**

After considering all of the evidence introduced at trial and the post-trial submissions, the Court makes the following findings of fact and conclusions of law.

Jose and Gladys Rosado have owned the subject property located at 3 Providence Boulevard, South Brunswick, NJ 08824 (the "Property") since 1993. They have lived there since 1993.

On July 25, 2008, Jose obtained a loan from Somerset Investors Corp. to refinance the Property. Jose borrowed \$403,970.00 from Somerset Investors Corp., and, as part of the refinance he and his wife Gladys secured that loan by giving a mortgage on the Property. All pertinent documents memorializing the foregoing refinance transaction, including the



promissory note and Mortgage were executed on July 25, 2008. Citi now owns the Mortgage by virtue of being an assignee of Somerset Investors Corp.

On or about June 23, 2010, Jose transferred his interest in the Property to his son Erick. Jose testified that this property was his only asset. The purported consideration was a mortgage reciting Erick's indebtedness. Erick did not sign a note in the amount of \$387,100.00. Erick does not reside in the property. Erick's parents do not pay him rent. The real estate taxes are being paid by CitiMortgage. Erick made only four cash payments of \$2,200.00 to his father in the months of September, October, November, and December 2010.

Jose testified that he learned that the Mortgage had not been recorded due to a title search performed by Mr. Shelton who specializes in mortgage modifications, who was working for Jose and Gladys on a mortgage modification with CitiMortgage. Jose was advised by Mr. Shelton to transfer the Property to a trusted family member, take back a mortgage, and record the mortgage. Jose testified that when he was told that the mortgage wasn't recorded he thought he had "won the lottery".

The Uniform Fraudulent Transfer Act, N.J.S.A. 25:2-25 provides:

A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

a. With actual intent to hinder, delay, or defraud any creditor of the debtor . . .

N.J. Stat. § 25 :2-25 ; See also Vineland Nat'l Bank & Trust Co. v. Rothman, 130 *N.J. Eq.* 228, 130 *N.J. Eq.* 288 (N.J. Ch. 1940), affirmed by 130 *N.J. Eq.* 225 (N.J. 1941)(A daughter's mortgage against her mother's property was set aside because the mortgage was a concerted attempt to hinder, delay and defraud the bank.)

N.J. Stat. § 25:2-26 sets forth a non-exhaustive list of eleven factors, referred to as ‘badges of fraud,’ that a Court may consider in determining whether a party has established an actual intent to hinder, delay, or defraud under N.J.S.A. § 25:2-25(a):

- a. The transfer or obligation was to an insider;
- b. The debtor retained possession or control of the property transferred after the transfer;
- c. The transfer or obligation was disclosed or concealed;
- d. Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
- e. The transfer was of substantially all the debtor’s asset;
- f. The debtor absconded;
- g. The debtor removed or concealed assets;
- h. The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
- i. The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
- j. The transfer occurred shortly before or shortly after a substantial debt was incurred; and
- k. The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.”

Firmani v. Firmani, 332 *N.J. Super.* 118, 121 (App. Div. 2000) (citing *N.J. Stat. § 25:2-26*.)

“In determining whether the circumstances of a particular transaction give rise to the conclusion that the transferor intended to thwart or evade creditors, courts generally look to factors commonly referred to as ‘badges of fraud.’” Id. at 122. ‘Badges of fraud’ represent circumstances that so frequently accompany fraudulent transfers that their presence gives rise to an inference of intent. Id. “The proper inquiry is whether the badges of fraud are present, not whether some factors are absent.” Id. “Although the presence of a single factor, i.e. badge

of fraud, may cast suspicion on the transferor's intent, the confluence of several in one transaction generally provides conclusive evidence of an actual intent to defraud." Id.

By its very nature, fraudulent intent is rarely proven by direct evidence. Id. (citations omitted.) Circumstantial evidence is more than sufficient to prove fraudulent intent. Id. A defendant will rarely acknowledge that the transfer was designed to thwart the reach of a creditor. Id. "Actual [fraudulent] intent often must be established through inferential reasoning, deduced from the circumstances surrounding the allegedly fraudulent act." Id.

A court need not discover a specific number of "badges" before labeling a transaction as fraudulent. Id. "In some cases, the presence of a single factor may suffice." Id. (citing Gilchinsky v. National Westminster Bank, 159 N.J. 463, 476-77 (1999)). "Where several badges of fraud accompany one transaction, however, a strong inference of fraud arises." Id. "Unless a sufficient explanation is supplied, clearly rebutting the inference of actual fraudulent intent, the conclusion that the debtor possessed the requisite intent is inescapable." Id.

In Firmani, the Appellate Court upheld a trial court's summary judgment entered in favor of the plaintiff, who claimed a transfer of real estate was fraudulent. Id. The Appellate Court was satisfied that the "badges of fraud" set forth below established the fraudulent nature of the transfer. Id. at 122 – 123.

1. The conveyance was made to an insider.
2. Neither possession nor control of the property was relinquished after the transfer.
3. Absent payment, an enforcement action would have been instituted against the debtor.
4. Assets were removed from the debtor.

5. The conveyance occurred shortly after the debt was called.

See Id. at 122 – 123.

Jose's conveyance to Erick illustrates the same badges of fraud relied on in Firmani, *supra*.

1. Jose conveyed the Property to his son, Erick, an obvious trusted insider.
2. Jose continues to live at the Property.
3. CitiMortgage was in the process of initiating a foreclosure action against Jose.
4. The Property, Jose's sole asset, was removed from his name.
5. The conveyance occurred shortly before the filing of the foreclosure action.

Jose's conveyance illustrates additional badges of fraud.

1. Jose did not receive any consideration for the transfer.
2. Erick has failed to make mortgage payments to Jose under the alleged mortgage.
3. Gladys, Jose's wife and co-owner of the Property, refused to cooperate with the transaction.
4. Jose transferred the property only after learning that the Mortgage was not duly recorded.

“Although the presence of a single factor, i.e. badge of fraud, may cast suspicion on the transferor's intent, the confluence of several in on transaction generally provides conclusive evidence of an actual intent to defraud.” Firmani v. Firmani, 332 *N.J. Super.* 118, 122 (App. Div. 2000). “Unless a sufficient explanation is supplied, clearly rebutting the inference of actual fraudulent intent, the conclusion that the debtor possessed the requisite intent is inescapable.” Id. (emphasis added), citing Glichinsky v. National Westminster Bank, 159 *N.J.* 463, 476-77 (1999).

The overwhelming undisputed facts of this case support the finding that Jose transferred the Property to Erick with the actual to hinder, delay, or avoid CitiMortgage's foreclosure proceeding and with the intent to defraud CitiMortgage.

In response to the overwhelming evidence of a fraudulent transfer of his interest, Jose offered no credible explanation other than the curious timing of an astonishingly premature testamentary intent after finding out that "he had won the lottery".

Jose controls the Property, and he denies that Erick owes him any money, and Erick has stopped paying the take-back mortgage. The Court finds that the only purpose served by the deed into Erick and the take-back mortgage was to hinder and delay Citi's enforcement of the Mortgage. The intent behind a violation of the UFTA "often must be established through inferential reasoning, deduced from the circumstances surrounding the allegedly fraudulent act". Id. In this case, no inference other than that Jose transferred his interest to frustrate Citi can be drawn from the facts.

Between purchasing the Property in 1993 and refinancing with Somerset in July 2008, Jose refinanced the Property three times and took out a home equity loan also:

October 26, 1993	\$164,700 (PMI)	P-30
July 29, 1999	\$26,000 (Home Equity)	P-31
August 2, 2002	\$208,000	P-32
March 19, 2004	\$245,000	P-33
July 27, 2004	\$280,000	P-34

Jose had sufficient familiarity with mortgages to understand the nature of a refinance transaction. His testimony that he thought his last mortgage had disappeared because it had not been recorded is not credible.

In addition to the facts mentioned above, Jose admitted signing all relevant documents as testified to by Citi's primary witness, Alicia Robertson. The documentary evidence establishes that Jose borrowed \$403,970.00 to pay off prior liens, i.e. mortgage debt (\$360,083.30); real estate taxes (\$14,961.35); judgments and other municipal taxes which encumbered the Property. Jose testified on direct that he did not receive a promised favorable interest rate. On cross-examination, Jose had to admit what the documents established, that he received a favorable rate of 6.7%, which was 2.8% less than the prior loan paid off by the Somerset loan.

Citi advocates that the deed into Erick be voided, and consequently the take-back mortgage Jose gave should be vacated. Erick would not have an interest subject to the take-back mortgage if the deed into him was voided. N.J.S.A. 25:2-29(a)(1) provides for the avoidance of any "transfer or obligation to the extent necessary to satisfy the creditor's claim". The Court finds that this remedy provides the clearest relief.

Defendants' counterclaim seeks monetary damages without any mention of equitable relief in any form. Jose could not testify as to suffering any cognizable damages, and the Defendants offered no evidence of any damages at all. Consequently, the counterclaim could fail on this basis alone.

The counterclaim does not state a statutory cause of action. The claims are common law claims for breach of some broadly defined duty, the breach of an "agreement between Rosado and CitiMortgage" and fraud. The Defendants did not demonstrate any breach of any duty or contract by Citi. Their claim to have suffered "extreme emotional distress" was not substantiated.

With regard to fraud, the Defendants did not prove any misrepresentation. Citi relies upon the Mortgage which it did not breach and does not constitute a misrepresentation. The Defendants had no relevant communications with Citi at the time of the loan closing which could constitute a fraud.

The enforceability of the Mortgage was not an issue pled by either party in this case, and presumably will be an issue in the separate Mortgage foreclosure proceeding where it belongs.

From the outset of the trial the Defendants repeatedly tried to raise a “standing” issue. Citi proved that it had physical possession of the original note since August 2008, assigned directly from Somerset to Citi, and so endorsed. The note has not been assigned out, although it has been endorsed (in blank) so that it may be assigned as part of the foreclosure process. Citi also established that the Mortgage had been assigned to it as part of its purchase of the Somerset loan, and that an assignment has been recorded. Jose made payments to Citi beginning in August 2008.

Citi has established its position as a creditor under the UFTA.

The Defendants’ third-party complaint was not substantiated at trial. Shepard Title Agency, LLC and Angela Morris testified as to their status as insurance producers, which presumably is the basis for the negligence and professional malpractice claims against them, no other profession having been demonstrated. The Defendants failed to produce an Affidavit of Merit in compliance with N.J.S.A. 2A:53A-27. No expert testimony was provided. The Defendants failed to demonstrate any liability on the part of the third-party defendants. Jose testified that he did not know why he was suing Angela Morris. The Defendants also failed to prove any damages at all.



The Defendants made no effort at all to prove a case against Angela Morris. Based on the evidence, all she did was meet with Jose on one occasion at the Property as part of the effort to convince him to do the right thing and the contractually obligated thing, by resigning the Mortgage.

Finally, the failure to record a mortgage by a title agent would not cause damage to a borrower who necessarily had notice of what he had signed to begin with. Recordation of a mortgage given to refinance a loan protects the new lender from other interests, generally other interests (e.g., judgment creditors) created by the borrower.

The Court finds that the deed to Erick and the take-back mortgage are invalid. The affirmative claims of the Defendants have no merit and are dismissed with prejudice. Mr. Grundlock is hereby directed to prepare a form of judgment consistent with this decision.

Very truly yours,



HONORABLE FRANK M. CIUFFANI  
Presiding Judge, Chancery Division

FMC:lu