EXHIBIT 3

Texto original en espanol

1982 JTS 59, 112 D.P.R. 631, 1982 WL 210626 (P.R.), 12 P.R. Offic. Trans. 786

Santos DE JESÚS DÍAZ and the Marital Community constituted by him and his wife Diómedes Ortiz Pérez, and Edgardo de Jesús Ortiz, Plaintiffs and Appellants,
v.
Carlos M. CARRERO, The Succession of Epifanio Ocasio et al., Defendants and Appellees.

Supreme Court of Puerto Rico.
No. R-82-76.
Decided April 21, 1982.

1. FRAUD -- ACTIONS -- EVIDENCE -- PRESUMPTIONS.
A creditor's action to attack the fraudulent and simulated acts of his debtor, which tend to create an apparent insolvency of the latter, is not restrained by the presumption of fraud of art. 1249 of the Civil Code--presumptions *juris tantum* regarding alienations without a consideration, and for a valuable consideration after an unfavorable judgment is rendered or a writ of attachment is issued--because they are not a bar to proving the existence of fraud through other means, whose weighing, as a matter of fact, is an exclusive concern of the trial court.

2. ID. -- ID. -- ID. -- INFERENCE OF FRAUD -- IN GENERAL.
When determining if the acts of a debtor have been made in fraud of creditors, without the pertinent legal presumptions, once the basic fact is verified, the question is left to the good sense of the trier, upon which must weigh the most powerful indication of fraud, such as haste in the alineation, the debtor's insolvency, the relation of kinship, closeness or trust with the acquirer, the state of the business of the conveyor owner and of the judicial claims pending against him.

3. CONTRACTS -- FRAUDULENT CONVEYANCES -- TRANSFERS AND TRANSACTIONS INVALID -- KNOWLEDGE AND INTENT OF GRANTEE -- IN GENERAL.
For the purposes of art. 1243(3) of the Civil Code--which provides that contracts executed in fraud of creditors may be rescinded when they may not otherwise collect what is due them--the debtor's insolvency ***787** and the fraud must concur. Insolvency supposes that the patrimony is not sufficient to satisfy all the debts weighing upon it; fraud does not require evidence of the purpose or aim of the debtor to harm his creditors, it suffices to show that he knew about the results produced.

4. FRAUD -- ACTIONS -- EVIDENCE -- SUFFICIENCY -- IN GENERAL.
The general rule that fraud is not presumed only means that the one affirming it must prove it with reasonable certainty, with preponderance of evidence that satisfies the trier's conscience.

5. CONTRACTS -- FRAUDULENT CONVEYANCES -- TRANSFERS AND TRANSACTIONS INVALID -- GROUNDS OF INVALIDITY IN GENERAL -- BADGES OF FRAUD -- FAMILY RELATION.
The intimate relationship between debtor and acquirer is not sufficient by itself to declare an act or contract to be prejudicial to creditors, but it does constitute a suspicious circumstance that, together with others, may lead the fair and rational weighing of the evidence to a declaration of nullity, and at least to shift the burden of proof from plaintiff to the person acquiring directly from the debtor.

6. ID. -- ID. -- REMEDIES OF CREDITORS AND PURCHASERS -- REMEDIES ON GROUND OF NULLITY OF TRANSFER -- IN GENERAL.
The Paulian action of rescission and the action for radical or absolute nullity are basically different. The former is the case of a debtor who has alienated truly but fraudulently, while the latter is the case of the debtor who seems to carry out an alienation that does not really exist or is different from the one actually carried out.

Synopsis
JUDGMENT of *Ronaldo Rodríguez Ossorio,* Judge (Bayamón), dismissing an action on nullity of mortgage and fraud of creditors. *Reversed.*

Rubén Rivera Ramos for appellants. *Félix M. Cifredo Camacho* for appellee Carlos M. Carrero. The other appellees did not appear.

***789 Judgment of Ronaldo Rodríguez Ossorio, Judge, Bayamón Part**

Review

MR. JUSTICE DIAZ CRUZ delivered the opinion of the Court.

In an action for damages filed on July 12, 1973, by appellants--De Jesús Díaz, his wife Diómedes Ortiz, and their son Edgardo de Jesús Ortiz--against Epifanio Ocasio and his wife Amparo Ferrao, the latter were served with process on July 30, 1973. On August 9, 1973, said defendants filed their appearance by motion, through their counsel Ramón León Malavé, admitting that they received "at their home a copy of the complaint and of the summons served by Mr. Luis Ramos," but attacking the sufficiency of the summons as to the husband and a minor son. The aforesaid motion was filed on August 13, 1973, at the office of the Clerk of the Superior Court of Bayamón, and on the following day, August 14, 1973, the defendant spouses, Ocasio and Ferrao, appeared before their own attorney in the damages action, with Ramón León Malavé, this time acting as a Notary Public, and executed deed ***790** No. 6, entitled "Execution of Mortgage Secured by Promissory Notes," wherein they stated that they were the record owners of a parcel of land with an area of one and a half cuerdas in Barrio Buena Vista of Bayamón, where they have erected two dwellings and a business establishment made of concrete and cement blocks, plus two wooden structures used as business premises, and now leased; that to "obtain credit," on that same day they had issued twelve (12) promissory notes to bearer, each one for a $10,000 principal with interest at 8% per annum and a common maturity date: August 14, 1977, for a total of $120,000, without specifying a liquid amount for costs and attorney's fees in case of foreclosure; and they executed a mortgage to secure the payment of the aforesaid twelve notes.

From the findings of the court, the admissions, and other evidence in the record, it appears that on August 24, 1977, the Bayamón Part rendered a judgment in the case for damages, ordering the defendant spouses to pay $10,000 to the then and now plaintiffs, plus interest at the legal rate. The defendant and judgment debtor, Epifanio Ocasio, died one year after the judgment had been rendered, and the promissory notes, about which at no time are there any documents stating that they have been circulated by the defendant debtors, appeared after the decedent's death in possession of Carlos M. Carrero, a brother-in-law of widow and debtor Amparo Ferrao. The issuance of the twelve mortgage notes exhausted the estate of the defendants held liable in the judgment for damages, Epifanio Ocasio and Amparo Ferrao, for which reason plaintiffs De Jesús-Ortiz have not been able to foreclose it in spite of the efforts ***791** made with the Ocasio Succession and the holder of the obligations, Carrero, for which reason the former filed a complaint on December 20, 1979, to collect their credit, in which complaint they alleged that the issuance of the twelve promissory notes and the execution of the $120,000 mortgage to secure it, as well as their delivery by the debtors to Carrero, the brother-in-law, was a simulation directed to injure the creditors, and carried out "with the sole purpose of thwarting the ends of justice and avoiding the payment of any judgment rendered in due time." Carrero, the holder of the promissory notes, answered to this that "between *cash* advance and *collateral securities,*" the succession of Epifanio Ocasio owes him $34,762.77; that he has legal possession, and that his "actions of giving financial aid to [the succession] is the result of a legitimate and *humanitarian* act"; and that the promissory notes are "*security for the credit* given" by him to the succession. (Underscore supplied.) At the pretrial conference, he said that the defense theory against the action of nullity was that he had legitimate possession of the promissory notes; and that plaintiffs' action on nullity of the mortgage is barred by the statute of limitations; and when informing about his documentary evidence he did not even mention one notarial deed in support of the nearly $35,000 he says the succession owes him. [1]

***792** The case on nullity of mortgage and fraud to the creditors was called to trial, and only Carrero appeared. Absent were all the members of the defendant succession, who did not answer the complaint, and were held in default. [2] At the close of plaintiffs' evidence, the trial court dismissed their complaint (Rule 39.2 of Civil ProcedureRule 39.2 of Civil Procedure) on two grounds: 1st that plaintiffs lack a cause of action to attack the mortgage deed on the grounds that it was null and void and because the creditors had committed fraud because they were not the creditors of the mortgagor spouses at the time of the execution; and 2nd that the action brought, taken as a rescissory action, was time-barred under art. 37 of the former Mortgage Law of 1893 (30 L.P.R.A. § 62) which set a term of one year from the time of the execution of the deed.

Appellee Carrero filed an opposition to the issuance of the writ. It adds nothing to the court's conclusions, except that it is the first reference to the insufficiency ***793** of the evidence that would establish in principle the right of plaintiffs to a remedy, and shifts the *onus probandi* to the defendant holder of the promissory notes. We decide pursuant to Rule 50 of our Rules.

The opening of the just remedy in cases of fraud of creditors has been the route along which modern law has evolved, geared toward the strengthening of the legal duty contained in art. 1811 of the Civil Code: the debtor is liable for the fulfillment of his obligations with all his present and future property; art. 1064 of the Civil Code: after having attached the property of which the debtor may be in possession, creditors may attack the acts which the latter may have performed in fraud of their right; in art. 1250: any person who may have acquired in bad faith things alienated in fraud of creditors must indemnify them for the damages the alienation may have caused them when it is impossible for him to return them; and in the presumption laid down in art. 585: a gift shall always be presumed as having been made to defraud creditors when at the time it is bestowed the donor does not reserve to himself sufficient property to pay the debts contracted prior thereto; and in those of art. 1249: contracts by virtue of which the debtor alienates property for a good consideration are presumed to be in fraud of creditors. Alienations for valuable consideration are also presumed to be fraudulent when they are made by those persons against whom condemnatory judgment had been rendered at any level or against whom an order for the attachment of property had been issued.

The traditional procedural remedy has been the rescissory action, known as Paulian action or action for revocation, provided in paragraph 3 of art. 1243 of the ***794** Code: contracts executed in fraud of creditors may be rescinded when the latter cannot otherwise recover what is due to them.

[1] But the creditor's case to attack fraudulent or simulated acts which tend to create an apparent insolvency is not confined to the presumption of fraud of art. 1249 which, as the Supreme Court of Spain has declared, are independent and do not preclude that through other probatory means the existence of the same may be declared, whose appreciation as a matter of fact is of the exclusive competence of the trier below at first instance. [3] These two presumptions *juris tantum* regarding alienations for a good consideration and for a valuable consideration, respectively, do not exhaust the possible cases of fraud, for there are many more reasons vitiating a contract with fraud; for, as Manresa says, "the ways and means of bad faith are quite difficult to foresee and pinpoint beforehand and, in any case, delimiting them would have the inconvenience of favoring the former with impunity if it knew how to give a different appearance from those foreseen by the lawmaker." 8 *Comentarios al Código Civil Español* 688 (4th ed. 1929). [4]

***795** [2] When the trier exercises his point of view, free from the imposition of the legal presumption, once the basic fact is verified, the question is left to the good sense [5] of the trier, upon which must weigh the most powerful indication of fraud, such as haste in the alienation, the debtor's insolvency, the relation of kinship, closeness or trust with the acquirer, the state of the business of the conveyor owner and of the judicial claims pending against him. Castán Tobeñas agrees that fraud may be proved by means different from those established in art. 1.297 (1249 in Puerto Rico) and that the determination of fraud, as a matter of fact, is incumbent upon the trial court. 3 *Derecho Civil Español* 238 (10th ed. 1967). [6]

***796** [3] According to Díez-Picazo, art. 1.291 (1243 P.R.) requires two conditions for the transaction to be rescinded: it must have been executed in "fraud of creditors" and they "may not otherwise recover what is due them," two presuppositions of the rescissory action, insolvency of the debtor and fraud. Insolvency supposes that the patrimony is not sufficient to satisfy all the debts weighing upon it; fraud does not require evidence of the purpose or aim of the debtor to harm his creditors, it suffices to show that he knew about the results produced. 1 *Fundamentos del Derecho Civil Patrimonial* 744-745 (1st ed. 1979).

> According to the scientific doctrine--Castán Tobeñas reiterates--the *intention* to harm the creditors (*animus nocendi*) need not be present and proved; it suffices that it be *known beforehand* that, with the act to be performed, the debtor makes it impossible for the creditor to collect his credit. (Underscore in the original.) *Op. cit.* at 238.

[4] Our case law goes hand in hand with the above doctrine. In *Carrasquillo v. Lippitt & Simonpietri, Inc.,* ***797** 98 P.R.R. 646, 649 (1970), and in *García López v. Méndez García,* 102 D.P.R. 383, 386 (1974), we abandoned the classification of "solid", "clear and convincing", and "unquestionable" evidence set forth in *Texas Co. (P.R.), Inc. v. Estrada,* 50 P.R.R. 709, 713-714 (1936), to note that the general rule that fraud is not presumed only means that the one affirming it must prove it with reasonable certainty, with preponderance of evidence that satisfies the trier's conscience. In this way, the obstacle requiring a higher degree of evidence, which served no other purpose but to give to the agent of fraud a special protection other defendants do not have, was eliminated. In *Roig Comm. Bank v. Portela,* 52 P.R.R. 626 (1938), when emphasizing the difference between the Paulian rescissory action and the action for radical nullity based on the simulation, which is never time-barred, we consider fraudulent and harmful to the creditors the alienations made by the debtor soon after the execution of a mere promissory

note that substituted others that were due and unpaid. In harmony with the trend that promotes the elimination of fraud, without having it determined by mere conjectures, this Court has held:

> We have considered the complaint and although it is nominally entitled as one in "rescission" of a contract, we have come to the conclusion that it should be regarded as one seeking primarily to set aside or undo a transaction entered into fictitiously by the plaintiff's debtor and others with the fraudulent intent to prevent the plaintiff from recovering. The lower court was not without some justification in applying what it considered to be the only statute under which the action could be brought, but we feel that its decision on this particular point should be reversed. Courts primarily exist in order to provide a remedy for a legal wrong. It is especially true in cases of fraud, where sympathy should be with the defrauded, so that his rightful ***798** remedy should not be withheld on some truly technical ground, such as the improper title to his action, where it appears that the complaint sets up sufficient facts from which to establish a definite cause of action in his favor. At 630-31.

We ratified the rule of analyzing every situation without technical and procedural ties, in order to expose the instance of fraud if the evidence so inclines the honest conscience and good sense of the trier of facts, when we held that it is not an indispensable requirement to a plaintiff's cause of action to annul a fraudulent conveyance that the debt or obligation was due or demandable on the date when the alleged alienation was carried out; it was held that the surety sued for damages for a wrongful attachment became a debtor of the person affected by the attachment, with a juridical duty to redress, and that the condition of creditor was fixed from the time the bond was given in his behalf on a date prior to that of the conveyance whose nullity was being asserted, and notwithstanding the lack of a judicial finding on the wrongfulness of the attachment at such an early stage; and reiterating the expression in *Roig Comm. Bank, supra,* that in cases of fraud the trier's sympathy--rather the judge's free inclination--should be with the defrauded person, and that the former should overcome the technical obstacle, we held:

> The principal function of judicial tribunals is to afford an adequate legal remedy for repairing any injury that may have been unlawfully caused to a party resorting to them for relief. *Ubi jus, ibi remedium.* Greater still must be the zeal and care of the courts in the performance of such a high function when it is sought to prosecute or to prevent fraud and simulation. *Castellón v. Padín,* 60 P.R.R. 369, 375 (1942).

***799** [5] From the intimate relation between debtor and his first acquirer, a fact which shows up in many simulated or fictitious contracts for the fraud of creditors, this Court held both in the *Texas Co., ante,* and in *Nine v. Avilés,* 53 P.R.R. 471, 476 (1938), that, even though when isolated it is not sufficient to declare an act or conduct fraudulent, it does constitute a suspicious circumstance that, together with others, may lead the fair and rational weighing of the evidence to a declaration of nullity, [7] and at least to shift the burden of proof from plaintiff to the person acquiring directly from the debtor.

[6] Castán establishes the limits between the Paulian actions of rescission and the action for radical or absolute nullity, which is particularly relevant to the case at bar:

> Finally, though in practice the Paulian one is sometimes confused with the action to declare simulation (because one and the ***800** other constitute a remedy granted to the creditors to revoke the acts of the debtor that make it impossible for them to collect their credits), they are fundamentally different, for the one for simulation is an action for nullity or inexistence. The case of the Paulian action is the case of the debtor who has truly but fraudulently alienated (as a rule, to replace something easily attachable with securities that are easy to conceal) while the one of the action for simulation is that of the debtor who seems to carry out an alienation that does not really exist or is different from the one actually carried out. Next to this essential difference by reason of the nature of each one of these actions, there are among them other differences depending on the people that may exercise them, to the requirements required therefor, to the effects they produce, and to the bar by the statute of limitations. 3 *Derecho Civil Español, Común y Foral* 234 (10th ed. 1967).

In the light of the preceding legal theory, there is no doubt that appellants established a prima facie case of nullity of actions and presumption of fraud of creditors that shifts the burden of proof to defendant-appellee Carrero. The hasty manner in which the debtors, Mr. and Mrs. Ocasio Ferrao--who had already been served with a copy of the complaint for damages--appeared before their own attorney in his capacity as a notary exactly one day after filing with the court, not an answer on the merits of the subject of litigation, but an allegation of insufficient service of process; the admittedly close relationship of Carrero and the mortgagors; the lack of proportion in the amount of $120,000 that encumbered the only property of the debtors, consisting of 1 1/2 cuerda and buildings in a Bayamón rural area; the possible lack of negotiability of said obligations where no specific quantity is secured for costs and attorney's fees in case of foreclosure; the fact that they were not negotiated or placed in circulation, but rather that the twelve promissory notes appeared in the brother-in-law's ***801** possession--their common maturity in a four-year term made them all but unredeemable--; his admission that he has not even one notarial instrument where Ocasio or his successor recognize the whole or part of the $35,000 that he says he gave them, part in cash and the other part as collaterals of bonds for humanitarian reasons of helping one's neighbor; the silence of the debtor succession, which was found in default and was absent on the day of the trial, all these are circumstances and facts that point to the existence of fraud to harm creditors, which form a presumption or establish a prima facie state of fraudulent conduct, of fraud of the law that skirts the juridical duty of paying what is due through an indirect way that is *grosso modo* a subterfuge.

The court below erred in deciding that plaintiffs--who at the time of the execution of the fraudulent mortgage did not have a judgment in their favor, but a complaint filed--were not creditors of Mr. and Mrs. Ocasio-Ferrao, a result of its confusing this action of radical nullity because of inexistence of contract with the action for rescission governed by the presumption of art. 1249 of the Civil Code. For the same reason and others, the trier erred in declaring the action time-barred by the one-year period of art. 62 of the former Mortgage Law. 30 L.P.R.A. § 62. Both this and its successor, art. 108 of the new Law, 30 L.P.R.A. § 2358, limit their effect to the actions for rescission, and even in these exclude from their protection the first acquirer in the fraudulent relation. Castán, *op. cit.* at 242-243; 4-1 José R. Vélez Torres, *Curso de Derecho Civil* 289 (1981). The action brought by the appellants is not the so-called Paulian or rescissory action, but the one for absolute nullity ***802** that has no time limit. When there is simulation, there is no rescission, but nullity. 2 Roca Sastre, *Derecho Hipotecario* 700 (6th ed. 1968); *Roig Comm. Bank v. Portela, supra; cf. González et al. v. Fumero et al.,* 38 P.R.R. 497 (1928); *García López v. Méndez García, supra* at 395. Plaintiffs' evidence has rebutted the presumption of innocence, honesty, and purity, a congenital but fragile quality of men's actions.

For the foregoing reasons, *the petition is granted, the judgment under review is reversed, and the case is remanded to the court below for further proceedings consistent with this opinion.*

Footnotes

1 We quote:

> "Documentary evidence:
>
> *Plaintiff:*
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> ....
>
> ....
>
> *Defendant* (Codefendant Carlos M. Carrero)
>
> 1. Savings passbook
>
> 2. Receipts of the Succession
>
> 3. Court documents in cases of bond
>
> 4. Any other shall be timely notified."

2 Pursuant to Rule 45.1 of Civil ProcedureRule 45.1 of Civil Procedure, the entry of default has the effect of admitting the averments set forth in the affirmative defenses, but the trial judge considered it his duty to relieve them of said result after verifying the averments. This was not necessary, inasmuch as the documentary evidence admitted without objection, (record of the case where a judgment was entered in 1977, promissory notes and mortgage deeds), and Carrero's admissions in the record established a prima facie case of fraud and fraudulent conduct.

3 Judgments of May 31, 1928; March 18, 1929, and February 23, 1934.

4 And regarding this amplitude and the varied proofs of fraud, he adds:

> "There is, therefore, a broad scope in this matter, and an infinite number of presumptions *ab homine* may be alleged, with the logical difference, regarding the legal ones, that with the base fact credited in the latter, the application of the precepts of the Code or of the Mortgage Law is imposed on the trier, under penalty of estimating said presumptions weakened by evidence to the contrary, which is very difficult; and on the other hand, for the other presumptions of fraud not established by law, he enjoys the ordinary broadness as to the appreciation of the base fact and of its relation with the fraud, of which it is supposed to be a sample. The scope of the power of the courts to reject these particular presumptions is so broad as to admit them, and is recognized by the Judgment of March 21, 1900." At 688.

5 Judgment of July 10, 1896. Manresa, *op. cit.* at 688-689.

6 Diez-Picazo also acknowledges two hypotheses: one when the creditor's fraudulent conduct fits one of the typical models of the Paulian or revocation action; and the other when the debtor's subterfuge or swindling of property to avoid paying his debts follows a peculiar course of evading law and duty. He says:

> "The creditor's protection against the debtor's fraud may be established along two different lines. The first is done through the institution of the typical actions of objective defense and protection of the creditors' interests (action for revocation, rescission, and Paulian action). The second, a subsidiary of the former, is produced through the application of the general rule of inadmissibility of the fraud of the law; the purpose of using it is to try to obtain the irrelevancy and inefficacy of all those acts of the debtor that, without fitting within the framework of the typical actions for revocation, are presided by a conscious plan to harm the creditor's right and at the same time they entail a circunventio legis; under a supposed law of coverage, the rule providing for the universal liability of the debtor's patrimony is sought to be broken (art. 1911 Civil Code [1811 P.R.]): in other words, the legal order may react by classifying as fraud of the law the debtor's acts done with the purpose of damaging the credit." 1 *Fundamentos del Derecho Civil Patrimonial* 741 (1979).

7 Going back to 27 C.J. § 717, in *Texas Co. v. Estrada, supra* at 716, this Court adopted the following quote, a predecessor of the remission of the facts to the power to weigh that prevails today:

> "'Where the parties to the transfer are related to each other, *this fact in connection with other facts* may be sufficient to raise a presumption of fraud and shift the burden of proof to the transferee to show good faith on his part in accepting the transfer; and it has been held that only slight evidence is required to shift the burden of showing the good faith of the transaction. A presumption of fraud is raised and the burden of proof of showing good faith impose on the transferee where, *in connection with the facts of relationship, other facts appear such as the insolvency or embarrassed circumstances of the party making the transfer*.' (Italics ours.)"

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