Nakatani v. Nishizono, 1 ROP Intrm. 289 (Tr. Div. 1985)

NORIYOSHI NAKATANI & NAKATANI,CONSTRUCTION COMPANY,
Plaintiff,

v.

MASAO NISHIZONO & SEIBU, DEVELOPMENT CORPORATION,
Defendants,

and

REPUBLIC OF PALAU,
Additional Defendant/Appellant,
and
PACIFICA DEVELOPMENT CORP.,
a Palau Corporation,
Intervenor.

MASAO NISHIZONO a/k/a KWON
BOO SIK CONSTRUCTION COMPANY,
Plaintiff,

v.

ROMAN TMETUCHL, M. TMETUCHL,
& NORIYOSHI NAKATANI,
Defendants,

and

REPUBLIC OF PALAU,
Additional Defendant/Appellant,
and
PACIFICA DEVELOPMENT CORP.,i
a Palau Corporation,
Intervenor.

CIVIL ACTION NOS. 25-85 & 73-85
(Consolidated)

Supreme Court, Trial Division
Republic of Palau

Nakatani v. Nishizono, 1 ROP Intrm. 289 (Tr. Div. 1985)
Order on application of Republic of Palau for stay
Decided: December 18, 1985

BEFORE: ROBERT WARREN GIBSON, Associate Justice.

⊥ 290 This matter came on for hearing before the undersigned judge of the Trial Division of the Supreme Court of the Republic of Palau on Tuesday, the 17th day of December, 1985, at 8:30 o'clock a.m. of said date, notice having been given and parties appearing by counsel or having indicated their intention to not appeal, and the Court, having read the Memorandum submitted in support of and in opposition to said application, entertained the argument of counsel, engaged in colloquy, and being in all things advised, FINDS, as follows:

1. Applicant Republic of Palau has filed its Notice of Appeal appealing the Order of the Court dated November 25, 1985, setting aside the Assignment Agreement of 7 October, 1985, by and between the Defendant Seibu Development Corporation and the Republic of Palau.

2. No leave of Court was requested or obtained. Federal Rules of Civ. Pro. 5(a), 28 U.S.C. § 1292(b) makes the filing of a petition for Leave to file an Interlocutory Appeal mandatory. *See Aparico v. Swan Lake*, 643 F.2d 1109 (CZCA) (1981); *Hellerstein v. Mr. Steak, Inc.*, 531 F.2d 470, cert. den. 97 S. Ct. 75.

3. An Order is said to be Interlocutory "where anything further is the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties." *Riddel v. Warne*, 167 P.2d 811, 73 Cal.App.2d 907. Under this and the enumerated requirements of finality found in 4 Am.Jur.2d pp. 572-578, Appeal and Error §§ 50-56 the Order from which the Appeal is taken in an "Interlocutory Order" and permission for Leave to file same should first have been moved on in the Trial Court.

4. Since however the matter, by virtue of the Notice of Appeal, is now before the Appellate Division, this Court lacks jurisdiction to set aside the Appeal or to act further upon it pending action in the Appellate Division.

5. The Order of the Court setting aside, as a Fraudulent Conveyance the October 7, 1985, Assignment Agreement is self-executing. There is nothing further for the Court to do. It requires no supercedeas as there is no judgment to suspend; it requires no summary proceedings as there is no judgment to enforce; there is no further action for the Court to take as the Court, by virtue of the filing of the Notice of Appeal, is divested of jurisdiction to do aught but act in matters relating to the enforcement or suspension of the judgment which, as we have noted is a ⊥291 factual non-necessity.

6. The nature of the judgment makes the effect of the application one that

might more properly have been denominated a "Motion to Re-Consider or for Re-Hearing," rather than "Application for Stay."

7. It is axiomatic however, that the Trial Court, once the Notice of Appeal has been filed, is voided of jurisdiction to entertain such a motion.

8. Applicant was, at the conclusion of the Hearing on Applicant's Motion to Dismiss Applicant as Additional Party Defendant, granted the relief sought. Applicant is no longer a party before this Court. It's only presence is as an Interlocutory Appellant (without proper permission) on the limited ground of lodging error in the Trial Court in setting aside the Assignment Agreement. Under this combination the Court has serious doubt as to its jurisdictional capacity to grant Applicant its stay should the Court be so disposed.

9. What the Republic of Palau is asking the Trial Court to do is to vacate its decision. The Court is reluctant to do this for it should permit the very ends which the Court Order seeks to prevent from occurring -- i.e., give the Republic of Palau a free hand to put Seibu revenue assets at a further distance from the reach of Seibu creditors.

> 1. 37 Am. Jur. 2d 691, Fraudulent Conveyance § 1. The law recognizes that the individual has primarily, a right to dispose of this property in accordance with his desires. The owner may not, however, so dispose of his land or goods as to infringe the right of another persons and a disposition of property is not sustainable if it necessarily accomplishes a fraudulent results. The principle underlying the law of fraudulent conveyances is that the creditor has a claim upon the property of his debtor, constituting a fund from which the debt should be paid, and that the debtor may not ignore the right or equity of his creditors to be paid out of it. Consequently, if a debtor exceeds legitimate authority over his property by disposing of it with intent to delay or defraud his creditors such disposition is deemed to be inequitable and subject to being set aside. Such a transaction is, by definition, a ⊥292 fraudulent transfer or conveyance. A fraudulent conveyance, or, more correctly, a conveyance in fraud of creditors, may generally be defined as a transaction by means of which the owner of real or personal property has sought to place the land or goods beyond the reach of his creditors, or which operates to the prejudice of their legal or equitable rights, or a conveyance which operates to the prejudice of the legal or equitable right of other persons, including subsequent purchasers. Under the Uniform Fraudulent Conveyance.
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> 2. 37 Am. Jur. 2d 695 Fraudulent Conveyances § 5. A very

> general test or criterion as to the character of a conveyance or transfer by a debtor is whether it operates to diminish his assets or to prejudice the rights of creditors. The law is based upon the theory that the assets or resources of the debtor constitute a fund out of which the creditors have a right to be paid; and within the purview thereof is any business affair which diverts the debtor's assets from payment of his debts, or which places beyond the reach of creditors property from which their claims might otherwise be satisfied.

10. The Court points out that prior to the commencement of the instant action some 90 days ago Republic was invited to join as Intervenor having an acknowledged public interest in seeing a successful conclusion to the action. The Republic elected not to do so but to proceed on its own.

11. It now claims that by virtue of 21 TTC § 1, *et seq.*, it may abrogate the provisions of Article 7 of Exhibit A, and Article 1 of Attachment 2, to the Stipulation for Judgment executed by and between TTPI and the State of Airai, and the Republic of Palau and the State of Airai, respectively, in Civ. Act. No. 72-79, dated September, 7, 1983.

12. The Republic of Palau admittedly does not have title to the real property upon which the Terminal Building is sited, and the Court fails to find any argument sufficiently persuasive of the fact that it has better right to claim same than does the State of Airai. At least the latter has two (2) signed agreements executed by both the High Commissioner and the President of the Republic of Palau giving it permission to do what it did, and the ⊥293 Republic of Palau has failed to adduce any valid reason as to why the State of Airai should now be excluded from this right and the Republic substituted in its place.

13. In answer to the Republic of Palau contention that the claims of the parties to this action are speculative, the Court points to the fact that there is before the Court sufficient documentation to establish justiciable claims and evidence of non payment of the same which, if accepted at face value, would indicate a probable inability or unwillingness of Seibu to meet its obligations to the parties Plaintiff herein in the event a judgment be rendered against it. That is the current Opinion of the Court based upon six (6) weeks of trial in the current case and the claim of the Republic that this is "speculation" seems to the Court to be a somewhat hollow assertion based upon a lack of knowledge of the facts in evidence before the Court.

14. The Courts points out one misstatement appearing in the Republic's Application. "All to be credited against the amount to be determined" implies an understanding that the money due Seibu will be devoted to the payment of creditors. A reading of the subject Agreement however belies that fact as the

agreement make no reference whatsoever to the satisfaction of the claims of creditors.

15. The Government suggests that enforcement of creditors rights prior to the entry of judgment liquidating the amount of the claim is improper and "smacks of pre-judgment attachment". Counsel's attention is directed to:

> 3. *Stone v. Farber*, 263 P.2d 159 (Okl.)(1953) "any conveyance of real estate, made without a fair and valuable consideration, is void as against all parties to whom the maker of the conveyance is indebted or under any legal liability. This is true regardless of whether or not the creditor has reduced his claim to judgment and irrespective of fraudulent intent or insolvency of the maker at the time of conveyance."
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> 4. *Rice v. Schubert*, 226 P.2d 50, 101 Cal. Rptr 638 (1051). "It is not necessary that the claim be first reduced to judgment before a fraudulent conveyance can be attacked. The "interest" in the property that is being determined in the instant action is not that of the plaintiff but ⊥294 that of the Schuberts. The effect of a judgment would be to revest the title to the property involved in the debtor."

16. Based upon testimony and statements made during the course of this trial to-date, it appears that, on the strength of the Stipulated Judgment in the Condemnation Action certain commitments with regard to commercial use and activity within the Terminal Building were made. To permit Republic of Palau to now abrogate these agreements and enter into long term agreements with others without the knowledge or concurrence of those so involved may well prove legally hazardous to them. The Court has no wish to perpetuate the airport controversy by creating more lawsuits.

17. Looking at the application from the aspect of its merits, we note it is devoted exclusively to pointing out wherein the Court is purportedly in error. It fails entirely to address the equitable concern of the Court as to how best to protect the interest of creditors who perforce are looking to recover from a Japanese corporation with assets in Palau limited to the Terminal Building revenue (and possibly some interest of Seibu as alter ego of Masao Nishizono in the Grace Hotel), and this to the Court seems callous and irresponsible on the part of the Government. The Government, it seems, simply wishes to assume the benefits of a completed (or relatively so) Terminal Building without any liability for the cost thereof to those who furnished materials and expended labor in its construction. Aside from the claim of the Court's "Pure Error," the only reason given is that the Republic cannot induce prospective tenants to enter into lease contracts with it because of the current unsettled status of the Terminal Building

and the claims against it. There are no affidavits to establish this fact -- no proposed form of lease -- and, more surprisingly, pre-supposes that the Republic has the right to become the Terminal Building landlord without ever presenting evidence to support it's position.

18. Counsel for the Government suggests that unless the Stay is granted the Government may consider "wasting the present Terminal Building and constructing its own in lieu structure. Be that fact or fancy, it is a suggestion made in poor taste and worse economics. To paraphrase, it "smacks" of intimidation.

19. We point out further that Trial of this matter ⊥295 resumes on February 3, 1986. Less than 60 days hence. It should conclude within two to three weeks following its resumption. The Court's Order will follow closely thereafter. It is quite probable that an Appeal will be taken by one or more aggrieved parties. It is believed however that the judgment of the Trial Court will at least establish a formula for a resolution of the issues which in turn should provide all parties with a reasonable basis for solving the problems which will beset the operational functions of the Airport facility. The Court finds little prejudice accruing to the Republic should it be required to await that decision, but, to the contrary, irreparable injury to the creditors should the Court reverse its position and restore the Assignment Agreement to full force and effect.

20. The Court understands the need to keep the Terminal Building open and functioning--to make long term arrangements for making it self-supporting -- to have it under the supervision of some government authority with proper Police Power. But this is not what the Republic of Palau is suggesting. While philosophically the Court espouses the idea of a strong central government as intended by Articles VI and XI of the Constitution of the Republic, it cannot accept the proposition that the Federal Government may intentionally, under the guise of sovereignty, ignore the sanctity of the contract and expropriate property upon its own terms. The act of entering into agreement with Seibu is an acknowledgment of the validity of the Stipulated Judgment, yet the Government would by its Agreement abrogate that Judgment and cut-off the rights of those who, acting under the authority of the Judgment, initiated the transaction of which the Republic now seeks to advantage itself at the expense of others. The Court is not persuaded that there is any reasonable basis for it to re-hear itself - if it must speculate, it is entitled to indulge the presumption that its judgment is correct rather than erroneous, and that to reverse itself is not only beyond its jurisdiction, but, a usurpation of the Appellate function.

The Application for Stay is Denied.