

**Hirji et al. v. Scavetta et al.**

**[Indexed as: Hirji v. Scavetta]**

15 O.R. (3d) 371  
[1993] O.J. No. 2546  
Action No. 40656/89

**Ontario Court (General Division),  
McGarry J.**

October 27, 1993

*Debtor and creditor — Fraudulent conveyances — Judgment debtor purchasing property "in trust" — Judgment debtor conveying property to spouse "in trust" — Original trust a sham to avoid claims of creditors — Conveyance to spouse a fraudulent conveyance — Corroborative evidence of bona fides of impugned conveyance should be offered if normally available — Fraudulent Conveyances Act, R.S.O. 1980, c. 176, s. 2.*

In 1980, the plaintiffs obtained a judgment for in excess of \$110,000 against the defendant RS, and the plaintiffs registered executions against him. In 1988, RS purchased, in trust, a property in Etobicoke, the subject property. In April 1989, RS, in trust, conveyed the subject property, in trust, to his wife, the defendant PS, who sold the subject property a few months later. Because of the outstanding executions against RS, the proceeds of sale were paid into court, although RS and PS alleged that the subject property was always hers and it was through inadvertence and contrary to her instructions that the property had been registered in RS's name, in trust. These allegations, however, were not supported by the lawyer who had acted on the original purchase, and PS had never filed income tax returns about the subject property. RS's allegations were also inconsistent with representations about ownership that he had made to his banker. The representations were made to obtain financing to construct a home on the subject premises, but RS stated that he had lied to his banker since banks do not lend money to women. The plaintiffs took the position that the trust arrangement was a sham set up by RS to avoid creditors. They sued for a declaration that RS was the equitable owner of the subject property and that the transfer from RS to PS was a fraudulent conveyance.

**Held**, judgment should be granted to the plaintiffs.

It was a salutary rule that when creditors impeach a conveyance between near relatives as a fraudulent conveyance, corroborative evidence of the bona fides of the transaction should be given where it normally would be available. Here there was no corroborative evidence, the evidence of the defendants and their witnesses could not be relied upon, and there was evidence contrary to their position. Suspicious circumstances combined with a close relationship between the debtor RS and the grantee PS of the conveyance established a prima facie case, and the defendants had not met the onus on them of showing that the transactions were not fraudulent. Notwithstanding the use of the words "in trust", RS was the beneficial owner as confirmed by, among other things, the representations he made to the bank that he was owner.

**Cases referred to**

Dougmor Realty Holdings Ltd. (Re), [1967] 1 O.R. 66, 59 D.L.R. (2d) 432, 10 C.B.R. (N.S.) 141

(H.C.J.) [revd on other grounds [1968] 1 O.R. 61, 65 D.L.R. (2d) 419, 11 C.B.R. (N.S.) 153 (C.A.)];  
Koop v. Smith (1915), 51 S.C.R. 554, 25 D.L.R. 355, 8 W.W.R. 1203

### **Statutes referred to**

Fraudulent Conveyances Act, R.S.O. 1980, c. 176, s. 2 -- now R.S.O. 1990, c. F.29

ACTION to set aside a conveyance as a fraudulent conveyance under the Fraudulent Conveyances Act, R.S.O. 1980, c. 176, s. 2.

K. Landy and S. Marr, for plaintiffs.

D. Conrad, for defendant, Palma Scavetta

Rocco Scavetta in person, defendant.

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**MCGARRY J.:** — In this matter the plaintiffs claim:

- a) a declaration that a transfer of land from Rocco Scavetta ("Rocco") in trust, Scavetta is fraudulent and void as against the plaintiffs;
- b) a declaration that Rocco has an equitable and beneficial and exigible interest in the land described hereafter to which the plaintiffs' execution attaches;
- c) an order that the monies paid into court pursuant to an order of August 30, 1989 be paid out to the plaintiffs;
- d) lastly that their costs of the action be paid on a solicitor-and-client basis.

The plaintiffs were granted a judgment on February 26, 1980 whereby the defendant Rocco was to pay the sum of \$110,249.62 together with interest at the rate of 15 per cent per annum plus costs on a solicitor-and-client basis in the sum of \$24,149.14 together with interest at the rate of 15 per cent. Payments have been made from time to time on the judgment. The total amount outstanding as of January 15, 1989 being in the sum of \$134,233.39. Pursuant to the terms of the judgment executions were registered against Rocco, Execution No. 16426/ 82 and Execution No. 12422/80 which were renewed as Execution No. 11324/88 and 1973/86 respectively.

On October 15, 1988 the defendant Rocco purchased certain premises more particularly described as:

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the City of Etobicoke, (formerly in the Borough of Etobicoke) in the Municipality of Metropolitan Toronto and being composed of part of Lot 8, Concession 5, Colonel Smith's tract in the said City which may be more particularly described as follows:

PREMISING that the southerly limit of Bloor Street west has a bearing of north 72 degrees 24 minutes east and relating all bearings herein thereto.

COMMENCING at an iron bar planted at the northwest angle of the said Lot 8;

THENCE southerly along the westerly limit of the said Lot 8 a distance of 10 feet more or less to the southerly limit of Bloor Street West as widened, being the place of beginning;

THENCE continuing southerly along the westerly limited of the said Lot 8, 165 feet to a point;  
THENCE on a course north 72 degrees 24 minutes east 61.5 feet to an iron bar planted;  
THENCE north 17 degrees 38 minutes 30 seconds west 164.94 feet to an iron bar planted in the southerly limit of Bloor Street as widened;  
THENCE south 72 degrees 24 minutes west along the southerly limit of Bloor Street as widened 61.25 feet more or less to the place of beginning.  
As described in Instrument Number Etobicoke 443201.

The above are hereinafter referred to as the "Bloor Street Premises". The said Bloor Street Premises were purchased from John Di Iorio and Paul Di Iorio by the defendant Rocco Scavetta in trust, and the deed was registered in the Registry Office by Instrument No. TB 523391 dated July 15, 1988.

On or about July 15, 1988 Rocco mortgaged the premises pursuant to a mortgage between Rocco Scavetta in trust as mortgagor and Robert Henderson et al. as mortgagees.

On December 22, 1988 Rocco entered into a subsequent mortgage with respect to the Bloor Street Premises pursuant to a mortgage between Rocco in trust as mortgagor and Toronto Dominion Bank as mortgagee. The said mortgage being registered as Instrument No. TB 571250.

On or about April 4, 1989, the defendant Rocco purported to assign the premises to the defendant Palma ("Palma") by way of deed from Rocco Scavetta, in trust to Palma Scavetta, in trust registered under instrument TB 592008.

By deed of conveyance TB 641116 the properties were sold on October 12, 1989. At that time the solicitor for the purchaser requisitioned the outstanding executions registered against Rocco and as a result the monies from the sale of the premises in sum of \$145,000 were paid into court pending the outcome of this case.

Subsequently, pursuant to a notice of motion an affidavit of Palma was filed whereby she stated: "[W]hen this property was acquired I put in all monies and instructed my lawyers that this be recorded in my name. Through inadvertence my husband's name in trust was recorded as the purchaser of the property." Pursuant to the affidavit of Rocco the defendant stated: "I am registered on title as owner of the property know municipally as 3973 Bloor Street West in Etobicoke, Ontario . . . when it was purchased the property was to be registered in my wife's name."

In his evidence the solicitor for the defendants, in the spring of 1988, a Mr. Harry Erlich stated that he had been retained with respect to the original acquisition and his instructions by way of written direction were to register the deed in favour of Rocco Scavetta in trust. Mr. Erlich also acted for the mortgagees being Henderson et al. and Rocco signed an acknowledgement and direction to the effect that Mr. Erlich was acting as solicitor for the mortgagee only and that he was advised to obtain independent legal advice with respect to the transaction but he waived his right so to do. It would appear from all the evidence that Rocco did not receive any independent legal advice in this respect.

Rocco approached the Toronto Dominion Bank to provide financing with respect to the construction of the home on the Bloor Street Premises and dealt with a Mr. Thomas Fullerton. The bank file contained in ex. 1 commencing at p. 56 describes Rocco as the mortgagor in his application for personal credit. He stated that he had a net worth in the sum of \$407,500. He further stated to the bank that he had purchased two properties being 31 Elmhurst Drive, Etobicoke which he planned to sell and 2606 Whaley Drive, Mississauga which he was building as his principal residence. This credit information

was provided to the bank as of February 23, 1988. Subsequent to signing the offer to purchase for the Bloor Street Premises, Rocco attended at the bank and requested a letter to be directed to HUDAC and Mr. Fullerton advised as of July 6, 1988 that the bank was "presently financing the construction of a home for Mr. Scavetta for which we have established a line of credit in the low six figure range". Further, as of November 18, 1988, the bank files would indicate that:

Mr. Scavetta has operated as a real estate agent/developer since 1982. In February we assisted Mr. Scavetta with the building of two new homes one of which he sold and the second he moved into as his personal residence.

Mr. Scavetta and his real estate associate Mrs. Alia Ahmed have purchased two properties 3973 Bloor Street West in Etobicoke, the purchase price \$229,900 and 3515 Joan Drive in Mississauga, the purchase price \$208,000 upon which they will build new homes . . .

We have requested to substitute \$140,000 collateral mortgage on Whaley and a \$200,000 second collateral mortgage on Bloor Street for \$360,000. While we would be giving up security on the personal residence, the fact that we are improving our position to first on Bloor compensates for this and makes our position stronger.

In preparation for closing a clerk at Mr. Erlich's office obtained a sheriff's certificate which showed two outstanding executions against Rocco which remained in place after closing. He stated "no one in the office did anything about it". Mr. Erlich had been away on vacation and upon his return he advised his insurers of the problem and instructed Rocco to retain new solicitors. Rocco retained a Mr. Anthony Klemencic.

Mr. Klemencic stated that he was approached by Rocco with respect to placing a mortgage on the Bloor Street Premises and additional lands on Joan Drive. In due course he registered two mortgages being a collateral mortgage on the above properties and further a mortgage on 2606 Whaley Drive the residence of both Rocco and Palma. The mortgages acted as security either by way of collateral or direct security to a construction loan to develop the Bloor Street Premises. He advised Mr. Fullerton of the executions; however, the Bank advanced funds and the problems with the executions only became evident when the property was sold, resulting in the proceeds being paid into court.

As of August 8, 1988 Ms. Alia Ahmed executed documents at the Toronto Dominion Bank to indicate that she was the sole owner of a proprietorship known as AIROC and the documentation permitted both Ms. Ahmed and Rocco to sign on behalf of the proprietorship. Subsequently, Mr. Klemencic incorporated a company known as AIROC Construction Limited and advised that the shareholdings were divided on the basis of 30 per cent to be held by Ms. Ahmed and 70 per cent by Palma. It is to be noted that the corporate documentation was never produced to the court in support of this.

The home on the Bloor Street Premises was constructed with plans being prepared by Ms. Ahmed and an architect. I find that the construction was supervised largely by Rocco and Ahmed with Rocco attending on a daily basis and further that he signed all of the cheques whereby the trades were paid.

The defendant Rocco acted on his own behalf and testified to the effect that the Bloor Street Premises was his wife's property and that he signed on her behalf because she was in Italy at the time of the closing, this included the execution of a mortgage document although he did not have her power of attorney. He stated that Ms. Ahmed was his wife's partner and that he received no remuneration for the Bloor Street Premises and that he wished all of the profits to go to his wife as she had loaned him the sum of \$450,000 which he had lost through investments in Florida real estate. Rocco stated that he had signed the direction involving the trust documentation at Mr. Erlich's office with the intent that his wife would remain the beneficiary of the trust. He further stated that he attended at the Bank and provided the banker with whatever information he requested and acknowledged that he had lied to the banker. He

claimed that he had to be the borrower as banks do not loan money to women. He also acknowledged that he had lied in his examinations as a judgment debtor. He further acknowledged that he was a real estate expert and in his evidence demonstrated to me that he was fully aware of all aspects of real estate development and financing.

The defendant Rocco was involved in numerous real estate transactions whereby he purchased the properties in trust with Ms. Ahmed acting as a co-real estate agent, this was confirmed by a prior employer, Mr. Allan Brown. The defendant Rocco acknowledged that he did not always advise the vendor of his position as an interested party in the real estate transactions. Counsel for the defendant Palma provided the court with a book of exhibits with respect to eight properties whereby the defendant Palma was stated to be the grantee in person or in trust and it was acknowledged by the defendant Palma that she had purchased these properties through her husband as the real estate agent.

The defendant Palma gave evidence to the effect that she was the beneficiary of the trust with respect to the Bloor Street Premises and that she was entitled to the proceeds of the sale as she had provided 2606 Whaley Drive as security and as she was named in the trust agreement as the beneficiary. She stated that she trusted the defendant Rocco and accordingly was content that he continue to sign documents on her behalf and to have the deed registered to him in trust. She was unable to explain why she would have claimed in an affidavit that the property was improperly registered. However, I attribute this to confusion rather than dishonesty.

The defendant Palma stated that she had received \$90,000 from her wealthy family in Italy in the 70s and it was the result of these funds and subsequent acquisitions and sale of real estate that she should be considered as the true owner of the Bloor Street Premises. Further, that she was a partner with Ms. Ahmed and accordingly should receive a portion of the profits on the sale of the subject premises. She further states that she knew Mr. Fullerton of the Toronto Dominion Bank and was aware of the banking arrangements.

She alleges that she loaned her husband the sum of \$450,000 to invest in Florida and stated that this occurred between 1981 and 1983 and at other times indicated the funds were advanced as the result of mortgaging properties owned by her in the years 1987 and 1988. She also advised that she used her maiden name to buy properties but denied that this was attempt to disguise the true owner.

It would appear from the defendant Palma's evidence that she has not filed an income tax return nor has she earned any income other than through rentals. The defendant Palma stated that as the partner of Ms. Ahmed she would drive to the Bloor Street West property; however, she acknowledged that she was not familiar with construction other than what she may have learned through her husband. She stated that the corporate records were held by Ms. Ahmed although Ms. Ahmed indicated that they were at the Scavetta residence.

The defendant Palma acknowledged that she had no documentation with respect to the proceeds of the sale of any properties nor did she have any reporting letters, bank records, accounting, tax or any other form of evidence which would attempt to establish that she in fact traded in properties other than copies of documents to be found in the registry office.

Tony Scavetta testified as the son of the defendants and confirmed that monies were lost through Florida investments. He stated that his mother always had money as she was able to scrounge here and there and that his father would not share either knowledge or the proceeds of his earnings.

Ms. Ahmed testified that she invested \$75,000 in AIROC and that the name was not a combination of

her first name and that of the defendant Rocco but was a combination of the words Al and Roc standing for the Rock. She stated that the incorporation was jointly held by herself and Palma and that the defendant Rocco signed all of the trade payable cheques and that she had signing authority provided she co-signed with Palma as she felt financial matters can ruin friendships.

The plaintiffs allege that the trust arrangement is a sham and was set up by the defendant Rocco to avoid his creditors with the defendant Palma acting as a straw person. The plaintiffs rely on the fact that the defendant Palma has never reported income nor capital gains nor rental income whereas the defendant Rocco reported rental income and expense and further that Rocco provided all of the information to the Toronto Dominion Bank and held himself out as the owner of various properties. In addition the defendant Rocco acknowledged that he would use someone else's name in order to pocket the profits from a transaction.

The plaintiff's claim that the declaration of trust and instructions to Mr. Erlich were clear and that there was no error as claimed by the defendants in their materials.

Counsel advised and it was not refuted that the defendant Rocco was involved in a prior action whereby Mr. Justice Osborne decided on March 5, 1982 that a conveyance to the children of the defendant Rocco was a fraudulent conveyance and that I can consider the current actions of the defendant Rocco in this light.

The plaintiffs claim that the defendant Palma has provided no corroboration for her testimony as I have previously outlined. Further, they query, should the declaration of trust be valid then, why swear in other proceedings that it was in error? The plaintiffs claim that the document was not in error and the correcting deed was executed before the defendant's solicitor who had acted for them from 1989 to 1993. The plaintiffs wish me to draw an adverse conclusion as a result of Mr. Jean Ghaliounqui, the solicitor for the defendants, not testifying as he had represented them from 1989 to 1993.

Taking into consideration all of the evidence I am satisfied that I cannot rely upon the evidence of either of the defendants nor the evidence of Alia Ahmed. They were either admitted liars or clearly contrived their evidence to support the defendants' position.

Having so decided I must now consider whether s. 2 of the Fraudulent Conveyances Act, R.S.O. 1980, c. 176, applies wherein it states:

2. Every conveyance of real property or personal property and every bond, suit, judgment and execution heretofore or hereafter made with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures are void as against such persons and their assigns.

Counsel for the plaintiffs state that there is extensive evidence whereby I can be satisfied that the defendants, in particular Rocco, was involved in fraudulent dealings in that he stated to the bank that he had assets and now denies the same; that he acknowledges he lied to the bank; he acknowledges he lied under his examination as a judgment debtor and that he is a sophisticated real estate developer who misused the trust arrangement.

I was referred to *Koop v. Smith* (1915), 51 S.C.R. 554 at p. 555, 25 D.L.R. 355, wherein the court stated:

. . . the rule laid down by the courts of Ontario with regard to assignments made between

near relations and impeached by the creditors of the assignor as fraudulent is a salutary one, namely, that where it is accessible some corroborative evidence of the bona fides of the transaction should be given.

In this case there is no evidence of corroboration of the bona fides and to the extent that I examine the evidence related to the banking documentation I am satisfied that it is to the contrary. Further, the total lack of corroborative evidence when it would normally be available persuades me further that the Bloor Street Premises were in fact held for the benefit of the defendant Rocco. Considering the test set forth [O.R. & D.L.R. headnote] in *Re Dougmor Realty Holdings Ltd.*, [1967] 1 O.R. 66, 59 D.L.R. (2d) 432 (H.C.J.):

Suspicious circumstances coupled with the close relationship between the transferee and the debtor make a sufficient prima facie case of fraud. From that point, the burden of producing credible evidence substantiating the transaction is upon those who set it up. If substantial valuable consideration is truly given for a transfer of lands, there must be better evidence of it than the recitals in the deed and the land transfer tax affidavit.

In this case I am satisfied that the defendants have not met the onus placed upon them and accordingly I am satisfied beyond the balance of probabilities that the transaction was fraudulent in nature. The defendant Rocco who is very knowledgeable in real estate matters has attempted to provide a shield between his creditors and his assets over the past decade. In these circumstances, notwithstanding the use of the words "in trust", I am satisfied that he was in fact the beneficial and controlling owner of the Bloor Street Premises. This is confirmed by his comments to the Toronto Dominion Bank and various other documents wherein he is stated to be the owner.

At the commencement of trial counsel for the plaintiffs indicated that they would be satisfied with respect to a judgment whereby the monies paid into court pursuant to the order of Master Sandler dated August 30, 1989 be paid out to the plaintiffs and I so order.

In light of the nature of this action I am satisfied that costs should be awarded to the plaintiffs on a solicitor-and-client basis. Due to the defendant Rocco representing himself at trial I would ask that the parties arrange for a form of judgment to be provided to me upon review of my reasons.

Judgment accordingly.