

1 FOR PUBLICATION

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7 **IN THE SUPERIOR COURT**
8 **OF THE**
9 **COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

8

9 DANIEL J. SULLIVAN,)

10 Plaintiff,)

11 v.)

12 YVONNE I. TAROPE and JOSE T. TAROPE)
13 (98-1293D),)

14 Defendants.)

CIVIL ACTION NO. 98-1293D and
consolidated cases
(C.A. Nos. 98-1294B and 98-1295D)

15 _____)

15 DANIEL J. SULLIVAN,)

16 Plaintiff,)

17 v.)

18 MARIE JO ESPIRITU TAROPE and JOSE T.)
19 TAROPE (98-1294B),)

20 Defendants.)

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT

21 _____)

21 DANIEL J. SULLIVAN,)

22 Plaintiff,)

23 v.)

24 LANI LANE ESPIRITU TAROPE and JOSE)
25 T. TAROPE (98-1295D),)

26 Defendants.)

26 _____)

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1 **I. INTRODUCTION**

2 **THIS MATTER** came on for hearing on November 19, 2001, in Courtroom 205A at 10:00 a.m.
3 on Plaintiff’s Motion for Summary Judgment. Michael A. White, Esq. and Stephen J. Nutting, Esq.
4 appeared on behalf of Daniel J. Sullivan (“Plaintiff”). Pedro M. Atalig, Esq. appeared on behalf of all three
5 Defendants: Yvonne I. Tarope (“Yvonne”), Marie Jo Espiritu Tarope (“Marie Jo”), and Lani Lane Espiritu
6 Tarope (“Lani”) (collectively “Defendants”).¹ The Court, having reviewed the documents on file, having
7 heard the arguments of counsel, and being fully advised, now renders its decision.

8 **II. BACKGROUND**

9 In October 1990, Frances A. Mullins (“Frances”) filed for divorce against Jose T. Tarope (“Jose”),
10 in the Superior Court of the State of California, County of San Diego (“California Superior Court”). On
11 April 18, 1991, the California Superior Court entered a default judgment (“California Judgment”) granting
12 the divorce, effective June 28, 1991, and ordering child support payments in the amount of \$3591.00 per
13 month, commencing May 1, 1991. In 1996, Frances retained Plaintiff to collect child support in
14 accordance with the California Judgment. On December 19, 1996, the California Superior Court ordered
15 Jose to pay \$218,179.81 in attorney fees to Plaintiff. *See Francisca A. Tarope v. Jose T. Tarope*, DN.
16 61200 (Cal. Super. Ct. Dec. 19, 1996) (Order for Child Supp. Arrears, Interest and Penalty, Att’y Fees
17 and Costs) (“California Order”).²

18 On April 23, 1998, Plaintiff filed the California Order in the N.M.I. Superior Court as a Foreign
19 Judgment pursuant to the Uniform Enforcement of Foreign Judgments Act of 1994, 7 CMC §§ 4401, *et*
20 *seq.* *See Sullivan v. Tarope*, Civ. No. 98-0151 (N.M.I. Super. Ct. 1998). On May 6, 1998, Plaintiff
21 moved for an Order in Aid of Judgment and a hearing on the motion was heard on August 17, 1998. *See*
22 *Tr. of Proceedings on Pl.’s Mot. for an Order in Aid of J.* (“Trans.”). On June 4, 1998, the Court granted

23 _____
24 ¹ Jose T. Tarope had ten children: five children from his first wife, Catalina Igisomar, (Jose Jun Tarope, Jr.,
25 Yvonne, Lucy Igisomar Tarope, Lloyd Vincent Tarope, and Roy Eric Tarope); three children from his second wife,
26 Frances A. Mullins, (Cherilyn Argualas Tarope, Michelle Argualas Tarope, and Jose Argualas Tarope, Jr.); and two
daughters from his third wife, Marivic Tarope, (Lani and Mary Jo). (*See Tr. of Proceedings on Pl.’s Mot. for an Order*
in Aid of J. at 4 ¶¶ 18-25, 5 ¶¶ 1-6, 7 ¶¶ 12-17, 8 ¶¶ 14-22.)

27 ² The California Superior Court entered judgment against Jose as follows: \$301,266.20 as child support arrears
28 plus interest; \$135,093.42 in penalties pursuant to CAL. FAMILY CODE §§ 4720-4733; \$319.09 in costs; and \$218,179.81 in
attorney fees. *See California Order.* The California Order also stated that all amounts were to be paid to the Client Trust
Account of Daniel J. Sullivan. *Id.*

1 Plaintiff's Motion for a Writ of Execution on various properties, including: Tracts 21866-18, 21866-19,
2 and 21866-20. *See* Am. Writ of Execution of Nov. 30, 1998. On December 7, 1998, Plaintiff
3 filed three complaints against Jose and his three daughters: Yvonne, Mary Jo, and Lani. Plaintiff asked
4 the Court to set aside Jose's conveyance of his properties by deed of gift to each of them, as being
5 fraudulent and therefore null, void, or without effect. *See Sullivan v. Tarope*, Civ. No. 98-1293 (N.M.I.
6 Super. Ct.), *Sullivan v. Tarope*, Civ. No. 98-1294 (N.M.I. Super. Ct.), *Sullivan v. Tarope*, Civ. No.
7 98-1295 (N.M.I. Super. Ct.). In each complaint, Plaintiff alleged that Jose conveyed his property on
8 January 27, 1997, after the issuance of the California Order. On January 6, 1999, Defendants filed their
9 Answers. On April 16, 1999, the Court consolidated the three complaints for further proceedings.

10
11 On October 22, 1999, Plaintiff moved for Partial Summary Judgment on the issue of whether the
12 California Superior Court had jurisdiction over Jose when it entered the California Order ordering him to
13 pay child support. *See* Pl.'s Mot. for Partial Summ. J. On August 29, 2000, the Court ruled that the
14 California Superior Court had jurisdiction and granted Plaintiff's Motion for Partial Summary Judgment and
15 denied Defendant's Motion to Dismiss. *See Sullivan v. Tarope*, Civ. No. 98-1293 (N.M.I. Super. Ct.
16 Aug. 29, 2000) ([Unpublished] Order Re Pl.'s Mot. for Summ. J. and Def.'s Mot. to Dismiss).

17 On September 17, 2001, Plaintiff moved for summary judgment and asked the Court to declare
18 the deeds of gift from Jose to his three children void, thus permitting the properties to be subject to
19 execution. *See* Pl.'s Mem. of Law in Supp. of Mot. for Summ. J. On September 28, 2001, Defendants
20 opposed the motion. *See* Defs.' Opp'n to Mot. for Summ. J. The Court heard oral arguments on
21 Plaintiff's motion on November 19, 2001.

22 **III. UNDISPUTED FACTS**

23 The Court finds that there is no genuine issue as to the following facts:

- 24 1. In 1995, Jose suffered a heart attack. *See* Decl. of Jose Tarope ("Jose's Decl.").
- 25 2. On October 2, 1996, Jose wrote a letter to his former wife and his three children who
26 were living in California at that time. *See* Pl.'s Memo. in Supp. of Mot. for Partial Summ. J., Ex. E ("Letter
27 Ex. E"). In this letter, Jose explained his inability to pay Plaintiff's fees, his poor health condition, and his
28 love and affection towards his children. *Id.*

1 3. On December 19, 1996, the California Superior Court ordered Jose to pay attorney
2 fees to Plaintiff. *See* Pl.'s Mot. for Summ. J. at 2; California Order.

3 4. On January 7, 1997, eighteen days after the entry of the California Order, Jose conveyed
4 his properties to Lani, Mary Jo, and Yvonne for his natural love and affection. *See* Pl.'s Mot. for Summ.
5 J. Ex. 2.

6 5. Without any consideration, Jose deeded Tract 22628-E-1 to Lani, who was about three
7 years old at the time of the conveyance. *See* Trans. at 9 ¶¶ 6-14, 41 ¶¶ 4-7. At the time of the Order in
8 Aid of Judgment hearing, Jose continued to live in the house on said property, and continued to maintain
9 possession and control over it, despite the conveyance to Lani. *See* Trans. at 10 ¶¶ 14-23, 39 ¶¶ 18-23,
10 41 ¶¶ 8-10.

11 6. Without any consideration, Jose deeded Tract 1691-2 to Mary Jo, who was about five
12 years old at the time of the conveyance. *See* Pl.'s Mot. for Summ. J. Ex. 3; Trans. at 9 ¶¶ 2-5, 14 ¶¶ 1-
13 8, 39 ¶¶ 4-17. Prior to the transfer, Jose did business on the property as Chemiboy Enterprises, which
14 also passed to his daughter with the property. *See* Trans. at 13 ¶¶ 11-15, 14 ¶¶ 1-4. At the time of the
15 Order in Aid of Judgment hearing, the business was leased out for \$500.00 a month. Furthermore, Jose
16 offset one month's rental payment in consideration for the payor's service in repairing Jose's car. *Id.* at
17 28 ¶¶ 7-16. There were also four rooms at the back of the business that Jose rented out. *Id.* at 19 ¶¶ 16-
18 25, 20 ¶¶ 2-4, 36 ¶¶ 7-19. In addition, there was a third building on the property that Jose used to operate
19 as a fast-food and pool hall. *Id.* at 36 ¶¶ 14-25, 37 ¶¶ 1-24.

20 7. Jose also deeded Tract 22886 to his daughter Yvonne, who was over the age of eighteen,
21 without any consideration. *See* Pl.'s Mot. for Summ. J. Ex. 4; Trans. at 43 ¶¶ 2-6. In March 1998, Jose
22 leased the property, under his name, for \$500.00 a month to be used as a barracks. *See* Trans. at 43 ¶¶
23 15-25, 44 ¶¶ 12-17, 45 ¶¶ 17-19. At the time of the Order in Aid of Judgment hearing, Jose continued
24 to collect the rental payments from said lease. *Id.* at 45 ¶¶ 9-15.

25 8. At the time of conveyance, Jose owed at least \$520,000.00 to different individuals,
26 including Frances, for back child support and Plaintiff for attorney fees. *See* Trans. at 64 ¶¶ 2-8. Jose's
27 conveyance of his properties to his three daughters left him insolvent. He was left without any land and he
28 had no money in the bank. *Id.* at 60 ¶¶ 5-6, 63 ¶¶ 17-18. Furthermore, he had no assets other than his

1 personal things in his house. *Id.* at 28-34. Both he and his wife were unemployed. *Id.* at 11 ¶¶ 12-16.
2 At the time of the hearing, Jose was applying for food stamps. *Id.* at 57 ¶¶ 10-15. During this same
3 period, he received no income from Social Security or retirement. *Id.* at 12 ¶¶ 14-17, 23 ¶¶ 1-2. The only
4 income Jose had was from the rental payments from the properties he purportedly conveyed to his children.
5 *Id.* at 17 ¶¶ 14-25, 18 ¶¶ 1-9. In fact, Jose did not have enough money for food and clothing for his
6 family. *Id.* at 57 ¶¶ 8-12, 59 ¶¶ 24-25, 60 ¶ 1.

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8 **IV. QUESTION PRESENTED**

9 Whether the Court should void Defendant’s conveyances of Lots 22628-E-1, 1691-2, and 22886
10 to his three daughters, where Defendant had constructive notice of the default judgment in favor of Plaintiff.

11 **V. ANALYSIS**

12 **A. Summary Judgment Standard**

13 The standard for summary judgment is set forth in Rule 56 of the Commonwealth Rules of Civil
14 Procedure. Rule 56(a) provides:

15 [a] party seeking to recover upon a claim . . . may . . . move with or without supporting
16 affidavits for a summary judgment in the party’s favor upon all or any part thereof.

17 Com. R. Civ. P. 56(a). Rule 56(c) continues:

18 [t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to
19 interrogatories, and admissions on file, together with the affidavits, if any, show that there
is no genuine issue as to any material fact and that the moving party is entitled to judgment
as a matter of law.

20 Com. R. Civ. P. 56(c). Once a movant for summary judgment has shown that no genuine issue of material
21 fact exists, the burden shifts to the opponent to show that such an issue does exist. *Riley v. Pub. Sch. Sys.*,
22 4 N.M.I. 85, 89 (1994). The opponent, by affidavit or otherwise, must set forth specific facts showing a
23 genuine issue for trial. *Id.* A fact in contention is considered material only if its determination may affect
24 the outcome of the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49, 106 S. Ct. 2505,
25 2510, 91 L. Ed. 2d 202, 212 (1986). The party opposing summary judgment must show the existence
26 of a genuine dispute of material fact in the context of any substantive evidentiary burdens of proof that
27 would apply at a trial on the merits. *Id.* at 253, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214; *see also Romano*
28 *v. Merrill Lynch, Pierce, Fenner & Smith*, 834 F.2d 523, 527 (5th Cir. 1987); *Idaho v. Hodel*, 814

1 F.2d 1288, 1292-93 (9th Cir. 1987). “Thus, in ruling on a motion for summary judgment, the judge must
2 view the evidence presented through the prism of the substantive evidentiary burden.” *Anderson*, 477 U.S.
3 at 254, 106 S. Ct. at 2513, 91 L. Ed. 2d at 215. Defendants cannot oppose summary judgment merely
4 by making conclusory statements or stating legal conclusions that plaintiffs have failed to state a claim upon
5 which relief can be granted.³ See *Gov’t of the N. Mariana Islands v. Micronesian Ins. Underwriters,*
6 *Inc.*, 2 CR 760, 770 (Trial Ct. 1986) (citing *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1195-96 (5th
7 Cir. 1986)). Defendants must substantiate the broad allegations of their answer with a “competent,
8 meaningful, or factual response which would necessitate a trial [on the issues presented], with the attendant
9 time and expense.” *Id.* at 771.

10 B. Affidavits Re “Partida” Stricken

11 Plaintiff moved for summary judgment, claiming that there are no genuine issues of material facts
12 in dispute. Plaintiff contends that Jose’s conveyances of all of his property to his children, without valuable
13 consideration, and without relinquishing possession and control over the properties, after the entry of the
14 California Order, constituted fraud upon Plaintiff. Defendants counter by averring that Jose’s conveyances
15 in 1997 were a “partida” and thus, summary judgment should be denied, as there are genuine issues of
16 material facts in dispute.

17 To shift the burden of proof to Defendants, Plaintiff, as the movant in a summary judgment motion,
18 need not support his motion with affidavits or similar materials that negate the opposing party’s claim, but
19 need only point out to the trial court the absence of evidence to support the nonmoving party’s claims.
20 Plaintiff asked the Court to consider that fact that Jose never raised the issue of “partida” in his letter to his
21 family prior to the conveyances, at the Order in Aid of Judgment hearing conducted in the N.M.I. Superior
22 Court, or anywhere in his pleadings, prior to filing his opposition to Plaintiff’s motion for summary judgment.
23 See Letter Ex. E; Trans. at 2. In addition, Plaintiff also argues that the statements in Jose’s and Yvonne’s
24 affidavits were nothing more than conclusory statements made without any supporting facts that Jose

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26 ³ See *Cabrera v. Heirs of De Castro*, 1 N.M.I. 172, 176-77 (1990) (holding that a party opposing a motion for
27 summary judgment cannot merely make conclusive statements); see also *Griggs-Ryan v. Smith*, 904 F.2d 112, 115 (1st
28 Cir. 1990) (holding that mere conclusions will not suffice); *Santos v. Santos*, 4 N.M.I. 206, 211 (1994) (holding that “merely
stating that it was his belief that he owned the land as the result of a partida did not create a factual dispute on the issue
of ownership”).

1 performed a “partida”. See Pl.’s Reply Mem. at 2-3. By showing that there is no evidence to support
2 Defendants’ claims, the burden shifts to Defendants to prove the existence of an element essential to their
3 claim that Jose conducted a “partida.”

4 Here, the only evidence Defendants presented were Jose’s and Yvonne’s affidavits in support of
5 Jose’s claim of “partida.” Commonwealth Rules of Civil Procedure 56 (e) sets the standard for affidavits,
6 and provides, in pertinent part: “[s]upporting and opposing affidavits shall be made on personal knowledge,
7 shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is
8 competent to testify to the matters stated therein.” Commonwealth case law has long held that the court
9 may strike an affidavit that does not comply with Rule 56(e). See *Gov’t of the N. Mariana Islands v.*
10 *Micronesian Ins. Underwriters, Inc.*, 2 CR 760, 763 (Trial Ct. 1986) (striking affidavit and granting
11 summary judgment where affidavit contradicted prior deposition statements of affiant and affidavit also not
12 relevant to dispositive issues); see also *Concepcion v. Am. Int’l Knitters Corp.*, 2 CR 939, 942 (Dist.
13 Ct. 1986) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254, 106 S. Ct. 2505, 2513, 91 L.
14 Ed. 2d 202, 215 (1986) (holding that “[t]here is no genuine issue of material fact if the evidence presented
15 in opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact to find for the
16 opponent by clear and convincing evidence”)).

17 In their affidavits, Jose and Yvonne made a general claim that Jose performed the Chamorro
18 custom of “partida,” but they failed to state any facts that a “partida” was performed in a manner consistent
19 with the law of “partida.” See Jose’s Decl.; Yvonne’s Decl.; see also *Pangelinan v. Tudela*, 1 CR 708
20 (Dist. Ct. App. Div. 1983). Jose stated in his affidavit, simply that “[d]ue to my ailing health in 1995, I
21 performed the Chamorro custom of ‘partida.’ I divided my lands as follows” See Jose’s Decl. ¶¶
22 8, 9. Yvonne stated in her affidavit, “[m]y father before giving me the deed of gift performed a ‘partida.’”
23 See Yvonne’s Decl. ¶ 4. The affidavits did not state the time, place, or family members present when the
24 “partida” was made. Both affidavits simply made general, conclusive statements that Jose conducted a
25 “partida” without any proper factual support. The Court, therefore, strikes Jose’s and Yvonne’s affidavits
26 pursuant to Com. R. Civ. P. 56(e). As such, in the absence of any factual evidence supporting Defendants’
27 claim of “partida,” the Court finds that Defendants failed to show that there are genuine issues of material
28 facts.

1 C. Defendants Conveyed Properties in Fraud of Creditors

2 The Court next addresses Plaintiff's claim that Jose's conveyances of Lots 22628-E-1, 1691-2,
3 and 22886 to his daughters were done to defraud creditors. As stated earlier, Plaintiff argues that Jose's
4 actions in conveying the properties to his children constituted a fraud upon Plaintiff. See Pl.'s Mot. for
5 Summ. J. at 7. Plaintiff further contends that such conveyances are subject to rescission and cancellation under
6 the common law doctrine of fraudulent conveyances: specifically, badges of fraud. *Id* at 11. On this issue,
7 Defendants argue that there is no need to apply the common law principle of fraudulent conveyances in this
8 case because the Commonwealth does not have a statute governing the transfer of real property in fraud of
9 creditors, and even if fraudulent conveyance was applied through the badges of fraud, Defendants' actions
10 did not give rise to the level of fraud contemplated by the common law. See Def.'s Opp'n at 2-4.

11 The Commonwealth has no statutory law regarding a transfer of real property in fraud of creditors.
12 In the absence of written law or local customary law to the contrary, the Court turns to the rules of the
13 common law, as expressed in the restatements of the law as approved by the American Law Institute, and
14 to the extent not so expressed, as generally understood and applied in the United States. See 7 CMC §
15 3401; *Trinity Ventures, Inc. v. Guerrero*, 1 N.M.I. 54, 61 (1990); *Ada v. K. Sadhwani's, Inc.*, 3 N.M.I.
16 303, 308 (1992); *Castro v. Hotel Nikko Saipan, Inc.*, 4 N.M.I. 268, 275 (1995), *appeal dismissed*, 96
17 F.3d 1259 (9th Cir. 1996).⁴ The Restatement provides, in pertinent part, "[a]n *inter vivos* donative transfer
18 of property, which property is not exempt from the claims of creditors of the donor, that leaves the donor
19 unable to meet the claims of creditors is subject to the statute in the controlling state on transfers in fraud of
20 creditors." See RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 34.3(1) (1992).

21 "The history of the law of fraudulent conveyances shows that, from the earliest times, transfers of
22 *personal* property in fraud of creditors have been deemed void at common law." *Ocklawaha River Farms*
23 *Co. v. Young*, 74 So. 644, 648 (Fla. 1917). A creditor is defined as one who has a claim, i.e., a right to
24 payment, "whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent,
25 matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." UNIF. FRAUDULENT

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⁴ With regards to Defendants' claim that the common law principle of fraudulent conveyances should not be
28 applied because the Commonwealth does not have such a statute, the Court finds that Defendants' claim is meritless.

1 TRANSFER ACT § 1(3)-(4) (1984). The principle underlying the common law was that, the creditor “had
2 a claim upon the property of his debtor constituting the fund from which the debt should be paid.” *Young*,
3 74 So. at 648. If the debtor, in disposing of his property, ignores the equitable right of his creditors to be
4 paid out of the property in his hands, with the intent to delay or defraud his creditor, such disposition is
5 deemed inequitable and void. *Id.* at 649.

6 The question of fraud involves the element of intent. *See In re Gafco, Inc. v. H.D.S. Mercantile*
7 *Corp.*, 263 N.Y.S. 2d 109, 114 (N.Y. Civ. Ct. 1965). Because it is difficult to look into a person’s mind
8 for purposes of ascertaining intent, it is often necessary to consider the circumstances surrounding the
9 assignment and to determine the intent from what he did or failed to do.⁵ *Id.* By reason of its nature, fraud
10 is usually very difficult to prove by direct evidence. *See Pergrem v. Smith*, 255 S.W.2d 42, 44 (Ky.
11 1953); *see also Battjes v. United States*, 172 F.2d. 1, 5 (6th Cir. 1949).

12 Surrounding circumstances which usually accompany an intent to hinder, delay or defraud creditors,
13 and from which fraud may be inferred are called “badges of fraud.” *See Timmer v. Pietrzyk*, 261 N.W.
14 313, 314 (Mich. 1935). The “term ‘badge of fraud’ means any fact tending to throw suspicion upon the
15 questioned transaction. It raises an inference that the conveyance was fraudulent, and throws upon the
16 parties to the transaction the burden of making a satisfactory explanation by more persuasive proof of good
17 faith than is ordinarily required.” *Leonardo v. Leonardo*, 251 F.2d 22, 26 (D.C. Cir.1958). *See also*
18 *United States v. Edwards*, 572 F. Supp. 1527 (D. Conn. 1983); *Pergrem*, 255 S.W.2d at 44; *Bentley*
19 *v. Caile*, 286 N.W. 163, 164 (Mich. 1939); *Payne v. Gilmore*, 382 P.2d 140 (Okla. 1963). Inadequacy
20 of consideration is a badge of fraud. *See Granger v. Granger*, 296 N.W. 288 (Mich. 1941); *Harris v.*
21 *Shaw*, 272 S.W.2d 53, 55 (Ark. 1954). The grantor’s continued possession of the property following
22 conveyance to another is also held to be a badge of fraud. *See Renn v. Renn*, 179 S.W.2d 657, 660 (Ark.
23 1944); *Godfrey v. City of Cochran*, 65 S.E.2d 605, 611 (Ga. 1951). Among the indicia, or badges, of
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25 ⁵ Generally, the only method of determining actual intent is by a consideration of the circumstances surrounding
26 the transaction. *Bentley v. Caile*, 286 N.W. 163, 164 (Mich. 1939). The court in *De West Realty Corp. v. I.R.S.*, 418 F.
27 Supp. 1274, 1279 (S.D.N.Y. 1976) discussed additional circumstances from which fraudulent intent would be inferred as
28 follows: “[actual intent to hinder, delay, or defraud] need not be proven by direct evidence but may be inferred (a) where
the transferor has knowledge of the creditor’s claim and knows that he is unable to pay it; (b) where the conveyance is
made without fair consideration; or (c) where the transfer is made to a related party (i.e., husband to wife, corporation
to stockholder).”

1 fraud, are: inadequacy of consideration, insolvency of transferor, relationship of the transferor and
2 transferee, pendency or threat of litigation, and transfer of the debtor's entire estate. *See Payne*, 382 P.2d
3 at 142-43. The court in *Sherry v. Ross*, 846 F. Supp. 1424, 1429 (D. Haw. 1994) identified eight badges
4 of fraud:

- 5 (1) The transferor is indebted or insolvent;
- 6 (2) The conveyance is general, i.e., the debtor's entire estate is diminished, thereby leaving
him insolvent;
- 7 (3) Consideration for the conveyance is absent;
- 8 (4) The conveyance is secret and concealed;
- 9 (5) The conveyance is made to a family member or to one of close relationship;
- 10 (6) The conveyance is made while a suit against the debtor is pending or threatening;
- 11 (7) The transferee takes the property in trust for the debtor;
- 12 (8) The debtor remains in possession, reserves the use and benefit, and deals with the
property as his own.

13 The application of any or all of these badges of fraud, however, depends upon whether a creditor
14 is a subsequent creditor or a pre-existing creditor. "Although a pre-existing creditor need only show badges
15 of fraud to establish an inference of fraud, a subsequent creditor must show fraud in fact or actual intent to
16 defraud." *Id.*; see also 37 AM. JUR. 2D *Fraudulent Conveyances* §§ 139, 143 (1968); *Lippi v. City*
17 *Bank*, 955 F.2d 599, 607 (9th Cir. 1992). Here, Plaintiff is clearly a pre-existing creditor. Jose's debt to
18 Plaintiff arose before the alleged fraudulent conveyance occurred. On December 19, 1996, the California
19 Superior Court ordered Jose to pay attorney fees to Plaintiff. *See California Order*. Eighteen days later,
20 on January 7, 1997, Jose conveyed his properties to his daughters. *See Ex. 2, 3, 4.*

21 The Court, therefore, finds that Plaintiff has the burden of showing only badges of fraud to prove
22 fraudulent conveyance. *See Benavente v. Marianas Pub. Land Corp.*, 2000 MP 13 ¶ 40 (holding that the
23 burden of proving fraud or misrepresentation is upon the party aggrieved thereby); *see also Sherry*, 846 F.
24 Supp. at 1428 (holding that utilization of the badges of fraud is favorable to the creditor, because by simply
25 showing the existence of badges of fraud, a creditor's burden is satisfied). Having determined that Plaintiff
26 needs only to prove badges of fraud, we now turn to the facts to decide whether any of the eight badges
27 listed in *Sherry* exist in this case, thereby casting suspicion about whether a fraudulent conveyance took
28 place. After a careful review of the record, the Court finds the presence of at least six badges of fraud in
the case at issue.

First, the transferor is indebted or insolvent. Jose owed at least \$520,000.00 to different individuals,

1 including child support and attorney fees, prior to conveying his properties to his daughters. *See* Trans. 64
2 ¶¶ 2-8. When Jose conveyed his properties to his daughters, he was left without any land. *See* Trans. 63
3 ¶¶ 17-18. He had no assets other than his personal things in his house. *Id.* at 28-34. As a result of the
4 transfer, Jose’s debts were greater than the assets reachable by his creditors, thereby, leaving him insolvent.⁶

5
6 Second, the conveyance is general, thereby causing the debtor’s entire estate to be diminished and
7 leaving him insolvent. *See* Ex. 2, 3, 4. As a result of the transfer, Jose was left without any land or assets
8 other than his personal things. *See* Trans. at 63 ¶¶ 17-18, 28-34. Jose and his wife are unemployed and
9 without any government assistance. *Id.* at 11 ¶¶ 12-16, 12 ¶¶ 14-17, 23 ¶¶ 1-2. The only income Jose
10 has is from the rental payments from the properties he purportedly conveyed to his children. *Id.* at 17 ¶¶
11 14-25, 18 ¶¶ 1-9. He has no other source of money. *Id.* at 60 ¶¶ 5-6, 26 ¶¶ 16-20. In fact, he does not
12 have enough money for food and clothing for his family, and is currently applying for food stamps. *Id.* at
13 57 ¶¶ 8-15, 59 ¶¶ 24-25, 60 ¶ 1.

14 Third, consideration for the conveyance is absent. Jose conveyed his properties for love and
15 affection and without any consideration. The love and affection of one’s children is insufficient to support
16 a conveyance as against the creditors of an insolvent grantor. *See Terre Haute Brewing Co., Inc. v.*
17 *Linder*, 7 N.W.2d 16, 18 (Iowa 1943); *see also Roddam v. Martin*, 235 So. 2d 654, 656 (Ala. 1970).
18 *See* Trans. at: 41 ¶¶ 4-7 and Ex. 2 (for Lani); 39 ¶¶ 10-11 and Ex. 3 (for Marie Jo); 43 ¶¶ 2-6 and Ex.
19 4 (for Yvonne).

20 Fourth, the conveyance was made to family members. Jose conveyed the properties to his three
21 daughters, two of which were minors. *See* Trans. at 9 ¶¶ 9-14, 9 ¶¶ 2-6; Ex. 2-4.

22 Fifth, the conveyance was made while a suit against the debtor was pending or threatening. The
23 conveyance was made just eighteen days after the California Superior Court issued the California Order
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25 ⁶ The Iowa Supreme Court in *First Nat’l Bank in Fairfield v. Frescoln Farms, Ltd.*, 430 N.W.2d 432, 436 (Iowa
26 1988) held that the test for insolvency is the test embodied in the common law, as well as the Uniform Fraudulent Transfer
27 Act, i.e., “an individual debtor is insolvent if the sum of the debtor’s debts is greater than all of the debtor’s assets at
28 fair valuation.” UNIF.FRAUDULENT TRANSFER ACT § 2(a) (1984). *See also*, UNIF.FRAUDULENT CONVEYANCE ACT § 2(1)
(1918); 37 AM. JUR. 2D *Fraudulent Conveyances* § 15 (1968) at 704-05); 37 C.J.S. *Fraudulent Conveyances* § 106 (1948)
at 945-47.; *United States v. Lombardi*, 924 F. Supp. 361, 363 (D. R.I. 1996) (holding that a person is insolvent if the sum
of his debts is greater than all of his assets and he is presumed insolvent if he fails to pay his debts as they become due).

1 against Jose. See California Order; Ex. 2-4.

2 Lastly, Jose, despite the conveyance, remains in complete control and possession of the properties,
3 and continues to receive benefits from these properties. Here, Jose conveyed Lot 22628-E-1 to Lani on
4 January 7, 1997 but he still lives on said property with his third wife. See Trans. 8 ¶¶ 14-15; Ex. 2. In fact,
5 when he was asked where he lived, he responded, “my house,” referring to Lot 22628-E-1. See Trans.
6 at 9 ¶¶ 15-17. In addition, Jose conveyed Lot 1691-2 to Marie Jo along with the business on it, Chemiboy
7 Enterprises. Id. at 13 ¶¶ 11-15, 14 ¶¶ 1-4. Though the business is being leased out for \$500.00 a month
8 payable to Marie Jo, Jose keeps the money. Id. at 14 ¶¶ 18-25, 15 ¶¶ 1-15, 27 ¶¶ 1-7. Jose even offset
9 one-month’s payment in consideration for the payer’s service in repairing Jose’s car. Id. at 28 ¶¶ 7-16.
10 Furthermore, there are four rooms at the back of the business that Jose rents out to his friends. Id. at 19
11 ¶¶ 23-24, 20 ¶¶ 2-4, 36 ¶¶ 7-19. There is also a second building on the property that Jose uses to operate
12 as a fast-food and pool hall. Id. at 36 ¶¶ 14-25, 37 ¶¶ 1-24. Moreover, on March 1998, one year and
13 fourteen months after conveying Lot 22886 to Yvonne, Jose leased out this property under his name for
14 \$500.00 a month to be used as a barracks. See Trans. at 43 ¶¶ 15-25, 44 ¶¶ 12-17, 45 ¶¶ 17-19. Jose
15 negotiated and signed the lease and continues to collect rental payments. Id. at 45 ¶¶ 9-15. Lastly, Jose
16 testified that he took it upon himself to give whatever he had to his daughter instead of paying the people he
17 owes. Id. at 39 ¶¶ 14-21.

18 The Court finds that the presence of even one of these “badges of fraud” may stamp the transaction
19 as fraudulent. See *Payne v. Gilmore*, 382 P.2d 140, 143 (Okla. 1963). Thus, a concurrence of several
20 of these badges will always make a strong case for fraud. See *United States v. Leggett*, 292 F.2d 423,
21 427 (6th Cir. 1961). As it is apparent that numerous “badges of fraud” arise from the undisputed facts
22 established by the record, these badges show that the conveyances were made to avoid creditors, such as
23 Plaintiff. The Court, therefore, finds that Jose conveyed his interests in all three properties to Lani, Marie
24 Jo, and Yvonne with the intent to defraud Plaintiff.⁷

25 VI. CONCLUSION

26 _____
27 ⁷ With regards to Plaintiff’s argument that Jose constructively defrauded Plaintiff, such argument has already
28 been addressed in the “badges of fraud” section above.

1 For the foregoing reasons, this Court finds: (1) there are no genuine issues of material fact in dispute
2 regarding Defendants' claim of "partida," and (2) there are no genuine issues of material fact regarding
3 Jose's conveyance of his properties to his daughters to defraud creditors. As such, Jose's deeds of gift to
4 his children are deemed void and, thus, the properties are subject to execution by Plaintiff as a judgment
5 creditor. Therefore, Plaintiff's Motion for Summary Judgment is hereby **GRANTED**.

6 **SO ORDERED** this 19th day of March 2003.

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/s/
VIRGINIA SABLAN-ONERHEIM, Judge *Pro Tempore*