

FIRST DIVISION

[G.R. No. 123358, February 01, 2000]

**FCY CONSTRUCTION GROUP, INC., AND FRANCIS C. YU,
PETITIONERS, VS. THE COURT OF APPEALS, THE HON. JOSE C.
DE LA RAMA, PRESIDING JUDGE, BRANCH 139, REGIONAL TRIAL
COURT, NCJR, MAKATI CITY, METRO MANILA, AND LEY
CONSTRUCTION AND DEVELOPMENT CORPORATION,
RESPONDENTS.**

DECISION

YNARES-SANTIAGO, J.:

On June 29, 1993, private respondent Ley Construction and Development Corporation filed a Complaint for collection of a sum of money with application for preliminary attachment against petitioner FCY Construction Group, Inc. and Francis C. Yu with the Makati Regional Trial Court which was docketed as Civil Case No. 93-2112. Private respondent alleged that it had a joint venture agreement with petitioner FCY Construction Group, Inc. (wherein petitioner Francis C. Yu served as President) over the Tandang Sora Commonwealth Flyover government project for which it had provided funds and construction materials. The Complaint was filed in order to compel petitioners to pay its half share in the collections received in the project as well as those yet to be received therein. In support of its application for a writ of attachment, private respondent alleged that petitioners were guilty of fraud in incurring the obligation and had fraudulently misapplied or converted the money paid them, to which it had an equal share.

On July 6, 1993, following an ex-parte hearing, the lower court issued an Order for the issuance of a writ of preliminary attachment, conditioned upon the filing of a P7,000,000.00 attachment bond.

Petitioners moved for the lifting of the writ of preliminary attachment on the following grounds: (1) the attachment was heard, issued and implemented even before service of summons upon them; (2) failure of the attaching officer to serve a copy of the affidavit of merit upon them; and (3) that there was no fraud in incurring the obligation. As an alternative prayer in their Motion, petitioners prayed that the attachment be limited to their receivables with the Department of Public Works and Highways. This alternative prayer was later withdrawn by petitioners in a Manifestation and Motion.

On May 25, 1994, the lower court issued another Order denying petitioners' Motion to Lift Attachment.^[1] It, however, reduced and confined the attachment to receivables due petitioners from the Tandang Sora commonwealth Flyover project.

Subsequently, petitioners filed a Motion for Reconsideration^[2] as well as an Omnibus Motion for Leave to file Amended Answer and/or to delete Francis C. Yu as

party-defendant.^[3]

With the denial of both Motions by the lower court on September 4, 1994,^[4] petitioners filed a Petition for Certiorari before the Court of Appeals on September 16, 1994.^[5] The Petition was, however, denied on July 31, 1995;^[6] so was petitioners' Motion for Reconsideration.^[7]

Hence, the instant Petition.

It is evident that the questioned writ of attachment was anchored upon **Section 1(d), Rule 57 of the Revised Rules of Court**, to wit -

"SECTION 1. Grounds upon which attachment may issue. - A plaintiff or any proper party may, at the commencement of the action or at any time thereafter, have the property of the adverse party attached as security for the satisfaction of any judgment that may be recovered in the following cases:

x x x x x x x x x.

(d) In an action against a party who has been guilty of a fraud in contracting the debt or incurring the obligation upon which the action is brought, or in concealing or disposing of the property for the taking, detention or conversion of which the action is brought;

x x x x x x x x x."

Petitioners, however, insist that the writ of preliminary attachment was irregularly issued inasmuch as there was no evidence of fraud in incurring the obligations sued upon.

In support of their stand, petitioners alleged that private respondent's principal witness admitted that it was the Department of Public Works and Highways (DPWH) that induced it to deliver materials and cash for the Tandang Sora Commonwealth Flyover project, to wit -

COURT:Now . . . as of January 5, 1993 you delivered to him (referring to defendant FCY corporation) in cash and in kind amounting to Fifteen Million Pesos (P15,000,000.00), now why did you keep on delivering cash and materials to him if you were not paid a single centavo?

A Because of every need for the project, and the Public Works official assured me that I will be given a new project after the Tandang Sora will be finished.

Q Who is this public official that promised you?

A Director Pendosa, Teodoro Encarnacion and Secretary de Jesus your Honor. (*TSN, 6 July 1993, pp. 47-48*)

x x x x x x x x x

- Q What about these officials of the Department of Public Highways, what would they do to project their sub alleged project?
- A Secretary de Jesus is no longer connected there, your Honor.
- Q At the time?
- A At that time, he resigned.
- Q Before he resigned.
- A He gave me assurance that they will soon give assurance, they will soon give me another project . . . (TSN, 6 July 1993, p. 55)^[8]

A cursory reading of the above-cited testimony, however, readily shows that said reassurance from the DPWH officials came, not at the inception of the obligation or contract, but during its performance. On the other hand, the fraud of which petitioners are accused of and which was the basis for the issuance of the questioned attachment, is fraud alleged to have been committed upon contracting the obligation sued upon. Thus, petitioners' argument that "the inducement was the mouth-watering temptation of a DPWH promise of a 'new project after the Tandang Sora Flyover project will be finished'" is clearly off-tangent as such inducement, if any, came not at the inception of the obligation.

Similarly, petitioners' arguments that it was private respondent who admittedly prepared the letter embodying the alleged joint venture agreement^[9] and had petitioner Francis Yu sign it must fail. The written agreement referred to was signed by petitioner Francis Yu only on January 5, 1993, long after the project had commenced. Thus, It was only a written confirmation of an arrangement that had already been existing and operational. Similarly then, such written confirmation did not occur at the inception of the obligation sued upon.

In ***Liberty Insurance Corporation vs. Court of Appeals***,^[10] this Court, discussing **Section 1(d), Rule 57**, cautioned as follows --

To sustain an attachment on this ground, it must be shown that the debtor in contracting the debt or incurring the obligation intended to defraud the creditor. The fraud must relate to the execution of the agreement and must have been the reason which induced the other party into giving consent which he would not have otherwise given. To constitute a ground for attachment in Section 1 (d), Rule 57 of the Rules of Court, fraud should be committed upon contracting the obligation sued upon. A debt is fraudulently contracted if at the time of contracting it the debtor has a preconceived plan or intention not to pay, as it is in this case. Fraud is a state of mind and need not be proved by direct evidence but may be inferred from the circumstances attendant in each case. (*Republic v. Gonzales*, 13 SCRA 633).

From the foregoing, therefore, the alleged inducement by the DPWH officials upon private respondent as well as the circumstances surrounding the execution of the joint venture agreement, both appear immaterial as they were not committed upon contracting the obligation sued upon but occurred long after the obligation has been established.