

SEP 17 2004

For The Northern Mariana Islands
By [Signature]
(Deputy Clerk)

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS

MICHAEL W. KENNEDY, doing)
business as MKI Air Conditioning)
and Refrigeration,)

Plaintiff)

v.)

ROSALINA T. GABUTIN,)
JOSEPH C. GABUTIN, FELIX M.)
MENDIOLA, LOURDES T.)
MENDIOLA, JOAQUIN F.)
TUDELA, SR., and EDITH)
TUDELA,)

Defendants)

Civil Action No. 03-0016

ORDER DENYING
DEFENDANTS THE
MENDIOLAS' MOTION
TO DISMISS

THIS MATTER came before the court on Thursday, September 16, 2004,
for hearing of defendants the Mendiolas' motion to dismiss the third amended

1 complaint for lack of both the jurisdictional amount and ancillary jurisdiction,
2 and also to dismiss for failure to state a claim under Fed.R.Civ.P. 9. Plaintiff
3 appeared by and through his attorney, Mark K. Williams; defendants the
4 Mendiolas appeared by and through their attorney, Victorino DLG. Torres.
5 Settling defendants the Tudelas appeared by and through their attorney, Joaquin
6 DLG. Torres.
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9 THE COURT, having considered the written and oral arguments of
10 counsel, rules as follows:
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12 Defendants the Mendiolas moved to dismiss the third amended complaint
13 on three grounds. First, that the amount in controversy, as to them, does not
14 meet the jurisdictional minimum of \$75,000.00 and, second, that there is no
15 ancillary jurisdiction over them because the lawsuit as to defendant Rosalina
16 Gabutin had been settled before they were made parties. Third, that the
17 allegedly fraudulent conveyance is not pleaded with the particularity required
18 by Fed.R.Civ.P. 9.
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22 The initial complaint in this matter was filed June 6, 2003, and named
23 only Rosalina Gabutin as defendant. Similarly, the first amended complaint,
24 filed September 29, 2003, named only Rosalina Gabutin as defendant. Both
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1 complaints alleged diversity jurisdiction and sought an amount greater than
2 \$75,000.00.
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4 On November 26, 2003, plaintiff and defendant Gabutin filed a settlement
5 agreement with the court, by the terms of which the plaintiff agreed to accept
6 the settlement amount "and release Defendant from further liability and
7 responsibility as alleged in the Complaint." "Settlement Agreement and
8 Consent Judgment Thereon," Docket No. 4. Jurisdiction was expressly reserved
9 in this court to enforce the terms of the settlement. "Settlement Agreement," ¶
10 5.
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14 It is alleged that, in anticipation of entering the settlement agreement,
15 defendant Gabutin transferred the real property identified in the third amended
16 complaint to defendants the Mendiolas on November 5, 2003.
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18 After a hearing on plaintiff's motion for an order in aid of judgment, the
19 court, pursuant to its retained jurisdiction "to enforce any and all terms and
20 conditions set forth in the Stipulated Settlement," *supra* at ¶ 5, entered an order
21 which stated in part that plaintiff was "permitted to amend its pleadings to file
22 an amended complaint and/or a supplemental complaint for the purpose of *inter*
23 *alia* setting aside conveyances of real property that Defendant made allegedly to
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1 avoid payment on the judgment.” “Order After Hearing (May 17, 2004),
2 Docket No. 10.
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4 On May 18, 2004, plaintiff filed his second amended complaint, adding all
5 the defendants who also are named in the third amended complaint, which is
6 presently before the court. There is no claim by the new defendants that they
7 were not properly served.
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9 Traditionally, “ancillary jurisdiction” describes a federal court’s assertion
10 of jurisdiction over claims or parties over whom the court lacks independent
11 subject matter jurisdiction, but that arise out of the same conduct, transaction,
12 or occurrence as the plaintiff’s original claim, which was encompassed by the
13 court’s subject matter jurisdiction. 16 Moore’s Federal Practice ¶ 106.03[4]
14 (2001). The United States Supreme Court has noted that ancillary jurisdiction
15 has been asserted (1) to permit disposition by a single court of claims which are
16 factually interdependent, and (2) to enable a court to manage its proceedings,
17 vindicate its authority, and effectuate its decrees. *Id.* See also United States v.
18 Alpine Land & Reservoir Co., 174 F.3d 1007, 1012 n.5 (9th Cir. 1999) (the
19 doctrine of ancillary jurisdiction is equitable in nature and allows federal courts
20 to effectuate their decrees). Ancillary jurisdiction primarily involves resolution
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1 of disputes involving non-parties to the main action, and is authorized even in
2 the absence of an independent basis for federal jurisdiction over the new parties,
3 if the dispute arose out of the same transaction or occurrence as the main claim.
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5 *Id.*

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7 The U.S. Court of Appeals for the Ninth Circuit recognizes that federal
8 courts possess the power to protect their judgments by setting aside fraudulent
9 conveyances, Thomas, Head and Greisen Employees Trust v. Buster (“Thomas,
10 Head”), 95 F.3d 1449, 1453 (9th Cir. 1996), *cert. denied*, 520 U.S. 1117, 117 S.Ct.
11 1247 (1997). This power “derives from the long-recognized principle that a
12 federal court may assert authority over non-federal claims ‘when necessary to
13 give effect to the court’s judgments.’” *Citing Finley v. United States*, 490 U.S.
14 545, 551, 109 S.Ct. 2003, 2008, 104 L.Ed.2d 593 (1989) and others. In Thomas,
15 Head, after plaintiff trust fund had obtained judgment against a real estate
16 mortgage broker for misrepresentation, it initiated proceedings against the
17 broker’s transferees to recover allegedly fraudulent conveyances of the broker’s
18 properties. The transferees were not parties to the original action or judgment.
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24 *Id.*

1 In distinguishing the case before them from the U.S. Supreme Court's
2 decision in Peacock v. Thomas, 516 U.S. 349, 116 S.Ct. 862, 867-69 (1996), the
3 Ninth Circuit noted that in Peacock the Supreme Court had held that ancillary
4 jurisdiction could not be used to establish a new defendant's liability for the
5 *original* judgment. In Thomas, Head, the Ninth Circuit held that ancillary
6 jurisdiction could be used to seek disgorgement of property from fraudulent
7 transferees. It is this latter scenario which faces the court in the instant matter
8 and, as in Thomas, Head, this court finds Peacock inapposite.

12 Accordingly, because plaintiff is not seeking to establish defendants the
13 Mendiolas' liability as to the original judgment and is simply seeking, rather,
14 disgorgement of assets allegedly conveyed to them fraudulently, the motion to
15 dismiss for lack of ancillary jurisdiction is denied. In instances of ancillary
16 jurisdiction, the issue of the \$75,000.00 jurisdictional amount does not come in
17 to play because such proceedings are not original proceedings for which federal
18 subject matter jurisdiction must be alleged and proved.

22 Defendants' alternative argument for dismissal is that the claim against
23 them fails to plead fraud with the particularity required by Fed.R.Civ.P. 9(b),
24 "Fraud, Mistake, Condition of the Mind." The degree of particularity required
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1 by Rule 9 is only such that a defendant can prepare an adequate answer to the
2 allegations. *See e.g. Bosse v. Crowell, Collier & MacMillan*, 565 F.2d 602 (9th
3 Cir. 1977).

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5 A review of the third amended complaint shows that the conveyance
6 being challenged as fraudulent occurred between defendant Rosalina Gabutin
7 and the Mendiolas (her sister and brother-in-law). The Mendiolas' knowledge of
8 Rosalina Gabutin's imminent sentencing is alleged, as well as that it was her
9 upcoming sentencing that triggered the conveyance, and that the consideration
10 was insufficient. Further, the date of the allegedly fraudulent transfer and the
11 specific identity of the real property transferred are both alleged.
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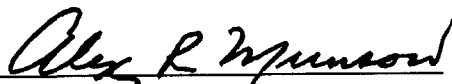
15 Here, the number of parties is small and they are all known personally to
16 one another. The details of the allegedly fraudulent transfer are alleged to be
17 known by the defendants. Accepting as it must that all allegations of material
18 fact are true, *Enesco Corp. v. Price/Costco, Inc.*, 146 F.3d 1083, 1085 (9th Cir.
19 1998), the court concludes that the allegations in the third amended complaint
20 are set forth in sufficient detail to allow defendants to prepare an adequate
21 answer. Further, a review of the case law shows that an equitable claim to set
22 aside a fraudulent transfer is treated differently than a claim of straight fraud and
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1 the "particularity" requirement is often deemed unnecessary or less onerous
2 than a fraud claim. *See* U.S. Code Service, Court Rules 1 - 12, Notes and
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4 Commentary to Rule 9.

5 FOR THE REASONS STATED ABOVE, defendants the Mendiolas'
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7 motion to dismiss is denied on all grounds and they shall file their answer within
8 the time prescribed by the Federal Rules of Civil Procedure.

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10 IT IS SO ORDERED.

11 DATED this 17th day of September, 2004.
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ALEX R. MUNSON
17 Judge
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