STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. BCD-24-318

Richard P. Olson, in his capacity as Trustee of the Promenade Trust

Appellee,

v.

Pamela Gleichman, et al.,

Appellants.

On Appeal from Decision of the Business and Consumer Docket

BRIEF OF APPELLEE RICHARD P. OLSON IN HIS CAPACITY AS TRUSTEE OF THE PROMENADE TRUST

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I. INTRODUCTION

Plaintiff-Appellee Richard Olson, in his capacity as trustee of a family arrangement known as "Promenade Trust," commenced this civil action against Defendant Appellant Pamela Gleichman, one of the settlors, also mother of the three beneficiaries, seeking avoidance of her purported transfer of intangible property denominated in the Business Court's final judgment as the "GP Interests." The other Defendant was the late Ellen Hancock in her then-capacity as the purported trustee of the purported Hillman Norberg Trust. The Business Court determined after trial that there is no Hillman Norberg Trust, that there had been no transfer of the GP Interests and that, if any such transfer did occur, it was a violation of the Fraudulent Transfer Act, 14 M.R.S. §§3575-3576.

Appellants include Ms. Gleichman, her husband Karl Norberg who joined as Counterclaim-Plaintiff, but who was not a defendant, and Mary Wolfson, successor to the late Ellen Hancock as Defendant, now Defendant-Appellant, but not a Counterclaim-Plaintiff-Appellant.

Defendant-Appellants all challenge the final judgment as legally erroneous. All three Appellants also challenge as legally erroneous the Business Court order that granted Appellee's motion to strike Appellants' jury demand. Counterclaim-Plaintiff-Appellants challenge the Business Court order that granted Appellee's motion to dismiss their counterclaim as a matter of law for failure to state a claim upon which relief can be granted.

II. STATEMENT OF FACTS OF THE CASE

The transactional facts concerning the GP Interests at the center of this case occurred in and around September 2012, before Plaintiff-Appellee became the second trustee of an arrangement known as the Promenade Trust. (App. 00220-00223.) There is very little dispute about who did what, when, and where but there is considerable disagreement about the legal significance of the events.

There are background facts that may help the Court to understand the issues. For many years, Appellant Gleichman was a successful developer of real estate, primarily rental housing for eligible tenants in accordance with federally supported and regulated programs. (Blue Brief, p. 3.) Each of the properties is the subject of a separate limited partnership agreement. Ms. Gleichman's interests as the individual general partner in three of those partnerships are the "GP Interests" that are the subject matter of this dispute. The three relevant limited partnerships are known as Mallard Pond (formed in 1984) (Plaintiff's Trial Exhibit (hereinafter "Pl.'s Ex."), 28) On the Green (formed in 1983[1]) (Pl.'s Ex. 29), and Harbor Hill (formed in 1988) (Pl.'s Ex. 27).

The former family home in Bar Harbor, known as Porcupine House, was also purchased in 1988. (Pl.'s Ex. 33, at 83:25-84:4; Pl.'s Ex. 2, at 2.) And, in November

[1] The Certificate of Limited Partnership shows that On the Green was formed on April 29, 1983. Ms. Gleichman's Affidavit, and various other filings in this case indicate that On the Green was formed in 1984. For the purposes of this case, this discrepancy is not relevant.

1988, Ms. Gleichman and her husband appointed Christopher J.W. Coggeshall, Esq. as trustee to hold various assets in trust pursuant to the arrangement known as Promenade Trust. (Defendant's Trial Exhibit (hereinafter "Def.'s Ex."), 101 at 4:12-5:6, 7:15-8:2.) The three beneficiaries are Ms. Gleichman's children, Luigi Scarcelli, Rosa Scarcelli, and Hillman Norberg.

Twelve years later, a substantial judgment was entered in the United States District Court against Appellant Gleichman, among others. (Pl.'s Ex. 44, at 3-6.) On September 7, 2000, that judgment was assigned to Karl Norberg by the judgment creditor. (Pl.'s Ex. 44, at 1-2.) Norberg's purchase of the judgment lien was funded by his misappropriation of over $4.5 million in distributions due to Promenade Trust from Lakeside Place LLC and N.G. Holdings LLC. (Def.'s Ex. 101, at 18:7-21, 115:2-25.) Mr. Norberg bought that judgment to serve as the cornerstone for a "wall of debt" to protect the family assets from the claims of Ms. Gleichman's many other creditors. The theory simply enough was that the senior lien would block the holders of junior liens and the general creditors. (Def.'s Ex. 103, at 25:16-28:19; App. 00063, ¶¶21, 22.)

By September 2012, Ms. Gleichman was attempting to refinance the defaulted mortgage loan on the Bar Harbor Home (itself conclusive evidence of insolvency), partly by orchestrating the sale of the real estate owned by Harbor Hill to the College of the Atlantic for use as a dormitory, assuming the property could be removed from the federal housing program. (Pl.'s Ex. 32, at 10:8-18, 46:2-49:8.) There was an

executed purchase and sale agreement for $2,025,000. (Pl.'s Ex. 14.) That sale never closed.

Ms. Gleichman was also attempting to negotiate a loan from Bank of America, to be guaranteed by her friend Ellen Hancock, a wealthy and sophisticated business leader. (T. Tr. 98:9-99:12, 101:21-25, 104:21-105:23, 143:10-145:8, 193:14-24.) Ms. Hancock was seeking some protection for her interests as guarantor, should the guaranty ever be called. (T. Tr. 145:15-146:17.) Although it has never been clear how serving as the trustee for Hillman Norberg could protect Ms. Hancock, part of the scheme was to transfer the GP Interests and other property to Ellen Hancock, in trust for Hillman Norberg. (T. Tr. 155:13-156:1; Pl.'s Ex. 1.)

The Bank of America never approved the proposed loan, Ms. Hancock never gave a guarantee, Ms. Hancock never functioned as the individual general partner of any of the three limited partnerships, and she never filed any tax returns for the so-called Hillman Norberg Trust. (T. Tr. 99:13-17, 147:11-13, 152:21-23, 177:9-178:20; Pl.'s Ex. 18, at Resp. 23.) Instead, soon after those trust papers had been signed, the attorney who drafted them identified some flaw and suggested starting over with what is denominated the Hillman Mather Adams Norberg (HMAN) Trust. (T. Tr. 169:1-16.) Ellen Hancock was named trustee, and she regularly filed trust tax returns as trustee for the HMAN Trust. (Pl.'s Ex. 3, at Resp. 5; Pl.'s Ex. 18, at Resp. 24.) The HMAN Trust has never had any interest in any of the three subject limited partnerships. (T. Tr. 153:2-11).

During the years after 2012, Appellant Gleichman, as the individual general partner of each of the three limited partnerships, continued to list the gains and losses of the GP Interests on her federal income tax returns. (App. 00168-00219.) Ms. Gleichman sent at least some correspondence in the years after 2012 identifying herself as the owner or general partner of one or another of the three limited partnerships. (App. 00224-00229.)

In 2013, Mr. Coggeshall, in his capacity as trustee, entered into a settlement agreement with Karl Norberg concerning Appellant Norberg's Lakeside misappropriation and his or Ms. Gleichman's other unpaid borrowings from the Promenade Trust corpus. As consideration for Norberg's release, he assigned to Coggeshall as trustee the subject judgments and judgment liens, i.e. the so-called "wall of debt." Soon afterward, Mr. Coggeshall filed a complaint against Ms. Gleichman, won a default judgment, and received charging orders. (T. Tr. 197:12-200:19; Def.'s Ex. 101, at 18:14-25, 22:18-23:25, 115:16-117:20; Pl.'s Ex. 49; Def.'s Ex. 28.)

In February 2015, Mr. Coggeshall resigned as trustee and Plaintiff-Appellee Richard Olson succeeded him. (T. Tr. 19:17-22; Pl.'s Ex. 47.) As part of getting informed, Appellee received from Ms. Gleichman a chart colloquially known as "Hillman's World" so that he would have a clear idea of Hillman Norberg's interests. (T. Tr. 31:6-32:8; App. 00252.) Nowhere on that chart is there any mention of the so-called Hillman Norberg Trust. The Business Court determined that no such trust arrangement had come into being. (App. 00031.)

There were other incidents and events between February 2015 and September 2018 that are not relevant to this appeal except to note that it was not a quiet time. Appellee had no knowledge of any of the 2012 transactional facts until he received a letter from Barry K. Mills, Esq., on behalf of his client, Ellen Hancock. The letter arrived shortly after its date, September 26, 2018. It announced a proposed or anticipated sale of Harbor Hill's real estate to the College, basically a revival of the 2012 deal. Appellee Olson was "flabbergasted." (T. Tr. 27:14-29:14; App. 00030, 00220-00223.)

With very little time remaining before the expiration of the six-year statute of limitations, Plaintiff-Appellee filed the original complaint. Numerous issues concerning service of process, followed by abundant discovery and motion practice, all complicated by the Covid pandemic, preceded a bench trial in February 2024. In the pretrial motion practice, the Business Court (Murphy, J.) entered orders (1) striking the Defendants' jury demand (App. 00016-00021), and (2) dismissing the counterclaim by Ms. Gleichman and counterclaim co-Plaintiff, Karl Norberg (App. 00009-00015). During the runup to trial, Ellen Hancock died and was replaced by Mary Wolfson as trustee of the HMAN Trust and, if it should be thought to exist, the Hillman Norberg Trust, and as one of the defendants in this action. (Agreed Upon Order Authorizing Substitution, May 23, 2022.)

Judge Duddy issued the judgment on June 26, 2024. (App. 00022-00039.)

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Whether the Business Court's Order Striking Appellants' Jury Demand was Legally Erroneous as a Matter of Maine Constitutional Law and Applicable Maine Precedent.

B. Whether any Error of Law Affected the Business Court's Order Dismissing the Counterclaim and Determining that the Duties of a Trustee of an Irrevocable Trust Run Only to the Beneficiaries.

C. Whether the Business Court's Judgment after the Bench Trial Must Be Vacated for any Error of Law.

IV. SUMMARY OF THE ARGUMENT

The Business Court correctly granted Plaintiff's motion to strike the jury demand. There was no form of action at law triable to a jury to rescind or nullify a fraudulent transfer of intangible assets or to adjudicate entitlements to future partnership distributions. Moreover, Appellee sought equitable relief: declaratory judgment or injunction. The complaint also mentioned damages as a matter of thorough pleading. The relief granted was a declaratory judgment effectively avoiding the purported transfers.

Although the Seventh Amendment to the Constitution of the United States is inapplicable in state court proceedings, the Supreme Court's decisions construing and applying the Seventh Amendment in federal matters are entirely in accord with Law

Court decisions interpreting the Maine Constitution and persuasive authority for the Business Court's order striking the jury demand.

The Business Court correctly dismissed the counterclaim. Despite its length and complexity, it failed to state a claim upon which relief can be granted because the only basis for all the counts was to assert that Appellee, as the second trustee of this irrevocable trust, owed and breached a duty to the settlors to favor their interests over the interests of the beneficiaries. The law is otherwise and there is no legal predicate for any such claim. Therefore, it was properly dismissed.

After trial, the Business Court determined that no Hillman Norberg Trust had been established, that there had never been any transfer of the GP Interests, and that any transfer would have been fraudulent. Nothing in the final judgment is legally erroneous and its findings of facts are supported by substantial evidence.

Because there was no error in either of the two challenged pretrial orders and because there was no error in the conduct of the trial or in the final judgment, the judgment should be affirmed.

V. ARGUMENT

A. The Business Court's Order Granting Plaintiff's Motion to Strike Jury Demand was Legally Correct and not Legally Erroneous.

To begin, it is appropriate to frame the question in terms of the case that was tried and the decision that was issued after the bench trial. There was no mention of any form of monetary relief at any point in the bench trial. The Court's order (App.

00022- 00039) in its conclusion (App. 00038- 00039) is a declaratory judgment that "Mary Wolfson as Trustee of the HN Trust holds no interest… [in any of the three limited partnerships]" and that:

> "[a]ll right, title, and interest, or any benefit associated therewith, in, to, or from, the GP Interests that are or ever were property of Pamela Gleichman in Harbor Hill Associates, LP, On the Green Associates, and Mallard Pond Associates were, are and remain subject to the charging orders assigned to Richard P. Olson as Trustee of the Promenade Trust and foreclosed… in the Circuit Court of Cook County, Illinois…."

Id. The Blue Brief seeks remand for jury trial but cites no precedent holding that any jury could have granted such relief if this dispute had been tried before a jury.

Every motion to strike a jury demand is necessarily decided before the trial, based on what is expected to occur at the trial. The Business Court did exactly that. But now we know, as a matter of record fact, that none of the evidence or argument in this trial supports the idea that this trial should have (or even could have) been conducted before a jury.

The second page of the Business Court's judgment after trial states in pertinent part:

> "Olson does not seek damages or other monetary relief, but rather a declaration that the GP Interests now or formerly belonging to Gleichman remain subject to charging orders assigned to Olson."

App. 00023. The Business Court's judgment after trial is obviously something no jury can do. That ought to count heavily in this analysis.

The jury trial order (App. 00016-00021) correctly relies principally on the Law Court's decision in *DesMarais v. Desjardins*, 664 A.2d 840 (Me. 1994). Maine is a primacy state. *See State v. Cadman*, 476 A.2d 1148, 1151 (Me. 1984), *NECEC Transmission LLC v. Bureau of Parks & Lands*, 2022 ME 48, ¶ 44, 281 A.3d 618 ("*NECEC*"), and Catherine R. Connors & Connor Finch, *Primacy in Theory and Application: Lessons From a Half-Century of New Judicial Federalism* 75 Me. L. Rev. 1 (2023). Since this is a matter of Maine Constitutional Law, the Maine cases discussed by the Business Court in its Order were correctly identified, correctly interpreted, and correctly applied to deny a jury in this case. The federal Seventh Amendment jurisprudence is persuasive secondary authority because it is not to the contrary.

Appellants' argument on this point runs nine and a half pages, largely text footnotes (apparently to fit 14,000 words onto 40 pages), and cites 68 cases, none of which is *DesMarais v. Desjardins*. Their arguments on the jury trial issue are a combination of bad law and bad history, mischaracterizing and misapplying Supreme Court interpretations of the federal Seventh Amendment, apparently unaware that the Seventh Amendment has no applicability to state court cases grounded in state law. *See* ***Ford Motor Co. v. Darling's***, 2014 ME 7, ¶ 34 n.10, 86 A.3d 35; ***Thermos Co. v. Spence***, 1999 ME 129, ¶ 7 n.2, 735 A.2d 484 (*citing* ***Minneapolis & St. Louis R.R. Co. v. Bombolis***. 241 U.S. 211, 217 (1916)).[2]

[2] The United States District Court for the District of Puerto Rico attempted to apply the Seventh Amendment to the States, however, the United States Court of Appeals for the First Circuit vacated the

Appellants rely on the Supreme Court decision in *Granfinanciera, S.A. v. Nordberg,* 492 U.S. 33 (1989). That was an action in a federal court by a trustee in bankruptcy asserting powers under the federal Bankruptcy Code. The decision relates directly only to the role of the Seventh Amendment in *federal* courts. However, the Supreme Court's explanation of the Seventh Amendment's jury trial right in federal court litigation is persuasive authority, consistent with the Maine Constitution as correctly determined and applied in the Business Court Order under review. Justice Brennan's opinion quotes from 1 G. Glenn, *Fraudulent Conveyances and Preferences*, Section 98, pp. 183-184 (rev. ed. 1940) to establish the well-recognized point that a fraudulent conveyance of a chattel or a sum certain in money is avoidable in an action at law. 492 U.S. 33 at 44. If the property transferred is a chattel, the action at law was replevin or trover. If the property transferred is a sum certain in money, the action at law for money had and received provided an adequate remedy precluding recourse to the Chancery Court.

The important point in that opinion for this case, however, is stated as follows: "If, on the other hand, the subject matter is…an intangible…the trustee…may invoke the equitable process, and that is also beyond dispute." *Id.* This case involves only equitable relief concerning only intangible property interests.

judgment stating, "[t]he Supreme Court has consistently held that states are not constitutionally required to provide a jury trial in civil cases." *González-Oyarzun v. Caribbean City Builders, Inc.*, 798 F.3d 26, 29 (1st Cir. 2015).

This is not an action about a chattel or a sum certain in money. This is an action about a contingent unliquidated interest in potential future distributions from three limited partnerships. Its resolution is dependent upon a determination of the respective rights of these parties, under state trust law, state property law, and state partnership law. It is fundamentally about whether any transaction even occurred and, if any transfer did occur, whether it should be avoided, i.e., rescinded or nullified by declaratory or injunctive remedies. The order striking the jury demand is in accord with this well-established doctrine. The issues relate to the nature of the property that is the subject of the transfer being challenged and the judicial remedy that will provide effective redress, i.e., "avoidance," here cancellation of any transfer of the property interest in question.

There was no form of action at common law whereby a jury would adjudicate disputes about rights to receive contingent unliquidated future distributions from a partnership. Issues concerning partnerships and trusts. and particularly accountings of trustees or partners or partnerships, were inherently equitable and at the core of the Chancery Court's jurisdiction. *See Reed v. Johnson*, 24 Me. 322, 325-26 (1844); *Wilby v. Phinney*, 15 Mass. 116, 120 (1818).

The challenged order properly relied upon *DesMarais, supra.* In that case, although there was a secondary or incidental demand for damages, the relief being sought primarily was rescission or cancellation of a deed to the defendant from the

decedent. Rescission, obviously, is an equitable remedy unavailable at law. *DaimlerChrysler Corp. v. Exec. Dir., Me. Revenue Serv.*, 2007 ME 62, ¶ 23, 922 A.2d 465.

The Blue Brief contains many citations in its challenge to the denial of the jury trial, but it is telling that *DesMarais* is not one of them. That is the precedent upon which the order rests, but the Blue Brief never tries to distinguish it or even acknowledge it. In a footnote, that order identified and distinguished several fraudulent transfer cases, some that had been tried before a jury and some that had not, illustrating the point made by the Brennan opinion and the Glenn treatise. (App. 00019.) The Blue Brief cites only the jury cases that the footnote distinguished, simultaneously remaining silent about the several non-jury cases cited in the very same footnote. The Blue Brief cites no decision overruling *DesMarais*. It remains the controlling precedent supporting the order challenged in this appeal.[3]

The most recent Law Court decision cited by the Appellants has nothing to say about this case. In *Belyea v. Campbell*, 2024 ME 62, 320 A.3d 465, there was no contested motion about the right to jury trial. In that case, the complaint included a count for fraudulent transfer in a 10-count complaint. The Business Court allowed the fraudulent transfer claim to survive until trial when the Court granted judgment as a matter of law. *Id.* ¶ 11. As nearly as one can tell, the fraudulent transfer issue was

[3] The Business Court decision also finds persuasive a Superior Court opinion in *WCP Me. Loan Holdings, LLC v. Norberg* 2019 Me. Super. LEXIS 4, denying a jury trial in a fraudulent transfer case against Karl Norberg.

abandoned at trial and properly so because, as nearly as one can tell from the opinion, that plaintiff was alleging that his own transfer of his own corporate stock was the fraudulent transfer. Success on that count would have been a legal innovation to say the least.

The generic statutory remedy for fraudulent transfer is "avoidance" of the transfer. The cases show that there are several specific judicial remedies to accomplish avoidance, some legal and some equitable. In a chattel case, replevin and return of the chattel is the "avoidance." Alternatively, in a chattel case, the action in trover accomplished "avoidance" by judgment for the fair market value of the chattel. In a money case, the transfer is "avoided" by payment of money. These are all legal remedies and are thoroughly irrelevant to this analysis.

When this purported transfer of GP Interests is "avoided," either by the declaration that it never occurred or by a determination that it is a nullity for violation of the fraudulent trust legislation, the original situation is restored, and the property remains subject to liens owned in trust by the Appellee by way of assignment from the predecessor trustee who was assignee from Counterclaim-Appellant Norberg, Gleichman's husband, who had purchased them with funds he had misappropriated from the Promenade Trust. It is difficult even to speculate how any properly instructed jury that agreed with Appellee would have accomplished "avoidance" here, if a jury trial had occurred.

In short, Appellants are wrong as a matter of Maine constitutional law and as a matter of federal constitutional law, both because the Seventh Amendment has no application to state cases in state courts and because the Supreme Court's decisions construing the Seventh Amendment are entirely consistent with the Business Court's denial of a jury trial in this case.

B. Dismissal of the Counterclaim was Legally Correct and not Legally Erroneous.

Appellant Gleichman, joined by her husband Appellant Karl Norberg, filed a prolix counterclaim that was properly dismissed for failing to state a claim upon which relief can be granted. The counterclaim's seventeen counts in 301 paragraphs occupy 84 pages. The order succinctly explained that all those paragraphs on all those pages had not identified any legal duty binding upon Appellee Olson as trustee. The Court recognized that the rights of a settlor of an irrevocable trust are narrowly limited. (App. 00014.) The counterclaim plaintiffs are not beneficiaries of the trust. (App. 00014.) The Court correctly determined as a matter of law that a trustee's duties are exclusively to the beneficiaries, not only generally but especially when the settlors are contending that the trustee should breach duties to the beneficiaries to favor the interests of the settlors.

1. The Trustee, not "the trust," is the Proper Party.

The argument about whether a trust is a juridical entity with the capacity to sue or be sued under Maine law is a sideshow. The Business Court order correctly

recognized that Plaintiff-Counterclaim Defendant-Appellee Olson has no liability in his personal capacity and that he can be sued in his capacity as Trustee. The counterclaim was dismissed because the counterclaim's allegations against Appellee Olson *qua* trustee do not have any legal predicate.

It has become convenient for judges, lawyers, bankers, and others to treat "a trust" as though it were a juridical entity with the capacity to contract and the capacity to sue and be sued, indistinguishable from corporations and limited liability companies. That is just shorthand for conduct by, or transactions with, or litigation involving, a person having the capacity of trustee. It is only a convenient collective noun to include the legal owner (trustee), beneficial owner (beneficiaries), and relevant property (the corpus). There is no statute providing for the creation of trust entities. Compare the statutory underpinnings of corporations, limited liability companies, and other juridical entities. Also note the process and documentation requirements for such entities authorized or created by state governments. *See* Maine Business Corporation Act, 13-C M.R.S. §§ 101-1832; Maine Limited Liability Company Act, 31 M.R.S. §§ 1501-1693.

Defendants' arguments that there *is* a juridical entity known as the Promenade Trust and that "the trust" is the real party in interest, not Appellee Olson in his capacity as trustee for the beneficiaries, are unsound but ultimately irrelevant. Assume for the sake of discussion that the Law Court will declare in this case for the first time that every private trust is a juridical entity with the capacity to contract and the

capacity to sue and be sued, notwithstanding the absence of any statutory authorization or any involvement by the Secretary of State, *or* assume instead only that, in litigation involving a party, as trustee, it is convenient to refer to the trustee, the beneficiaries, and the trust corpus collectively as "the trust." Under either assumption, analysis of the two pre-trial orders and the final judgment in this appeal is the same.

There is probably no case less relevant to whatever theory Counterclaim-Plaintiffs-Appellants Gleichman and Norberg are asserting than *Maine Shipyard & Marine Railway v. Lilley*, 2000 ME 17, 757 A.2d 1279. The late Daniel G. Lilley was settlor, beneficiary, and trustee of a secret undisclosed arrangement denominated "a trust." At Lilley's express request and direction, the shipyard made repairs to marina property occupied, possessed, and controlled by Lilley. The property may have been owned by Lilley as trustee, instead of individually, as a matter of real estate title law. The Shipyard knew nothing of any trust and Lilley never disclosed that he was not acting in his personal capacity at all material times. The court might very well have decided that there was no legally valid declaration of trust to begin with but, as a simple matter of commercial law, it was sufficient for the court to recognize that Lilley had acted at all material times, so far as the Shipyard could know, in his personal capacity. The best reading of the *Lilley* decision is that Mr. Lilley was obligated to pay for work he had requested and authorized, either personally or as trustee or both, given his behavior in whatever capacity he was behaving. There has

never been any doubt about the capacity of Chrisopher Coggeshall or the capacity of Richard Olson in these circumstances and neither is accused of acts or omissions that violate any legal duty to any Appellant.

2. As a Matter of Law, Trustees Have No Duty to Favor Settlors of Irrevocable Trusts Over Beneficiaries.

It is not possible in one count or seventeen for the settlors of an irrevocable trust to articulate a justiciable basis for a legal or equitable remedy against the trustee for not favoring the settlors at the expense of the beneficiaries. The settlors are not entitled to damages for breach of, or what amounts to specific performance of, an alleged implied or oral promise by a predecessor trustee that, if made, would have been illegal for violating the trustee's duties to the beneficiaries.

No matter how labeled and spun, the allegations of the 301-paragraph counterclaim provide no recognizable legal basis for a judicial determination that Appellee Olson had any duty to the settlors. As the Court's order makes clear, the point of the counterclaim apparently is to compel Appellee Trustee Olson to act or forbear from acting in some respect consistent with the Counterclaim-Plaintiffs' understanding or belief about what Mr. Coggeshall would have done or not done had he not resigned.

Appellee does not mean to say or imply that Mr. Coggeshall has ever done or said anything wrong. The point is that none of the Counterclaim-Appellants' arguments on this appeal can have any traction whatsoever unless Mr. Coggeshall

made an enforceable promise to betray the interests of the beneficiaries, in violation of his own fiduciary duty, *and* that Appellee, as successor trustee, is *therefore* obligated to violate *his* fiduciary duty to the beneficiaries for the benefit of the settlors.

There is no basis for the Law Court to determine, the Business Court did not determine, and there is no evidence that supports a judicial determination that Christopher Coggeshall ever made any promise to the settlors of the Promenade Trust to violate his fiduciary duties to the beneficiaries for the benefit of the settlors. (Def.'s Ex. 101, at 64:6-15.) That, however, is the essential premise of every argument challenging the dismissal of the counterclaim because it is the sole premise of the counterclaim. The counterclaim was properly dismissed because Appellee Olson has no judicially enforceable duty to violate the interests of the beneficiaries for the benefit of the settlors.

The Business Court's order refers directly to the Maine statute governing trusts to show, as a matter of law, that there can be no such duty. (App. 00014.) The order correctly interprets and understands the counterclaim and correctly determines that it asserts no claim upon which relief can be granted as a matter of law. The order says:

> "As lengthy and confusing as it is, the Counterclaim's basic premise is that Mr. Olson has not managed the Promenade Trust with a view to the best interests of Ms. Gleichman and, to a lesser extent, Mr. Norberg, and that Mr. Olson can be sued for that, notwithstanding the fact that neither Counterclaim Plaintiff is a beneficiary of the irrevocable Trust. That basic premise fails as a matter of law: 'A trustee shall administer the trust *solely* in the interests of beneficiaries.' (emphasis added by the court) 18-B M.R.S. §802."

App. 00014. The Court elaborated in its footnote 2 correctly as follows:

> "Remarkably, Ms. Gleichman and Mr. Norberg allege multiple times that the Trust itself—as an entity—owed them fiduciary duties [Citing counterclaim]. This allegation is a legal conclusion, not a factual allegation, but moreover, it is a faulty legal conclusion that the Court need not and does not accept as true. [Citation Omitted]. Even if considered an entity in legal shorthand, a trust cannot owe fiduciary duties to anyone, and a trustee's duty of loyalty is to the beneficiaries *exclusively* pursuant to statute. *See* 18-B M.R.S. §802." (Emphasis by the Court.)

Id. In short, the Business Court's order is correct and free from error for the reasons stated in the order.

C. The Final Judgment of the Business Court is Without Legal Error and Should be Affirmed in All Respects.

At trial and on this appeal, Defendant-Appellants have resisted Plaintiff-Appellee's action with two sets of contentions. One is that Defendant-Appellant Gleichman did indeed accomplish an effective transfer of either the entirety of the general partner position, notwithstanding significant legal hurdles to such a thing, or of the transferable economic value, including especially future value, of the GP Interests.[4] 31 M.R.S. §§ 1302(22), 1381-1383.

Defendants' other arguments initially were centered on Plaintiff's decision to forgo expert testimony to show the exact present value of the GP Interests. That argument on the eve of trial morphed into a challenge to any

[4] Defendant-Appellants appear to have abandoned the groundless contention that the documentation known as the Hillman Norberg Trust including its Schedule A, would have effectively transferred not only the individual general partner's interest, whatever it might be, but also the corporate general partner's interest. None of that, of course matters, because no gift ever occurred.

use of the fraudulent transfer statute here because the GP Interests (and Appellant Gleichman's other non-exempt assets) were fully encumbered and therefore their transfer cannot be avoided as fraudulent. Defendants also wrongly characterize Plaintiff-Appellee as merely a late coming general creditor. The Court properly rejected these arguments and correctly determined that there had never been a transfer of the GP Interests but that, if there had been, it was fraudulent and avoidable under the statute.

1. The Judgment Correctly Determined that No Transfer had Ever Occurred as a Matter of Fact or as a Matter of Law.

The evidence overwhelmingly makes clear that the so-called Hillman Norberg Trust was never formed. Almost as soon as it was written, its drafter identified a flaw leading to the almost contemporaneous drafting and execution of the documents forming the Hillman Mather Adams Norberg (HMAN) Trust. There is no evidence that two trust arrangements, both for the benefit of Hillman Norberg, were fully formed. There is abundant evidence that only the HMAN Trust was formed and operationalized.

Significantly, the GP Interests in dispute were never transferred, or purported to be transferred, or attempted to be transferred, to Ellen Hancock as Trustee for the HMAN Trust. As Trustee of the HMAN Trust, Ellen Hancock routinely filed annual trust tax returns that did not mention the GP Interests. (Pl.'s Ex. 3, at Resp. 5; Pl.'s Ex. 18, at Resp. 24.**)** She never filed any

tax return as trustee for the so-called Hillman Norberg Trust. (T. Tr. 152:21-23; Pl.'s Ex. 18, at Resp. 23.)

Every year, totally without regard to the abandoned 2012 Hillman Norberg Trust paperwork, Appellant Gleichman reported gains and losses on her individual tax return in her capacity as the individual general partner of the three limited partnerships in question. (App. 00168-00219.) In 2015, Appellant Gleichman wrote an officious, if not official, letter describing herself as the general partner. (App. 00224-00229.) In the Illinois foreclosure proceedings, Ms. Gleichman presented the testimony of an expert valuation witness, asserting that Ms. Gleichman was at all material times the general partner of the limited partnerships, i.e. owner of the GP Interests. (Pl.'s Ex. 15.) Whether characterized as a finding of fact or a conclusion of law, the Court's determination that there was no transfer is invulnerable to challenge on this appeal.

2. The "unpled" "theory" Argument is Legally Wrong and the Business Court on Two Separate Occasions was Legally Correct to Ignore It.

This contention of the Appellants represents a hyper-technical retreat to the pleading arcana of the 18th century. Acceptance of this contention by the Law Court would be a repudiation of the fundamental premise of the Maine Rules of Civil Procedure, adopted in 1959, modeled on the Federal Rules of Civil Procedure twenty years earlier. The essential thrust of the decision on appeal is that there was no

transfer. At least as early as the summary judgment motions three years before the trial, the Defendant-Appellants have been arguing, wrongly, that the "theory," i.e., that no Hillman Norberg Trust was ever formed and that there was no transfer of the GP Interests, however defined, was not in the case because it was "unpled." That fallacious argument was rejected in the order denying the summary judgment motions and similarly disregarded in the trial.

The order denying the motions for summary judgment is not in the Appendix because it is not the subject of this appeal. It is, however, in the record and it has dispositive significance with respect to Appellants' argument that Appellee has wrongly argued what Appellants characterize as an "unpled theory." Footnote 4 of the July 7, 2021, Order on Motions for Summary Judgment correctly and succinctly states:

> "As Maine is a notice-pleading state, Plaintiff's complaint supplies enough allegations to put into question the issue of the transfer from Gleichman to Hancock as Trustee of the HN Trust. It is fundamental that such a transfer must have taken place in the first instance for it to be set aside as fraudulent. The Court does not find Defendants' objection convincing and proceeds to address the merits of the issue."

As a well-known matter of legal history, the cornerstone premise of the "new rules" was to reject the technicalities of common law pleading whereby plaintiffs bringing an action in case would be met with the argument that it should have been trover or trespass and plaintiffs who had brought an action in trover or trespass would find the action being defended on the ground that it

should have been brought in case. M. R. Civ. P. 2, like F. R. Civ. P. 2, states clearly and plainly that there is *one* form of action, the "civil action."

Notice pleading not only abolished the individual forms of action, or merged them all into one, but it also rejected the technicalities of common law pleading and code pleading. All that is needed under our rules today is "a short and plain statement of the claim showing that the pleader is entitled to relief" M. R. Civ. P. 8(a). Compare M. R. Civ. P. 9 concerning the necessity or not of "pleading special matters." Nothing in Rule 9 supersedes Rule 8 in this case. Further, M. R. Civ. P. 10(b) requires pleading a separate count only if the complaint pleads a second "claim founded upon a separate transaction or occurrence…." There is only one transaction or occurrence in this case.

The letter and the spirit of the Maine Rules of Civil Procedure are entirely satisfied by Appellee's statement of this claim. To state the obvious, one cannot have a fraudulent transfer challenge unless there has been a transfer. To challenge a transfer necessarily includes the issue of whether any transfer has occurred. Two separate jurists in the Business Court considered and rejected the fallacious if not facetious argument that the issue of whether any transfer had happened was "unpled." Finally, if any more detailed pleading had ever been necessary, it surely would have been permitted by amendment under the text and policy of M. R. Civ. P. 15. But, from the time of the summary judgment practice three years before trial, the Defendant-Appellants

have been complaining about Plaintiff-Appellee's assertion of these arguments and this evidence. They cannot claim to have been surprised at the trial. The point of notice pleading is to inform the court and the other parties and protect defending parties from unfair surprise. Here, there is no surprise at all.

3. In the Alternative, If There Was a Completed Gift in 2012, It Was Avoidable as Fraudulent.

To begin, there is no contention that Defendant-Appellant Gleichman received equivalent (or any) value from Ellen Hancock at the time of the purported transfer or at any time thereafter. The Bank of America loan never happened. (T. Tr. 99:13-17.) Hancock never gave any guarantee. (T. Tr. 147:11-13.) The entire point of the purported transfer, strangely enough, was to protect Hancock, who needed no protection because she gave no guarantee. How Hancock could have been protected from financial loss by being a trustee for Hillman Norberg has never been explained and is difficult to understand, but that is a side issue.

Nor is there any serious question about whether Appellant Gleichman was deeply insolvent before, during, and after all the material events. The next question apparently began as an abstract debate about whether the GP Interests had any value at all. By trial, it had become whether their value was more or less than the amount of a large judgment lien in the "wall of debt" then owned by Gleichman's husband.

4. The Business Court Correctly Decided After Trial that the Property Did Not Have Zero Value.

Appellee did not engage an expert witness and had no obligation to do so. It was not Appellee's obligation to prove the present value of a contingent unliquidated entitlement to future distributions from three limited partnerships to seek to avoid their fraudulent transfer. Because the only judicial relief being sought was avoidance by nullification or rescission of any transfer, if one occurred, all that needed to be shown was that there was some value, i.e., that there was not zero value. As many, including Judge Duddy, have observed, the Defendant-Appellants' vigorous defense is itself evidence of value.

More to the point, however, in the foreclosure proceedings in Illinois, years after 2012, during which Appellant Gleichman was still insisting that she was the owner of the GP Interests, her expert witness swore an oath to his testimony that the aggregate value of the GP Interests was $3,821,448.52**.** (Pl.'s Ex. 15, at p.6.) By the time of trial, Defendant-Appellants' position appears to have changed from arguing that Appellee had failed to prove any value to the argument that Appellee had failed to prove that the value of the GP Interests exceeded the amount of a certain judgment lien to be addressed further below.

5. Fraudulent Transfers of Fully Encumbered Property.

Appellee does not dispute that, both in bankruptcy proceedings and generally, a general creditor is not entitled to judicial avoidance of a fraudulent

transfer of a fully encumbered asset. Basically, there is obviously no point to it because the judgment creditor or secured party has the right to enforce the judgment lien or the security interest, and there is nothing for others to gain by invoking the fraudulent transfer legislation. That, however, has nothing to do with this case.

Because the Business Court correctly decided that there never was a transfer of the GP Interests to Ellen Hancock as trustee, a declaration to that effect protects Appellee's rights with respect to the GP Interests. However, if the Law Court were to conclude that the Business Court was wrong and that a transfer of the GP Interests to Ellen Hancock (and her successor in interest Mary Wolfson) did occur, then there is every reason to set aside the transfer at least in this case on these facts.

It is not disputed that Appellant Gleichman's husband, Appellant Norberg purchased a large judgment against Appellant Gleichman for the purpose of constructing a "wall of debt" to protect Appellant Gleichman from her other creditors, both junior lien creditors and general creditors. (Def.'s Ex. 103, at 25:16-28:19; App. 00063, ¶¶21, 22.) Invoking the general rule that fraudulent transfers of fully encumbered property are not to be "avoided" as violations of the Fraudulent Transfer Act, Appellants urge the Court to disregard the essential transactional facts.

Appellant Norberg misappropriated over $4.5 million dollars of Promenade Trust funds to buy the lien in question. (Def.'s Ex. 101, at 18:7-21, 115:2-25.) It bears repeating that the Promenade Trust is an irrevocable trust. Subsequently, Appellant Norberg and Trustee Coggeshall made a settlement. Mr. Coggeshall gave Mr. Norberg a release from liability for the misappropriation and other debt obligations in return for Norberg's assignment of the lien that had been purchased with the Promenade Trust funds. (T. Tr. 197:12-200:19; Def.'s Ex. 101, at 18:14-25, 22:18-23:25; Pl.'s Ex. 49.)

The judgment lien assigned to Trustee Coggeshall was later assigned to Appellee as successor Trustee and he brought this action to challenge Appellant Gleichman's effort to place the GP Interests out of the reach of all her creditors including Appellee as owner of the lien that Appellant Norberg assigned to Trustee Coggeshall to settle Trustee Coggeshall's claim for misappropriating the funds Norberg used to buy the lien. (Pl.'s Ex. 47.)

The lien was never discharged. There was no magic that empowers that lien to preclude fraudulent trust avoidance of this purported transfer under the general rule on encumbered assets, while also stripping that same lien of its value upon assignment of the lien as consideration for release of Norberg's liability for misappropriating money due to the releasor. The circularity and invalidity of Appellants' argument is self-evident.

Ultimately the core logic of this lien argument is also the core logic of the dismissed counterclaim. Appellant Norberg may have intended never to use the lien for any purpose other than to block other creditors pursuant to the "wall of debt" strategy. Neither Trustee Coggeshall nor Appellee, the successor trustee, had or could have had any obligation to breach their fiduciary duties to the beneficiaries, especially after assignment of that lien as consideration for release of liability for misappropriation of over four and a half million dollars from the Promenade Trust to buy that lien. Just as the counterclaim was dismissed, this argument must be rejected.

In passing, before closing, something needs to be said about the Appellants' contention that Appellee is only a general creditor arriving on the scene too late. Appellee is a lien creditor by assignment from Trustee Coggeshall who owned the lien by assignment from Appellant Norberg in settlement of claims against Norberg for misappropriating funds of the Trust to buy the judgment. Therefore, Appellee is neither a general creditor nor too late. It is not necessary for the Court to decide whether the subject lien would have precluded fraudulent transfer avoidance at the behest of other creditors because there are no other creditors before the Court. It is enough to decide either that fraudulent transfer enforcement is unnecessary because there was no transfer or that fraudulent transfer avoidance is imperative to protect the

interests of the lienholder, even if fraudulent transfer relief might not otherwise be available to other parties.

In sum, in the unlikely event the Law Court determines that there was a valid completed transfer of the GP Interests, Appellant Gleichman was deeply insolvent at all material times and received no equivalent value for the transfer. Her only defense is that a lien, acquired by her husband with misappropriated funds of the Promenade Trust, and now owned by the current trustee of the Promenade Trust, insulates this fraudulent transfer from judicial remedy, i.e., the lien bought with Trust money now defeats the Trustee's action seeking to protect the ability to enforce that lien in due course when the GP Interests can be liquidated. The argument is self-refuting. If there was a transaction, it must be "avoided." The Business Court correctly so determined.

VI. CONCLUSION

Under the Maine Constitution, neither the Defendant-Appellants nor the Counterclaim-Plaintiff-Appellants had any right to a jury trial on any issue in this matter. The counterclaim fails to state a claim upon which relief can be granted because the statutory law of Maine is clear that the duties of the trustee of an irrevocable trust run exclusively to the beneficiaries and the counterclaimants are not beneficiaries.

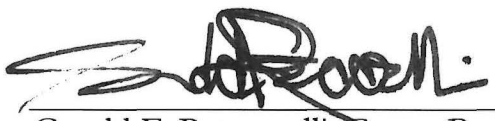
As a matter of law and operational fact, nothing in the record supports the idea that there ever was an arrangement known as the Hillman Norberg Trust or that the

GP Interests were ever transferred to Ellen Hancock as trustee of any trust arrangement. The tax returns that were filed (and the absence of any others) show that no transfer of the GP Interests was accomplished. If it had been, it was fraudulent. Either way, the rights of the Plaintiff-Appellee as holder of liens against Defendant-Counterclaim-Plaintiff-Appellant Pamela Gleichman are unaffected and Defendant Appellant Mary Wolfson has no ownership in or claim to the GP Interests. The liens remain fully enforceable against any future distributions from any of the three limited partnerships because Defendant-Appellant Pamela Gleichman was and remains the holder of the GP Interests.

The judgment must be affirmed.

Respectfully Submitted,

November 20, 2024
Date



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CERTIFICATE OF SERVICE

I, Gerald F. Petruccelli, Esq., hereby certify that on this 20th day of November the Brief of Appellee Richard P. Olson, in his capacity as Trustee of the Promenade Trust was served as set forth below, by electronic mail:

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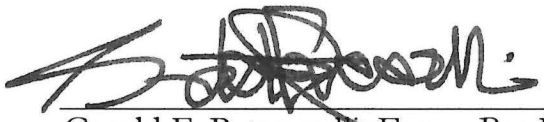
Seasonably after receiving approval of the electronically filed brief from the Clerk of the Law Court, printed copies will be prepared, filed by hand delivery, and served by depositing printed copies in the United States mail, postage prepaid, addressed as indicated above.

NOVEMBER 20, 2024
Date



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