SUPREME JUDICIAL COURT

SITTING AS THE LAW COURT

LAW DOCKET NO. BCD-24-318

RICHARD P. OLSON, Trustee of the Promenade Trust
Plaintiff – Appellee

v.

PAMELA GLEICHMAN
GENERAL HOLDINGS, INC. AND ELLEN HANCOCK, TRUSTEE OF Hillman Norberg Trust
Defendants– Appellants

ON APPEAL FROM BUSINESS AND CONSUMER COURT

APPELLANTS' REPLY BRIEF

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APPELLANTS' REPLY BRIEF

I. INTRODUCTION

The Appellants Pamela Gleichman ("Gleichman") and Karl Norberg (Norberg") submit this reply brief in response to the Brief of Appellee Richard Olson, Trustee of the Promenade Trust (the "Red Brief") dated November 20, 2024.

Olson argues that despite the genuine and contemporaneous documentation of a trust arrangement executed twelve years ago with the assistance of attorneys and with the involvement of the then trustee of the Promenade Trust, the Court should nevertheless deem that the Hillman Norberg Trust was never created and that there never was a transfer of Gleichman's GP interests in the three Maine partnerships into that trust. Olson alternatively argues that, even if the transfers of economic rights did take place in 2012, those transfers were in violation of Maine's Fraudulent Transfer Act and that Olson is entitled to by-pass the "axiomatic" requirement to exhaust legal remedies and circumvent the normal statutory prerequisites to MUFTA liability. He argues that it was sufficient for him to merely prove that the interests had "some value" at the time they were conveyed.

The Red Brief discusses very few of the many legal authorities supporting Appellants' positions, and the few cases discussed in the Red Brief do not support Olson's positions on appeal. The Red Brief cites to no statutory language or caselaw that justifies the Business Court's: A) denying the properly and timely invoked

demand for a jury trial or B) its dismissing the numerous counterclaim counts – none of which were in fairness premised upon a duty running to the trustee to "betray the beneficiaries"; or C) its disregarding the fundamental premise of fraudulent transfer liability which is proof that "equity" in fact existed in the property transferred at the time of transfer which equity was diverted away from the "estate" where it otherwise would have been available to unsecured creditors.

A. THE CLAIMS BROUGHT BY OLSON AS WELL AS THE COUNTERCLAIM COUNTS GIVE RISE TO A RIGHT TO HAVE THEM RESOLVED BY A JURY

The Red Brief fails to distinguish the decision Granfinanciera, S. A. v. Nordberg 492 U.S. 33, 46-47 (1989), 109 S.Ct. 2782 ("Granfinanciera") and relies entirely on a 1994 undue influence decision by this Court, see DesMarais v. DesJardins, 664 A.2d 840 (Me. 1994), that did not even involve any fraudulent transfer claim. Otherwise, the Red Brief merely dismisses the wealth of authorities cited in the Blue Brief as simply being "bad law and bad history." Red Brief at 15.

The DesMarais case was not a fraudulent transfer case, but instead involved claims that undue influence was exercised in connection with causing a deceased woman to convey her Wells beach-front family home to her two caregivers. The claim against the caregivers that went forward to a bench trial was a tort claim for interference with an expected legacy; summary judgment had been entered earlier against the plaintiffs on their related claims for duress, undue influence, and unjust

enrichment. This Court first reiterated the well-established principle that there is a right to a jury trial in all civil cases unless the party bringing the claim "affirmatively shows" "that a jury trial was unavailable in such a case in 1820". Id. quoting Harriman v Maddocks, 560 A.2d 11, 12(Me. 1989). The decision made it clear that the right to a jury trial does not depend solely upon the relief sought – but instead that the relief sought is but "a factor" in the analysis. DesMarais v. DesJardins, 664 A.2d 840, 844-45 (Me. 1994). The "basic nature of the issue presented" was found to be "equitable" because "the issues were undue influence, duress, lack of capacity, and damages" as were the issues in Cyr v. Cyr, 396 A.2d 1013, 1018 (Me. 1979) (usually the decision is based upon the pleadings). The Court observed that the damages relief referred to in the Complaint was "not included in a manner indicating that they are a separate and alternative form of relief to rescinding the transfer" which was construed to mean that they did not seek an award of "damages equal to the value of the property … as an alternative to rescinding the transfer." Id.

The DeMarais case therefore by no means constitutes "the controlling precedent" as to the issues presented in this case as argued on page 18 of the Red Brief. The decision does not involve or even discuss actions to recover personal property; it was not a fraudulent transfer claim and did not involve any form of statutory liability in which conditions for relief (or elements of proof) have been set by the Maine Legislature. The decision is in no way enlightening on the issue of

whether a litigant may circumvent a jury by "waiving" legal remedies provided for by statute. Instead, the decision involved the entirely equitable issues of resolving questions of capacity and duress along with the need to recover a unique asset – i.e., the family real estate that had been conveyed.

The Granfinanciera decision did involve the fraudulent transfer statutes and highlights the common law history which limited non-jury treatment principally to those actions seeking the recovery of real estate which the common law has long recognized as having a special nature.[1] The Red Brief concedes at page 15 that U.S. Supreme Court decisions construing the Seventh Amendment provide "persuasive secondary authority" for applying Maine's Constitution (which was adopted just twenty-nine years after the Seventh Amendment), and concedes at page 16 that it is "well-recognized" that actions for "fraudulent conveyance[s] of a chattel or a sum of money" presented jury matters at common law. To avoid the implications of that language and the fact that a chattel is the equivalent of personal property, at page 17 of the Red Brief, Olson attempts to redefine what was at stake in the present case as being a mere "intangible" and something other than personal

[1] The "concept of the uniqueness of a piece of real estate" is often cited in Maine law as supporting the entry of injunctive relief and satisfying the irreparable harm element. Horton and McGehee, *Maine Civil Remedies*, § 5-5(b) at 104 (4th ed. 2004). The Superior Court case cited in the Red Brief likewise involved an action seeking to recover real estate, with the Court writing "when the claim in the case is a fraudulent transfer of real property and the specific relief requested is equitable in nature, the case sounds in equity." WCP Me. Loan Holdings, LLC v. Norberg, 2019 Me. Super. LEXIS 4.

property. But the only interests in the limited partnerships that could be transferred to Ellen Hancock were the economic interests, and the Legislature has defined those rights as "personal property." Maine law defines the "transferable interests" in a limited partnership as constituting "personal property." See 31 M.R.S. section 1381 (quoted at footnote 18 of the Blue Brief, but not even referred to in the Red Brief). The personal property that Olson challenges the transfer of are in fact "chattels," and the Granfinanciera reasoning makes clear that actions to recover such interests were at least in part "legal matters" at common law – giving rise to a jury right in those matters. 492 U.S. 33 at 44.

It is clear that documents evidencing distributional rights are much like stock certificates and that they are explicitly defined under Maine law as constituting "personal property."[2] Actions to reverse transfers of stock certificates as being fraudulent surely would implicate jury rights. They would constitute actions to recover personal property and not merely accounting actions or actions seeking

[2] A chattel is commonly defined as "[a]n article of personal property, as opposed to real property." Bahre v. Pearl, 595 A.2d 1027, 1033-34 (Me. 1991) (citing Black's Law Dictionary 215 (5th ed. 1979)). While the term "chattel" is used to encompass tangible items, when the "chattel" involved represents ownership or rights to payments, it is not a mere "intangible" – but instead constitutes personal property that can be the subject of an action for conversion. See Bahre, 595 A.2d 1034 (discussing stock certificates as chattel due to the tangible nature of the certificate); Danton v. Kerr, CV-18-18, 2018 Me. Super. LEXIS 134, at *12 (Aug. 13, 2018) ("[i]ntangible personal property represented by and/or merged into tangible instruments or documents may be subject to conversion [and thus trespass to chattels], such as for example intangible interests represented by promissory notes...whether negotiable or non-negotiable, insurance policies and savings bank books. Restatement (Second) of Torts, § 242 cmt. b (1979)").

intangible rights in "partnerships" or "trusts". Actions like Olson's action here were not uniquely reserved "at the core of the Chancery Court's jurisdiction" (that is, not worthy of protection through a jury trial) as Olson argues at page 17 of the Red Brief.[3]

The Granfinanciera decision also rejects the notion that a claimant can circumvent the jury right by claiming that the remedies at law are not adequate. The Supreme Court wrote at pages 48 and 49 that its decision in Schoenthal v. Irving Trust Co., 287 U.S. 92 (1932), had removed all doubt that legal remedies can be waived so as to bypass a jury right and that where legal remedies exist a jury right exists since this "serves to guard the right of trial by jury preserved by the Seventh Amendment and to that end it should be liberally construed." 287 U.S., at 94. The Red Brief ignores the entire body of law and argument discussed at pages 19 to 21 of the Blue Brief establishing that fraudulent transfer claims require the exhaustion of all legal remedies before resort can be had to equitable remedies such as reversing transfers.

[3] Compare Ross v. Bernhard, 396 U.S. 531, 533-43 (1970) (right to jury trial in a stockholder derivative suit since part of the claim implicated "legal" issues – that is, claims of wrongdoing by those controlling the entity; the Court recognized that the common law entitled parties to a jury trial "for conversion of personal property"; statute allowing triple damages added further supported the right). In the Ross case the Court wrote that "where equitable and legal claims are joined in the same action, there is a right to jury trial on the legal claims which must not be infringed either by trying the legal issues as incidental to the equitable ones or by a court trial of a common issue existing between the claims". Id. 537-538.

In a very timely decision for purposes of resolving the jury issue in the present case, this Court wrote just a couple of weeks ago that exhausting legal remedies before resorting to equity is "axiomatic" and that an "unjust enrichment claim involving the rendition of services cannot be adjudicated until after the court has rejected a quantum meruit claim involving the same services". Core Finance Team Affiliates, LLC v. Maine Medical Center et al. 2024 ME 78, para. 28.[4] For these same reasons, Olson cannot avoid a jury by claiming that he wished to proceed directly to obtaining an order voiding the transfers and conveying those interests to him rather than the trust to benefit Hillman Norberg. The equitable remedy of avoidance is only authorized if liability is established through proof of the various

[4] Justice Horton wrote for the Court on November 26, 2024, that the requirement that all litigants first exhaust the legal remedy of quantum meruit could be:

> "readily inferred from the combination of our limitation on the availability of equitable remedies if there is an adequate legal remedy, see Keniston v. JPMorgan Chase Bank, 2007 ME 29, ¶ 9 n.6, 918 A.2d 436; Wahlcometroflex, Inc. v. Baldwin, 2010 ME 26, ¶ 22, 991 A.2d 44; McIntyre v. Plummer Assocs., 375 A.2d 1083, 1084 (Me. 1977), and our characterization of quantum meruit as a legal remedy and unjust enrichment as an equitable remedy, see Dinan v. Alpha Networks Inc., 2013 ME 22, ¶ 20, 60 A.3d 792 ("Quantum meruit is a legal, not an equitable, remedy and thus is distinct from the theory of unjust enrichment." (citing Cummings, 2004 ME 93, ¶ 9, 853 A.2d 221)). Our cases express the "axiomatic" principle that an equitable remedy will be granted only where there is not an adequate legal remedy. McIntyre, 375 A.2d at 1084. So too, a party will not be awarded an equitable form of relief when the party fails to timely pursue a legal remedy available to it. Id. ("[The] appellee had an adequate legal remedy available to her, namely, redemption, and . . . having failed to pursue that remedy she is not entitled to the equitable relief of specific performance."). Limiting a litigant's access to courts of equity serves to encourage the diligent pursuit of legal remedies. See Kane v. Morrison, 44 A.2d 53, 54 (Pa. 1945); In re Wife, K., 297 A.2d 424, 425-26 (Del. Ch. 1972).

Id. at para. 28.

elements of a MUFTA claim. As in the Maine Medical case, the nature and structure of MUFTA provide independent reasons to require initial jury involvement (apart from the axiomatic exhaustion rule).[5]

B. THE AMENDED COUNTERCLAIM CONTAINED SUFFICIENT ALLEGATIONS TO STATE VALID CLAIMS IN RESPECT TO EACH OF THE COUNTS

As for the dismissal of the counterclaim, Olson sets up the strawman argument that the claims asserted were based upon the theory that a trustee owes a duty to the settlers of a trust to betray the beneficiaries. See Red Brief at 24. That argument seeks to "re-frame" the allegations of the Counterclaim so that they can be

[5] Equitable remedies cannot be obtained before meeting the various elements of proving a MUFTA violation. The various provisions of that enactment reflect a "primacy" of first establishing damages under the remedial scheme involved. Id. at para. 29. An initial resort to legal remedies (implicating the jury right) is built into the very structure of Maine's Fraudulent Transfer Act. The statute contemplates a gateway assessment of whether there is any case at all for relief by requiring a decision as to whether the transfer even involved an "asset" – meaning a decision whether any equity was conveyed (a classic jury issue of assessing the value of assets). Then the statute contemplates resolving numerous factual issues as to matters such as whether there was any fraudulent intent and whether the transferor was insolvent. If the elements are met to establish "voidability" – an award of damages can be entered by the jury (with limitations on recoveries) and can be entered against both the transferor as well as the transferee – but only in a sum sufficient to satisfy the claimant's debt. If those remedies do not suffice, equitable relief is allowed in the form of the avoidance of the transfer. These various steps to proving liability and entering remedies represent a combination of legal and equitable relief. The primacy of the types of relief available as implied in the MUFTA provisions is not unlike the distinct levels of remedies that this Court held required that the plaintiff in the Maine Medical case first exhaust the non-equitable remedies. In that recent decision the failure to exhaust the legal remedies resulted in this Court's vacating a judgment of well over one-half million dollars that had been entered by the Business Court based on the equitable claim after the plaintiff had failed to first attempt recovery for its losses through the "legal claim". See also Gillespie v. Sand-Rock Transit, Inc., 292 Ga. App. 661 665 S.E.2d 385 (2008) (action to void a transfer of real estate and to impose an equitable lien gave rose to jury right; jury decides fraudulent intent).

easily shot down.

The Red Brief's "framing" of the Counterclaim is not accurate; instead, the counts set forth various well-recognized tort and contract theories of liability. The counts of the Counterclaim arise out of commitments made by the Trustee of the Promenade Trust in relation to assets which the grantors of the trust (Gleichman and Norberg – who are also the only persons who have ever made contributions to the trust) conditionally entrusted to the Promenade Trust as part of an arrangement to enhance the assets of the trust.[6]

The Red Brief ignores entirely the allegations set forth in the Counterclaim despite the fact that not only are they all supposed to be assumed to be true – but the motion justice was supposed to assume the truth of not just what was explicitly alleged, but also of all reasonable inferences that could be drawn from them favorable to the pleader.

By accepting Olson's caricatures of the various claims, the Business Court was misled into addressing the matter as if it were entirely dependent upon whether a trustee had a duty to betray his fiduciary duties. Since no such assertions were made – much less asserted as the foundation of all counts, the various counts were improperly dismissed.

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C. THE BCD MISCONSTRUED THE PRECONDITION TO FRAUDULENT TRANSFER LIABILITY OF PROVING VALUE ABOVE THE AMOUNT OF "VALID LIENS" AND ERRED IN DISREGARDING "AXIOMATIC" EXHAUSTION REQUIREMENTS AND IN UPSETTING THE ASSIGNMENTS AGREED TO AND DOCUMENTED BY BOTH TRANSFEROR AND TRANSFEREE

The Red Brief dedicates a mere one page (page 31) to the most important argument in the Blue Brief – that is, that MUFTA liability requires as an essential element and condition to granting any form of relief that there be evidence that net equity existed for unsecured creditors at the time of the transfer. See Blue Brief at 27 – 36. The Red Brief fails to address the Business Court's legal interpretation errors delineated in some detail on pages 29 through 35. Instead, all that appears are false, irrelevant and unsupported disparaging remarks about Norberg[7] and the

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The Counterclaim further alleged that the Counterclaim Defendant – the Promenade Trust – [] used the judgments in various ways in violation of the understandings reached when the judgments were assigned" and used "the assigned judgments against the Counterclaim Plaintiffs so as to obtain for itself and for the benefit of Rosa Scarcelli (and/or her entity) the economic interests in numerous limited partnership entities owned by Pam Gleichman – in violation of the agreement that it would protect those interests," even "joining in an attempt to wrest from Pam Gleichman her management interests in the numerous limited partnerships". See Amended Counterclaim ¶¶ 183. App. At 108. The Counterclaim even quoted testimony of Promenade Trust Trustee Coggeshall agreeing that the judgments were only to be used to protect Pam and her family, and that he had refused to take any actions using them to take projects away from Gleichman – in fact opposing actions to do that in Illinois. See Amended Counterclaim ¶68, 106 and 107 and 114 – 115. App. 76, 86-89.

Counts XV through XVII asserted fraudulent transfer claims against the Promenade Trust, alleging each of the required elements for UFTA claims. The Counterclaim contained several allegations as to how Gleichman and Norberg were in fact creditors at the time of the transfers being challenged. See Amended Counterclaim ¶¶ 265, 266, 267, 268, and 292. App. 128 through 139.

bald assertion – with no law or analysis - that there is no need to determine "equity" – but rather just that the property transferred had "some value" wholly apart from encumbrances, ignoring the definition of the word "asset" and the innumerable cited cases that have addressed the topic.

Finally, the Red Brief fails to explain how Olson (as a creditor) has any standing

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[7] Olson's brief avoids discussing the Business Court's erroneous construction of MUFTA by instead repeatedly making disparaging false suggestion of wrongdoing by Karl Norberg in connection with the judgments he obtained in settling claims against his wife. The Red Brief repeatedly states that Norberg wronged the Promenade Trust to the tune of millions of dollars and for that reason handed over to the Trust the judgments which Olson proceeded to use to foreclose on Gleichman's interests in 45 partnerships and which he is attempting to use in the present case to take from Karl's son, Hillman, the beneficial interest in the remaining three partnerships. That claim is entirely contrary to the actual evidence submitted at trial. Contrary to the notion that Norberg misappropriated over $4.5 million, the actual testimony was that Norberg committed no wrongs against the Promenade Trust and that Trustee Coggeshall knew that he had not done so and was not pursuing any claim against Karl. Instead, the family plan was devised with the Promenade Trust at the center of it to protect the family assets, using an argument that Scarcelli had contrived that Karl had failed to properly make payments to the Promenade Trust out of a refinancing – despite the fact that Karl himself had put up his entire inheritance to further the project.

To support his extraordinary assertion Olson relies on page 33 of his brief on the Trial Transcript of Karl Norberg; but that testimony (and that shortly before it on his direct examination) establishes that the transfers were part of the lawyer-designed strategy of protecting the family assets with a wall of debt (a strategy that Olson himself testified that he also used for clients, Tr Trans. at 69:3 to 70:1); Norberg testified about building that wall of debt with judgments against his wife which he had paid off and purchased. T. Tr 197:12 to 198:5 (testimony of Karl Norberg). He testified that he did not misuse funds that should have gone to the Promenade Trust and that Trustee Coggeshall made no accounting demand of him. Tr. Trans at 189:14 to 190:25 and 198:8 to 199:21. Instead, Norberg's uncontroverted testimony was that after he gave to the Promenade Trust <u>for no consideration</u> his 40% interest in a very valuable project in Chicago (the Lakeside Project), he used sale proceeds of a portion of the project to pay project bills – doing so with the consent to Trustee Coggeshall – only to have Scarcelli later second guess his good faith actions. Tr. Trans at 189:14 to 190:25. The Business Court interrupted Norberg's direct and cross on this topic – finding that the entire topic was irrelevant. Olson's counsel did not argue that it had any relevance such as he is now claiming it has in his twisted version. See Trans. At 191:1-12 and 198:20 to 199:13.

to upset a conveyance of economic interests when Olson is not a regulator, and both the transferor and transferee credibly reached an agreement which they placed in writing and executed 12 years ago. He fails to assert that he detrimental relied upon any representations to him that the economic rights in these partnerships were being conveyed to him.[8] And he does not attempt to reconcile his position with the fact that Trustee Coggeshall was consulted in regard to the transfer before it occurred or with the fact that the conveyance was made known to Scarcelli's lawyer at least by 2015. See Blue Brief at footnote 10.

Parties must be able to rely upon the integrity of contracts and the written conveyance of contract rights. Property rights are not "free floating" such that they can be easily reversed years after transfers have occurred based upon nothing more than a creditor's wishing that it had received 100% of a portfolio rather than just 95%. Hancock not only granted her valuable time over years and her creditworthiness to save the family home, but she advanced $200,000 of her own funds to make sure that a portion of the property that the family wished to protect in Bar Harbor was saved.

[8] Olson implies there was some significance to the fact that a lawyer asked that a separate trust benefiting Hillman be formed for purposes of receiving other assets, but there is no suggestion that the initial trust was voided. And the lack of filed tax returns does not void property transfers. Moreover, that fact was explained in any event as arising from a combination of the partnerships having produced no income and the fact Gleichman's daughter was managing them. Property interests should not be disrupted simply because tax returns are not filed or because they are filed erroneously due to business disputes between factions as to the control over the entities.

III. CONCLUSION

The Court should vacate the judgment and remand for a jury trial on all aspects of the Complaint and all counterclaim counts.

Dated this 13th day of December 2024, at Portland, Maine.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that after receiving approval of the electronically filed brief from the Clerk of the Law Court, printed copies will be prepared, and filed by hand delivery or served by depositing printed copies in the United Stated mail, postage prepaid to the Appellees' counsel:

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