NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-6045-09T4
A-0317-10T4

SUN NATIONAL BANK,

Plaintiff-Appellant,

v.

JOSEPH J.J. VISCI; VISCI & ASSOCIATES, PC; CHARLES ALARIO; JANET ALARIO; and VENDOR CAPITAL GROUP, a division of TELERENT LEASING CORPORATION,

Defendants,

and

FRANK ALARIO and NANCY ALARIO,

Defendants-Respondents.

SUN NATIONAL BANK,

Plaintiff-Respondent/
Cross-Appellant,

v.

JOSEPH J.J. VISCI and VISCI & ASSOCIATES, P.C.,

Defendants-Appellants/
Cross-Respondents,

and

FRANK ALARIO; NANCY ALARIO; CHARLES ALARIO; JANET ALARIO; and VENDOR CAPITAL GROUP, a division of TELERENT LEASING CORPORATION,

Defendants.

Argued May 18, 2011 - Decided June 8, 2011

Before Judges R. B. Coleman, Lihotz, and J. N. Harris.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Docket No. L-2215-09.

Mark S. Kancher argued the cause on behalf of appellant Sun National Bank in A-6045-09T4, and respondent/cross-appellant Sun National Bank in A-0317-10T4 (The Kancher Law Firm, LLC, attorneys; Mr. Kancher, on the briefs).

Joseph J.J. Visci argued the cause on behalf of pro se appellants/cross-respondents Joseph J.J. Visci and Visci & Associates, P.C. in A-0317-10T4 (Visci & Associates, P.C., attorneys; Mr. Visci, on the brief).

Michael J. Watson argued the cause on behalf of respondents Frank Alario and Nancy Alario in A-6045-09T4 (Brown & Connery, LLP, attorneys; Mr. Watson and Stephen J. DeFeo, on the brief).

PER CURIAM

In these back-to-back appeals, which we have now consolidated for purposes of this opinion, we review an uncommon scenario that plaintiff Sun National Bank (Sun) claims implicated New Jersey's version of the Uniform Fraudulent Transfer Act (NJUFTA), N.J.S.A. 25:2-20 to -34.[1] The Law Division dismissed all of Sun's statutory claims on summary judgment, denied Sun the right to amend its complaint to add a

[1] N.J.S.A. 25:2-20 expressly states: "This article shall be known and may be cited as the 'Uniform Fraudulent Transfer Act.'"

common law unjust enrichment claim, and also denied frivolous litigation remedies to two of the successful moving parties, defendants Joseph J.J. Visci (Visci) and Visci & Associates, P.C. (the Visci law firm). We reverse the dismissal of the complaint and the denial of the request to amend the complaint; we remand for further proceedings in the Law Division; and we vacate, as moot, the denial of frivolous litigation remedies.

I.

The factual backgrounds of both appeals, which we glean from the summary judgment record developed through the pleadings and discovery, are identical. See Kieffer v. Best Buy, 205 N.J. 213, 217 n.1 (2011). Because these appeals initially arise on defendants' motions for summary judgment, we generously consider the facts in the light most favorable to plaintiff Sun, and we turn around the generosity when we consider Sun's cross-motion for summary judgment. See Henry v. N.J. Dep't of Human Servs., 204 N.J. 320, 325 (2010); R. 4:46-2.

Defendants Frank Alario and Charles Alario are brothers, now estranged. Defendant Nancy Alario is married to Frank; defendant Janet Alario is married to Charles.[2] Defendant Visci is a licensed New Jersey attorney and owner of the Visci law

[2] Sun recovered a default judgment against Charles and Janet on December 23, 2009, which is not the subject of this appeal.

firm. Defendant Vendor Capital Group, a division of Telerent Leasing Corporation (Vendor Capital) —— since dismissed from this action and not the subject of this appeal —— is engaged in leasing restaurant equipment. Non-party JTA Associates, LLC (JTA) is a limited liability company, which entered into a loan facility with Sun in the aggregate amount of $800,000. Although the origins of JTA are obscure,[3] Janet signed the loan facility's promissory note, loan and security agreement, two modification notes, and security agreement as the "Sole Member" of JTA.

According to Frank, a practicing physician, he first entered into a business venture with Charles in 1992. Frank invested approximately $200,000 in a number of Nathan's Hotdogs restaurant franchises run by Charles. Frank described his aggregate investment as "all done on a handshake and trust because of brothers." At the time of Frank's deposition in this case, he had not received any return on these Nathan's Hotdogs investments, and he believed that the franchises had filed for bankruptcy.

Frank additionally invested approximately $100,000 with Charles for the establishment and operation of a Golden Corral restaurant franchise in Audubon, which later expanded to another

[3] In response to a Request for Admissions promulgated by Visci and the Visci law firm, Sun admitted that JTA was organized in New Jersey on December 25, 2007, by Janet. Sun denied that Charles both organized JTA and was a member of it.

location in Bensalem, Pennsylvania. Charles then asked Frank to invest in the construction of a third Golden Corral restaurant in Howell. Frank signed a bank loan guaranty for the acquisition of land to build the restaurant, but he did not make a monetary investment in the project. Frank also claimed that based upon Charles's recommendation, he had invested approximately $200,000 in a candy company called "Ricky's," which by the time of the deposition in this case was defunct.

In May 2007, a Master Lease Agreement (together with several ancillary agreements) was executed between non-party Buffets of Pennsylvania, LLC d/b/a/ Golden Corral, Bensalem, Pennsylvania (Buffets) (as lessee) and Vendor Capital (as lessor) for the lease of restaurant equipment intended for the Golden Corral restaurant in Bensalem (the Bensalem Golden Corral equipment lease). According to the several instruments in the record, the individual representative of Buffets was Frank. His signature —— acknowledged by a New Jersey notary public —— appears on numerous documents above the words "Frank Alario, Managing Member." Frank also allegedly co-signed the documents as a co-lessee. Charles, Janet, Nancy, and eleven non-party business entities also signed as co-lessees.[4]

[4] The individual representative of each non-party business entity was Charles. All of the individual co-lessees' signatures were acknowledged by the same New Jersey notary public.

Frank and Nancy have argued that someone —— presumably Charles —— forged their signatures on all of the documents associated with the Bensalem Golden Corral equipment lease. Other than the assertion of a forgery in their appellate brief, our review of the record reveals scant competent evidentiary material to support their claim. Neither Frank nor Nancy submitted certifications in the Law Division, and in their respective depositions they did not utter the word forgery. The sole evidential support for their forgery allegation is found in Visci's summary judgment certification, which conclusorily stated: "[a]fter review of the Vendor [Capital] financing documents and further investigation, it was confirmed that Charles had forged Frank's name and Nancy's name to the said Vendor Capital financing documents."

Things did not go smoothly with the Bensalem Golden Corral equipment lease for reasons that are not relevant to this appeal. According to Visci's certification, in December 2007, Frank received a letter from Vendor Capital demanding payment of a loan it had made "to a business venture in which [Frank] had invested with Charles," an apparent reference to the Bensalem Golden Corral equipment lease. Visci stated that Frank was "shocked" by the letter because Frank claimed he had "never undertaken a loan from or heard of Vendor [Capital]." According

to Frank's deposition, after he was served with Vendor Capital's civil action complaint, he confronted Charles:

> Q. What was your conversation with your brother after having received [the Vendor Capital complaint]?
>
> A. I said, "I got sued by this company. Who's this company?"
>
> Q. What did he say?
>
> A. He says, "He's a vendor that I'm taking care of. Don't worry about it. Go back to your business."
>
> Q. Did you respond to that?
>
> A. I said, "Okay, thanks," and I went back to Mr. Visci.

Vendor Capital commenced the civil action relating to the Bensalem Golden Corral equipment lease in December 2007. It sued Buffets and the four individual Alarios as defendants, along with the eleven business entities designated as co-lessees. A seventeenth defendant was non-party Bob Finkelstein & Associates, Inc., the putative supplier of restaurant equipment. Vendor Capital sought in excess of $400,000 in damages, based primarily upon a breach of contract theory. The Visci law firm agreed to represent Frank and Nancy in the action. Neither Charles nor any of the other defendants was represented by the Visci law firm.

According to Visci, Charles, "[o]n his own initiative," offered "to settle the matter between him and Frank" by paying

Vendor Capital the amount due, $417,000, along with "Frank's attorneys fees." Visci stated in his deposition that Vendor Capital originally sought as much as $450,000 in damages, which he negotiated downward. In order to bring the Vendor Capital settlement to fruition, Visci needed funds on behalf of his clients, which he claimed came from Charles.

On March 6, 2008, three months after the Vendor Capital lawsuit began, Sun and JTA entered into the aforementioned $800,000 loan facility, whereby Sun agreed to provide JTA with a working capital line of credit for "purchases of equipment and leasehold improvements for use in [JTA's] business operations." Janet signed the loan documents on behalf of JTA as its "Sole Member." Concurrently, Janet and Charles individually signed separate loan guaranty agreements; non-party Janet's Inc. executed both a loan guaranty agreement and a security agreement in favor of Sun, which Janet signed as "President" of Janet, Inc. Based upon Sun's responses to Visci's and the Visci law firm's Request for Admissions, within twenty-four hours of the loan facility becoming effective, JTA "had on deposit the sum of $600,000," which came entirely from the line of credit.

The next day, Sun consummated a wire transfer to shift $419,000 from JTA's account at Sun to the Visci law firm's trust account maintained at the Bank of America. We reproduce here the redacted wire transfer authorization form:

SUN NATIONAL BANK

WIRE TRANSFER AUTHORIZATION

Date: 3/7/08 CBC Name: Freehold #1608

DOMESTIC WIRE	INTERNATIONAL WIRE
TRANSFER AMOUNT: 419,000.00	AMOUNT - US DOLLARS:
	AMOUNT - FOREIGN CURRENCY:
INDIVIDUAL INITIATING WIRE: Charles Alario	ORIGINATOR ACCOUNT NUMBER: [redacted]
ORIGINATOR ACCOUNT TITLE: JTA Associates LLC	
ORIGINATOR STREET ADDRESS: 8 Nan Tone CT	ORIGINATOR CITY, STATE AND ZIP CODE: 07722 Colts Neck NJ
BENEFICIARY ABA/SWIFT #: [redacted]	BENEFICIARY ACCOUNT NUMBER: [redacted]
BENEFICIARY BANK NAME: Bank of America	BENEFICIARY NAME: Joseph J J Visci Esq
BENEFICIARY BANK STREET ADDRESS: 6 South Main ST	BENEFICIARY STREET ADDRESS: 25 North main ST
BENEFICIARY BANK CITY AND COUNTRY: Marlboro N.J 07746	BENEFICIARY CITY AND COUNTRY: Marlboro N.J. 07746
SPECIAL INSTRUCTIONS: Alario - BFA - Golden Corral Equipment	
PURPOSE OF WIRE: Purchase of Eq	CUSTOMER ID - TYPE: NJDL
CUSTOMER WRITTEN AUTHORIZATION:	CUSTOMER ID - NUMBER: A [redacted]
BANK EMPLOYEE PREPARING FORM: Carmen E Cr	BANK WRITTEN APPROVAL:
CONFIRMED WITH/TIME CONFIRMED:	CONFIRMED BY:
TIME WIRE REQUEST TRANSMITTED	INDIVIDUAL TRANSMITTING WIRE REQUEST (HOST)

The purpose of the wire transfer was denominated as the purchase of equipment for a Golden Corral restaurant. The wire transfer authorization form listed Charles as the "individual initiating wire" and JTA as the "originator account title." The "customer written authorization" is illegible, but it presumably was signed by Charles. A copy of the wire transfer authorization form was sent by electronic facsimile to Visci on the same day the transfer was effectuated.

Upon receipt of the funds, Visci sent a wire transfer authorization to Bank of America to shift $417,000 from the Visci law firm's trust account to Vendor Capital's bank account. The balance of $2,000 was retained by the Visci law firm as its legal fees. Notwithstanding his receipt of a copy of Sun's wire transfer authorization form with its reference to JTA as the "originator account title," Visci disclaimed knowledge of "an entity known as JTA Associates, LLC" until this litigation.

Sun's representative stated in its summary judgment certification that had Sun known that JTA's money would be used to settle the Vendor Capital litigation —— a lawsuit to which JTA was a stranger —— it never would have approved the wire transfer. Furthermore, Sun's certification asserted, "[o]n or about March 7, 2008, JTA was insolvent, which was known or should have been known by [the four Alarios], as it had no assets, nor did it have income from which it could pay its debts

as they fell due." According to an unauthenticated JTA bank statement, as of the end of March 2008, JTA had a small balance of less than $4,000 in its Sun account. That statement shows the following activities, all happening on either March 6 or 7, 2008:

Initial deposit:	$600,000.00
Unrelated wire transfer:	$17,563.91
Wire transfer to Visci:	$419,000.00
Wire transfer fee:	$20.00
Unrelated check:	$160,000.00.

No portion of JTA's $600,000 advance has been repaid to Sun.

Sun commenced the instant action in early May 2009, alleging a fraudulent transfer and seeking at least $419,000 in damages. Its borrower, JTA, was not named as a defendant. In June 2009, before any defendant filed an answer, Sun stipulated to a dismissal of the complaint without prejudice as to Vendor Capital.

In March 2010, Sun filed a motion to amend its complaint to add a count for unjust enrichment against Frank and Nancy. In April 2010, Visci and the Visci law firm filed a motion for summary judgment. The Law Division granted the summary judgment motion and denied Sun's motion to amend the complaint. Orders memorializing the court's decisions were signed on April 30, 2010.

In June 2010, Frank and Nancy filed a motion for summary judgment. Sun responded with a cross-motion for summary

judgment. After considering the parties' briefs and oral argument, the Law Division denied Sun's motion but granted summary judgment in favor of Frank and Nancy. Conforming orders were entered on July 9, 2010.

On July 21, 2010, Visci and the Visci law firm filed a motion for "sanctions and attorneys fees for a violation of R. 1:4-8 and N.J.S.A. 2A:15-59.1(a)(1)." On August 6, 2010, without acceding to the movants' request for oral argument, the Law Division denied the motion and signed an order to that effect on the same date.

On August 13, 2010, Sun filed a notice of appeal in A-6045-09T4 from the July 9, 2010 orders in favor of Frank and Nancy.[5] On September 16, 2010, Visci and the Visci law firm filed a notice of appeal in A-0317-10T4 from the August 6, 2010 order denying sanctions and attorneys fees. On September 30, 2010, Sun filed a cross-appeal from the April 30, 2010 order granting summary judgment to Visci and the Visci law firm, and from the denial of its motion to amend the complaint.

[5] Frank commenced a Chapter 11 bankruptcy proceeding in September 2010, and an automatic stay was implemented. On December 20, 2010, the United States Bankruptcy Court entered an order granting relief from the automatic stay to permit Sun to prosecute its appeal in A-6045-09T4. The order expressly provided that Sun could not levy or execute upon Frank's property if successful on the appeal without further order of the Bankruptcy Court.

II.

In A-6045-09T4 and its cross-appeal in A-0317-10T4, Sun contends that the Law Division erred as a matter of law in granting summary judgment to defendants, dismissing the complaint, and denying its cross-motion for summary judgment, because defendants' use of JTA's $419,000 to settle the Vendor Capital lawsuit and pay the Visci law firm its attorneys fees derived from a fraudulent transfer under the NJUFTA, despite defendants' lack of fraudulent intent. We agree that the Law Division improvidently granted summary judgment in favor of defendants, but we do not agree that the summary judgment record was sufficient to enter summary judgment in favor of Sun.

When reviewing grants of summary judgment, we employ the same standards used by the motion court. Burnett v. Gloucester Cnty. Bd. of Chosen Freeholders, 409 N.J. Super. 219, 228 (App. Div. 2009); Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998); R. 4:46-2(c) (providing that summary judgment may be granted if the record shows that "there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."). Our first task is to determine whether the moving party has demonstrated that there is no genuine dispute as to any material fact; if there is none, we next decide whether the motion judge

correctly applied the applicable law. Atl. Mut. Ins. Co. v. Hillside Bottling Co., Inc., 387 N.J. Super. 224, 230-31, (App. Div.), certif. denied, 189 N.J. 104 (2006). In so doing, we view the evidence indulgently in a light most favorable to the non-moving party. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). We review issues of law de novo and accord no deference to the motion judge's conclusions on issues of law. Zabilowicz v. Kelsey, 200 N.J. 507, 512-13 (2009).

Sun's claims at the time of the summary judgment motions required viewing the facts through the prism of the NJUFTA. That statute, adopted by the Legislature in 1988 (and effective as of January 1, 1989), replaced the Uniform Fraudulent Conveyance Act, N.J.S.A. 25:2-7 to -19, which had been in effect since 1919. Flood v. Caro Corp., 272 N.J. Super. 398, 403 (App. Div. 1994). As of this writing, at least forty-four states have adopted similar versions of the uniform statute promulgated in 1984 by the National Conference of Commissioners on Uniform State Laws. New Jersey's version is substantially identical to the uniform statute. Ibid. Because an explicit purpose of N.J.S.A. 25:2-33 is "to make uniform the law with respect to the subject of this article among states enacting it," we freely consider the decisional law of other states in our

interpretation of the NJUFTA.[6] See Thompson v. Hanson, 174 P.3d 120, 126 (Wash. Ct. App. 2007), aff'd 239 P.3d 537 (Wash. 2009) (recognizing that the interpretation of courts of other states may provide guidance); Farstveet v. Rudolph, 630 N.W.2d 24, 30 (N.D. 2000) (special deference is given to decisions of other jurisdictions interpreting the uniform act).

The UFTA modernized the law respecting the rights and remedies of creditors in cases of transfers of assets by debtors the design, or effect of which, is to prevent or impede satisfaction of claims out of the debtor's assets. It serves as a vehicle by which creditors can recover from debtors and others who impede their collection efforts. Banco Popular N. Am. v. Gandi, 184 N.J. 161, 177 (2005).

In other words, the purpose of the NJUFTA is to prevent debtors from defrauding creditors by placing assets beyond their

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[6] We note as well that claims to avoid fraudulent transfers exist under section 548 of the Bankruptcy Code, 11 U.S.C.A. 548(a)(1)(A), (B), and because provisions of section 548 are similar to relevant portions of the NJUFTA, decisional law as to one statute may logically apply to the other. See Kojima v. Grandote Int'l L.L.C. (In re Grandote Country Club Co., Ltd.), 252 F.3d 1146, 1152 (10th Cir. 2001) (applying the language of section 548 to the Colorado Uniform Fraudulent Transfer Act, Colo. Rev. Stat. § 38-8-105(1)(a), (b)); Official Comm. of Unsecured Creditors of Fedders N. Am., Inc. v. Goldman Sachs Credit Partners L.P. (In re Fedders N. Am.), 405 B.R. 527, 547 (Bankr. D. Del. 2009) (noting that the language of the Delaware and New Jersey versions of the statute "track the language of each other, and also mirror the language of section 548(a)(1)(A) and (B) of the [Bankruptcy] Code").

reach. Thus, one remedy of the NJUFTA is to allow a creditor to undo the wrongful transaction so as to permit the creditor to collect. See N.J.S.A. 25:2-29(a)(1); Gilchinsky v. Nat'l Westminster Bank N.J., 159 N.J. 463, 475 (1999).

A transfer of assets may be fraudulent under the NJUFTA if the transaction was completed (1) with the actual intent to defraud the creditor, or (2) through constructive fraud, where the debtor had no actual intent to commit fraud.[7] N.J.S.A. 25:2-25, which applies to present and future creditors, states:

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> a. With actual intent to hinder, delay, or defraud any creditor of the debtor; or
>
> b. Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
>
> (1) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

[7] The former type of claim is sometimes called "fraud-in-fact"; the latter is referred to as "fraud-in-law." See Bowman v. Dixon Theatre Renovation, Inc., 581 N.E.2d 804, 807-08 (Ill. App. 1991).

> (2) Intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

Thus, transfers are fraudulent as to a present or future creditor if either the debtor made the transfer with intent to defraud, or the transfer was made without receiving a reasonably equivalent value in exchange for the transfer, and the debtor intended to incur, or believed or reasonably should have believed that it would incur debts beyond its ability to pay as they became due.

Also, N.J.S.A. 25:2-27(a), which relates to present creditors only, states:

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

Thus, the elements of a fraudulent transfer under this portion of the NJUFTA are (1) the creditor's claim must have existed prior to the asset transfer, (2) the transferee did not pay reasonable equivalent value for the asset, and (3) the transferor was insolvent at the time of the transfer, or became insolvent as a result of the transfer.

If the transfer is demonstrated to be fraudulent within the meaning of the NJUFTA, the creditor's remedies include (1) avoidance of the transfer, (2) invocation of a provisional remedy, (3) an injunction, (4) appointment of a receiver, or (5) "[a]ny other relief the circumstances may require." N.J.S.A. 25:2-29. However, the NJUFTA does not impose strict liability, because pursuant to N.J.S.A. 25:2-30, transferees are accorded several affirmative defenses, for which they bear the burden of proof. N.J. Dep't of Envtl. Prot. v. Caldeira, 338 N.J. Super. 203, 224 (App. Div. 2001), rev'd on other grounds, 171 N.J. 404, 409 (2002).

With these straight-forward statutory principles in mind, the circumstances of the parties become clear. In this case, we start with the NJUFTA's definition of a claim: "'Claim' means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." N.J.S.A. 25:2-21. As a "person," N.J.S.A. 25:2-22, that "has a claim," Sun is a "creditor." N.J.S.A. 25:2-21. JTA, Charles, and Janet are "debtors," because they are persons who are "liable on a claim." Ibid. Although the NJUFTA does not define the term "transferee," we conclude it is self-evident that Frank, Nancy, and the Visci law firm are transferees because they are persons within the orbit of the statutory

definition of transfer: "'Transfer' means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance." N.J.S.A. 25:2-22.[8]

Thus poised, Sun legitimately pursued Frank, Nancy, and the Visci law firm as part of its quest to avoid the transfer from JTA to Vendor Capital. Arguably, JTA did not receive "a reasonably equivalent value in exchange for the transfer," N.J.S.A. 25:2-27, and Sun's summary judgment posture asserted that at all relevant times, JTA was insolvent. If proven, Sun would accordingly be entitled to remedies provided by N.J.S.A. 25:2-29, including avoidance of the transfer, with its obvious implications to Frank, Nancy, and the Visci law firm: a judgment against them "for the value of the asset transferred, as adjusted under [N.J.S.A. 25:2-30(c)], or the amount necessary to satisfy the creditor's claim, whichever is less." N.J.S.A. 25:2-30(b). The adjustment provision contemplates "adjustment as the equities may require," N.J.S.A. 25:2-30(c), which would be premature to address in this appeal.

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[8] We note that the NJUFTA also does not define "claimant," but we have previously treated that term as synonymous with the term "creditor." N.J. Dep't of Envtl. Prot., supra, 338 N.J. Super. at 214 n.8.

On the other hand, we do not find that Joseph J.J. Visci qualifies as a transferee under the NJUFTA. Although he may be a principal in the professional corporation that is the Visci law firm, he did not —— on this record —— receive a transfer, but his law firm did, making the law firm a transferee of at least $2,000, and potentially exposed to remedies pursuant to N.J.S.A. 25:2-30. However, to the extent that Sun's pleadings assert a cause of action against Joseph J.J. Visci, individually, pursuant to the civil conspiracy theory enunciated in Banco Popular North America, supra, 184 N.J. at 177, summary judgment was improvidently granted because there are genuine issues of material fact in dispute concerning the lawyer's knowledge and his actions, as well as questions concerning whether Joseph J.J. Visci was "an unwitting party [who] may not be liable under a conspiracy theory." Id. at 178. Accordingly, we remand the matter to explore whether Joseph J.J. Visci had a duty, upon receiving a copy of the wire transfer authorization form indicating JTA as the "originator account title," to inquire about the true source of the $419,000.

Frank and Nancy argue there is no evidence that they were aware of the fraudulent nature of the transfer. A transferee's awareness of the fraudulent nature of a transfer is not an essential element of a NJUFTA claim. However, N.J.S.A. 25:2-30(a) provides that a transfer is not voidable under N.J.S.A.

25:2-25(a)[9] if the transferee "took in good faith and for a reasonably equivalent value." Even if we were to assume that "good faith" equals lack of awareness of the fraudulent nature of the transfer, the appellate argument fails. Good faith is an affirmative defense to a fraudulent transfer claim. The burden of proof on this affirmative defense rests with Frank and Nancy, who did not submit any certifications in connection with their motion for summary judgment, and relied solely upon stray deposition excerpts asserting their unawareness of Charles's alleged machinations. Thus, fact issues on "good faith" remain in dispute and cannot be resolved, even on competing cross-motions for summary judgment. Also, where transferees are arguably insiders,[10] and know the transferor is insolvent at the time of the transfer, they cannot be good faith transferees. N.J.S.A. 25:2-27(b); Putman v. Stephenson, 805 S.W.2d 16, 20 (Tex. App. 1991).

Frank, Nancy, Joseph J.J. Visci, and the Visci law firm argue that the focus of the NJUFTA analysis should be on Charles

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[9] We note that Sun's main argument does not implicate this fraud-in-fact provision of the NJUFTA. Rather, its contention relies most heavily upon the fraud-in-law provisions of N.J.S.A. 25:2-25(b) and -27(a).

[10] N.J.S.A. 25:2-22. Frank and Nancy, as "relatives" of Charles in his capacity as an individual "debtor," are insiders. Ibid. Also, they would qualify as insiders because they are relatives of Charles to the extent he served as JTA's "person in charge." Ibid.

as the debtor, not JTA. In so concentrating, they claim that a fraudulent transfer could not exist due to the fact that Charles, as a debtor, received "reasonably equivalent value in exchange for the transfer" when Vendor Capital released its claims against him. The NJUFTA, however, does not require the creditor —— Sun —— to be limited by this truncated viewpoint. Sun, like all creditors, may seek every available cumulative remedy pursuant to the NJUFTA, subject only to its ability to prove a statutory violation. Its evidence, if believed, is capable of supporting a fraudulent transfer claim that involves a debtor's (JTA's) discharge of a debt of third parties including Charles, Janet, Frank, and Nancy. The same evidence could support a fraudulent transfer claim against the other defendants as well.

Notwithstanding the foregoing, fraudulent transfer jurisprudence recognizes that where the debtor and third party are so related or situated that they share an identity of interests, a trier of fact must examine all aspects of the transaction and carefully measure the value of all benefits and burdens to the debtor, both direct and indirect. See, e.g., HBE Leasing Corp. v. Frank, 48 F.3d 623, 638 (2d Cir. 1995)(applying the New York Uniform Fraudulent Conveyance Act, N.Y. Debt. & Cred. Law §§ 270-281); Mann v. Hanil Bank, 920 F. Supp. 944, 954

(E.D. Wis. 1996)(applying the Wisconsin Uniform Fraudulent Transfer Act, Wis. Stat. § 242.01 et seq.).

Given the demonstrably close relationship —— perhaps even alter ego status —— among Charles, Janet, and JTA, it is plausible that JTA received "reasonably equivalent value" within the meaning of N.J.S.A. 25:2-25(b) or -27(a) from the benefit that Charles and Janet derived from Vendor Capital's release. The fact that Frank and Nancy may also have benefited is not relevant to the identity of interest analysis. On remand, Frank, Nancy, Joseph J.J. Visci, and the Visci law firm shall be permitted to attempt to demonstrate that JTA's transfer, in fact (because it is a question of fact), was not fraudulent because JTA may have received reasonable equivalent value from what Charles and Janet derived in the transaction.

Transfers made solely for the benefit of third parties, however, are generally not considered reasonably equivalent value. Butler v. NationsBank, N.A., 58 F.3d 1022, 1029 (4th Cir. 1995)(applying the North Carolina fraudulent conveyance statute); In re B-F Bldg. Corp., 312 F.2d 691, 694 (6th Cir. 1963)("In the usual case, however, the payment of another's debt is held to be a transfer without fair consideration."); Telefest, Inc. v. VU-TV, Inc., 591 F. Supp. 1368, 1377-78 (D.N.J. 1984)(applying New Jersey's now-repealed Uniform Fraudulent Conveyance Act).

We have identified several factual disputes that are apparent on the summary judgment record before us. We further observe that Sun claimed entitlement to summary judgment in its favor, but we do not agree that it was entitled to such judgment as a matter of law. First, defendants are entitled to mount their affirmative defenses, some of which we have discussed. Also, we do not share Sun's sanguinity concerning the insolvency of JTA at the time of the transfer. The evidence of such insolvency was found in the mostly conclusory certification of Sun's representative, which merely parroted statutory language. The certification asserted, for example, "[a]t the time of the transfer, JTA had no assets other than the funds so transferred." This assertion was either incomplete or belied by the evidence, which purportedly indicated that JTA still had approximately $200,000 in the bank at the time of the disputed transfer. Although the timing of the expenditure of the nearly $200,000 is unclear from the record, Sun's proofs of insolvency in the summary judgment context were underwhelming. We do not suggest that Sun cannot demonstrate either JTA's insolvency or its potential to incur debts beyond its ability to pay them as they became due.[11] Nevertheless, the summary judgment record on

[11] On remand, because we expect that an effort will be made to demonstrate an identity of interest among JTA, Charles, and Janet, Sun shall be permitted to demonstrate the individuals' (continued)

this issue was too attenuated to have permitted Sun to carry the day. On remand, all sides shall be entitled to present such appropriate evidence as they believe is necessary to meet the relevant burden of proof.

As for Sun's effort to amend its complaint to assert a common law claim for unjust enrichment, we do not share the Law Division's view that prosecution of the claim would be futile. Courts may grant relief on the basis of unjust enrichment if a plaintiff establishes that it conferred a benefit upon a defendant and it would be unjust to allow the defendant to retain it. VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 554 (1994). Liability will only be imposed if the "'plaintiff expected remuneration from the defendant, or if the true facts were known to [the] plaintiff, he would have expected remuneration from [the] defendant, at the time the benefit was conferred.'" Castro v. NYT Television, 370 N.J. Super. 282, 299 (App. Div. 2004) (quoting Callano v. Oakwood Park Homes Corp., 91 N.J. Super. 105, 109 (App. Div. 1966)).

From the record established in this case, it appears that Sun is capable of demonstrating a prima facie case of unjust enrichment, and it was premature to deny its application to

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(continued)
insolvency or inability to pay debts as they become due in response to such effort.

amend the complaint. In so ruling, we take no position on the merits, nor do we rule out appropriate motion practice in the Law Division to address the eventual pleading.

III.

In summary, we conclude that granting summary judgment in favor of Frank Alario, Nancy Alario, Joseph J.J. Visci, and the Visci law firm was inappropriate. Because of this determination, it is unnecessary to address the issues raised by Joseph J.J. Visci and the Visci law firm regarding sanctions and attorneys fees, as they are presently moot pending the final outcome of the litigation. Additionally, we determine that Sun's cross-motion for summary judgment was properly denied, based upon the record presented. Lastly, we reverse the denial of Sun's application to amend the complaint to seek remedies pursuant to principles of unjust enrichment.

Affirmed in part; reversed in part; vacated in part; and remanded for further proceedings in accordance with this opinion.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION