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THE APPROVAL OF THE COMMITTEE ON OPINIONS

COOLING GUARD MECHANICAL CORP. and PEEPELS MECHANICAL CORP., *Plaintiffs,* v. ANDRAS FRANKL a/k/a ANDY FRANKL, DAWN FRANKL, ABC COMPANIES 1-100 (ficticious entities) and JOHN DOES 1-100 (ficticious persons), *Defendants.*	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION GENERAL EQUITY PART BERGEN COUNTY DOCKET No. BER-C-119-17 CIVIL ACTION DECISION

Argued: August 18, 2017
Decided: August 21, 2017

Honorable Robert P. Contillo, P.J.Ch.

Justin H. Scheier, Esq. appearing on behalf of the plaintiffs, Cooling Guard Mechanical Corporation and Peepels Mechanical Corporation. (The Scheier Law Firm).

John P. DiIoro, Esq. appearing on behalf of the defendant, Dawn Frankl. (Shapiro, Croland, Reiser, Apfel & Di Iorio, LLP).

DECISION

I. Statement of the Case

Before the Court is a Motion to Dismiss the Complaint filed by the defendant, Dawn Frankl ("Dawn" or "Defendant"), seeking to dismiss the Complaint pursuant to R. 4:6-2(e). The plaintiffs, Cooling Guard Mechanical Corporation ("Cooling Guard") and Peepels Mechanical Corporation ("Peepels") (collectively, "Plaintiffs") filed an Opposition on August 10, 2017. On August 14, 2017, Defendant filed a Reply. Oral argument was had on August 18, 2017. At issue

is the viability of Plaintiffs' claims under the Uniform Fraudulent Transfer Act, N.J.S.A. 25:2-20, et seq.

Each of the Plaintiffs are in the business of designing, building, installing, servicing, and maintaining, heating, ventilation, and air conditioning units and systems. Complaint at ¶¶ 2–4. Defendants Andras Frankl ("Andy") and Dawn Frankl are husband and wife, both residing at 140 Birch Road, Franklin Lakes, New Jersey (the "Subject Property"). Id. at ¶¶ 5, 7, 11.

The Complaint alleges on information and belief that, by Deed dated April 14, 2004, and recorded on May 13, 2004 (the "2004 Deed"), title to the Subject Property was transferred from Andy and Dawn collectively, as joint tenants in the entirety, to Dawn individually (the "2004 Conveyance"). Id. at ¶ 12. The 2004 Conveyance was for the sum of one dollar. Id. at ¶ 13. The Complaint alleges on information and belief that, by Deed dated June 30, 2009 (the "2009 Deed"), and recorded on July 27, 2009, title in the Subject Property was transferred from Andy and Dawn, as joint tenants in the entirety, to Dawn individually (the "2009 Conveyance"). Id. at ¶ 16. The 2009 Conveyance was also for the sum of one dollar. Id. at ¶ 17.

On or about March 16, 2016, Cooling Guard filed a Summons and Verified Complaint against Andy and Ibex Construction Company, LLC ("Ibex") in the Supreme Court of New York, New York County (the "CGM Litigation"). Id. at ¶ 20. The Complaint filed in this action alleges, on information and belief, that Andy is an owner, officer, director, and/or agent of Ibex. Id. at ¶ 6. On or about July 16, 2016, the CGM Litigation was resolved by way of a Settlement Agreement (the "CGM Settlement"), whereby Andy and Ibex were to pay Cooling Guard $54,500.00 in ten monthly payments. Id. at ¶¶ 21–22. Andy personally guaranteed the payments. Id. at ¶ 23. Andy and Ibex made six of the required ten monthly payments, but on or

about March 11, 2017, Andy and Ibex failed to make the February 2017 payment. Id. at ¶¶ 24–25. As a result, $24,000.00 of the $54,500.00 owed remains outstanding. Id. at ¶ 26.

On April 21, 2016, Peepels and Ibex entered into a subcontract agreement, whereby Peepels was to provide services to Ibex in connection with a construction project for the Art of Shaving, LLC (the "AOS Subcontract"). Id. at ¶ 27. Peepels claims to be owed $61,702.00 from Ibex under the AOS Subcontract. Id. at ¶ 30.

On or about July 6, 2016, Ibex and Peepels entered into another subcontract agreement for services in connection with a construction project for The Lobster Press (the "LP Subcontract"). Id. at ¶¶ 31–33. Peepels claims to be owed $121,641.99 from Ibex under the LP Subcontract. Id. at ¶ 34.

The Complaint contains two Counts. Count I alleges that the 2004 Conveyance and the 2009 Conveyance (collectively, the "Conveyances") were "made with actual intent to hinder, delay, or defraud Andy's then current creditors and/or future creditors." Id. at ¶ 54. Count I alleges further that the Conveyances were "made without Andy receiving a reasonably equivalent value in exchange for his share of the property, and Andy: (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 (2) Andy 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 become due." Id. at ¶ 56. In the wherefore clause of Count I, Plaintiffs seek a declaration that the Conveyances are in violation of the Uniform Fraudulent Transfer Act (N.J.S.A. 25:2-20, et. Seq.) and asked the court to transfer the Subject Property back to Andy and Dawn, as husband and wife and as joint tenants in the entirety. In addition to

other relief, Plaintiffs also demand a lien on the Subject Property in the amount of $183,344.13, pursuant to N.J.S.A. 25:2-29(a)(2).

In Count II, Plaintiffs allege that Andy and Dawn, jointly and severally, conspired to fraudulently transfer the Property. Id. at ¶¶ 58–62. Plaintiffs maintain that "[t]he sole purpose of the Fraudulent Transfer was to defraud Andy's then current and future creditors and the Fraudulent Transfer was one with the actual intent to hinder, delay, or delay [sic] any creditor of Andy." Id. at ¶ 60. By way of this Motion, Defendant seeks an order dismissing the Complaint with prejudice pursuant to R. 4:6-2(e).

II. Defendant's Argument

Defendant Dawn Frankl maintains that the Complaint fails to set forth viable causes of action, thereby warranting dismissal with prejudice pursuant to R. 4:6-2(e). Brief at 6–7. To that end, Defendant contends that both Count I and Count II should be dismissed as a matter of law. Id. at 7–13.

As a preliminary matter, Defendant explains that Count I asserts a fraudulent transfer claim against Dawn, alleging both an Actual Fraud Claim and a Constructive Fraud Claim pursuant to N.J.S.A. 25:2-25(a) and N.J.S.A. 25:2-25(b), respectively, of New Jersey's Fraudulent Transfer Act (the "FTA"). Id. at 7. Defendant asserts that "transfers made by a debtor with an intent to hinder, delay or defraud creditors are deemed fraudulent [. . .]." Id. at 7–8. Transfers "made for less than reasonably equivalent value at a time when the debtor was about to engage in a business or transaction for which its remaining assets were unreasonably small or the debtor intended to occur, or reasonably should have believed it would incur, debts beyond its ability to pay as they became due" are deemed fraudulent under N.J.S.A. 25:2-25(b). Id. at 8.

With respect to Count I, Defendant argues first that Count I must be dismissed because Plaintiffs were neither present nor future creditors at the time of the conveyances. Id. at 8–11. Plaintiffs do not contend that they were present creditors, but only that they were future creditors at the time of the conveyances. Id. at 8. Although neither the statute nor any New Jersey court has defined the term "future creditor" under the FTA, Defendant explains that Pennsylvania state courts have interpreted the equivalent provision in Pennsylvania's FTA. Id. at 9 (footnote omitted). Defendant maintains that those courts have found that there are limits as to who is deemed a future creditor. Ibid. For example, the Pennsylvania Supreme Court defined a "future creditor as "one with a legal claim against a person at the time that person makes a conveyance, even one that has not yet been reduced to judgment or even filed[.]" Id. at 9 (quoting Stauffer v. Stauffer, 465 Pa. 558, 576 (1976)). The Pennsylvania Supreme Court continued by announcing that one who qualifies as a "future creditor" "is entitled to set aside the conveyance if he can show it was made with actual intent to hinder, delay, or defraud present or future creditors." Ibid. Defendant contends that another Pennsylvania court has construed the term "future creditor" as follows: "In short, a 'future creditor' does not exist unless a conveying party can reasonably foresee incurring the costs of a claim or judgment at the time of the conveyance." Id. at 9–10 (quoting Leopold v. Tuttle, 378 Pa. Super. 466, 472 (1998)).

Applying these authorities to this matter, Defendant argues that Plaintiffs' claims were not reasonably foreseen as arising in the near future at the time of the Conveyances. Id. at 10. In support, Defendant first emphasizes that the Complaint was not filed until almost thirteen years after the 2004 Conveyance and eight years after the 2009 Conveyance. Ibid. Second, the Complaint fails to allege any connection between Andy and Plaintiffs at any period contemporaneous to the Conveyances. Ibid. Third, Cooling Guard did not commence the CGM

Litigation until March 16, 2016—twelve years after the 2004 Conveyance and six years after the 2009 Conveyance. Ibid. Furthermore, the default under the settlement agreement that resolved the CGM Litigation, which serves as the basis of Cooling Guard's claims, did not occur until March 2017. Ibid. Likewise, the subject of the Peepels' claim in this matter is the AOS subcontract, which was not entered into until twelve years after the 2004 Conveyance and six years after the 2009 Conveyance. Ibid.

Based on the foregoing lapses in time between the challenged Conveyances and Plaintiffs' rights to payment, Defendant submits that Plaintiffs' claims were not reasonably foreseeable at the time of the Conveyances. Ibid. Accordingly, Plaintiffs' claims cannot be sustained as a matter of law. Id. at 10–11.

Second, Defendant argues that the Constructive Fraud Claim contained in Count One is barred, as a matter of law, by the applicable statute of limitations. Id. at 11–13. In support, Defendant asserts that, pursuant to N.J.S.A. 25:2-31, a constructive fraud claim brought under N.J.S.A. 25:2-25(b) must be brought within four years of the challenged transfer. Id. at 11. In Paragraph 56 of Count II, Plaintiffs set forth allegations indicative of a constructive fraud claim under N.J.S.A. 25:2-25(b). Ibid. Because the challenged transfers occurred in 2004 and 2009, Defendant contends that the four-year limitations period set forth in N.J.S.A. 25:2-31 bars Plaintiffs' constructive fraud claim. Ibid.

In further support of this position, Defendant discusses Sasco 1997 NI, LLC v. Zudkewich, 166 N.J. 579, 586 (2001). Id. at 12. Therein, our Supreme Court read the limitations period set forth in N.J.S.A. 25:2-31 to mean that a constructive fraud claim must be brought within four years after the transfer was made. Id. (citing Sasco, supra, at 586). In

applying this interpretation to the issue before it, the Supreme Court ruled that the limitations period "runs from the date of the transfer". Id. (quoting Sasco, supra, at 586).

Defendant also cites to Intill v. DiGiorgio, 300 N.J. Super. 652 (Ch. 1997) for the proposition that there exists no basis to extend or otherwise told the four-year limitations period applicable to a constructive fraud claim. Id. (quoting Intill, supra, at 661) ("'Since the Legislature granted a defrauded creditor the right to pursue fraudulent transfers within four years from the transfer date, this Court holds that the Legislature's purpose would be frustrated if N.J.S.A. 25:2-31's time limitations were relaxed.'").

Finally, Defendant addresses Count I, which seeks damages for conspiracy to defraud creditors. Id. at 13. Defendant contends that Count I must be dismissed because conspiracy is not an independent cause of action, but is dependent on the existence of an underlying tort or other cause of action. Id. citing (Farris v. County of Camden, 61 F. Supp. 2d 307, 326 (D.N.J. 1999)). Defendant argues further that Plaintiffs' conspiracy claim fails as a matter of law because Plaintiffs' claims for violation of the FTA—the tort supporting their conspiracy claim—fail. Id. As a result thereof, Plaintiffs' claim for civil conspiracy must likewise fail and must be dismissed. Ibid.

III. Plaintiffs' Opposition

In Opposition to Defendant's Motion, Plaintiffs submit opposing certifications from Steven Drizis, the President of Cooling Guard, and David Katzen, the President of Peepels, as well as an Opposition Brief. Certification of Steven Drizis ("Drizis Cert.") at ¶ 1; Certification of David Katzen ("Katzen Cert.") at ¶ 1. In their certifications, Mr. Drizis and Mr. Katzen both certify that they "only became aware of the fraudulent transfer in 2017, after due diligence of Andras Frankl's assets revealed the fraudulent transfer." Drizis Cert. at ¶ 4; Katzen Cert. at ¶ 4.

In Plaintiffs' Opposition Brief, they submit that "the only issue before the Court is the Court's interpretation of N.J.S.A. 25:2-25 and whether or not Plaintiffs are 'future creditors'." Opposition Brief at 2. To that end, Plaintiffs assert that they have complied with the commands of N.J.S.A. 25:2-31 by bringing an action within both four years after the obligation was incurred as well as within one year after discovering the fraudulent transfer of the Subject Property. Ibid. As a result, Plaintiffs' claims are timely. Id. at 3.

Plaintiffs argue further that Defendants' arguments that Plaintiffs were not creditors at the time of the Conveyances ignores the plain language of N.J.S.A. 25:2-25, which clearly states that "future" creditors have claims against a fraudulent conveyance. Id. at 2–3. Plaintiffs elaborate that N.J.S.A. 25:2-25 defines a creditor as someone who has a claim that arose before or after the transfer. Id. at 3. Additionally, the title of N.J.S.A. 25:2-25 includes the term "future creditors". Ibid.

Plaintiffs similarly stress that Defendant has acknowledged that the issue of who qualifies as a "future creditor" has not been decided in any reported or unreported case by a New Jersey State Court. Ibid. Although Defendant cites to numerous Pennsylvania authorities for an interpretation of the term "future creditor", these authorities are not binding on this Court. Ibid. Rather, this Court is bound by the directives of the New Jersey Supreme Court, which has announced: "If the Legislature's intent is clear from the statutory language and its context with related provisions, we apply the law as written." Id. at 3 (quoting Shelton v. Restaurant.com, Inc., 214 N.J. 419, 428 (2013)). Because N.J.S.A. 25:2-25 is clear, and because Plaintiffs qualify as "future creditors", Plaintiffs maintain that the Complaint should not be dismissed. Id.

IV. Defendant's Reply

In Reply, Defendant addresses Plaintiff's argument that the plain language of the FTA supports a claim in favor of "future creditors". Reply Brief at 3–6. Specifically, Defendant contends that Count I fails to state either an Actual Fraud Claim or a Constructive Fraud Claim because Plaintiffs were not creditors, as defined by the statute, at the time of the Conveyances. Id. at 4–6.

In support, Defendant emphasizes that the term creditor is defined in N.J.S.A. 25:2-21 as "a person who has a claim." Id. at 4–5. In turn, a claim is defined as "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." Id. at 5 (quoting N.J.S.A. 25:2-21). Defendant contends that, at the time of the Conveyances, Plaintiffs had no right to payment from Andy. Id. Nor were Plaintiffs' claims "even a possibility," or "even imaginable," at the time of the Conveyances because Plaintiffs' right to payment did not accrue until 2016—twelve years after the 2004 Conveyance and six years after the 2009 Conveyance. Ibid. Because Plaintiffs had no right to payment at the time of the Conveyances, it follows that they had no claims, and were accordingly not creditors. Ibid. Defendant argues further that, since Plaintiffs had no claims against Defendants, Defendants could not have had an intent to defraud Plaintiffs at the time of the Conveyances, which is an element of an Actual Fraud claim. Ibid. For these reasons, Defendant submits that Plaintiffs' claims fail as a matter of law. Ibid.

Next, Defendant challenges Plaintiffs' reliance on the term "future creditor" to support their claims. Id. at 5–6. Defendant contends that, despite Plaintiffs' insistence that they qualify as "future creditors", that term appears nowhere in the text of the statute. Id. at 5. The term appears only in the statute's title, which is referred to as the headnote. Ibid. However,

Defendant asserts that the headnote is not considered part of the statute, and does not assist in statutory interpretation, "because headnotes are not the product of legislative action[.]" Id. (quoting Gerrity v. County of Salem, 2016 N.J. Unpub. LEXIS 73, *14 (App. Div. Jan. 14, 2016) (citing State v. Malik, 365 N.J. Super. 267, 279 (App. Div. 2003) (other citations omitted).

Defendant maintains that what is determinative is the language of the statute, which speaks only in terms creditors who have 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"—at the time of the transfer. Id. at 5–6 (quoting N.J.S.A. 25:2-21). In support, Defendant cites to those cases cited in Defendant's moving brief and reiterates that the Pennsylvania Supreme Court, in applying a state statute identical to the New Jersey FTA, defined a "future creditor" as "one with a legal claim against a person at the time that person makes a conveyance, even one that has not yet been reduced to judgment or even filed[.]" Id. at 6 (citations omitted) (quoting Stauffer v. Stauffer, 465 Pa. 558, 576 (1976)).

In closing, Defendants submit that this "interpretation is logical since a debtor cannot have the requisite intent to defraud a creditor that did not exist or, as in this case, whose claim did not have its origins . . . until twelve (12) years, or at best six (6) years, after the subject transfer." Ibid. Because Plaintiffs have no right to payment from Andy at the time of the challenges Conveyances, Plaintiffs do not qualify as creditors under the FTA. Id. at 6–7. For this reason, Defendants maintain that Plaintiffs' Complaint fails to state a claim and should be dismissed in its entirety. Id. at 7.

V. Analysis

A. Standard of Review

A defendant may move to dismiss a plaintiff's complaint for failure to state a cause of action under R. 4:6-2(e). On a motion under R. 4:6-2(e), the court must search the complaint in depth and with liberality to determine if a cause of action can be gleaned even from an obscure statement, particularly if further discovery is taken. See Printing Mart v. Sharp Electronics, 116 N.J. 739, 746 (1989). The court must afford the plaintiff every reasonable inference of fact. Ibid. If the complaint states no basis for relief and discovery would not provide one, dismissal of the complaint is appropriate. See Banco Popular N. Am. v. Gandi, 184 N.J. 161, 166 (2005). But, if a generous reading of the allegations "merely suggests a cause of action," the complaint will survive the motion. F.G. v. MacDonell, 150 N.J. 550, 556 (1997). A motion to dismiss for failure to state a claim may be addressed to specific counts of the complaint, and the court, on a motion to dismiss the entire complaint, has the discretion to dismiss only some of the counts. See Jenkins v. Region Nine Housing, 306 N.J. Super. 258 (App. Div. 1997), certif. den. 153 N.J. 405 (1998) (dismissing contract and fraud claims, but sustaining intentional interference and promissory estoppel theories).

If the court relies on any materials outside of the pleadings, a motion to dismiss for failure to state a cause of action automatically converts to a summary judgment motion. R. 4:6-2(e); Lederman v. Prudential Life Ins., 385 N.J. Super. 324, 337 (App. Div.), certif. den. 188 N.J. 353 (2006). However, a motion to dismiss on the pleadings does not convert into a summary judgment motion when a party files, and the court relies on, documents referred to in the pleadings. See N.J. Sports Prods., Inc. v. Bostick, 405 N.J. Super. 173, 178 (Ch. Div. 2007); see also Dickerson &Sons, Inc. v. Ernst & Young, LLP, 361 N.J. Super. 362, 365 n.1 (App. Div. 2003) (reasoning that the courts may consider "a document integral to or explicitly relied upon in the complaint" without converting a motion to dismiss into a summary judgment motion), aff'd,

179 N.J. 500 (2004). Courts will also consider exhibits attached the complaint and matters of public record in consideration of a motion to dismiss. See Banco, supra, 184 N.J. at 183.

Here, Defendant seeks to dismiss the entire complaint for failure to state a claim upon with relief can be granted. Count One asserts a fraudulent transfer claim with respect to the Conveyances, alleging both an actual fraud claim and a constructive fraud claim, pursuant to N.J.S.A. 25:2-25(a) and N.J.S.A. 25:2-25(b), respectively. Count Two asserts a claim for conspiracy to defraud creditors. Defendants contend that both Counts should be dismissed because Plaintiffs do not qualify as "creditors" under the statute and because Plaintiffs' claims are untimely filed pursuant to N.J.S.A. 25:2-31.

B. Statute of Limitations Under New Jersey's Uniform Fraudulent Transfer Act

Plaintiffs have filed this lawsuit under New Jersey's Uniform Fraudulent Transfer Act. "The purpose of the [Act] is to prevent a debtor from placing his or her property beyond a creditor's reach." Gilchinsky v. Nat'l Westminster Bank N.J., 159 N.J. 463, 475 (1999) (citation omitted). To that end, the Legislature enacted N.J.S.A. 25:2-25, entitled "Transfers fraudulent as to present and future creditors", which provides as follows:

> 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
>
> (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 become due.

Actions brought under N.J.S.A. 25:2-25(a) are understood to be claims of actual fraud whereas actions brought under N.J.S.A. 25:2-25(b) are understood to be claims of constructive fraud. Plaintiffs seek to recover under both N.J.S.A. 25:2-25(a) and N.J.S.A. 25:2-25(b). However, Plaintiffs agree that they were not "present creditors" at the time of the Conveyances. Accordingly, they seek no relief under N.J.S.A. 25:2-27 "Transfers fraudulent as to present creditor". The issue before the Court is whether Plaintiffs qualify as "future creditors" under the N.J.S.A. 25:2-25, "Transfers fraudulent as to present and future creditors".

C. The Applicable Limitations Periods

Plaintiffs assert a claim under N.J.S.A. 25:2-25(a) and N.J.S.A. 25:2-25(b). N.J.S.A. 25:2-31 sets forth the applicable statute of limitations for bringing such actions. In particular, N.J.S.A. 25:2-31 provides:

> A cause of action with respect to a fraudulent transfer or obligation under this article is extinguished unless action is brought
>
> a. Under [N.J.S.A. 25:2-25(a)], within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was discovered by the claimant; [or]
>
> b. Under [N.J.S.A. 25:2-25(b)], within four years after the transfer was made or the obligation was incurred[.]

Furthermore, the FTA defines a "transfer" as "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. With respect to real property, a "transfer" has been defined as the date the deed to the real property is recorded. See N.J.S.A. 25:2-28(a)(1); Boardwalk Regency Corp. v. Burd, 262 N.J. Super. 162, 165 (App. Div. 1993).

In this case, there are two challenged conveyances, both relating to the same Subject Property. The record does not reveal why the exact same transfer was made and recorded twice five years apart. Nevertheless, the first conveyance was by Deed dated April 14, 2004, and recorded on May 13, 2004. The second conveyance was by Deed dated June 30, 2009, and recorded on July 27, 2009.

Applying N.J.S.A. 25:2-31 to Plaintiffs' actual fraud claim, the Court finds that Plaintiffs' claim was timely filed. The statute plainly states that a cause of action brought under N.J.S.A. 25:2-25(a) must be filed within four years after the transfer was made or, if later, within one year after the transfer was discovered by the claimant. Plaintiffs have submitted certifications from their respective Presidents stating that they did not learn of these transfers until 2017. This action was commenced on April 19, 2017. Although Plaintiffs have brought their actual fraud claim more than four years after both Conveyances, they have filed this action within one year of discovering the Conveyances. Accordingly, the limitations period of N.J.S.A. 25:2-31 has been satisfied with respect to Plaintiffs' claim under N.J.S.A. 25:2-25(a), and the claim is not time barred.

The same is not true of Plaintiffs' constructive fraud claim brought under N.J.S.A. 25:2-25(b). Unlike N.J.S.A. 25:2-31(a), N.J.S.A. 25:2-31(b)—which sets forth the limitations period for constructive fraud claims—does not include the provision permitting a claimant to bring an action within one year of discovering the transfer. Instead, N.J.S.A. 25:2-31(b) states only that a constructive fraud claim must be brought within four years after the transfer was made. Here, the Conveyances were made in 2004 and 2009. Both of these Conveyances—which are identical and concern the same Subject Property—fall outside of the four-year limitations period. As a result, regardless of the precise definition of a "future creditor", discussed below, Plaintiffs are

unable to proceed with the constructive fraud claim under N.J.S.A. 25:2-25(b) because that cause of action is time barred.

Here, Plaintiffs plead fraud with sufficient particularity, as required by R. 4:5-8. The challenged Conveyances, the dates of those Conveyances, and the property that is the subject of the Conveyances are all identified. Plaintiffs similarly specify in the Complaint their rights to payment from Andy and Ibex. The fact that the intent element of an actual fraud claim brought under the Act is not plead with particularity is not a basis for this Court to dismiss Plaintiff's cause of action.

At oral argument, Plaintiffs' counsel suggested that the statutory reference to "obligation" saves the constructive fraud claim from being time-barred (and presumably provides an independent basis to conclude that the actual fraud claim is not time barred). N.J.S.A. 25:2-31, entitled "Extinguishment of Cause of Action", provides in full as follows:

> A cause of action with respect to a fraudulent transfer or **obligation** under this article is extinguished unless action is brought:
>
> a. Under subsection a. of R.S. 25:2-25, within four years after the transfer was made or the **obligation** was incurred or, if later, within one year after the transfer or obligation was discovered by the claimant;
>
> b. Under subsection b. of R.S.25:2-25 or subsection a. of R.S. 25:2-27, within four years after the transfer was made or the **obligation** was incurred; or
>
> c. Under subsection b. of R.S. 25:2-27, within one year after the transfer was made or the **obligation** was incurred.

(Emphasis Added)

Here, the Plaintiffs do not claim the debtor "incurred the obligation: a: With actual intent to hinder …", etc. N.J.S.A. 25:2-25(a). Rather, they allege the debtor "made the transfer …. a: With actual intent to hinder ….", etc. Id.

Plaintiffs do not seek to extinguish any **obligation** incurred by the debtor that is said to be fraudulent as, for example, encumbering a property with a fraudulent mortgage to impede collection. Therefore, that fact that N.J.S.A. 25:2-31 allows for a fraudulent **obligation** to be "extinguished" if brought within one (1) year of when the obligation was **discovered** (in an Actual Fraud (claim), or within four years of when the **obligation** was **incurred** (in a Constructive Fraud Claim), does not save the Plaintiffs' constructive fraud claim from being time barred, as Plaintiffs are not seeking to **extinguish** any allegedly fraudulent **obligation** assumed by the debtor, but rather seeking to set aside an allegedly fraudulent **transfer**.

Accordingly, the obligation language in the Uniform Fraudulent Conveyance Act provides no basis to save Plaintiffs' fraudulent transfer claim – actual or constructive.

In sum, the actual fraud claim is not time-barred. The constructive fraud claim is time-barred.

D. On the Issue of Whether The Complaint States A Viable Cause of Action of Actual Fraud Under N.J.S.A. 25:25(a)

While the Court has determined that Plaintiffs' Actual Fraud Claims are not time-barred, the issue remains whether the Complaint states a viable cause of action under subsection (a), for actual fraud under the Act.

N.J.S.A. 25:2-25 is entitled "Transfers fraudulent as to present and future creditors". It reads as follows:

> 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
   (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 become due.

As aforesaid, Plaintiffs do not claim to be "present creditors" within the language of the Act. They do not claim they were creditors at the time of the transfers. N.J.S.A. 25:2-27. They do claim to be "future creditors" under the Act, and assert that status as the basis of their claim to set aside the 2004/2009 conveyance as having been made with actual intent to defraud.

The phrase "future creditors" does not appear in the text of the New Jersey Uniform Transfer Act, but only in the title or headnote of N.J.S.A. 25:2-25. As set forth persuasively in movant's brief, headnotes are not part of the statute and do not assist in statutory interpretation as they they are a creation of the Office of Legislative Services, not the Legislature. See, State of New Jersey v. Malik, 365 N.J. Super. 267, 279 (App. Div. 2003). See also, J.O. v. Twp. Of Bedminster, 433 N.J. Super. 199, 213 n.6 (App. Div. 2013); see also, N.J.S.A. 1:3-1.

The term "future creditor" appears nowhere in the text of the Act, which speaks exclusively of "creditors". A "creditor" is defined as "a person who has a claim". N.J.S.A. 25:2-21. The term "claim" is defined as "a right to payment, whether or not the right is reduced to judgment, liquidated, fixed, contingent, matured, disputed, undisputed, legal, equitable, secured or unsecured". N.J.S.A. 25:2-21. A "debtor" is defined as "a person who is liable on a claim". N.J.S.A. 25:2-21.

The crucial phrase in N.J.S.A. 25:25-25(a), for purposes of determining whether these Plaintiffs possess a viable claim as to this Defendant is the introductory language: "A transfer made … by a debtor is fraudulent **as to a creditor** …." (Emphasis added). Since a creditor is

defined as a person who has a claim, and a claim is defined as a right to payment, it follows that no viable cause of action lies against the Defendant because the Plaintiffs had no right to payment at the time of the conveyance – either at the time of the 2004 Conveyance or at the time the redundant 2009 conveyance. A creditor who had a right to payment at the time of the transfer may bring a fraudulent transfer claim. That claim need not have been reduced to judgment at the time of the transfer. The claim is statutorily defined as a "right to payment, whether or not the right to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, legal, equitable, secured, or unsecured". N.J.S.A. 25:2-21. The claim of these Plaintiffs, Cooling Guard and Peeples Mechanical, have their origins in contracts entered into around 2013[1] and April 21, 2016, respectively. At the time of the 2004/2009 Conveyance, neither Plaintiff had any "claim" against the debtor, as neither possessed at that time any "right to payment" — "whether or not reduced to judgment", whether "liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, legal, equitable, secured, or unsecured". N.J.S.A. 2A:25-21.

Logic dictates the conclusion that an Actual Fraud Claim, i.e., a claim that a transfer was made with "actual intent to hinder, delay or defraud any creditor of the debtor", requires that the requisite mental state – actual intent to hinder, etc. – be existence at the time of the transfer. It can not be viably contended that the debtor conveyed the real estate in 2004/20009 intending to hinder collection on claims originating from contracts entered into in 2013 and 2016. Constructive fraud, by contrast, can accommodate unknown, future 'victims'. Under N.J.S.A. 2A:2-25(b), the transfer is fraudulent by a debtor where

b. Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

[1] So stipulated at oral argument.

(1) Was engaged or was about to engage in a business or transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(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 become due.

Pennsylvania has adopted the Uniform Fraudulent Conveyance Act. In Stauffer v. Stauffer, 465 Pa. 558, 351 A.2d 236 (Pa. 1976), the Supreme Court characterized as a 'future creditor' "one with a legal claim against a person at the time that person makes a conveyance, even one that has not yet been reduced to judgment or even filed" at Id. at 576. Such a 'future creditor' is entitled to set aside the conveyance "if he can show it was made with actual intent to hinder, delay, or defraud present or future creditors". While I am not certain I would utilize the word "future" creditors, the thrust of the Pennsylvania court dicta is that, at least in an "actual intent" fraudulent conveyance case, the creditor has to be a person "with a legal claim against a person **at the time that person makes a conveyance**". Ibid. (Emphasis added).

Future creditors" were addressed in another Pennsylvania case involving an Actual Fraud Claim, i.e., a claim that a conveyance was made with actual intent to hinder, delay, or defraud "present or future creditors". Leopold v. Tuttle, 378 Pa. Super. 466, 549 A.2d 151 (Sup. Ct. of Penn. 1988). The Leopold court would allow an Actual Intent Claim to be brought where "the conveying party can reasonably foresee incurring the costs of a claim or judgment at the time of the conveyance". Id. at 466. Plaintiff can find no shelter in this generous reading of the Uniform Fraudulent Conveyance Act as it can not be viably contended that the Defendant's husband could have reasonably foreseen in 2004 or in 2009 — the time of the conveyances — that he would be incurring costs of a claim or judgment in 2016 or 2017 based on contracts entered into in 2013 and 2016.

E. **Count II: Conspiracy to Defraud Creditors**

In Count II, Plaintiffs allege that Andy and Dawn, jointly and severally, conspired to fraudulently transfer the Property. Complaint at ¶¶ 58–62. Defendant correctly states that a cause of action for conspiracy cannot stand alone. Rather, a cause of action for conspiracy must be supported by an underlying tort. Farris v. County of Camden, 61 F. Supp. 2d 307, 326 (D.N.J. 1999). Herein, Plaintiffs have failed to sufficiently alleged a cause of action under N.J.S.A. 25:2-25(a) to withstand a motion to dismiss and are time-barred as to N.J.S.A. 25:2-25(b). Accordingly, Plaintiffs may not proceed with their conspiracy cause of action.

VI. **Conclusion**

For the foregoing reasons, Defendant's Motion to Dismiss is granted.

An Order accompanies this Decision.

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ROBERT P. CONTILLO, P.J.CH.