

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UGI Corporation,	:	
Plaintiff,	:	
	:	
v.	:	CIVIL ACTION
	:	NO. 88-CV-1125
Charles Piccione,	:	
Joan Piccione, and	:	
Myron Feldman and	:	
Philip Pape, individually	:	
and trading as My-Phil,	:	
a partnership,	:	
Defendants.	:	
	:	
	:	

MEMORANDUM OF DECISION

McGlynn, J.

November , 1997

Before the court is the Motion for Summary Judgment of defendants Myron Feldman and Philip Pape. For the reasons set forth below, defendants' motion will be denied.

I. Background

The historical facts of this case are not in dispute. Plaintiff UGI Corporation ("UGI") commenced this action on February 12, 1988 against Charles and Joan Piccione ("the Picciones"), and My-Phil Company, a general partnership consisting of Myron Feldman and Philip Pape. UGI Corp. v. Piccione, Civ. A. No. 88-1125, slip op. at 1 (E.D. Pa. March 17, 1989)(Huyett, J.). In 1981 and 1982, UGI provided natural gas to a textile dyeing and finishing facility in West Hazelton, Pennsylvania ("the Valmont Facility"). Id. UGI sued Spectra Dye, Ltd. ("SDL") and Spectra Dye and Finishing, Inc. ("SDF") in

the Lehigh County Court of Common Pleas to recover payment for this service. Id. SDF is the corporation which operated the Valmont Facility. Id. Since 1982, SDF has been insolvent, assetless and defunct. Id. SDL is the corporation which owned the machinery and equipment at the plant, which it leased to SDF. Id. Charles Piccione is the owner and sole shareholder of both corporations, and he and his wife were owners of the real estate upon which the Valmont Facility is located. Id.

On August 8, 1987, the Lehigh County Court of Common Pleas entered a judgment in the amount of \$155,352.67 for UGI and against the Picciones. Id. This judgment has not been appealed and remains unsatisfied. Id. at 2. On August 13, 1987, five days after the state court judgment was entered, the Picciones and SDL sold the real estate, buildings and machinery of the business to Feldman and Pape. Id. Charles Piccione acted as the representative of both SDL and his wife in this transaction, which consisted of an Asset Purchase Agreement that was signed on April 2, 1987. Id. The real estate was conveyed for the sum of \$1,336,000 and the SDL equipment was conveyed for the sum of \$441,000. It is not disputed that these sums represent the fair market value of the Valmont Facility. Id. At issue is the propriety of the disbursement of these funds to the Picciones and the Hazelton National Bank ("HNB"), rather than to SDL or UGI. The Picciones used the sale proceeds to satisfy three outstanding mortgages held by HNB: one by Hazelton Area Industrial Development Authority for the use of a partnership consisting of

Charles Piccione and two other individuals in the amount of \$402,136.84; one by Charles Piccione for \$473,909.64 (this was borrowed by the Picciones, SDL and Captex - the successor corporation to SDL - but was treated in the Picciones' personal financial records as a loan to the Picciones); and one by Charles and Joan Piccione for \$219,417.07. Id. at 3-4. Defendant Myron Feldman's Poughkeepsie Finishing Corporation received \$300,000.00 in return for a loan made to Charles Piccione on May 18, 1987. Pl. Exs. D & H. After satisfying the above loans and paying various taxes, legal expenses, and other costs, Charles and Joan Piccione also received \$125,186.13 from the sale. Id. at 4. At all relevant times up to the August 13 settlement, the Picciones knew of the existence and pendency of the state court action. Id. At the settlement, the Picciones knew that a judgment had been entered in UGI's favor, and that UGI therefore had a sizable monetary claim against SDL. Id. However, no funds from the sale were paid to SDL, and thus no sale proceeds were available to UGI to satisfy the state court judgment. Id. Because the sale resulted in the conveyance of SDL's only significant asset - the Valmont Facility's machinery and equipment - SDL became insolvent as a result of the sale. Id.

UGI subsequently brought suit against the Picciones, Feldman and Pape under Sections 4 and 7 of Pennsylvania's Uniform Fraudulent Conveyance Act ("UFCA"), Pa. Stat. Ann. tit. 39, §§ 354 & 357 (repealed 1993), and the Bulk Transfers Act, Pa. Stat. Ann. tit. 13, §§ 6101-111 (repealed 1992). UGI has since settled

its claims against the Picciones, leaving Feldman and Pape as the only remaining defendants. Feldman and Pape now seek summary judgment on all plaintiff's claims.

II. Discussion

Federal Rule of Civil Procedure 56(c) provides for summary judgment when, after consideration of the evidence in the light most favorable to the non-moving party, no genuine issue of material fact remains in dispute and the moving party is entitled to judgment as a matter of law. Getahun v. Office of the Chief Admin. Hearing Officer of the Executive Office for Immigration Review of the United States Dept. of Justice, No. 96-3531, 1997 WL 567323 (3d Cir. Sept. 15, 1997); Fed. R. Civ. P. 56.

A. Conveyance Made with Intent to Defraud

Section 7 of Pennsylvania's Uniform Fraudulent Conveyance Act provides:

Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.

Pa. Stat. Ann. tit. 39, § 357 (1954)(repealed 1993).¹

A plaintiff bears the burden of demonstrating intent under § 7 through "clear and convincing evidence." United States v. Gleneagles Investment Co., Inc., 565 F. Supp. 556, 580 (M.D. Pa.

¹ Transfers made or obligations incurred prior to the repeal of this act are controlled by the law in effect at the time the transfer was made or the obligation was incurred. Section 4 of Act 1993, Dec. 3, P.L. 479, No. 70.

1983), aff'd in part and remanded, United States v. Tabor Court Realty Corp., 803 F.2d 1288 (3d Cir. 1986), cert. denied sub nom., McClelland Realty Co. v. United States, 483 U.S. 1005 (1987). Actual intent to defraud need not be shown directly, but may rather be inferred from the circumstances surrounding the disputed transfer. Moody v. Security Pacific Business Credit, 971 F.2d 1056, 1075 (3d. Cir. 1992). However, if the transferee had no knowledge of the fraud and paid fair consideration for the conveyance, the transfer will not be set aside under § 4. United States v. Gleneagles Investment Co., Inc., 565 F. Supp. 556, 580 (M.D. Pa. 1983); Godina v. Oswald, 211 A.2d. 91, 94 (Pa. Super. Ct. 1965); Pa. Stat. Ann. tit. 39, § 359 (1965 & Supp. 1997).

In Pennsylvania, an inference of intent to hinder, delay, or defraud creditors under § 7 may be raised in two ways. First, by showing that consideration for the disputed transfer is lacking and that the transferor and transferee have knowledge of the claims of creditors and know that the creditors cannot be paid. United States v. Tabor Court Realty Corp., 803 F.2d 1288, 1304 (3d Cir. 1986). And second, by demonstrating the presence of one or more of the "badges of fraud," which can include: (1) inadequate consideration; (2) a close relationship between the transferor and transferee; (3) pendency of litigation; (4) the transferor's reservation of a benefit in the transferred property; (5) the transferor's retention of possession; and (6) intent to conceal the transfer. In the Matter of Foxcroft Square Co., 184 B.R. 671, 675 (Bankr. E.D. Pa. 1995)(citing Moody v.

Security Pacific Business Credit, Inc., 127 B.R. 958, 990-91 (W.D. Pa. 1991), aff'd 971 F.2d 1056 (3d Cir. 1992); United States v. Klayman, 736 F. Supp. 647, 649-50 (E.D. Pa. 1990)).

Feldman and Pape argue that plaintiff cannot prove that they had the requisite intent to defraud under § 7. As proof, defendants offer the deposition statements of Marc Wolfe, their attorney for the Valmont Facility conveyance, to show that they had no knowledge of UGI's claim. Wolfe testified: (1) that the title report for the Valmont Facility did not mention the UGI judgment (Wolfe Dep. at 21); (2) that SDL's counsel sent him a letter assuring him that there was no material pending litigation involving the sellers (Id. at 56); and (3) that the closing documents demonstrate that My-Phil satisfied all duly recorded liabilities of SDL at closing (Id. at 20). Defendants also contend that UGI had actual knowledge of the Valmont Facility sale to Feldman and Pape and never informed them of UGI's lawsuit or UGI's judgment against SDL.² The fact that the Lehigh County judgment in favor of UGI was never recorded in Luzerne County where the Valmont Facility is located is uncontroverted. Def. Mot. for Summ. Judg. at 7.

In response, Plaintiff points to the "badges of fraud" which

² For this statement, Feldman and Pape rely upon the affidavit of Robert J. Meyer, an executive officer at My-Phil in 1987. In his affidavit, Meyer states that he advised Roy Felker, Sr., the local district manager for UGI, and/or other UGI representatives, that the then-current tenant would be vacating the Valmont Facility and that My-Phil would lease the premises in the near future and would eventually purchase them. Meyer Affidavit at ¶ 5.

raise an inference of intent to defraud on the part of Feldman and Pape, in particular: (1) lack of consideration in that My-Phil's payment for the Valmont Facility flowed not to SDL, but to the Picciones, defendant Myron Feldman's Poughkeepsie Finishing Corporation, and Hazelton National Bank; (2) My-Phil's supposed acknowledgment in the Valmont Facility Asset Purchase Agreement that there were debts/liabilities related to SDL's assets being conveyed; (4) the fact that the Asset Purchase Agreement provided that My-Phil would have access to SDL's books and records (Pl. Ex. C. at ¶ 4.2.); (5) Robert J. Meyer's alleged acknowledgment of SDL's indebtedness in his affidavit (Meyer Affidavit at ¶ 8); (6) the \$300,000.00 loan from Myron Feldman's Poughkeepsie Finishing Corporation to Charles Piccione in which Charles Piccione claims to have pledged \$300,000.00 in gold coins as collateral³ (Pl. Ex. H); and (7) the fact that the August 13, 1987 settlement in which SDL conveyed the Valmont Facility to My-Phil was only five days after UGI won its state court judgment against SDL.

When seeking summary judgment, the movant has the initial burden of identifying evidence which demonstrates the absence of a genuine issue of material fact. Equimark Commer. Fin. Co. v. C.I.T. Fin. Servs. Corp., 812 F.2d 141, 144 (3d. Cir. 1987). In considering the evidence in the light most favorable to UGI, it

³ According to Charles Piccione, these coins were subsequently burglarized from his Florida apartment after repayment of the debt. Pl. Ex. I, 11/23/87 & 1/30/89 Deps. of C. Piccione at 83.

is clear that summary judgment on the issue of Feldman and Pape's intent to defraud UGI is not warranted. Defendants' title search and the assurances received from SDL's counsel that the Valmont Facility was free and clear are not conclusive evidence of defendants' lack of knowledge or intent. The fact that the closing documents provided for the satisfaction of SDL's other outstanding liabilities is similarly inconclusive in light of the magnitude of the unsettled liability in question here - \$155,362.57. Finally, Robert J. Meyer's affidavit stating that he advised UGI district manager Roy Felker, Sr., of defendants' plan to lease and eventually purchase the Valmont Facility is contradicted and therefore rebutted by Felker's own affidavit (Pl. Ex. L at 2.) in which he denies ever having such conversations. Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358, 1363 (3d Cir. 1992) ("where the non-moving party's evidence contradicts the movant's, then the non-movant's must be taken as true"), cert. denied, 507 U.S. 912 (1993).

Even if defendants had met their initial summary judgment burden, plaintiff's evidence provides adequate support for their "badges of fraud" theory. The closing of the Valmont Facility deal only five days after UGI won its judgment against SDL raises an issue as to the pendency of litigation surrounding the transaction. Further, the fact that in May, 1987 Myron Feldman lent Charles Piccione \$300,000.00, secured only by gold coins under questionable circumstances, also demonstrates a close business relationship between the transferor and transferee.

Salomon v. Kaiser, 722 F.2d 1574, 1582 (2d Cir. 1983)(listing family, friendship or close associate relationship between parties as a badge of fraud); Greene v. Gibraltar Mortgage Investment Corp., 488 F. Supp. 177, 180 (D.D.C. 1980)(recognizing close business relationship as badge of fraud); Orlando Light Bulb v. Laser Lighting and Elec. Supply, Inc., 523 So.2d 740, 744 (Fla. Dist. Ct. App. 1988)(stating that close business relationship is a badge of fraud). Lastly, SDL received none of the funds resulting from the sale of its assets, suggesting a lack of consideration for the conveyance.

Accordingly, the court will deny Feldman and Pape's motion for summary judgment as to plaintiff's UFCA § 7 claim.

B. Conveyances By Insolvent

Section 4 of the UFCA provides:

Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent, is fraudulent as to creditors, without regard to his actual intent, if the conveyance is made or the obligation is incurred without a fair consideration.

Pa. Stat. Ann. tit. 39, § 354 (1954)(repealed 1993).⁴

It has already been determined that SDL was rendered insolvent by the August 13, 1987 conveyance of the Valmont Facility. UGI Corp. v. Piccione, Civ. A. No. 88-1125, slip op. at 2 (E.D. Pa. March 17, 1989)(Huyett, J.). When the transferor is in debt at the time of the conveyance, the burden of proof

⁴ Supra note 1.

rests upon the transferee to establish by clear and convincing evidence that either the transferor was solvent or that fair consideration was paid for the conveyance in order to avoid having the transaction set aside. U.S. v. Purcell, 798 F. Supp. 1102, 1111 (E.D. Pa. 1991), aff'd, 972 F.2d 1334. The conveyance of the Valmont Facility took place five days after UGI won its state court judgment against SDL. Because SDL was in debt at the time of the conveyance, the burden falls upon Feldman and Pape to prove by clear and convincing evidence that SDL was solvent or that fair consideration was paid. To meet this burden, defendants "must show that the record contains evidence satisfying the burden of persuasion and that the evidence is so powerful that no reasonable jury would be free to disbelieve it." 11 James W. Moore et al., Moore's Federal Practice § 56.13[1] (3d ed. 1997)(citing, inter alia, Norfolk & Dedham Mut. Fire Ins. Co. v. DeMarta, 799 F. Supp. 33, 34 (E.D. Pa.), aff'd, 993 F.2d 225 (3d Cir. 1992)).

Defendants have not met this burden.⁵ Section 3 of the UFCA provides two definitions of fair consideration for property or obligation:

- (a) When, in exchange for such property or obligation, as a fair equivalent therefor and in good faith, property is conveyed or an antecedent debt is satisfied; or
- (b) When such property or obligation is

⁵ Feldman and Pape argue that plaintiff cannot prove that SDL did not receive fair consideration for the Valmont Facility. The burden, however, falls upon defendants to prove that fair consideration was given. Purcell, 798 F. Supp. at 1111.

received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property or obligation obtained.

Pa. Stat. Ann. tit. 39, § 353 (1954)(repealed 1993).

Citing no authority, defendants contend that their good faith in purchasing the Valmont Facility is proven by the absence of any evidence on record showing that they knew of UGI's lawsuit and judgment. In United States v. Tabor Court Realty Corp., however, the Court of Appeals interpreted lack of good faith under § 4 to mean knowledge of the transferor's insolvency. 803 F.2d 1288, 1296 (3d Cir. 1986)("knowledge of insolvency is a rational interpretation of the statutory language of lack of 'good faith'"). The Tabor court affirmed the district court's finding of no good faith because the transferee was aware that the transaction would render the transferor insolvent and that no member of the transferor shareholder group would receive fair consideration for the conveyance. Id. Given that Feldman and Pape had access to SDL's financial records prior to closing (Pl. Ex. C., Asset Purchase Agreement at ¶ 4.2), and because no consideration flowed directly to SDL from the transaction, a genuine issue of material fact still exists regarding whether defendants knew SDL would be rendered insolvent by the transaction in question.

Admitting that SDL received no funds at closing, defendants also argue that plaintiff cannot prove that SDL did not receive

fair consideration from the Valmont transaction.⁶ They base their fair consideration argument on the fact that UCC 1's were filed showing the encumbrance of SDL's assets by Hazelton National Bank (Wolfe Dep. at 38) and that this debt was satisfied at closing. Id. at 40. Plaintiff replies that Feldman and Pape paid nothing to SDL at closing, but rather directed payment to Charles and Joan Piccione and HNB. Further, plaintiff asserts that the Hazelton mortgages were not shown on SDL's tax returns, and are therefore better characterized as belonging to the Picciones and the other named mortgagors, not to SDL. Although satisfaction of an antecedent debt does constitute fair consideration under the UFCA, 39 P.S. § 353, what remains open to question is whether the debt satisfied by defendants belonged to SDL, and thus constituted fair consideration, or is more properly regarded as belonging to Charles Piccione and the other mortgagors. As a consequence, Feldman and Pape's motion for summary judgment on plaintiff's UFCA section 4 claim is denied.

C. Bulk Transfers Act

Feldman and Pape also argue that the Bulk Transfers Act, Pa. Stat. Ann. tit. 13, §§ 6101-11 (repealed 1992)⁷, does not apply

⁶ Again, Feldman and Pape misstate the law. The burden is upon them to prove they paid fair consideration. Purcell, 798 F. Supp. at 1111.

⁷ Rights and obligations that arose under 13 Pa.C.S. Div. 6 (relating to bulk transfers) and 13 Pa.C.S. § 9111 (relating to the applicability of bulk transfer laws) before their repeal remain valid and may be enforced as though those provisions had not been repealed. Section 30 of act 1992, July 9, P.L. 507, No. 97.

here because the sale of SDL's machinery was not a bulk transfer within the meaning of § 6102 of the statute. Section 6102 provides, in pertinent part:

(a) Definition of "bulk transfer".-A "bulk transfer" is any transfer in bulk and not in the ordinary course of business of the transferor, or a major part of the materials, supplies, merchandise or other inventory (section 9109) of an enterprise subject to this division.

(b) Transfer of equipment as bulk transfer.-A transfer of a substantial part of the equipment (section 9109) of such an enterprise is a bulk transfer if it is made in connection with a bulk transfer of inventory, but not otherwise.

(c) Enterprises subject to division.-The enterprises subject to this division are all those whose principle business is the sale of merchandise from stock, including those who manufacture what they sell.

Pa. Stat. Ann. tit. 13, § 6102 (1984)(repealed 1992).

Feldman and Pape essentially argue that because SDL's business was leasing equipment and SDL did not maintain an inventory of equipment for resale or regularly order new machines to be resold, the transaction at issue does not fall within the scope of § 6102. In taking that position, defendants ignore § 9109 of Pennsylvania's UCC, which specifically includes articles held "for sale or lease" within the definition of inventory. Pa. Stat. Ann. tit. 13, § 9109(4)(emphasis added).⁸ Feldman and Pape

⁸ Section 9109 classifies goods as

[i]nventory if they are held by a person who holds them for sale or lease or to be furnished under contracts of service or if he has so furnished them, or if they are raw materials, work in process or materials used

concede that SDL "was organized and conducted business specifically for the purpose of leasing out certain equipment." Defs.' Brf. in Supp. of Mot. for Summ. Judg. at 12. Moreover, the sale of a substantial part of SDL's equipment (i.e., goods used in the business which are not inventory or farm equipment, 13 P.S. § 9109 cmt. 5) along with the sale of its inventory is also considered a bulk transfer. Pa. Stat. Ann. tit. 13, § 6102(b). Therefore, defendants' characterization of SDL as a service provider to which the statute does not apply, rather than a holder of inventory, is incorrect.

Feldman and Pape next argue that even if the Bulk Transfers Act applies to the Valmont Facility conveyance, they complied with the act's requirements. Specifically, they claim that their employee, Robert Myers, orally notified plaintiff's employee, Roy Felker, Sr., of Feldman and Pape's intention to purchase the Valmont Facility (Aff. of Robert J. Meyer, ¶ 5) and that this oral notification constituted "actual notice" which satisfies the statute's requirements. Plaintiff responds that the language of § 6107 requires formal written notice and that oral notice does not satisfy the statute's requirements.

The issue of whether oral notice satisfies the requirements of Pennsylvania's Uniform Bulk Transfers statute appears to be a

or consumed in business. Inventory of a person is not to be classified as equipment.

Pa. Stat. Ann. tit. 13, § 9109 (1984).

matter of first impression.⁹ Defendants cite three non-Pennsylvania cases for the proposition that actual notice dispenses with the requirement of formal, written notice: Brownson v. Lewis, 377 P.2d. 327, 330 (Or. 1962)(holding that actual knowledge dispenses with formal notice where creditor knows far more about disputed transaction than formal notice could provide); In re Scranton & Short, 7 F.2d 473, 474 (D. Or. 1925)(finding that where bank had ample notice through its cashier that sale was about to occur, bank could not complain that Bulk Sales Law was not complied with); and SVM Investments v. Mexican Exporters, Inc., 685 S.W.2d 424, 429 (Tex. App. 1985)(holding that informal notice which made creditor aware of transfer did not support a finding of concealment for failure to comply with written notice provisions). Those rulings are factually distinguishable from the case at bar. In all three cases, the creditor plaintiffs had close business relationships with the respective transferee defendants. Those relationships gave the plaintiffs detailed foreknowledge of the bulk transfers at issue. That is not true here, where Feldman and Pape's employee allegedly informed UGI's local district manager only

⁹ When the highest court of a state has not ruled on an issue of state law, a federal court is required to predict how that court would rule. Commissioner v. Estate of Bosch, 387 U.S. 456, 465 (1967); see also Robertson v. Allied Signal, Inc., 914 F.2d 360, 364 (3d Cir. 1990)(noting that federal courts must predict how Supreme Court of Pennsylvania would rule when confronted with issues of first impression under Pennsylvania law).

that defendants "would eventually be purchasing the [Valmont Facility] from the Piccione's [sic], as well as the equipment and fixtures on the Premises, which were owned by Spectra Dye, Ltd." Aff. of Robert J. Meyer at ¶ 5.

There is commentator support for the proposition that actual notice which provides the same information that is required under § 6107 can take the place of written notice.¹⁰ Section 6107(b), however, requires that:

[i]f the debts of the transferor are not to be paid in full as they fall due or if the transferee is in doubt on that point then the notice shall state further:

- (1) The location and general description of the property to be transferred and the estimated total of the debts of the transferor.
- (2) The address where the schedule of property and list of creditors (section 6104) may be inspected.
- (3) Whether the transfer is to pay

¹⁰ See William D. Hawkland, Uniform Commercial Code Series § 6-107:04 (1984).

Once the creditor knows that a bulk transfer is impending and has all the facts concerning it that would be provided by formal notice given pursuant to section 6-107, he knows everything he needs to know to determine what action he can take. In addition, it must be remembered that bulk transfer law is extraordinary legislation, providing, together with fraudulent conveyance law, the only set of rules of Anglo-American jurisprudence that make it impossible for a transferor to convey away his entire interest. Such extraordinary rules ought to be construed narrowly to satisfy only the social policies behind them and there should be no insistence on unnecessary formalities.

Id.

existing debts and if so the amount of such debts and to whom owing.

(4) Whether the transfer is for new consideration and if so the amount of such consideration and the time and place of payment.

(5) If for new consideration the time and place where creditors of the transferor are to file their claims.

Pa. Stat. Ann. tit. 13, §6107(b) (1984).

The oral notice allegedly conveyed by Robert Meyer did not address the specific information required under § 6107(b), and defendants have not shown that plaintiff already possessed that information. Therefore, even if Robert Meyer did inform plaintiff of the impending bulk transfer, defendants' evidence does not show that Meyer's communication conveyed the necessary information. Defendants have consequently failed to demonstrate that no genuine issue of material fact remains relating to the notice aspect of plaintiff's bulk transfers claim. Accord Cinocco Realty, Inc. v. J.L.J., Ltd., 736 P.2d 421, 423 (Colo. Ct. App. 1987)(holding that a creditor's generalized knowledge of an impending bulk sale will not serve as a substitute for the notice required by the act); see also Cleaners Products Supply, Inc. v. Garcia, 629 N.Y.S.2d 647, 650 (N.Y. Civ. Ct. 1995).

However, even if Robert Meyer's oral notice fulfilled the requirements of the statute, plaintiff is correct that Roy Felker's contradictory statements as to whether that notice was in fact given create a genuine issue of material fact which may not be dispensed with on summary judgment. Big Apple BMW, Inc.

v. BMW of North America, Inc., 974 F.2d 1358, 1363 (3d Cir. 1992)("where the non-moving party's evidence contradicts the movant's, then the non-movant's must be taken as true"), cert. denied, 507 U.S. 912 (1993).

D. Dismissal of Attorney Marc Wolfe as Third-Party Defendant

In January of 1989, Feldman and Pape joined former third-party defendant Marc Wolfe, their attorney for the Valmont Facility transaction. Feldman and Pape alleged that if they were liable, then Wolfe was liable for negligence and breach of contract in allowing the conveyance to proceed. On March 3, 1989, the court granted Wolfe's motion for summary judgment. Without citation of authority, defendants now argue that the court's order of summary judgment for Wolfe "as the law of the case, collaterally [sic] estops Plaintiff " from litigating its fraudulent conveyance and bulk transfer claims.¹¹ Def. Brf. in Supp. of Mot. for Summ. Judg. at 16.

¹¹ It should be noted that defendants have confused the related but distinct doctrines of law of the case and collateral estoppel. Under the law of the case doctrine, "'when a court decides upon a rule of law, that decision should continue to govern the same issues in prior stages in the same case.'" Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816 (1988). By contrast, collateral estoppel means "that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." Schiro v. Farley, 510 U.S. 222, 232 (1994). Therefore, "[r]elitigation of issues previously determined in the same litigation is controlled by principles of the law of the case doctrine rather than collateral estoppel." Hull v. Freeman, 991 F.2d 86, 90 (3d Cir. 1993)(citing 18 Charles A. Wright et al., Federal Practice and Procedure: Jurisdiction § 4478, at 788 (1981)). Because the Wolfe summary judgment action was an earlier stage of this case, and not a prior lawsuit, the doctrine of law of the case would control in this instance.

The doctrines of law of the case and collateral estoppel both require that the issue sought to be precluded must have been actually decided. Schultz v. Onan Corp., 737 F.2d 339, 345 (3d Cir. 1984) (law of the case doctrine only applies to issues actually decided or decided by necessary implication); Raytech Corp. v. White, 54 F.3d 187, 190 (3d Cir. 1995)(for collateral estoppel to apply, the issue must have been actually decided in a decision that was final, valid, and on the merits). "As a general rule, when a question of fact is put in issue by the pleadings, is submitted to the trier of fact for its determination, and is determined, that question of fact has been 'actually litigated.'" 18 James W. Moore et al., Moore's Federal Practice § 132.03[2][c] (3d ed. 1997); accord Restatement (Second) of Judgments § 27 cmt. d (1982). The court's summary judgment ruling for Wolfe, however, did not reach the issue of defendants' liability under Pennsylvania's Fraudulent Conveyances Act or Bulk Transfers Act. See generally UGI Corp. v. Piccione, Civ. A. No. 88-1125, slip op. (E.D. Pa. March 17, 1989)(Huyett, J.). Rather, the court based its decision on two findings: (1) the absence of "direct authority for the proposition that a purchaser's attorney may be held primarily or secondarily liable under the UFCA or the Bulk Transfers Act for the attorney's reliance upon a certification of counsel of no outstanding claims, absent reasonable grounds to suspect the existence of undisclosed claims" (Id. at 13); and (2) the fact that defendants did not controvert Wolfe's assertion that his legal services were

in conformity with the professional standard of care. Id. Given the above-mentioned bases for the Wolfe summary judgment ruling, plaintiff's fraudulent conveyance and bulk transfer causes of action were not actually decided and defendants' assertion of prior adjudication cannot prevail.

E. Punitive Damages

Lastly, Feldman and Pape ask the court to find as a matter of law that plaintiff is not entitled to punitive damages because defendants did not engage in outrageous conduct. In Pennsylvania, punitive damages are appropriate when the act committed, in addition to causing actual damages, constitutes outrageous conduct, either through reckless indifference or bad motive. Donaldson v. Bernstein, 104 F.3d 547, 556 (3d Cir. 1997). "Punitive damages must be based on conduct which is malicious, wanton, reckless, willful, or oppressive" Feld v. Merriam, 485 A.2d 742, 747-48 (Pa. 1984). In assessing a claim for punitive damages "one must look to the act itself together with all the circumstances including the motive of the wrongdoers and the relations between the parties The state of mind of the actor is vital. The act, or the failure to act, must be intentional, reckless or malicious." Id. at 748.

Summary judgment is inappropriate when a case hinges upon credibility determinations or on state of mind. Coolspring Stone Supply, Inc. v. American States Life Ins. Co., 10 F.3d 144, 148 (3d Cir. 1993). Issues of knowledge and intent are particularly inappropriate for resolution by summary judgment, as such issues

must often be resolved on the basis of inferences drawn from the conduct of the parties. Riehl v. Travelers Ins. Co., 772 F.2d 19, 24 (3d Cir. 1985).

Plaintiff has established that genuine issues of material fact still remain with regard to its fraudulent conveyance claims. See infra parts A & B. The inquiry in any claim for punitive damages is whether the defendant caused the plaintiff's injury with the requisite state of mind - i.e., intentionally, willfully, or recklessly. See Feld, 485 A.2d at 748. Because a factfinder must rely upon inferences drawn from the parties' conduct in determining whether punitive damages are warranted, Riehl, 772 F.2d at 24, the court will not hold as a matter of law that plaintiff is precluded from seeking punitive damages for its fraudulent conveyance claims.¹² See Kraeger v. Nationwide Mut. Ins. Co., No. Civ. A. 95-7550, 1996 WL 711488, at *3 (E.D. Pa. Dec. 6, 1996). Consequently, Feldman and Pape's motion for summary judgment on the issue of punitive damages is denied.

III. Conclusion

In consideration of the foregoing, defendants' Motion for Summary Judgment is denied. An appropriate order follows.

¹² Feldman and Pape inexplicably argue that they are owed summary judgment on the issue of punitive damages for plaintiff's bulk transfers claim. Defs.' Brf. in Supp. of Mot. for Summ. Judg. at 18. This argument is irrelevant, as plaintiff has only requested punitive damages for its fraudulent conveyance claims. Pl. Compl. at 13-17.