IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

CAROL CHESEMORE, DANIEL DONKLE THOMAS GIECK, MARTIN ROBBINS, and NANNETTE STOFLET, on behalf of themselves, individually, and on behalf of the CERTIFIED SUBCLASS in the Matter Known as *Chesemore v. Alliance Holdings, Inc.*, United States District Court for the Western District of Wisconsin, Case No. 09-cv-413,

Plaintiff,

v.

DAVID B. FENKELL,

Defendant.

OPINION AND ORDER

18-cv-724-wmc

In this action, former employees of Trachte Building Systems, Inc., who participated in the Alliance Holdings, Inc. Employee Stock Ownership Plan assert claims under the Pennsylvania Uniform Fraudulent Transfer Act ("PUFTA"), 12 Pa Con. Stat. § 5101, *et seq.*, on their own behalf and on behalf of a certified subclass in a prior action in this court, against defendant David Fenkell, the prior CEO of the ESOP and one of the defendants in the prior action. This case is set for bench trial on November 2, 2020. In advance of the final pretrial conference on Tuesday, October 20, 2020, the court issues the following opinion and order on the parties' motions *in limine* and on defendant's pending motion for reconsideration.

OPINION

I. Defendant's Motions

A. Motion for Reconsideration

Defendant seeks reconsideration of the court's denial of his motion for judgment on the pleadings, rejecting his argument that plaintiffs' claims are extinguished under PUFTA's statute of repose, 12 Pa. Stat. and Cons. Stat. Ann. § 5109. In its prior opinion, the court equated the "obligation incurred" language in § 5109 to the judgment entered against defendant Fenkell, awarding plaintiffs' attorney fees. The court further concluded that the date of that judgment provided an alternative basis for starting the clock under § 5109. (9/22/20 Op. & Order (dkt. #50) 4-5.) Having now reviewed cases cited in defendant's motion for reconsideration (*see* Def.'s Br. (dkt. #61) 7-8) and the language of PUFTA more carefully, the court agrees with defendant that "obligation incurred" cannot mean the judgment incurred for fees. Instead, "obligation incurred," like "transfer," refers to the fraudulent transaction a PUFTA plaintiff seeks to void. Outside of the Uniform Fraudulent Transfer Act ("UFTA") context, entry of judgment might serve as an independent basis for a fraudulent transfer claim under the common law, *see, e.g.*, *Morganroth & Morganroth v. Norris, McLaughlin & Marcus, P.C.*, 331 F.3d 406, 417 (3d Cir. 2003), but the court could not find broader support for applying this approach to the statute of repose language under PUFTA and comparable UFTA state statutes, other than an outlying California Court of Appeals' decision, *see Cortez v. Vogt*, 52 Cal. App. 4th 917, 937, 60 Cal. Rptr. 2d 841, 853 (1997). The court further finds that its prior construction of the term "obligation" constitutes a manifest error of law, satisfying the standard for

reconsideration under Federal Rule of Civil Procedure 59.

Perhaps realizing that the definition of "obligation incurred" proposed by plaintiffs, and which this court adopted in its original opinion, was not supported by caselaw, plaintiffs also argue that their claim did not accrue until the judgment. While there may be some merit to this argument, plaintiffs were aware of David Fenkell's transfers to his wife during the pendency of the *Chesemore I* action, as perhaps best illustrated by plaintiffs' motion *in limine*, described below, requesting that the court apply issue preclusion or take judicial notice of the court's prior findings of fraudulent transfers. Even if plaintiffs weren't aware of the fraudulent nature of the post-2007 transfers, § 5101 also permits plaintiffs to file a lawsuit within one year of discovery of the fraudulent transfers, and there appears to be no dispute that this, too, occurred well before August 30, 2017 -- one year before the filing of this lawsuit. While the court is not unsympathetic to plaintiffs' predicament -- they attempted to collect on this judgment without filing another lawsuit -- that choice has consequences. Specifically, the consequence is that all, or at least the bulk, of the alleged fraudulent transfers occurred outside of PUFTA's statute of repose.

Plaintiffs filed a motion for leave to file a sur-reply (dkt. #4) to defendant's motion to reconsider, which the court will grant. In the sur-reply, plaintiffs contend that if the court grants the motion for reconsideration and concludes that the post-2007 transfers fall outside of the statute of repose, there is a timely July 2019 transfer, in which David Fenkell deposited his tax refunds on amounts paid on his salary and reduced for his legal defense into tenancies by the entirety. Accordingly, the court will only grant defendant's motion for judgment on the pleadings as to any transfers *preceding* August 30, 2014 -- four years

before the filing of this lawsuit. To the extent plaintiffs have evidence of transfers post-dating August 30, 2014, the court will take up whether plaintiff can proceed on that narrowed claim at the final pretrial conference.

B. Motion in *Limine* (dkt. #52)

Defendant's motion *in limine* seeks to exclude testimony, argument or evidence of transfers made before August 30, 2014. For the reasons just described above, this motion will obviously be GRANTED.

II. Plaintiffs' Motions *in Limine* (dkt. #54)

A. MIL No. 1: Limit Affirmative Defenses

In this motion, plaintiffs seek orders deeming any affirmative defense not pleaded in defendant's answer waived and precluding him from raising or relitigating affirmative defenses already decided by the court's prior decisions. With respect to the latter request, plaintiffs contend that of the five affirmative defenses asserted in his answer, the latter three have already been decided -- the plaintiffs' failure to include necessary and indispensable parties, the failure to state a claim upon which relief can be granted, and the statute of repose.[1]

[1] Defendant also asserted improper venue and lack of subject matter jurisdiction as affirmative defenses. Venue has also been waived. *See* Fed. R. Civ. P. 12(h)(1); *Auto. Mechanics Local 701 Welfare & Pension Funds v. Vanguard Car Rental USA, Inc.*, 502 F.3d 740, 746 (7th Cir. 2007) ("[A] an objection to venue can be waived or forfeited." (internal citation and quotation marks omitted)). And, while a lack of subject matter jurisdiction cannot be waived, *see* Fed. R. Civ. P. 12(h)(3), defendant has failed to present any argument for the court's lack of subject matter jurisdiction. Moreover, the court finds none based on the diversity of the parties and the amount in controversy. (Compl. (dkt. #1) ¶¶ 5-10, 14, 16.)

In response, defendant does not appear to oppose plaintiffs' specific request for relief, but rather argues that nothing about this motion precludes defendant from presenting evidence in defense of elements of the claims for which plaintiffs bear the burden of proof, and for which defendant denied liability in his complaint. Although unnecessary, no one is arguing otherwise and this is nothing more than a statement of black letter law: "[a]n affirmative defense 'limits or excuses a defendant's liability even if the plaintiff establishes a prima facie case.'" *Bell v. Taylor*, 827 F.3d 699, 704–05 (7th Cir. 2016) (quoting *Tober v. Graco Children's Prods., Inc.*, 431 F.3d 572, 579 n.9 (7th Cir. 2005)). "In other words, an affirmative defense is '[a] defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's . . . claim, even if all the allegations in the complaint are true.'" *Id.* (citing Defense, BLACK'S LAW DICTIONARY (10th ed. 2014)).

To clarify, in prior orders, the court has already rejected defendant's argument that plaintiffs' complaint should be dismissed for failing to join a necessary and indispensable party (namely, Karen Fenkell), and addressed the extent to which the complaint is extinguished or otherwise barred by the statute of repose. (4/27/20 Op. & Order (dkt. #34); 9/22/20 Op. & Order (dkt. #50).) Finally, defendant's affirmative defense for failure to state a claim does not preclude defendant from putting plaintiffs to their proof and submitting evidence that undermines the elements of these claims. Accordingly, this motion will also be GRANTED.

A. MIL No. 2: Take Judicial Notice or Apply Issue Preclusion as to Findings Made by the Court in Prior Case

In this motion, plaintiffs ask the court to either take judicial notice of findings of

fact made in the prior action about the transfers at issue or apply issue preclusion as to those findings, barring defendant from relitigating these transfers. More specifically, plaintiffs cite eight findings, while also indicating that there may be others, that the court made in the No, 09-cv-413 action, including that: (1) just after the 2007 transaction, David Fenkell began transferring his assets into his wife's names; (2) as of November 18, 2015, the vast majority of the Fenkells' $13 million held in various accounts were now held in accounts titled solely in Karen Fenkell's name; (3) the transfers were David Fenkell's attempt to move assets beyond the reach of plaintiffs' potential claims; (4) David Fenkell was the sole source of income for his family since 1988, and specifically made over $27 million from Alliance Holdings from 2001 through 2011; and (5) while the money was held in accounts titled to Karen Fenkell, David Fenkell continued to exercise control over the money, including regularly authorizing wire transfers from the accounts. (Pls.' Mot. (dkt. #54) 5-6.)

Given the court's ruling on the motion for reconsideration, this motion is DENIED AS MOOT.

B. MIL No. 3: Concerning Order of Presentation and Burdens of Production and Persuasion

Finally, plaintiffs contend that "under PUTFA, once a creditor shows that a transfer was made from a debtor husband to his wife or to a tenancy by the entirety for little or no consideration, the transfer is presumed fraudulent." (Pls.' Mot. (dkt. #54) 8 (citing *Iscovitz v. Filderman*, 6 A.2d 270, 272 (1939)) (emphasis omitted).) Relying on the findings described above with respect to MIL No. 2, and on David Fenkell's purported deposition

testimony that he did not receive anything of value in transferring assets to Karen Fenkell, plaintiffs contend that they have made out their prima facie case, and the burden shifts to David Fenkell to show that the transfers were fair or were exchanged for consideration. (*Id.*) As such, plaintiffs contend that defendant should go first in proving his defense.

Here, too, the court will DENY this motion in light of its decision on the motion for reconsideration.

ORDER

IT IS ORDERED that:

1) Defendant David Fenkell's motion *in limine* (dkt. #52) is GRANTED.

2) Plaintiffs' motions *in limine* (dkt. #54) is GRANTED IN PART AND DENIED IN PART.

3) Defendant's motion for reconsideration (dkt. #60) is GRANTED; the court's prior opinion and order on defendant's motion for judgment on the pleadings (dkt. #50) is VACATED; and that motion is now GRANTED, dismissing plaintiffs' claims as to asset transfers before August 30, 2014.

4) Plaintiffs' motion for leave to file a sur-reply (dkt. #74) is GRANTED.

Entered this 19th day of October, 2020.

BY THE COURT:

/s/

_____
WILLIAM M. CONLEY
District Judge