SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0047-21

POLINA ROITBURG,
executor of the estate of
DAVID ROITBURG,

Plaintiff-Appellant,

v.

LEONID ROITBURG, a/k/a
LEON ROITBURG, DESIGN
OF TOMORROW, INC., a/k/a
EDUCATIONAL &
LABORATORY SYSTEMS, and
NATIONAL PRECISION TOOL
COMPANY, INC.,

Defendants/Third-Party
Plaintiffs-Respondents,

v.

POLINA ROITBURG and
IGOR ROITBURG, individually,

Third-Party Defendants-
Appellants.

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Argued January 24, 2023 – Decided August 31, 2023

Before Judges Messano and Gummer.

On appeal from the Superior Court of New Jersey, Law Division, Morris County, Docket No. L-1478-16.

Linda S. Agnew argued the cause for appellants (Harras Bloom & Archer, LLP, attorneys; Linda S. Agnew, on the briefs).

Mark D. Miller argued the cause for respondents (Dubeck & Miller, attorneys; Mark D. Miller, of counsel and on the brief).

PER CURIAM

This matter — a bitter intrafamily dispute that was tried to verdict before a Law Division judge — is before us for a second time. As we explained in our prior decision:

> Defendant Leonid (Leon) Roitburg and his brother David were equal shareholders in Design of Tomorrow, Inc. (DOT), a company that constructed custom kitchens and cabinetry and operated out of a building owned by National Precision Tool Company, Inc. (NPTC). NPTC was a corporation in which Leon was the sole shareholder. Plaintiff Polina Roitburg, David's wife, was DOT's bookkeeper.
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> [Roitburg v. Roitburg, No. A-2963-18 (App. Div. Dec. 14, 2020) (slip op. at 2–3) (footnote omitted).]

The brothers executed a buy-sell agreement funded by $1 million life insurance policies purchased by DOT, with the proceeds of the policies payable to their

respective estates upon their deaths. Id. at 3. Critically, in what became the focal point of the litigation,

> [t]he agreement also provided for the repayment of any loans made to DOT by the deceased shareholder: "If the corporation owes money to the deceased shareholder, the corporation shall pay such amount to the estate of the deceased shareholder in the normal course of business, but no later than two [] years following the deceased shareholder's date of death."
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> [Ibid. (second alteration in original).]

David passed away in October 2014, and Leon obtained his brother's shares of stock in DOT after paying David's estate the insurance policy proceeds. Id. at 4. Although DOT began re-paying David's loans, in February 2015, Leon directed plaintiff to make payments to NPTC and Leon's wife, for loans they had made to DOT, "without paying the balance of David's loan account." Id. at 5.

When the parties could not resolve the dispute about how much was owed to David's estate, plaintiff filed a complaint alleging:

> DOT breached the buy-sell agreement and owed David's estate more than $600,000 as repayment of loans David made to the company. [Plaintiff] also alleged that Leon was the alter ego of DOT and NPTC and had fraudulently transferred funds from DOT to NPTC, in violation of the Uniform Fraudulent Transfer Act (UFTA), N.J.S.A. 25:2-20 to -34. Plaintiff claimed the circumstances warranted piercing the corporate veils of DOT and NPTC, and she sought to hold Leon

> personally liable for compensatory and punitive damages, and counsel fees.
>
> [Ibid.]

Following a bench trial, the judge entered judgment in plaintiff's favor, against DOT, and, piercing the "corporate veils" of DOT and NPTC, the judge held Leon and NPTC jointly and severally liable for the judgment. Id. at 8. The judge later modified the judgment amount to $459,103.14. Id. at 9.

We affirmed the judgment in plaintiff's favor against DOT but vacated the judgment against Leon and NPTC, concluding that the judge's findings did "not support piercing DOT's corporate veil." Id. at 18, 28. However, because the judge had completely failed to address plaintiff's claim under the UFTA, we remanded the matter for the court "to consider plaintiff's UFTA cause of action against defendants." Id. at 28. We left "the conduct of the remand to the judge's discretion." Ibid.[1]

The remand took place before a different judge because the trial judge had since retired, and the parties consented to have the judge decide the issues on

[1] Plaintiff's brief cover lists herself personally and her son, Igor Roitburg, as cross-appellants. However, the previous cross-appeal presented only claims made by the estate, see id. at 10, and the only issue we remanded to the trial court, i.e., the judge's failure to address the UFTA claim in the complaint, was made on behalf of David's estate, which was DOT's creditor, id. at 28.

the trial record without any additional evidence or testimony. Plaintiff asserted that as the sole remaining shareholder of DOT, Leon had made six transfers of DOT's assets to "insiders," specifically himself, his wife, and NPTC, after DOT was insolvent and while its obligation to David's estate was still extant. Plaintiff identified those six transfers and the alleged supporting reasons for the disbursements:

- August 7, 2015 to November 9, 2015 – four payments totaling $4,335.05 to Leon's wife for interest on a loan she had made to DOT from her personal line of credit with her brokerage house;
- December 7, 2015 payment of $214,000 to NPTC as repayment of loans it had made to DOT;
- December 10, 2015 payment of $301,000 to Leon's wife as repayment of the loan she had made to DOT.

And after plaintiff filed her complaint on July 1, 2016:

- December 22, 2016 payment of $90,000 to NPTC for rent;
- December 22, 2016 payment of $23,000 to NPTC for utilities; and,
- December 23, 2016 payment of $95,814.17 to Leon as salary.

Defendants asserted that the transfers had been payments for legitimate expenses incurred in the ordinary course of DOT's business.

On August 5, 2021, following briefing and argument, the remand judge entered judgment in defendants' favor "finding . . . there w[ere] no violation[s]

of the [UFTA]." In a short, written statement of reasons that accompanied the order, the judge noted that plaintiff had asserted a violation of N.J.S.A. 25:2-27(a) in her complaint but raised an alleged violation of N.J.S.A. 25:2-27(b) at trial.

Citing our opinion in Jecker v. Hidden Valley, Inc., 422 N.J. Super. 155 (App. Div. 2011), the judge noted that plaintiff was required "to prove fraud by clear and convincing evidence," and the court was required to consider the factors listed in N.J.S.A. 25:2-26, the so-called "badges of fraud," see Gilchinsky v. Nat'l Westminster Bank N.J., 159 N.J. 463, 476 (1999), in deciding whether any transfer was fraudulent. The judge recognized that N.J.S.A. 25:2-30(f)(2) provided a defense to insider transfers made in the ordinary course of the debtor's business.

The judge then examined each of the six allegedly fraudulent transfers using the "badges of fraud" factors contained in N.J.S.A. 25:2-26(b). He concluded that plaintiff had failed to prove by clear and convincing evidence that the transfers were made to "hinder, delay or defraud plaintiff." See N.J.S.A. 25:2-25(a). The judge also determined that the transfers "qualif[ied] as legitimate expenses and . . . a defense pursuant to N.J.S.A. 25:2-30(f)(2)."

Before us, plaintiff argues she proved by clear and convincing evidence defendants had violated N.J.S.A. 25:2-27(b).[2] She contends the remand judge erred by finding defendants had not violated the UFTA because the transfers were made in the ordinary course of DOT's business, arguing particularly in this regard that the remand judge failed to consider or give appropriate weight to factual findings made by the trial judge. Plaintiff also contends the judge erred by relying "exclusively" on the "badges of fraud" listed in N.J.S.A. 25:2-26. Plaintiff urges us to exercise original jurisdiction, see Rule 2:10-5, declare the six transfers void, order Leon to refund the amounts to DOT, order DOT to satisfy plaintiff's judgment, and grant plaintiff counsel fees and any other relief deemed appropriate under the UFTA.

[2] The Legislature amended the UFTA effective August 10, 2021, well after the trial and immediately prior to the remand judge entering the judgment we now review. See L. 2021, c. 92. The title of the statute was changed to the "Uniform Voidable Transactions Act." Id. at § 1. In addition, the amendments added a new subsection (c) to N.J.S.A. 25:2-27 that clarified "a creditor making a claim for relief under [N.J.S.A. 25:2-27(a) or (b)] has the burden of proving the elements of the claim for relief by a preponderance of the evidence." Id. at § 8 (emphasis added). The parties agree that the pre-amendment version of the UFTA controls our review. Plaintiff also agrees she was required to prove her claim by clear and convincing evidence under the pre-amendment version of N.J.S.A. 25:2-27(b). We express no opinion on that issue because, as we explain below, plaintiff clearly met that burden.

We have considered the arguments in light of the record and applicable legal standards. We reverse and vacate the judgment entered in defendants' favor. For reasons expressed below, we reluctantly decline to exercise original jurisdiction and remand the matter to the trial court for further proceedings consistent with this opinion.

I.

"The standards we apply in reviewing the findings and conclusions of a trial court following a bench trial are well-established." Allstate Ins. Co. v. Northfield Med. Ctr, PC, 228 N.J. 596, 619 (2017). Under a deferential standard, "findings must be upheld if they are based on credible evidence in the record," Motorworld, Inc. v. Benkendorf, 228 N.J. 311, 329 (2017) (citing D'Agostino v. Maldonado, 216 N.J. 168, 182 (2013)), and we will "not 'engage in an independent assessment of the evidence as if [we] were the court of first instance,'" Bank of N.Y. Mellon v. Corradetti, 466 N.J. Super. 185, 206 (App. Div. 2020) (alteration in original) (quoting State v. Locurto, 157 N.J. 463, 471 (1999)). "To the extent that the trial court interprets the law and the legal consequences that flow from established facts, we review its conclusions de novo." Motorworld, 228 N.J. at 329 (citing D'Agostino, 216 N.J. at 182).

Enacted in 1988, New Jersey's version of the UFTA replaced the Uniform Fraudulent Conveyances Law (UFCL), which had been in effect since 1919. The UFTA "is substantially the same as the uniform statute." Flood v. Caro Corp., 272 N.J. Super. 398, 403 (App. Div. 1994). The UFTA was intended to "modernize[] 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, or to prefer favored claimants." Ibid. (emphasis added). "A prime purpose of [UFTA] [wa]s to align state law on fraudulent transfers with the federal Bankruptcy Act, see 11 U.S.C. §§ 547 and 548, and the Uniform Commercial Code-Secured Transactions. N.J.S.A. 12A:9-101 et seq. Another goal [wa]s to make uniform the law among the states that adopt the [UFTA]." Id. at 403–04 (citing N.J.S.A. 25:2-33). "As the Third Circuit has stated, in applying the UFTA, courts 'may look to the law in other jurisdictions that have adopted the [UFTA], and decisions construing analogous provisions of the Bankruptcy Code.'" Motorworld, 228 N.J. at 325 n.4 (quoting Klein v. Weidner, 729 F.3d 280, 283 (3d Cir. 2013)).

II.

A.

In his written decision, the remand judge observed that on her complaint, plaintiff had pled a cause of action under N.J.S.A. 25:2-27(a) but was proceeding now under N.J.S.A. 25:2-27(b). The complaint, filed by an attorney who did not try the case, alleged that Leon's transfers had been made "with intent to hinder, delay and defraud" David's estate. N.J.S.A. 25:2-25(a). But plaintiff's proofs at trial were directed toward a claim under section 27(b), i.e., that Leon had paid himself, his wife and his company, NPTC, before paying David's estate. In her appellate brief in the first appeal, plaintiff specifically argued that she had proven defendants violated N.J.S.A. 25:2-27(b), and plaintiff's counsel at argument before the remand judge clarified that the claim was premised on a violation of section 27(b), not section 25(a) or 27(a). Perhaps our opinion could have been more precise, but we remanded the matter for the judge to consider plaintiff's claim under this section of the UFTA.

It is possible that the remand judge erroneously interpreted dicta in our prior opinion that generally discussed the UFTA and N.J.S.A. 25:2-26, Roitburg, slip op. at 27, as the starting point for analyzing plaintiff's claim under section 27(b). The badges of fraud are relevant "to determine whether an actual intent

to hinder or defraud existed." Jurista v. Amerinox Processing, Inc., 492 B.R. 707, 747 (2013); see also United Jersey Bank v. Vajda, 299 N.J. Super. 161, 163–64 (App. Div. 1997) (discussing interplay between N.J.S.A. 25:2-26 and determining fraudulent intent under N.J.S.A. 25:2-25(a)). Section 27, however, "has two provisions, both designed to protect creditors whose claims arose before the time of a transfer by a debtor ('present creditors'). Neither requires showing an intent on the part of the debtor to hinder, delay or defraud creditors." Flood, 272 N.J. Super. at 404 (emphasis added); see also Boardwalk Regency Corp. v. Burd, 262 N.J. Super. 162, 164 (App. Div. 1993) (discussing N.J.S.A. 25:2-27(a) and noting "[f]raudulent intent is not a part of" the statutory elements).

The National Conference of Commissioners on Uniform State Laws (NCCUSL), which promulgated the UFTA in 1918, adopted significant changes to the uniform statute in 2014, including amending the short title, as New Jersey later did in 2021, to the "Uniform Voidable Transactions Act." The NCCUSL specifically omitted "fraud" from the statute's title because it was "a misleading description of the [UFTA] as it was originally written." Nat'l Conf. of Comm'rs on Unif. State Laws, Unif. Voidable Transactions Act, 2014 Amendment at 48.

The NCCUSL wrote: "Fraud is not, and never has been, a necessary element of a claim for relief under the [UFTA]." Ibid.

At the time of trial, N.J.S.A. 25:2-27(b) provided:

> A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.[3]

This subsection was specifically "designed to deal with preferences." Flood, 272 N.J. Super. at 404. "Consistent with the Bankruptcy Act, 11 U.S.C. § 547(b)(4)(B), it declares fraudulent as to present creditors a transfer made by a debtor to an 'insider' for an antecedent debt if the debtor was insolvent and the insider had reasonable cause to believe the debtor was insolvent." Id. at 404.

Toward the end of his written decision, the remand judge framed the issue posed and its resolution as follows: "The question is not could the transfers have been intended to hinder, delay or defraud plaintiff, but rather has plaintiff proven that by clear and convincing evidence. She has not." We agree with plaintiff that it was legal error for the judge to apply the standards regarding claims for intentional fraud under N.J.S.A. 25:2-25(a)(1) to her claim, and to use the factors

[3] The 2021 amendments to the UFTA eliminated the term "fraudulent" and made such a transfer "voidable." L. 2021, c. 92 § 8.

listed in N.J.S.A. 25:2-26 to decide whether plaintiff had met her burden of proof. See Nat'l Conf. of Comm'rs on Unif. State Laws, Unif. Voidable Transactions Act, 2014 Amendment, cmt. 1 (noting the section 26 "[f]actors [are] appropriate for consideration in determining actual intent" whereas under section 27, "the fraud on the creditors will be presumed if certain objective criteria are met." (emphasis added)).

The judge provided scant analysis of plaintiff's claim under N.J.S.A. 25:2-27(b). He wrote, without further explanation, that the statute "require[d] payments to 'antecedent debts' which defendant[s] assert[] did not occur." Distinguishing an unpublished case from our court that plaintiff had cited for support, the judge determined DOT's six "payments had a legitimate business reason," "qualif[ied] as legitimate expenses and qualif[ied] as a defense pursuant to N.J.S.A. 25:2-30(f)(2) made in the ordinary course of business."

To establish a prima facie UFTA violation under N.J.S.A. 25:2-27(b), plaintiff was required to prove: (1) the estate's "claim arose before the transfer was made"; (2) "the transfer was made to an insider"; (3) "for an antecedent debt;" (4) DOT "was insolvent at that time"; and (5) "the insider had reasonable cause to believe that [DOT] was insolvent."

David's estate was a debtor whose claim "arose" under the buy-sell agreement before DOT made any of the six disputed transfers. Indeed, DOT began to pay back the loans David had made to the company as required under the buy-sell agreement before abruptly stopping at Leon's direction and making these disbursements to Leon, his wife and NPTC.

If, like DOT, the debtor is a corporation, the UFTA defines an "insider" as "[a] person in control of the debtor" or "[a] relative of a . . . person in control of the debtor." N.J.S.A. 25:2-22(b)(3) and (6). Leon and his wife were clearly insiders. Although NPTC does not fit precisely within the definitions of an insider in the UFTA, the Court has said: "The unifying theme among the enumerated persons [in N.J.S.A. 25:2-22(a)] is that they stand in such close relation to the debtor as to give rise to the inference that they have the ability to influence or control the debtor's actions." Gilchinsky, 159 N.J. at 478 (citing William L. Norton, Bankr. Law & Prac. 2d § 57:31 (1999)). With Leon as the sole shareholder of both NPTC and DOT, NPTC's insider status is beyond debate.

The judge never decided the issue, and we cannot discern why he stated that defendants asserted the six transfers were not payments for "antecedent debts." Neither the UFTA or the Bankruptcy Code define "antecedent debt."

However, the Bankruptcy Code defines "debt" as a "liability on a claim," 11 U.S.C. § 101(12), and "'[a]ntecedent' in turn, is generally defined as 'existing or occurring before in time or order often with consequential effects.'" In re DOTS, LLC v. Capstone Media, 533 B.R. 432, 438 (D.N.J. 2015) (quoting Webster's Third New International Dictionary 91 (1981)). "A debt is 'antecedent' . . . then, 'if it was incurred before the allegedly preferential transfer.'" Ibid. (quoting In re Bridge Info. Sys., Inc., 474 F.3d 1063, 1066–67 (8th Cir. 2007)). Here, defendants' entire defense was predicated on the claim that the six transfers were made in payment of DOT's obligations to Leon, his wife, and NPTC that pre-existed the transfers. In other words, it is undisputed that the payments were made for antecedent debts of DOT.

Similar, there is no dispute that DOT was insolvent when the six transfers were made, and Leon, personally and on behalf of NPTC, knew and his wife reasonably should have known DOT was insolvent. Plaintiff established by clear and convincing evidence that defendants violated section 27(b) of the UFTA.

B.

Applying the factors in N.J.S.A. 25:2-26 to the six transfers, the remand judge essentially concluded plaintiff had failed to "show by clear and convincing

evidence" that any of the transfers was fraudulent because he found they were payments for DOT's legitimate business expenses. He later cited N.J.S.A. 25:2-30(f)(2) as the statutory basis for support.

The judge concluded the payments to Leon's wife and NPTC were based on DOT's "corporate debt" because both had loaned money to DOT to keep the company operating and able to fulfill a large contract it had obtained prior to David's death. The payment of interest on Leon's wife's loan, a line of credit secured through her brokerage account with Morgan Stanley, was "an expense relating to the business loan."

The judge also determined payment of Leon's "salary" for operating DOT in 2015 was not fraudulent, even though Leon was never paid a salary during the years prior to or after 2015, and, unlike other employees who were regularly issued payroll checks, the payment to Leon was made in one lump sum at the end of 2016. The judge reached a similar conclusion regarding the rent and utilities payments, even though he found that defendants had presented "no rent bills," and it was undisputed that DOT had not paid any rent or utilities to NPTC since 2012.

At the time of trial, N.J.S.A. 25:2-30(f) provided:

> A transfer is not voidable under [N.J.S.A. 25:2-27(b)]:

> (1) To the extent the insider gave new value to or for the benefit of the debtor after the transfer was made, unless the new value was secured by a valid lien;
>
> (2) If made in the ordinary course of business or financial affairs of the debtor and the insider; or
>
> (3) If made pursuant to a good-faith effort to rehabilitate the debtor and the transfer secured present value given for that purpose as well as an antecedent debt of the debtor.
>
> [(Emphasis added).][4]

Because the judge erroneously analyzed whether plaintiff had proven a prima facie case that the six transfers were voidable under N.J.S.A. 25:2-27(b), he failed to conduct an appropriate analysis of whether defendants established that the transfers were made in "the ordinary course of" DOT's and defendants' "business or financial affairs." N.J.S.A. 25:2-30(f)(2).

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[4] Defendants argue that subsections (1) and (3) also apply because Leon, his wife and NPTC, through their loans or willingness to forego salary, rents or utility costs, gave DOT "new value" or made "good faith effort[s] to rehabilitate" DOT as an ongoing business enterprise. However, the argument ignores that when the transfers were made in 2015 and 2016, DOT was insolvent, and defendants bestowed no "new value" on the corporation after the transfers were made, nor were the transfers made in a good faith effort to "rehabilitate" DOT. The 2021 amendments to the UFTA made only minor changes to subsection (f)(1). See L. 2021, c. 92, § 11.

The UFTA does not define "ordinary course of business." However, N.J.S.A. 25:2-30(f)(2) adopted verbatim section 8(f)(2) of the Uniform Act, which was in turn "derived from § 547(c)(2)[5] of the Bankruptcy Code, which excepts certain payments made in the ordinary course of business or financial affairs from avoidance by the trustee in bankruptcy as preferential transfers." Uniform Laws Annotated (ULA), Vol. 7A, Pt.II, "Uniform Fraudulent Transfer Act (1984)," cmt. 6, § 8 (2017).

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[5] 11 U.S.C. § 547(c)(2) provides:

> (c) The trustee may not avoid under this section a transfer—
>
> . . . .
>
> (2) to the extent that such transfer was in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee, and such transfer was—
>
> (A) made in the ordinary course of business or financial affairs of the debtor and the transferee; or
>
> (B) made according to ordinary business terms[.]

At the time of trial and remand, the UFTA was silent as to the burden of proof on this issue and which party bore that burden.[6] However, the Bankruptcy Code makes clear that the "creditor or party . . . against whom recovery or avoidance is sought," has the burden of proof. 11 U.S.C. § 547(g). That party must prove entitlement to the "ordinary course of business exception . . . by a preponderance of the evidence." In re Conex Holdings, LLC, 522 B.R. 480, 486 (Bankr. Del. 2014) (citing In re First Jersey Sec., Inc., 180 F.3d 504, 512 (3d Cir. 1999)). "The purpose of Section 547(c) is to leave undisturbed normal financial relations between a debtor and its creditors, even as a company approaches bankruptcy. It protects 'recurring, customary credit transactions that are incurred and paid in the ordinary course of business of the debtor and the debtor's transferee.'" In re First Jersey Sec., Inc., 180 F.3d at 512 (quoting 5 Collier on Bankruptcy, 547–47).

In addition to not properly considering the burden of proof, the remand judge erroneously concluded that defendants were entitled to the defense provided by N.J.S.A. 25:2-30(f)(2) simply because the six transfers were

[6] The 2021 amendments to the UFTA now make it clear that the debtor or transferee has the burden of proving this defense by a preponderance of the evidence. N.J.S.A. 25:2-30(g)(1) and -30(h).

payments for "legitimate expenses." The timing and manner of the transfers, which the judge failed to consider, were critical factors. See ibid. ("Factors such as timing, the amount and manner in which a transaction was paid are considered relevant." (citing In re Yurika Foods Corp., 888 F.2d 42, 45 (6th Cir. 1989))).

Under the Uniform Law's equivalent of N.J.S.A. 25:2-27(b), "[w]hether a transfer was in the 'ordinary course' requires a consideration of the pattern of payments or secured transactions engaged in by the debtor and the insider prior to the transfer challenged." ULA, Vol. 7A, Pt.II, cmt. 6 on § 8. "The defense . . . is available, irrespective of whether the debtor or the insider or both are engaged in business, but the prior conduct or practice of both the debtor and the insider-transferee is relevant." Ibid.

In considering its state's equivalent version of N.J.S.A. 25:2-30(f)(2), the Supreme Court of South Dakota held: "Under § 8(f)(2)[,] only the parties prior dealings are examined to decide whether a transfer was made in the ordinary course of the parties' business affairs. . . . [T]his means looking at the payment history to decide if a preferential transfer was made in the ordinary course." Prairie Lakes Health Care Sys., Inc. v. Wookey, 583 N.W.2d 405, 415 (S.D. 1998); but see Garrison City Broad., Inc. v. York Obstetrics & Gynecology, PA, 985 A.2d 465, 467–68 (Me. 2009) (interpreting Maine's version of N.J.S.A.

25:2-30(f)(2) and concluding the debtor was entitled to "ordinary course of business" defense for late payment of accrued rent to insider because the debtor or insider was not required to prove the late payment was "a normal business practice").

Because the remand judge failed to properly consider whether defendants had proven by a preponderance of the credible evidence that the six transfers were "made in the ordinary course of business or financial affairs of [DOT] and [Leon, his wife, and NPTC]," N.J.S.A. 25:2-30(f)(2), we reverse the August 5, 2021 judgment in defendants' favor and reinstate plaintiff's UFTA claim.

III.

Given the length of time this litigation has been pending, the costs incurred by both sides, and our conclusion that plaintiff established by clear and convincing evidence that defendants violated N.J.S.A. 25:2-27(b), we consider whether to accept plaintiff's invitation to exercise our original jurisdiction and decide on the existing record whether defendants are entitled to the defense provided by N.J.S.A. 25:2-30(f)(2).

"Rule 2:10-5 allow[s an] appellate court to exercise original jurisdiction to eliminate unnecessary further litigation, but discourage[s] its use if factfinding is involved." Price v. Himeji, LLC, 214 N.J. 263, 294 (2013)

(alterations in original) (quoting State v. Santos, 210 N.J. 129, 142 (2012)). Our exercise of original jurisdiction is also appropriate "where the record is adequate to terminate the dispute and no further . . . discretion is involved." Vas v. Roberts, 418 N.J. Super. 509, 523–24 (App. Div. 2011) (citing In re City of Plainfield's Park-Madison Site, 372 N.J. Super. 544, 552 (App. Div. 2004)).

Plaintiff argues defendants failed as a matter of law to prove the transfers were not voidable because they were made in the "ordinary course of business" pursuant to N.J.S.A. 25:2-30(f)(2). She cites, in particular, statements made by the trial judge in his written decision. But, we agree with defendants that the trial judge's fact-finding was not controlling on the remand judge, nor would it be controlling upon us should we decide to exercise original jurisdiction.

The facts proving plaintiff's claim are easily discerned from the documentary evidence in the trial record, supplanted without the need for much trial testimony. As we noted, under N.J.S.A. 25:2-27(b), "the fraud on the creditors will be presumed if certain objective criteria are met." Nat'l Conf. of Comm'rs on Unif. State Laws, Unif. Voidable Transactions Act, 2014 Amendment, cmt. 1. It was undisputed that the estate was a present creditor of DOT when the company made the six transfers to insiders in payment of antecedent debts, DOT was insolvent when it made the transfers, and Leon, his

wife and NPTC knew or reasonably should have known, DOT was insolvent. N.J.S.A. 25:2-27(b). Plaintiff established these "objective criteria" by clear and convincing evidence.

But facts necessary to establish a defense under N.J.S.A. 25:2-30(f)(2), and whether defendants proved those facts by a preponderance of evidence, should have been considered within the proper legal framework, which the remand judge failed to do. That legal framework is far less "objective." As the South Dakota Supreme Court stated:

> In dealing with "ordinary course" questions, bankruptcy courts have examined (1) the time the parties engaged in the type of dealing at issue, (2) whether the subject transfer was for an amount more than usually paid, (3) if the payment was tendered in a manner different from previous payments, (4) whether there was unusual action by either the debtor or the creditor to collect or pay on the debt, and (5) whether the creditor did anything to gain an advantage (such as gain additional security) in light of the debtor's deteriorating financial condition.
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> [Wookey, 583 N.W.2d at 416.]

The test under the similar Bankruptcy Code provision is "subjective," and "courts generally eschew precise legal tests and instead engage in a fact-specific analysis." In re Fred Hawes Org., Inc., 957 F.2d 239, 244 (6th Cir. 1992) (citing In re Fulghum Constr. Corp., 872 F.2d 739, 743 (6th Cir. 1989)).

We acknowledge plaintiff's argument that the existing trial record is sufficient to make specific factual findings using the proper legal framework and resolve the issue and, therefore, we should exercise original jurisdiction. However, we decline the opportunity for several reasons.

Although we express skepticism that defendants established the "ordinary course" defense under N.J.S.A. 25:2-30(f)(2) based on the existing record, our prior opinion did not foreclose the remand court from adducing additional evidence from the parties, and we do not foreclose that possibility again. Whether it decides additional evidence is necessary or not, it is the remand court, not this court, that should decide the facts in the first instance.

Another reason for us to decline plaintiff's invitation to exercise original jurisdiction and resolve whether defendants are entitled to the "ordinary course" defense is that even if plaintiff succeeds, a remand would be necessary to decide an appropriate remedy for defendants' violation of the UFTA. Simply put, our exercise of original jurisdiction would not terminate this long dispute.

As the Court has explained,

> The remedies available to a successful claimant under the UFTA are broad. Obviously, avoidance of the transfer is primary. N.J.S.A. 25:2-29(a)(1). Other remedies include attachment against the asset transferred or other property of the transferee, N.J.S.A. 25:2-29(a)(2); a money judgment against the transferee

> where the transfer cannot be undone, N.J.S.A. 25:2-30(a), (b); and injunctive relief[,] N.J.S.A. 25:2-29(a)(3)(a). The statute also contains a catch-all provision, affording a creditor "[a]ny other relief the circumstances may require." N.J.S.A. 25:2-29(a)(3)(c).
>
> [Banco Popular N. Am. v. Gandi, 184 N.J. 161, 176–77 (2005) (second alteration in original).]

Plaintiff asserts the appropriate remedy is defendants' refund of $736,105.22 to DOT, the sum of the six transfers made by DOT, followed by DOT's payment in satisfaction of the estate's judgment, $459,103.14, and an award of counsel fees to the estate in amount to be determined, payable by DOT and "respondents." On its face, the requested relief requires the remand court to have further involvement in the litigation.

More importantly, although plaintiff has proved that the transfers were fraudulent because they were made to insiders under conditions satisfying N.J.S.A. 25:2-27(b), the remand judge determined on the existing record that Leon, his wife, and NPTC, were also creditors of DOT. The parties have not briefed whether David's estate was also an "insider" for purposes of the UFTA, and we have found no controlling authority on the issue. However, the definitions of a corporate insider in N.J.S.A. 25:2-22(b) were not intended to be exclusive or "elevate[] the technical over the substantive." Gilchinsky, 159 N.J. at 478. We raise the question without resolving it because if the estate were

indeed an insider for purposes of the UFTA, another, perhaps more significant, question regarding remedy must be considered.

As the Court noted in construing the UFCL, the UFYA's prior iteration,

> a preference as such is not a fraudulent conveyance. True, a creditor who collects from an insolvent debtor fares better than other claimants. Yet if the transfer were set aside in favor of another creditor, there would be but a substitution of one preference for another. For that reason[,] a preference cannot be undone by a competing creditor whether the preference was obtained through judicial process or by a transfer from the debtor, and the Uniform Fraudulent Conveyance Act did not alter that proposition.
>
> [Smith v. Whitman, 39 N.J. 397, 402 (1963) (citing Rednor v. First-Mechanics Nat'l Bank, 131 N.J. Eq. 141 (E. & A. 1942)).]

Furthermore, as we have noted, "The premise of [N.J.S.A. 25:2-27(b)] is that an insolvent debtor should pay debts owed to unrelated creditors before paying debts owed to corporate insiders." Flood, 272 N.J. Super. at 404–05 (emphasis added). The statute's intended purposed was to make transfers to insiders presumptively fraudulent as against "unrelated creditors." Without deciding the issue which has not been briefed or argued, the court on remand will have to decide the appropriateness of plaintiff's proposed remedies if all of DOT's creditors – David's estate, Leon, his wife and NPTC – were insiders.

Although the UFTA provides a successful creditor with the ability to seek "[a]voidance of the transfer or obligation," it is only to the extent "necessary to satisfy the creditor's claim." N.J.S.A. 25:2-29(a)(1) (emphasis added). Equitable principles control the court's authority in fashioning such a remedy. See, e.g., United States v. Patras, 544 Fed. Appx. 137, 146 (3d. Cir. 2013) (discussing application of equitable principles upon avoidance of a transfer under the UFTA); Sec. & Exch. Comm'n v. Antar, 120 F.Supp. 2d 431, 447 (D.N.J. 2000) ("[T]he UFTA expressly recognizes the availability of equitable remedies against debtors who engage in fraudulent transfers.").

In short, factual issues regarding defendants' proofs as to the "ordinary course of business" defense provided by N.J.S.A. 25:2-30(f)(2), and difficult questions not addressed by the parties regarding plaintiff's proposed remedy if successful, demonstrate a remand is unfortunately necessary and appropriate.

IV.

On remand, considering the factors and law outlined above, the judge shall initially decide whether defendants have proven by a preponderance of evidence that each of the six transfers were "made in the ordinary course of business or financial affairs of [DOT] and [Leon, his wife, and NPTC]," N.J.S.A. 25:2-30(f)(2). If the judge decides defendants have carried their burden of proof on

this issue as to all six transfers, the court shall enter judgment in favor of defendants.

If, however, the judge concludes defendants failed to carry their burden of proof on this issue as to any of the transfers, then the court shall enter judgment in favor of plaintiff on her UFTA claim and proceed to decide an appropriate remedy. In doing so, the judge should determine whether David's estate is an "insider" for purposes of the UFTA and, if so, the effect of that finding upon the court's fashioning of a proper remedy.

Reversed and remanded. We do not retain jurisdiction.