

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ACHILLE BAYART & CIE.,)
)
 Plaintiff)
)
 v.)
)
 BYRON A. CROWE, et al.,)
)
 Defendants)

Docket No. 98-163-P-C

**MEMORANDUM DECISION ON DEFENDANTS’ MOTION
TO STRIKE AFFIDAVIT AND RECOMMENDED DECISION ON
DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT**

The defendants, Byron A. Crowe and Ruth Crowe, husband and wife, move for summary judgment in their favor on all counts of the complaint and to strike the affidavit of an attorney representing the plaintiff that was submitted in opposition to their motion. I deny the motion to strike and recommend that the court deny the motion for summary judgment.

I. Summary Judgment Standard

Summary judgment is appropriate only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute is resolved

favorably to the nonmovant. By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party’” *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, “the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue.” *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). “This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof.” *International Ass’n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Background

The following material facts are appropriately supported in the summary judgment record. The plaintiff, a French corporation, was a creditor of Andrew Crowe & Sons d/b/a Crowe Rope Company (“Crowe Rope”) on and before December 15, 1995. Transcript of 30(b)(6) Deposition of Byron A. Crowe (“Crowe Dep.”), submitted with defendants’ Statement of Undisputed Material Facts (“Defendants’ SMF”) (Docket No. 20), at 29 & Exh. 7; Transcript of Deposition of Achille Bayart & Cie. (Bernard Leys) (“Leys Dep.”), submitted with Defendants’ SMF, at 22 & Exh. 4.

Before December 15, 1995 Crowe Rope was indebted to Shawmut National Bank, predecessor in interest to Fleet Bank (“the Shawmut debt”). Crowe Dep. at 33, 75-79. To secure the debt, Shawmut held mortgages on and security interests in certain assets of Crowe Rope, *id.* at 60-61; and guarantee mortgages on all buildings and real estate used by Crowe Rope, which were owned by the defendants or entities other than Crowe Rope, Affidavit [of U. Charles Remmel, II] in Opposition to Defendants’ Motion for Summary Judgment¹ (“Remmel Aff.”) (Docket No. 28), Exh. 2.

Crowe Rope was in default on its debt to Shawmut as of December 8, 1995. Agreement, Exh. 11 to Crowe Dep. (“Purchase & Sale Agreement”) at 1, ¶2. In 1994 and 1995 Crowe Rope had fallen behind in payments to its vendors. Crowe Dep. at 26. Defendant Byron Crowe had guaranteed the Shawmut debt. *Id.* at 60. Byron Crowe owned all of the shares of Crowe Rope and

¹ The defendants have moved to strike this affidavit on the grounds that it fails to meet the requirements of Fed. R. Civ. P. 56(e) because the jurat states only that the affidavit is true to the best of the affiant’s knowledge rather than that it is made on his personal knowledge; the affiant could not have personal knowledge of the statements made; and the affiant is not competent to testify about the matters contained in the affidavit. Motion to Strike Affidavit of Attorney Remmel (Docket No. 31) at 2. The plaintiff responds that the affidavit is intended to place conveniently before the court documents necessary to the resolution of the motion and, with two exceptions, all of the documents attached to the affidavit are admissible by agreement of the parties. Objection . . . to Defendants’ Motion to Strike (Docket No. 33) at 2. The defendants have not disputed this characterization, choosing not to file a reply memorandum. Of the remaining attached documents, Exhibit 4 is represented to be the operative agreement between the plaintiff and Crowe Rope, along with a translation of a section of that agreement. Remmel Aff. ¶ 4. Again, the defendants have not responded to the plaintiff’s assertion that “[i]t is not the document itself that is at issue, but its effect.” Objection at 2. The remaining document, Exhibit 3 to the affidavit, a letter from the plaintiff’s expert witness, is clearly hearsay, a fact not disputed by the plaintiff. *Id.* The plaintiff contends rather that the letter shows “the economic scope of the controversy that will be present . . . at trial.” *Id.* at 3. To the extent that the two latter statements are intended to portray the documents at issue as being presented for some purpose other than the truth of the matters asserted therein, I conclude that the plaintiff’s explanations are insufficient to make the documents admissible as evidence at this time. Accordingly, I will not consider Exhibits 3 and 4 to the Remmel affidavit in connection with the pending motion. Under the circumstances, there is no need to strike the affidavit itself and the motion to do so is denied.

of two corporations, Portco, Inc. and Floatation Products, Inc., that leased commercial properties to Crowe Rope. *Id.* at 11; Exh. 16 to Crowe Dep. at 1-2. On December 8, 1995 the defendants entered into an agreement with J. P. Bolduc to transfer property owned by them to Bolduc, or to an entity to be formed by him. Purchase & Sale Agreement at 1-6. This agreement resulted from several months of negotiations between Bolduc and Byron Crowe or representatives of Byron and Ruth Crowe. Crowe Dep. at 50-51; Transcript of Deposition of John P. Bolduc (“Bolduc Dep.”), submitted with Defendants’ SMF, at 11-13.

Bolduc acquired the Shawmut debt through an entity called JPB Maine Holdings Limited Liability Company. Exhs. 16 & 17 to Crowe Dep. After acquiring the Shawmut debt, Bolduc foreclosed on the assets of Crowe Rope.² Bolduc Dep. at 56. The defendants were released from any personal guarantees on the Shawmut debt at this time. Crowe Dep. at 80. The real estate owned by the defendants or other entities controlled by them and used by Crowe Rope was conveyed at this time to JPB Maine Capital Limited Liability Company, a corporation owned by Bolduc. Bolduc Dep. at 54-56; Rimmel Aff. Exh. 6. Bolduc intended throughout the transaction to acquire ownership of all properties used in the operation of Crowe Rope. Bolduc Dep. at 16, 41; Crowe Dep. at 51. Bolduc also required the defendants to convey to JPB Maine Capital Limited Liability Company as part of this transaction two shorefront lots owned by them and unrelated to the operation of Crowe Rope. Crowe Dep. at 99-100; Bolduc Dep. at 25, 42-43. Intellectual property owned by Byron Crowe and used by Crowe Rope in the operation of its business was also included in the transaction. Bolduc Dep. at 43. In January 1995 Crowe, the inventor of the devices subject to these

² These assets were apparently transferred to an entity known as Crowe Rope Industries LLC, although none of the parties has provided the court with a citation to any authority in the summary judgment record for this fact.

patents, had arranged for the patents to be transferred from Crowe Rope to him. Crowe Dep. at 84-90. Bolduc attributed no value to the patents in the sale. Bolduc Dep. at 43.

As part of the sale, JPB Maine Capital Limited Liability Company agreed to pay the defendants \$40,000 per year so long as either of them was living; these payments were personally guaranteed by Bolduc. Bolduc Dep. at 24-25, 44 & Exh. 1 at 3-4. Also in conjunction with the sale, Byron Crowe executed an agreement to provide consulting services to Crowe Rope Industries LLC for one year and not to compete with Crowe Rope Industries LLC for five years. Crowe Dep. at 47-49; Bolduc Dep. at 43-44 & Exh. 1 at 4. He was paid \$60,000 for this agreement. Bolduc Dep. at 43-44. None of the transactions involving Bolduc was disclosed to the plaintiff until after they were completed. Leys Dep. at 28.

The plaintiff had credit/export insurance that covered its sales to Crowe Rope; this insurance was provided by a public organization in France known as COFACE. Leys Dep. at 13-16. COFACE has paid the plaintiff 80 to 85% of the amount owed to the plaintiff by Crowe Rope. *Id.* at 17.

III. Discussion

The plaintiff seeks to recover from the defendants the \$132,827.20 still due to it from Crowe Rope for materials supplied in 1995 and additional sums for interest and damages. Amended Complaint (Docket No. 12) ¶ 16. The defendants seek summary judgment at this time on two grounds: that no avoidable transfer occurred under the Uniform Fraudulent Transfer Act (“UFTA”), 14 M.R.S.A. §§ 3571-82, upon which the plaintiff’s claim is based; and that the plaintiff lacks standing to bring this action due to its receipt of an insurance payment on the debt from COFACE.

The portions of the Maine UFTA under which the plaintiff apparently seeks to recover

provide as follows:

1. Fraudulent transfer. 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 obligations 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 he would incur, debts beyond his ability to pay as the debts became due.

2. Determination of actual intent. In determining actual intent under subsection 1, paragraph A, consideration may be given, among other factors, to whether:

A. The transfer or obligation was to an insider;

B. The debtor retained possession or control of the property transferred after the transfer;

C. The transfer or obligation was disclosed or concealed;

D. Before the transfer was made or obligation was incurred, the debtor sued or threatened with suit;

E. The transfer was of substantially all the debtor's assets;

F. The debtor absconded;

G. The debtor removed or concealed assets;

H. The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

I. The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

J. The transfer occurred shortly before or shortly after a substantial debt was incurred; and

K. The debtor transferred the essential assets of the business to a lienor who had transferred the assets to an insider of the debtor.

14 M.R.S.A. § 3575.

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

2. Transfer to insider. 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.

14 M.R.S.A. § 3576. A creditor may obtain relief upon proof of a fraudulent transfer including avoidance of the transfer, attachment against the property transferred, injunctive relief, appointment of a receiver and damages in an amount “not to exceed double the value of the property transferred.”

14 M.R.S.A. § 3578. Judgment in an amount necessary to satisfy the creditor’s claim may be obtained against the first transferee of the asset or the person for whose benefit the transfer was made. 14 M.R.S.A. § 3579(2)(A).

A. Standing

The defendants contend that “COFACE acquired the *exclusive* right to sue Crowe Rope to collect upon the claim” when it paid the plaintiff at least 80% of the amount due. Defendants’ Motion for Summary Judgment (With Incorporated Memorandum of Law, etc.) (Docket No. 19) at 10 (emphasis in original). They therefore conclude that the plaintiff is no longer the real party in interest on the claim and lacks standing to sue. *Id.* They base this assertion on a citation to pages 17-18, 34, and 44 of the transcript of the deposition of Bernard Leys. Statement of Undisputed Material Facts (“Defendants’ SMF”) (Docket No. 20) ¶ 23. In fact, M. Leys testified at those pages

that COFACE acquired the right to sue a defaulting customer when it paid the insured some portion of the amount due, but that “I couldn’t tell you” whether it acquired the exclusive right to bring suit. Leys Dep. at 18. Neither of the other cited pages records testimony establishing a contractual right in COFACE to sue upon the underlying obligation to the exclusion of the right of the creditor to bring suit.

The plaintiff responds that the motion for summary judgment on this basis is untimely³ and, in the alternative, that Maine law allows suit to be brought in the name of the original party rather than the insured under these circumstances, citing M.R.Civ.P. 17(a) and *Unity Tel. Co. v. Design Serv. Co. of New York, Inc.*, 158 Me. 125, 179 A.2d 804 (1962). Memorandum in Opposition to Defendants’ Motion for Summary Judgment (Docket No. 27) at 11-12. The plaintiff has submitted a copy of the insuring agreement between COFACE and the plaintiff, Exh. 4 to Remmel Aff., and a translation of a portion of that document that provides that, while COFACE acquires the right to proceed against the debtor upon payment of any portion of the amount due, the insured must take all steps necessary to obtain payment if COFACE does not act itself. Exh. 4 to Remmel Aff. at [20]. The defendants’ reply memorandum does not address this issue.

While M.R.Civ.P. 17(a) would authorize suit in the name of the plaintiff here,⁴ that rule is not applicable to this action, which was brought in federal court. The Maine Law Court

³ This basis for this assertion, made in a single sentence referring to a letter from counsel for the plaintiff to the court dated January 8, 1999, is less than clear. In any event, the court initially on January 22, 1999 and again on March 8, 1999 specifically granted the defendants leave to file the motion for summary judgment that is now before the court, Docket Nos. 18 (endorsement) & 26, so there can be no question concerning the timeliness of this motion.

⁴ The rule provides, in relevant part: “An insurer who has paid all or part of a loss may sue in the name of the assured to whose rights it is subrogated.” M.R.Civ.P. 17(a).

characterized the relevant portion of this rule as “[m]anifestly . . . designed to continue the policy which has been in force in this jurisdiction to the effect that the names of insurance companies are not ordinarily to be mentioned in litigation.” *Unity Tel.*, 158 Me. at 135. However, this policy is clearly a matter of procedure rather than substantive state law, and accordingly does not apply to proceedings in federal court. *Servicios Comerciales Andinos, S.A. v. General Elec. Del Caribe, Inc.*, 145 F.3d 463, 478 (1st Cir. 1998).

“The general rule in the federal courts is that if the insurer has paid the entire claim, it is the real party in interest and must sue in its own name.” 6A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1546 at 355 (2d ed. 1990). The evidence here, however, is that COFACE has paid at most 85% of the claim. Under these circumstances, either the insured or the insurer may sue. *Id.* at 360; *State Farm Mut. Liab. Ins. Co. v. United States*, 172 F.2d 737, 739 (1st Cir. 1949). The defendants are not entitled to summary judgment on this basis.

B. The UFTA Claim

The defendants argue that they are entitled to summary judgment on the plaintiff’s substantive claims because no transfer of property from Crowe Rope, the debtor, to them occurred. They base this conclusion on the fact that the real estate owned by the defendants, or by corporations other than Crowe Rope which were owned by the defendants,⁵ and transferred to one of Bolduc’s corporations at the closing had sufficient value to account for the payments made to the defendants by one or more of Bolduc’s corporations. Bolduc testified that there were mortgages on the real estate properties in a total amount of approximately \$550,000. Bolduc Dep. at 24. The total value

⁵ The fact that some of this real estate was pledged by the defendants as collateral for Shawmut’s loans to Crowe Rope does not make it property of Crowe Rope. *In re N&D Properties, Inc.*, 799 F.2d 726, 733-34 (11th Cir. 1986).

of those properties, not including the two waterfront lots not used by Crowe Rope, was approximately \$1,580,000 according to the transfer tax declarations filed at the time of the transfer, Exh. 6 to Rimmel Aff., leaving a value of approximately \$1 million after Bolduc paid off the mortgages, Bolduc Dep. at 24. Bolduc testified that he calculated the present value of the defendants' annuity to be \$450-460,000. *Id.* at 25. The only other payment shown by the evidence to have been received by either of the defendants at the time of the Crowe Rope closing was the \$60,000 paid to Byron Crowe to consult and not to compete with his former business. Even if the \$60,000 payment is considered as a payment for something other than consulting services and a promise not to compete, the total payment to the defendants does not exceed the value of the real estate, concededly not owned by Crowe Rope, that was transferred to Bolduc.⁶

Ordinarily, the only conclusion that could be drawn from these facts would be that no interest in property was transferred from Crowe Rope to the defendants in the course of the transaction at issue because the defendants received less than the value of the real estate that they owned independently and sold to Bolduc at the time he acquired Crowe Rope. This conclusion is bolstered by the statement in the written agreement between Bolduc and the defendants that “[t]he parties believe that there is no equity in the collateral securing the Shawmut Debt.” Agreement, Exh. 1 to Bolduc Dep., at 1. However, Byron Crowe testified at his deposition that he did not understand that statement in the written agreement that he had signed and that, after being told that “[n]o equity would mean that there’s no value in it over and above the debt,” he thought that “there was equity

⁶ The plaintiff apparently intends to offer expert testimony that the present value of the annuity was between \$532,637.00 and \$665,043. Exh. 3 to Rimmel Aff. at 2. As previously noted, no such evidence is properly before the court in the summary judgment record. I mention the numbers here nonetheless to show that, even if the plaintiff's highest valuation could be used, the value in the real property would still exceed the amounts paid to the defendants.

in that [Crowe Rope collateral] over the debt, above the debt.” Crowe Dep. at 60-61. When asked again, “you think that maybe there was some equity over and above the debt?” he responded, “I think there was. I think.” *Id.* at 62. If there was equity in Crowe Rope, the only destination for that equity upon the transfer of Crowe Rope, in the same transaction that included the transfer of the real estate, was the defendants, who were the only persons or entities that received any payment as a result of the transaction.

The facts as presented in the summary judgment record may make it unlikely that any portion of the payment received by the defendants represented equity in Crowe Rope, but it is not the role of the court on summary judgment to weigh the evidence. If any portion of the payment did represent equity in Crowe Rope, then that portion of the payment could constitute a transfer of an asset of Crowe Rope in a manner that defrauded creditors of Crowe Rope. *See also Northern Pac. Ry. Co. v. Boyd*, 228 U.S. 482, 504 (1913) (stockholders may not be preferred before creditors of corporation); *In re Brockway Mfg. Co. ex parte Mitchell*, 89 Me. 121, 35 A. 1012, 1013 (1896) (same). Viewing the evidence in the summary judgment record in the light most favorable to the plaintiff, Byron Crowe’s deposition testimony makes it impossible for the court to grant summary judgment in the defendants’ favor.

IV. Conclusion

For the foregoing reasons, the defendants’ motion to strike the affidavit of U. Charles Rimmel is **DENIED**, and I recommend that the defendants’ motion for summary judgment be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall and to appeal the district court's order.

Dated this 10th day of May, 1999.

*David M. Cohen
United States Magistrate Judge*