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## Order on Motion for Reconsideration (Khan & Choice Care Occupational Medicine)

Alice D. Bonner  
*Superior Court Judge*

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**COPY**

**IN THE SUPERIOR COURT OF FULTON COUNTY  
STATE OF GEORGIA**

ISHTIAQ A. KHAN AND CHOICE )  
CARE OCCUPATIONAL MEDICINE )  
AND ORTHOPAEDICS, LLC, ISHTIAQ )  
A. KHAN, as Trustee, MJ & KJ Khan )  
1990 Family Trust )

Plaintiffs, )

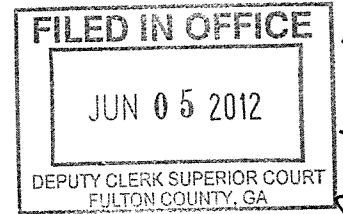
v. )

M. SHAILENDRA, KIRAN )  
SHAILENDRA, SHAILENDRA )  
GROUP, LLC, SG CONTRACTING, )  
INC., SG CONSULTING, INC., )  
LEE'S MILL, INC., SG BROKERAGE, )  
LLC, 966 INVESTMENTS, LLC, S&S )  
ENGINEERS, INC., SAKET PAUL )  
SHAILENDRA, SACHIN DEV )  
SHAILENDRA, PINNACLE AT )  
EAGLE'S POINT, )

Defendants. )

VIRGINIA HAMMOND KHAN )  
KRISHAN G. GUPTA )  
ENTERPRISE BANKING CO. )

Nominal Parties. )



*Shirley Shamer*

Civil Action File No.  
2010CV194327

**ORDER ON MOTION FOR RECONSIDERATION**

This matter is before the Court on Defendants' Motion for Reconsideration of the Court's Order of February 9, 2012 ("February Order"), granting Plaintiffs Ishtiaq A. Khan's ("Khan") and Choice Care Occupational Medicine and Orothopaedics, LLC's ("Choice Care," together with Khan, "Plaintiffs") Motion for Partial Summary Judgment as to their "bad checks" claim. Upon consideration of the motion, the response thereto and the record of the case, this Court finds as follows:

In the February Order, the Court ruled in favor of Plaintiffs, finding that Plaintiffs had succeeded in making a “prima facie showing as to Defendants’ liability on the checks... [and] that Defendants have failed to come forward with any admissible competent evidence establishing a defense with respect to the checks.”

Defendants ask the Court to reconsider this ruling for two reasons. First, Defendants contend that the evidence before the Court suggests that the five “bad checks” were issued in an effort to repay only one advance from Khan in the amount of \$100,000, rather than five independent payments. To support this claim Defendants rely on a ledger attached to the Complaint as well as an untimely filed affidavit of Defendant Shi Shailendra (“Shailendra”), which describes the circumstances in which the instant checks were issued as purported repayment of one specific loan made to fund several real estate projects.

Second, Defendants contend that the Court failed to take into account a pending motion to compel, which Defendants asked the Court to hold in abeyance (and such request has never been withdrawn). In the motion to compel, Defendants apparently seek information that they claim will substantiate the allegations made by Plaintiffs regarding the “bad check” claim.

The Court disagrees that the discovery at issue in Defendants’ motion warrants reconsideration of its ruling. It was incumbent upon Defendants to come forth with *any* evidence—even an affidavit of one of the Defendants (which was available to Defendants without the need for discovery from Plaintiffs) in support of their defense of failure of consideration, and the Court found that the evidence presented in opposition to summary judgment was insufficient to pierce Plaintiffs’ prima facie case.

However, now Defendants have belatedly offered evidence in the form of an affidavit from Shailendra filed eleven days after the Court's February Order that supports their contention that the checks at issue were made to repay only one sum of \$100,000. This evidence, which they were free to submit at the time of filing their opposition to Plaintiffs' motion, gives substance to Defendants' defense based on failure of consideration.

The trial court has discretion to refuse to consider an untimely filed affidavit. See International Auto Processing, Inc. v. Glynn County, 287 Ga. App. 431 (2007). However, in the interests of reaching a correct result that takes into consideration all relevant evidence, the Court agrees to consider Shailendra's untimely filed affidavit, with a word of caution that Defendants should not view the Court's leniency as an invitation to continue to thwart standard procedural requirements.

Turning to the affidavit, Shailendra testifies that the checks at issue were cut in an effort to pay a single loan in the amount of \$100,000 from Choice Care, and repeated checks were issued due to the lack of funds in the accounts on which the checks were drawn.

Failure of consideration is a defense available to anyone who is not a holder in due course. O.C.G.A. §§ 11-3-303(b), 11-3-305(b). While Plaintiffs contend they are entitled to holder in due course status, the Court finds that whether or not value was given in exchange for each of the checks at issue is a question for the trier of fact. Accordingly, the Court hereby **GRANTS** Defendants' request to reconsider its ruling set forth in the February Order. The Court vacates its decision and hereby **DENIES**

Plaintiffs' Motion for Partial Summary Judgment as to Bad Checks Claim. In consideration of the Court's ruling, Plaintiffs' Motion for Supersedeas Bond is **DENIED**.

SO ORDERED this 5<sup>TH</sup> day of June, 2012.

*Alice D. Bonner*

ALICE D. BONNER, SENIOR JUDGE  
 Superior Court of Fulton County  
 Atlanta Judicial Circuit

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