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Order on Defendants' Motion for Summary Judgment (Millenium Partners _ Shailendra)

Alice D. Bonner
Superior Court Judge

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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

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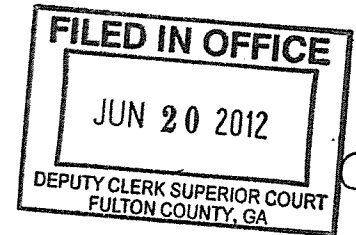
MILLENIUM PARTNERS, LLC,
RAHIM SABADIA and NAFEES EL
BATOOL, Co-Trustees of the
SABADIA FAMILY TRUST, and
ISHTIAQ A. KHAN

Plaintiffs,

v.

M. SHAILENDRA, a/k/a SHI
SHAILENDRA, SHAILENDRA
GROUP, LLC, SG CONSULTING, LLC,
and KIRAN SHAILENDRA

Defendants.



Civil Action File No.
2011-CV-195604

ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

On June 4, 2012, counsel appeared before the Court to present oral arguments on Defendants' Motion for Summary Judgment. Upon consideration of the briefs submitted on the motion, the arguments of counsel, and the record of the case, this Court finds as follows:

This case involves a dispute between tenants in common over the management of a real estate investment located in Pasco County, Florida (the "Pasco Property"). In 2001 Defendant Shi Shailendra ("Shailendra") identified the Pasco Property as a potential development site for a mixed-use community. In 2002-2003, the tenants in common, Plaintiff Sabadia Family Trust (the "Sabadia Trust"), Plaintiff Ishtiaq Khan ("Khan") and his then wife non-party Virginia Hammond Khan, non-party Phani R. Tummala, non-party Nabil Muhanna and Defendant Kiran Shailendra purchased approximately 950 acres of land comprising the Pasco Property. The purchase price of

\$13,489,910 consisted of contributions from the five tenants in common in the amount of \$3,456,878.00, plus the remaining \$10,033,035 which was financed through debt. Shailendra was not an investor in the project himself, but he acted as manager of the Pasco Property and hired engineers and lawyers to manage the process of developing the Pasco Property for commercial use.

In 2006, Defendant Kiran Shailendra transferred her interest in the tenancy in common to Defendant Shi Holdings, LLC. In 2010, Khan, the Sabadia Trust, and non-party Phani R. Tummala assigned their interest in the tenancy in common to Plaintiff Millenium Partners, LLC.

Currently, the project is in debt, with costs owed for professional services incurred in connection with the preparation of a Development of Regional Impact Application for Development Approval from Pasco County, Florida. Additionally, the mortgage is in default, with, according to Plaintiffs, over \$8,000,000 outstanding on the note.

Plaintiffs contend that Defendants Shailendra, Kiran Shailendra and Shailendra Group, LLC¹ breached their fiduciary duties owed to Plaintiffs as tenants in common and as managers and/or agents of the Pasco Property by failing to provide adequate accountings, improperly disbursing \$2.2 million to themselves and others not related to

¹ According to Defendants, Shailendra Group, LLC is incorrectly identified by Plaintiffs as "Shailendra Group, LLC a/k/a Shi Holdings, LLC," when in fact these entities are separate. Plaintiffs do not dispute this contention. Accordingly, the Court will treat Shailendra Group, LLC as an entity separate and distinct from Shi Holdings, LLC, consistent with the Defendants' characterizations.

the investments, and, in the case of Shailendra and Shailendra Group, LLC, improperly managing the development of the Pasco Property.

Plaintiffs assert claims for an accounting, conversion and money had and received against all Defendants (with the exception of Shi Holdings, LLC as explained below) and breach of fiduciary duty against Shailendra, Kiran Shailendra, and Shailendra Group, LLC. Defendants have moved for summary judgment as to all claims asserted against all Defendants other than Shailendra, and as to Shailendra, all claims with the exception of any claim for breach of fiduciary duty based on acts that occurred after January 25, 2007.

A court should grant a motion for summary judgment pursuant to O.C.G.A. § 9-11-56 when the moving party shows that no genuine issue of material fact remains to be tried and that the undisputed facts, viewed in the light most favorable to the non-movant, warrant summary judgment as a matter of law. Lau's Corp., Inc. v. Haskins, 261 Ga. 491, 491 (1991).

As an initial matter, Plaintiffs concede that Millenium Partners, LLC only has standing by virtue of assignment to assert claims for accounting, conversion and money had and received. It does not have standing to assert any claims for breach of fiduciary duty, as these claims are not capable of assignment and remain with Khan and the Sabadia Trust, who now assert breaches of fiduciary duty claims only as to Defendants Shailendra, Kiran Shailendra, and Shailendra Group, LLC.

At oral argument, counsel for Plaintiffs admitted that a fiduciary duty did not exist as to SG Consulting, LLC, who was hired to review engineering work purportedly

performed on behalf of the Pasco Property, or Shi Holdings, LLC, against whom Plaintiffs expressed an intention to dismiss without prejudice from the case. Based on the Plaintiffs' oral representations, the Court hereby **ORDERS** Plaintiffs to submit to the Court appropriate dismissals within 10 days of the date of this Order. Contrary to Defendants' position in rebuttal that a plaintiff is not entitled to voluntarily dismiss an action once a defendant files for summary judgment, Georgia permits a Plaintiff to voluntarily dismiss its claims at any time before the first witness is sworn, in contrast with the federal rule that does not allow a plaintiff to voluntarily dismiss an action after a defendant has answered or moved for summary judgment, whichever comes first. O.C.G.A. § 9-11-41(a); Mariner Health Care, Inc. v. PricewaterhouseCoopers, LLP, 282 Ga. App 217 (2006).

1. Accounting and Injunctive Relief

The parties concede that Plaintiffs' request for an accounting is now moot in light of the Court's order on May 10, 2011, granting Plaintiffs' request for a court-ordered accounting to be performed by Frazier & Deeter. The issue of Plaintiffs' right for attorneys' fees, if any, under O.C.G.A. § 13-6-11 is reserved for later consideration by the Court. As to Plaintiffs' claim for injunctive relief, the Court agrees with Plaintiffs that the claim is not abandoned merely because Plaintiffs have not yet pursued this request. Accordingly, summary judgment is **DENIED** as to Plaintiffs' claim for injunctive relief.

2. Conversion

According to Plaintiffs' interpretation of the report of the court-ordered accountant ("Frazier & Deeter Report"), Defendants Shailendra, Kiran Shailendra, Shailendra

Group, LLC, and Shailendra Consulting, LLC (together, the “Conversion Defendants”) improperly disbursed or accepted at least \$2.2 million from the Pasco Property account. Conversion Defendants seek summary judgment on Plaintiff Millenium Partners, LLC’s claims for conversion, contending that the property allegedly converted has been returned and that, in any case, Plaintiffs are required to point to a written document showing that the alleged converted monies were improperly used.

As for the Conversion Defendants’ position that a written document specifying the intended use of the allegedly converted funds is required for a conversion claim, [see Internal Med. Alliance, LLC v. Budell, 290 Ga. App. 231, 239 (2008)], the Court finds the rule inapplicable under the instant circumstances. In Budell, the funds at issue were partnership funds that were properly used for partnership purposes; the parties simply disagreed over whether and how much should be paid out to one of the partners. Id. In contrast, Plaintiff Millenium Partners, LLC contends that Conversion Defendants wrongfully withdrew and/or accepted Pasco Property funds and used such funds for non-partnership purposes. “Conversion consists of an unauthorized assumption and exercise of the rights of ownership over personal property belonging to another, in hostility to his rights; an act of dominion over the personal property of another inconsistent with his rights; or an unauthorized appropriation... Any distinct act of dominion wrongfully asserted over another’s property in denial of his right, or inconsistent with it, is a conversion.” Maryland Cas. Ins. Co. v. Welch, 257 Ga. 259, 261 (1987). The Court finds that Plaintiff Millenium Partners, LLC has set forth a valid conversion claim.

Turning to Conversion Defendants' argument that any alleged converted property has been returned, the Court find this contention equally unavailing. Conversion Defendants argue that any funds deducted from the Pasco Property account should be off-set with amounts contributed to the account by Shailendra or related entities, as reflected in the Frazier & Deeter Report. However, the Frazier & Deeter Report specifically disclaims that it verified the source of the capital contributions on which Conversion Defendants rely or confirmed the authorization of the tenants in common as to the use of such funds. As such, the record is not clear that any funds paid into the Pasco Property account, as reflected in the Frazier & Deeter Report, necessarily represent Conversion Defendants' money. Accordingly, the Court finds that there are issues of fact with regard to Plaintiff's conversion claims. Additionally, the Court notes that the amount of any deposits or capital contributions is irrelevant to whether the withdrawals were authorized. For the foregoing reasons, summary judgment is **DENIED** as to Plaintiff Millenium Partners, LLC's claims for conversion.

3. Breach of Fiduciary Duty

By virtue of his position as manager of the Pasco Property, Plaintiffs contend that Shailendra owed fiduciary duties to the tenants in common, and that he breached those duties by withdrawing funds without authorization, by mismanaging the development of the Pasco Property, and by failing to provide accountings, among other alleged breaches. Plaintiffs also contend that Defendant Kiran Shailendra owed fiduciary duties to the tenants in common given her interest in the tenancy, and that she breached such duties by her receipt and deposit of a check for \$4,996, that was allegedly improperly

drawn on the Pasco Property account.² Finally, Plaintiffs allege that Shailendra Group, LLC, owed a fiduciary duty to the tenants in common by serving as the “agent” for the tenancy in connection with the development of the Pasco Property, and that such duties were purportedly breached by the failure to sufficiently manage the development project and by receiving disbursements from the Pasco Property account.

Defendants counter by arguing that Plaintiffs’ claims fail, as against Kiran Shailendra and Shailendra Group, LLC, because these entities did not owe a fiduciary duty to the tenants and common, and even if they did, there is no evidence of a breach. As stated above, Plaintiffs have pointed the Court to specific sources of a fiduciary duty and alleged breaches of that duty by Kiran Shailendra and Shailendra Group, LLC. Thus, this basis for summary judgment as to claims against Kiran Shailendra and Shailendra Group, LLC is **DENIED**.

Additionally, Defendants contend that any claim for breach of fiduciary duty prior to January 25, 2007, is time-barred as to all Defendants. Defendants point out that, under Georgia law, the statute of limitations that governs a breach of fiduciary duty is based on the underlying conduct that caused the breach. See Crosby v. Kendall, 247 Ga.App. 843, 849 (2001) (applying six-year statute of limitation set forth in OCGA § 9-3-24 to claim for breach of fiduciary duty for breach of contract); Kothari v. Patel, 262 Ga.App. 168, 17 (2003) (applying four-year statute of limitation set forth in OCGA § 9-3-

² Defendants point out that Kiran Shailendra assigned her interest in the Pasco Property to Shi Holdings, LLC, on December 8, 2006. The incident involving the check occurred on January 18, 2006, before Kiran Shailendra assigned her interest in the tenancy. Accordingly, she still owed a fiduciary duty to the other tenants in common at the time of the alleged receipt and deposit of the check.

31 to breach of fiduciary duty claim when the underlying act was fraud). Defendants contend that the four year statute of limitations applicable to fraud or negligent misrepresentation governs Plaintiffs' claims for breach of fiduciary duty. See Paul v. Destito, 250 Ga. App. 631, 636 (2001). Because the statute of limitations was purportedly triggered in 2002, when Plaintiffs suffered damage by making initial capital contributions in the Pasco Property, and because Plaintiffs waited more than eight years to initiate their action on January 25, 2011, Defendants argue that claims prior to January 25, 2007 are time-barred.

Plaintiffs take issue with the statute of limitations advanced by Defendants, instead arguing that a ten year statute of limitations governs their claims. See Singleton v. Terry, 262 Ga. App. 151 (2003). But more importantly, Plaintiffs urge the Court to find that, notwithstanding the applicable time period, Defendants' conduct tolled the statute of limitations.

The Court finds that, even if it sided with Defendants and applied a four-year statute of limitations, there is an issue of fact regarding whether Defendants' duty to disclose tolled the statute of limitations. Under O.C.G.A. § 9-3-96, the four-year statute of limitations for fraud "shall run only from the time of the plaintiff's discovery of the fraud." The record contains evidence that Plaintiffs did not discover the allegations that form the basis of their claims until 2009, when the Sabadia Trust hired an independent advisor to review the investments with Shailendra. "When a confidential relationship exists, such as between partners, the plaintiff's duty to investigate is decreased, and the defendant's duty to disclose is increased. In such situations, silence when one should

speak, or failure to disclose what ought to be disclosed, is as much a fraud in law as is an actual false representation.” Cochran Mill Associates v. Stephens, 286 Ga. App. 241 (2007). Accordingly, The Court **DENIES** summary judgment to Defendants, finding a fact question, with respect to Shailendra, as to whether he failed to disclose the facts giving rise to Plaintiffs’ claims and, as to Defendants Kiran Shailendra and Shailedra Group, LLC, regarding the nature of their understanding of the alleged diversion of Pasco Property funds such to trigger a duty to disclose.

4. Money Had and Received

Defendants argue that Plaintiff Millenium Partners, LLC cannot maintain a claim for money had and received because the funds have been returned to the Pasco Property account and because the claims are time-barred.

For the reasons set forth above in the Court’s discussion of the conversion claim, the Court finds no basis to award summary judgment to Defendants on the premise that the funds have allegedly been returned to the Pasco Property account. As far as Defendants’ argument that the claims are barred by the four-year statute of limitations applicable to this claim, the Court finds a fact issue as to when the fraud became known for purposes of determining when the cause of action accrued. See Macomber v. First Union Nat. Bank of Georgia, 212 Ga. App. 57, 58 (1994) (“Accrual of cause of action for money had and received begins with discovery of fraud.”). Accordingly, summary judgment is **DENIED**.

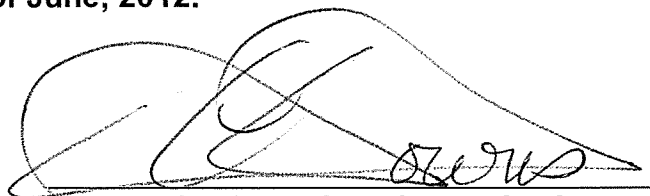
5. Amount of Damages Recoverable by Plaintiffs

Defendants argue that Plaintiffs should be able to recover only their pro rata share of the tenancy in common. In support, they rely on Georgia law, which provides that “[a] tenant in common may bring an action separately for his own interest, and the judgment in such case shall affect only himself.” O.C.G.A. § 9-2-23.

On the other hand, Plaintiffs point out that under Florida law, tenants in common are allowed to recover for the entire value of the leasehold estate, even if only a portion of the ownership is joined in the suit. Hurwitz v. C.G.J. Corp., 168 So.2d 84, 88 (3rd DCA 1964).

Because this dispute is over Florida property, the Court finds that Florida law regarding the nature of the real property ownership should govern this matter. Accordingly, the Court agrees with Plaintiffs. Because Florida law permits tenants in common to recover on behalf of the entire tenancy, Plaintiffs’ damages will not be limited to their pro rata share of their percentage of ownership in the tenancy in common.

SO ORDERED this 20th day of June, 2012.

A handwritten signature in black ink, appearing to read 'D. Downs', is written over a horizontal line.

DORIS L. DOWNS, JUDGE *for*
ALICE D. BONNER, Senior Judge
Superior Court of Fulton County
Atlanta Judicial Circuit

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