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Order on Motion for Leave to Allow Disclosure and Designation of Expert Witness and Motion to Strike Affidavit (Khan_Shailendra)

Alice D. Bonner
Fulton County Superior Court

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

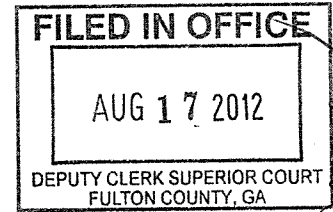
ISHTIAQ A. KHAN AND CHOICE)
CARE OCCUPATIONAL MEDICINE)
AND ORTHOPAEDICS, LLC, ISHTIAQ)
A. KHAN, as Trustee, MJ & KJ Khan)
1990 Family Trust)

Plaintiffs,)

v.)

M. SHAILENDRA, KIRAN)
SHAILENDRA, SHAILENDRA)
GROUP, LLC, SHI HOLDINGS, LLC;)
SG CONTRACTING, INC., SG)
CONSULTING, INC., LEE'S MILL,)
INC., SG BROKERAGE, LLC, 966)
INVESTMENTS, LLC, S&S)
ENGINEERS, INC. and PINNACLE AT)
EAGLE'S POINT,)

Defendants.)



**Civil Action File No.
2010CV194327**

**ORDER ON MOTION FOR LEAVE TO ALLOW DISCLOSURE AND DESIGNATION
OF CARLENE KIKUGAWA AS AN EXPERT WITNESS AND MOTION TO STRIKE
AFFIDAVIT OF CARLENE KIKUGAWA**

This matter is before the Court on Plaintiffs' Motion for Leave to Allow Disclosure and Designation of Carlene Kikugawa as an Expert Witness and Defendants' Motion to Strike Affidavit of Carlene Kikugawa. Upon consideration of the briefs submitted on the motion, the affidavit of Carlene Kikugawa, the arguments of counsel and the record of the case, the Court finds as follows:

Plaintiff Ishtiaq Khan ("Khan") retained Carlene Kikugawa, a CPA, to conduct an accounting of his investments with Defendant M. Shailendra ("Shailendra") at issue in this case, as well as investments at issue in other cases. Under the Court's case management orders, all parties were required to identify expert witnesses by January 16, 2012. Plaintiffs failed to designate Ms. Kikugawa as an expert by that deadline,

although she was identified as a fact witness. Additionally, Plaintiffs objected to the production of documents generated by Ms. Kikugawa or her accounting firm on the basis of the work product privilege. Plaintiffs now seek leave to designate Ms. Kikugawa as an expert witness at the upcoming trial of this matter. In addition, they submitted an affidavit of Ms. Kikugawa in opposition to Defendants' Motion for Summary Judgment. Defendants oppose Plaintiffs' motion and ask the Court to strike Ms. Kikugawa's affidavit.

Trial judges possess broad discretionary powers to control discovery, including the ability to impose sanctions, and an appellate court will not reverse a trial court's decision regarding discovery unless there has been a clear abuse of discretion. Collins v. Dickman, 295 Ga. App. 601 (2008). These sanctions can include excluding or striking testimony, including expert testimony. Gill v. Spivey, 264 Ga. App. 723 (2003).

Plaintiffs point the Court to Hart v. Northside Hosp., Inc., 291 Ga. App. 208, 209-10 (2008), in which the Court of Appeals reversed the decision of the trial court to exclude the testimony of two expert witnesses belatedly identified by the plaintiffs in a malpractice action. In that case, the Court of Appeals found that the failure to meet a discovery deadline can only be cured by a postponement of trial or mistrial. Id. However, the Court was careful to restrict this holding to those cases in which a party did not violate a court order specifically establishing deadlines by which a party must identify expert witnesses for trial:

We emphasize that this is not a case where a party violated a court order explicitly directing the party to identify an expert witness for trial, nor did the order at issue warn parties of potential sanctions for failure to meet deadlines, such as the exclusion of evidence or the dismissal of the action. Accordingly, we limit our holding to the specific issue before us, and we do not purport to limit a trial court's authority to issue such orders.

Id. at 578 n. 9.

Here, the Court ordered the parties to identify expert witnesses by January 16, 2012. Thus the Court is not inclined to exercise its discretion to permit Ms. Kikugawa to provide expert testimony, especially when that testimony, as described by Plaintiffs' counsel at the hearing, may amount to opinion testimony on ultimate issues in dispute (whether Shailendra's conduct amounts to a ponzi scheme or fraud) when such conclusions are capable of being drawn by a jury. See Raines v. Maughan, 312 Ga. App. 303, 307 (2011) ("where the path from evidence to conclusion is not shrouded in the mystery of professional skill or knowledge, and the conclusion determines the ultimate issues of fact in a case, the jury must make the journey from evidence to conclusion without the aid of expert testimony"). Moreover, the Court is not persuaded by Plaintiffs' explanation for the delay. Ms. Kikugawa has had deep involvement in the parties' disputes since at least 2010, and Defendants should not be penalized because Plaintiffs waited until the last minute to finalize their decision regarding expert testimony.

Accordingly, Plaintiffs' motion is **DENIED**. Ms. Kikugawa must restrict her testimony to matters appropriate for a fact witness. With regard to Defendants' motion to strike, the Court hereby **DENIES**, in part, to the extent Ms. Kikugawa provides factual information. Defendants are invited to submit by close of business on Monday, August 27, 2012, the specific paragraphs that they feel amount to expert opinion for the Court's consideration.

SO ORDERED this 17th day of August, 2012.

Alice D. Bonner

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

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