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Order on Motions for Summary Judgment (Khan_Shailendra)

Alice D. Bonner

Fulton County Superior Court

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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

COPY

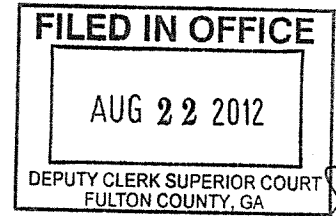
ISHTIAQ A. KHAN AND CHOICE)
CARE OCCUPATIONAL MEDICINE)
AND ORTHOPAEDICS, LLC, ISHTIAQ)
A. KHAN, as Trustee, MJ & KJ Khan)
1990 Family Trust)

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 MOTIONS FOR SUMMARY JUDGMENT

This matter is before the Court on Plaintiffs' Motion for Partial Summary Judgment and Defendants' Motion for Summary Judgment. Upon consideration of the briefs submitted on the motion, the arguments of counsel and the record of the case, the Court finds as follows:

Plaintiff Ishtiaq A. Khan ("Khan") partnered with Defendant M. Shailendra ("Shailendra") over the course of twenty years in various real property investments, which Shailendra primarily managed, either individually or as manager of various limited liability companies. Khan alleges that Shailendra and his wife Defendant Kiran Shailendra, acting from time to time through various related entities, committed a series of improprieties in managing the various real property investments, ultimately creating a

“ponzi scheme,” which resulted in significant wealth for Defendants to the detriment of Khan, who in many cases was left on the hook as a co-obligor on various loans made to finance the investments. The other named Plaintiffs (Choice Care Occupational Medicine and Orthopaedics, LLC, and MJ & KJ Khan 1990 Family Trust) are all vehicles through which Khan purportedly invested in or loaned money to Shailendra and his wife, and the Shailendra-related Defendants.

Plaintiffs have asserted the following claims against Defendants: 1) Fraudulent Misrepresentation; 2) Breach of Fiduciary Duty; 3) Civil Conspiracy; 4) Actual Fraud by Intentional Breach of Fiduciary Duty; 5) Fraudulent Concealment; 6) Constructive Fraud; 7) Bad Checks; 8) Fraudulent Conveyances; 9) Indemnification and Contribution; 10) Conversion; 11) Repayment of Loans; 12) Attorneys’ Fees; 13) Punitive Damages; and 14) Equitable Relief Related to Fayette County Property.

Plaintiffs seek summary judgment with respect to Count XI (Repayment of Loans), Count VII (Bad Checks), Count IX (Indemnification and Contribution) and Count XIV (Equitable Relief Related to Fayette County Property). Defendants seek summary judgment as to all claims.

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).

1. Defendants’ Motion for Summary Judgment

Defendants move the Court to dismiss the entire case against them arguing, in part, that Plaintiffs failed to plead fraud claims with particularity and otherwise failed to allege any misrepresentations. The tort of fraud has five elements: a false representation by a defendant, scienter, intention to induce the plaintiff to act or refrain from acting, justifiable reliance by plaintiff, and damage to plaintiff. VanRan Communications Services, Inc. v. Vanderford, 313 Ga. App. 497 (2012). In all averments of fraud or mistake, the circumstance constituting fraud or mistake shall be stated with particularity. O.C.G.A. § 9-11-9(b). However, given that fraud is inherently subtle, slight circumstances of fraud may be sufficient to establish a proper case, and it is peculiarly the province of the jury to pass on the circumstances showing fraud. Thompson v. Floyd, 310 Ga. App. 674, (2011).

Upon review of the Fourth Amended Complaint and the Affidavit of Ishtiaq Khan¹ submitted in opposition to Defendants' motion, the Court finds that Plaintiffs assert adequate fraud claims against both M. Shailendra and Kiran Shailendra to withstand summary judgment. In his affidavit, Khan points to various instances when he claims to have relied on misrepresentations of Shailendra that funds from the sale of a piece of property or from a loan would be used to invest in another entity, when such funds were used for other, unauthorized, purposes.

Furthermore, suppression of a material fact which a party is under an obligation to communicate constitutes fraud. The obligation to communicate may arise from the confidential relations of the parties or from the particular circumstances of the case.

¹ Defendants state that, rather than filing a motion for more definite statement, they opted to adduce the specific allegations of fraud at issue through discovery. Because Defendants chose to forego reliance on the complaint for specifics, the Court finds that they cannot now complain that the pleadings lack specificity, when they chose to rely elsewhere in the record. The Court found specific allegations of fraud in the Affidavit of Ishtiaq Khan.

O.C.G.A. § 23-2-53. The Court finds that Plaintiffs have pled sufficient allegations to find a confidential relationship between Plaintiff Khan and Defendants M. Shailendra and Kiran Shailendra, as tenants in common or as managers of limited liability companies, such that the failure to disclose a material fact can also amount to fraud. Accordingly, Defendants' motion is **DENIED** as to fraud and breach of fiduciary duty claims asserted against M. Shailendra and Kiran Shailendra.

Turning to claims against the Shailendra-related Defendants, Plaintiffs have attempted to pursue causes of action against them based on alter ego allegations. As it has held in related cases, the Court finds this attempt to "improperly reverse" the alter ego doctrine unavailing. See Gwinnett Prop., N.V. v. G+H Montage GmbH, 215 Ga. App. 889 (1994). In that case, the Court of Appeals pointed out that the alter ego doctrine is generally used to collapse the corporate form to hold an individual stockholder liable for the debts of a corporation, not the other way around, to hold the corporation liable for the personal debt of a stockholder. Id. at 893. Furthermore, the Court in that action noted that the alter ego claim resembled an effort to merely recast claims for fraudulent conveyances, issues of which are also pending in this case. Accordingly, the Court **GRANTS** summary judgment to the Shailendra-related Defendants on the alter ego claims and likewise dismisses them from all claims with the exception of Count III (which will be addressed below), Count VII (with regard to Pinnacle at Eagle's Point, LLC) and Count VIII (as to Lee's Mill, Inc. and SG Contracting, Inc.).

As to Defendants' challenge of Plaintiffs' civil conspiracy claim, Defendants complain that Plaintiffs have failed to show the Defendants acted in concert with each

other to commit a tortious act. Plaintiffs again rely on their allegations of alter ego to support this claim.

“To recover damages based on a claim of civil conspiracy, a plaintiff must show that two or more persons combined either to do some act which is a tort, or else to do some lawful act by methods which constitute a tort.” Tyler v. Thompson, 308 Ga. App. 221(2011). Although it is not specifically argued here, because Plaintiffs have not alleged any wrongdoing on the part of any individual other than M. Shailendra or Kiran Shailendra, they are presumably relying on the doctrine of respondeat superior to impose liability on the Shailendra-related entities for civil conspiracy.

Under the theory of respondeat superior, also known as the master–servant rule, an employer is liable for a tort committed by his employee only where the injury is inflicted in the course of the employment. Odom v. Hubeny, Inc., 179 Ga. App. 250 (1986). If a tortious act is committed not in furtherance of the employer's business, but rather for purely personal reasons disconnected from the authorized business of the master, the master is not liable under doctrine of respondeat superior. Dowdell v. Krystal Co., 291 Ga. App. 469 (2008).

Other than the allegations supporting Plaintiffs' claims for fraudulent conveyance and the payments to Shailendra Group and SG Brokerage, LLC f/k/a Amma Investments, the Court finds that Plaintiffs have failed to specifically allege conduct on the part of the Shailendra-related Defendants to support a civil conspiracy claim, and alter ego allegations are insufficient to make the requisite showing when they merely reflect that Shailendra was acting for himself in moving money from different investments to suit his own needs. Accordingly, summary judgment is **GRANTED** with

respect to Count III in favor of Shi Holdings, LLC, SG Consulting, LLC, 966 Investments, LLC, and S&S Engineers, Inc.

Defendants also take issue with Plaintiffs' standing to assert claims, which Defendants attempt to characterize as derivative claims belonging to the limited liability companies in which Khan owned membership interests. Generally, Georgia law requires that a claim for breach of fiduciary duty against a corporation or its directors be pursued in a derivative suit brought on behalf of a corporation, since the injury is to the corporation and its shareholders, collectively. Phoenix Airline Services, Inc. v Metro Airlines, Inc., 260 Ga. 584, 585 (1990). However, Georgia will permit a shareholder to bring a direct claim under certain circumstances. Specifically, if a shareholder can show a "special injury" separate and distinct from that suffered by other shareholders, he may bring a direct claim. Phoenix Airline Services, 260 Ga. at 585. Likewise, a shareholder can bring a direct claim if the circumstances requiring a derivative suit do not apply, such as in the context of a closely held corporation. See Thomas v. Dickson, 250 Ga. 772, 774 (1983).

In this case, Khan points to damages he sustained independently by virtue of Shailendra's conduct in using funds intended for Khan in unauthorized ways. For example, Khan seeks damages in connection with the Shi Investments Two, LLC, closing distribution, arguing that it qualified as a special injury uniquely suffered by him, not the entity. He contends that his special injury occurred when Shailendra misled him into turning over his share of the profit from the sale of the property for use in connection with another investment, when the funds were actually deposited in Shailendra's bank account. Kahn additionally argues, and the Court finds, that Khan's

other claims are grounded in his unique losses as an obligor on various loans taken out for the benefit of other entities, a separate contractual right independent of the corporation. To the extent that there is a question in this case whether a particular loss for which Khan seeks redress actually belongs to an entity, the Court finds that it will be appropriate to leave such fact issues for jury determination. Accordingly, summary judgment is **DENIED** on the challenge to Plaintiffs' standing.

Defendants argue that Plaintiffs' allegations do not meet the elements of a civil conversion claim. Specifically, Defendants seek summary judgment, contending that Plaintiffs have failed to specifically identify the funds allegedly converted.

"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).

Here, Plaintiffs have alleged that Shailendra diverted funds specifically earmarked for certain purposes (for example, investment in the East Bay properties) for his personal use. The Court finds that Plaintiffs have set forth a valid conversion claim for specifically identifiable funds.

Defendants also argue that, in any event, Plaintiffs failed to make a prima facie showing to recover under this cause of action because they failed to show that they made a demand for the return of the property and that Defendants failed to comply with said demand. The Court finds that there is no threshold requirement that a party must

first make a demand for the property's return along with refusal of same, so long as the party has alleged actual conversion.

"Where, as here, an actual conversion is shown, no demand is necessary, for proof of demand and refusal is required only as evidence of a conversion; and where ... a conversion has been shown by other evidence, such proof is not essential." Lovinger v. Hix Green Buick Co., 110 Ga. App. 698, 700-701 (1964). Accordingly, summary judgment is **DENIED** on the count for conversion.

Finally, Defendants move for summary judgment as to Plaintiffs' fraudulent conveyance claims. Specifically, Defendants argue that the transfer of Shailendra's interest in a certain parcel of property in 2010 was done because Lee's Mill required capital of \$50,000 at the request of a bank. Plaintiffs point out that there is no evidence of a loan or that additional equity was given to Shailendra for this exchange. Because "great or gross inadequacy in consideration of the transfer of property creates a strong inference that the challenged transfer was fraudulent," U.S. v. McMahan, 392 F. Supp. 1159 (N.D. Ga. 1975), the Court finds that fact issues preclude summary judgment.

However, the Court finds insufficient evidence of fraud to overcome summary judgment as to the claim based on the transfer of Shailendra's interest in property to 966 Investments, LLC. The only badge of fraud specifically identified by Plaintiffs is the speculation that Shailendra is affiliated with 966 Investments, which Shailendra denies. However, even if the transfer at issue was made to an "insider," the Court finds this insufficient to withstand the burden of proof on summary judgment. The undisputed facts show that value was given in exchange for the transfer in the amount of \$695,000,

including the assumption of a loan encumbering the property for \$487,500. Accordingly, summary judgment is **GRANTED** as to this claim.

2. Plaintiffs' Motion for Partial Summary Judgment

Plaintiffs Khan and Choice Care Occupational Medicine and Orthopaedics, LLC ("Choice Care") seek summary judgment on Count XI for \$1,878,000 in allegedly unpaid loans owed by Shailendra. Plaintiffs argue that the funds were advanced to Shailendra as loans, which both parties understood would be repaid either on demand or on a specified date. Plaintiffs submit a ledger maintained by Rose Melinda Brooke, an employee of Choice Care, that is alleged to reflect these loans.

The Court **DENIES** summary judgment on this claim. Defendants point out inconsistencies in the ledger and compellingly argue that the terms of any alleged loans were too vague to make the oral agreements enforceable as a matter of law. To the extent that there has been part-performance of an oral agreement so as to remove it from the operation of the statute of frauds, this creates a factual question for jury determination. Smith v. Cox, 247 Ga. 563 (1981).

Plaintiffs next seek summary judgment in the amount of \$100,500 based on its claim for "Bad Checks" against Pinnacle at Eagle's Point, LLC ("Pinnacle"). Plaintiffs previously moved for summary judgment against Defendants to recover \$400,000 for bad checks. By Order dated February 19, 2012, the Court granted Plaintiffs' Motion for Partial Summary Judgment with respect to that claim, but subsequently vacated the order upon consideration of an out-of-time affidavit filed by Shailendra. Now Plaintiff asks the Court to reinstate its judgment in the amount of \$100,500 based on Shailendra's concession that the check was made to repay an advance of \$100,000.

Defendants oppose, arguing that the check was not made for consideration, as the advance was not made in favor of Pinnacle, and therefore, the check at issue was not issued for consideration.

O.C.G.A. § 11-3-303(a)(3) provides that an instrument is issued for value if “[t]he instrument is issued or transferred as payment of, or as security for, an antecedent claim against any person, whether or not the claim is due.”

Accordingly, the Court finds Defendants’ position unavailing. It is undisputed that the check from Pinnacle was dishonored and that Plaintiffs had advanced \$100,000 to Shailendra, which he attempted to repay through Pinnacle. For these reasons summary judgment is **GRANTED** in favor of Plaintiffs as to Count VII in the amount of \$100,500.

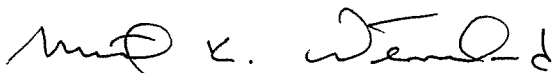
Plaintiffs also seek summary judgment on Count IX in the amount of \$435,000, which Plaintiffs claim Shailendra owes for indemnification and contribution with respect to Khan’s settlement with Heritage Bank on a loan. It is undisputed that Shailendra and Khan jointly executed a promissory note in favor of Heritage Bank in the principal amount of \$2,499,906.39. It is also undisputed that Heritage Bank obtained a judgment against Plaintiff in the amount of \$3,577,873.39, which Plaintiffs satisfied under a settlement agreement for \$435,000.

Plaintiffs contend that Shailendra promised to take full responsibility for the note under an indemnification agreement that provides: “I, Shi Shailendra, will be responsible for serves [sic] the loan and full responsibility for the loan.” At the very least, Plaintiffs claim that Shailendra is obligated as a co-obligor for half of the settlement paid by Plaintiff.

Defendants counter by pointing out that the agreement is ambiguous and in any event, a fact question exists regarding the amount Shailendra would owe as a joint obligor due to the amounts he paid over the course of several years maintaining the monthly payment.

The Court finds the alleged indemnity agreement ambiguous and therefore, an issue appropriate for the trier of fact. As for Shailendra's obligation as a co-maker on the note, the Court finds that he is responsible for his proportionate half of the funds advanced to Heritage Bank in satisfaction for the note. O.C.G.A. § 23-2-4. However, given that Shailendra paid \$480,000 in monthly payments, there is a fact question regarding whether Khan paid more than his fair share on the note. Accordingly, summary judgment is **DENIED**.

SO ORDERED this 22nd day of August, 2012.



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

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