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Order on Defendants' Petition in Equity to Enforce Settlement Agreement and to Enjoin Plaintiffs from Enforcing Judgment (Khan and Choice Care Occupational Medicine et al.)

Alice D. Bonner
Fulton County Superior Court

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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

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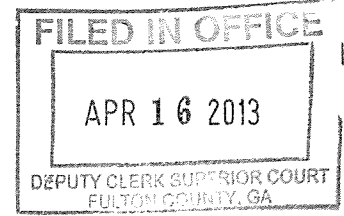
ISHTIAQ A. KHAN AND CHOICE)
CARE OCCUPATIONAL MEDICINE)
AND ORTHOPAEDICS, LLC, ISHTIAQ)
A. KHAN, as Trustee, MJ & KJ Khan)
1990 Family Trust)

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.)



VVF

Civil Action File No.
2010CV194327

ORDER ON DEFENDANTS' PETITION IN EQUITY TO ENFORCE SETTLEMENT AGREEMENT AND TO ENJOIN PLAINTIFFS FROM ENFORCING JUDGMENT

Counsel appeared before the Court on April 5, 2013, to present oral argument in support of Plaintiffs' ("Khan" or "Plaintiffs") request that the Court enter Consent Final Judgment against Defendants M. Shi Shailendra, Kiran Shailendra, Shi Holdings, LLC, Shailendra Group, LLC and SG Consulting, LLC (collectively, "Shailendra" or "Defendants"), and Defendants' Petition in Equity to Enforce Settlement Agreement and to Enjoin Plaintiffs from Enforcing Judgment. After consideration of the parties' argument, the testimony of Plaintiff's expert, and the evidence introduced at the hearing, this Court finds as follows:

On January 28, 2013, this Court entered a Consent Order Settling Case, which stayed this case for a period of 180 days following the date the parties entered into the Release and Settlement Agreement ("Settlement Agreement") on August 22, 2012.

Accordingly, the case was stayed until February 18, 2013. Under the Settlement Agreement, Defendants were obligated to pay Khan by February 18, 2013, the amount of \$1.5 million dollars, less the value of Shailendra's net equity in real property located in Henry County (the "Property"). Shailendra was also required to transfer to Khan his interest in a limited liability company, which owned an 81.25% interest in the Property.

If Defendants did not perform by the deadline, the parties agreed that a Consent Final Judgment should be entered in favor of Khan in the amount owed under the Settlement Agreement, plus an additional 32.5% of said amount.

Under the Settlement Agreement, the parties agreed to certain terms that would govern the process by which the Property would be valued. Under Section 4 of the Settlement Agreement, the parties agreed that the value of the Property would be established by an independent and mutually agreeable appraiser who would determine the "Fair Market Value" of the Property "at the time of the appraisal" using "generally accepted appraisal techniques, under MAI standards."

The parties agreed that Kenneth Cantrell would perform the appraisal, and he ascribed a value of \$500,000 to the Property. Under the payment calculation set forth in the Settlement Agreement, this reduced the amount owed to Khan by \$50,781.25, leaving \$1,449,218.75 as the total amount owed by Shailendra.

Shailendra failed to tender payment by the specified date. Accordingly, Khan seeks the entry of the Consent Final Judgment pursuant to the Consent Order Settling Case. In support of his request, he submits the Affidavit of Richard J. Storrs, his attorney.

On February 25, 2013, Shailendra filed the Petition in Equity to Enforce Settlement Agreement and to Enjoin Plaintiffs from Enforcing Judgment. Shailendra argues that the appraisal was conducted under an “as-is” analysis rather than a “fair market value” analysis of the property. Accordingly, Shailendra contends that the terms of the Settlement Agreement have not been met and asks the Court to enjoin enforcement of the Consent Final Judgment to allow the Property to be appraised under the standards mandated by the Settlement Agreement.

On April 5, 2013, the Court held a hearing at which counsel for the parties provided oral argument and were given the opportunity to question the appraiser, Kenneth Cantrell, whom Khan called as an expert and fact witness.

“In Georgia, the construction of contracts involves three steps. At least initially, construction is a matter of law for the court. First, the trial court must decide whether the language is clear and unambiguous. If it is, the court simply enforces the contract according to its clear terms; the contract alone is looked to for its meaning. Next, if the contract is ambiguous in some respect, the court must apply the rules of contract construction to resolve the ambiguity. Finally, if the ambiguity remains after applying the rules of construction, the issue of what the ambiguous language means and what the parties intended must be resolved by a jury.” Southland Development Corp. v. Battle, 272 Ga. App. 211, 213-214 (2005).

“One rule of construction provides that ‘words generally bear their usual and common signification; but technical words, words of art, or words used in a particular trade or business will be construed, generally, to be used in reference to this peculiar meaning.’ Ambiguities in terms used in written contracts, and their meanings as

understood in the trade and by the contracting parties, may be explained by parol proof of this trade usage and custom. Parol evidence is admissible to explain the meaning of technical terms employed in written contracts.” Id., at 214.

Upon consideration of the testimony of Plaintiffs’ expert and in view of the definitions provided for the different valuation methodologies contained in the appraisal, the Court finds that the appraisal rendered by Mr. Cantrell complies with the “Fair Market Value” requirement in the Settlement Agreement.

Shailendra attempts to draw a distinction between “As Is” market value, which is defined in the appraisal as “[t]he estimate of the market value of the real property in its current physical condition, use and zoning as of the appraisal date,” and “Market Value,” which is defined in the appraisal as:

The most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus. Implicit in this definition are the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby buyer and seller are typically motivated; both parties are well informed or well advised, and acting in what they consider their own best interests; a reasonable time is allowed for exposure in the open market;...the price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions granted by anyone associated with the sale. [See Petition in Equity to Enforce Settlement Agreement and to Enjoin Plaintiffs from Enforcing Judgment, Exh. A.]

Specifically, Shailendra takes issue with the fact that “As Is” value purportedly fails to take into account the likelihood that a portion of the Property may be rezoned in the future from residential to commercial. The appraiser testified that he found this

possibility too speculative to increase the Property's value in the manner advanced by Shailendra.

Pretermittting the issue of the appropriate weight the appraiser should have given the Property's potential zoning possibilities, the Court finds the distinction advanced by Shailendra between a "Fair Market Value" methodology and "As Is" value methodology inaccurate. Based on the testimony of Plaintiffs' expert and the definitions in the appraisal, the Court is persuaded that "As Is" value is merely a subset of the definition of "Fair Market Value" that looks to the appraisal date as the relevant date for purposes of the valuation. The fact that the appraisal at issue provides the fair market value as of the date of the appraisal does not mean Shailendra did not get the benefit of his bargain. In fact, the Settlement Agreement specifically provides: "The [amount by which the settlement figure shall be reduced] shall be determined by first determining the Appraiser's Fair Market Value of the Real Estate *at the time of the appraisal.*"

(emphasis added)

Accordingly, the Court **DENIES** Shailendra's Petition and will enter the Consent Final Judgment pursuant to the Consent Order Settling Case.

SO ORDERED this 16th day of April, 2013.



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

Jerry Bax
as president
Judge
Judge
Bonner

Copies sent electronically to:

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