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Order on Motion to Dismiss (KHAN)

Alice D. Bonner

Superior Court of Fulton County

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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,)

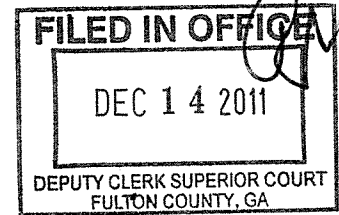
v.)

M. SHAILENDRA, KIRAN)
SHAILENDRA, SHAILENDRA)
GROUP, LLC, 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, HERITAGE BANK)

Defendants.)

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

Nominal Parties.)



Civil Action File No.
2010CV194327

ORDER ON MOTION TO DISMISS

This matter is before the Court on Defendants Paul Shailendra and Sachin Shailendra's Motion to Dismiss Claims Set Forth in Plaintiffs' First, Second and Third Amended Complaints. Upon consideration of the record of the case, the briefs submitted on the motion, and the arguments of Counsel heard at the hearing on October 10, 2011, the Court finds as follows:

In their first, second and third amended complaints, Plaintiffs have asserted claims against Defendants Paul and Sachin Shailendra (“Defendants”) for unjust enrichment and conspiracy to commit fraud. Specifically, Plaintiffs allege that Defendants were unjustly enriched by virtue of the fact that certain “investment entities” paid the mortgage on a home in Panama City, Florida owned by Defendants. With respect to the claim for conspiracy to commit fraud, Plaintiffs initially argued that Defendants conspired with their parents, Defendants M. Shailendra and Kiran Shailendra, to commit “fraudulent conduct, defraud Plaintiff Khan, and make fraudulent transfers for the purpose of concealing and continuing the fraud.” Plaintiffs did not incorporate this claim into their Third Amended Complaint. Nevertheless, in their response brief, Plaintiffs clarify the nature of Defendants’ alleged wrongdoing—their receipt of transfers that Plaintiffs contend are fraudulent.

Defendants move to dismiss the claims against them because 1) Plaintiffs lack standing to pursue unjust enrichment claims, which belong to unidentified “investment entities” and therefore, must be brought as derivative claims of the investment entities; and 2) Plaintiffs have abandoned the “Conspiracy to Commit Fraud” claim against Defendants by failing to include that claim in the Third Amended Complaint, and in any event, the claim fails for lack of specificity.

A court should grant a motion to dismiss when a plaintiff “would not be entitled to relief under any state of facts that could be proven in support of his claim.” Northeast Georgia Cancer Care, LLC v. Blue Cross & Blue Shield of Georgia, Inc., 297 Ga. App. 28, 29 (2009). In ruling on such a motion, the Court must accept as true all of plaintiff’s

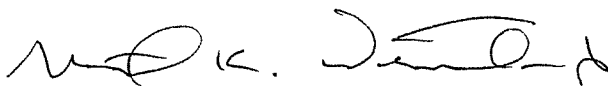
well-pleaded factual allegations, and draw all reasonable inferences in plaintiff's favor. Baker v. McIntosh County Sch. Dist., 264 Ga. App. 509, 509 (2003).

In the various amended complaints, Plaintiffs fail to specifically identify the investment entity that purportedly paid the mortgage on the Panama Beach home. Rather, they contend that the payments were made by one or more "investment entities" and that Plaintiffs are seeking to recover, individually and derivatively on behalf of any such entity. A claim for unjust enrichment cannot go forward unless it is clear from Plaintiffs' pleadings that they are the party that conferred the benefit upon the Defendants that they did not deserve. See Sanders v. Commercial Casualty Ins. Co., 226 Ga. App. 119, 122 (1997) ("Quantum meruit applies when...a benefit has been conferred upon the party sought to be charged by the party contending an unjust enrichment."). Moreover, to have standing to bring or maintain a derivative proceeding, Plaintiffs had to be shareholders in the entity with the claim at the time the act or omission complained of occurred. O.C.G.A. § 14-2-741. Additionally, Plaintiffs must fairly and adequately represent the interests of the entity in enforcing the right of the corporation. Id. Because the pleadings fail to establish that Plaintiffs or an entity that they have the right to assert a derivative claim on behalf of paid the mortgage on the Panama City home, Plaintiffs' claims for unjust enrichment against Defendants stand **DISMISSED**.

Turning to Plaintiffs' fraud claims against Defendants, it is clear from the pleadings and from Plaintiffs' response that they have abandoned claims of fraud involving Defendants other than claims based on their alleged receipt of fraudulent transfers. The Court finds that Plaintiffs' pleadings do not establish a claim for

fraudulent conveyance against Defendants. The only allegations of a transfer to or from Defendants is the payment by an “investment entity” of Defendants’ mortgage. The pleadings do not suggest that the transfer was made from an insolvent entity that is indebted to Plaintiffs. Accordingly, Defendants’ motion is **GRANTED**. Plaintiffs’ claims against Defendants regarding their receipt of transfer that inured to their benefit are **DISMISSED**.

SO ORDERED this 14th day of December, 2011.



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

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