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Order on Motion to Dismiss and Motion for  
Summary Judgment of Defendant SG Contracting,  
Inc. (Khan\_Shailendra)

Alice D. Bonner  
*Fulton County Superior Court*

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IN THE SUPERIOR COURT OF FULTON COUNTY  
STATE OF GEORGIA

FILED IN OFFICE  
AUG 22 2012  
DEPUTY CLERK SUPERIOR COURT  
FULTON COUNTY, GA

*Shandy*

**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. SHAIENDRA, KIRAN )  
SHAIENDRA, SHAIENDRA )  
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 TO DISMISS AND MOTION FOR SUMMARY JUDGMENT  
OF DEFENDANT SG CONTRACTING, INC.**

This matter is before the Court on Defendant SG Contracting, Inc.'s Motion to Dismiss and Motion for Summary Judgment. Upon consideration of the briefs submitted on the motions, the arguments of counsel and the record of the case, the Court finds as follows:

Defendant M. Shailendra ("Shailendra") held a majority ownership interest in SG Contracting, Inc. ("SG"). By 2009, Shailendra turned over full day to day operational control of SG to S. Paul Shailendra ("Paul") and Sachin Shailendra ("Sachin"), and other management team members. Additionally, Shailendra transferred his ownership interest in SG to a trust established in 2009.

Over the years, SG had extended loans to Shailendra, totaling Six Hundred Sixty-Eight Thousand Dollars (\$668,000). On January 1, 2010, Defendant Kiran

Shailendra transferred to SG a ten percent (10%) ownership interest in a parcel of real property in Henry County, Georgia, in an effort to satisfy the loans. SG subsequently encumbered the property by using it as collateral for a loan from Heritage Bank.

Defendant SG seeks dismissal of Plaintiffs' claim for fraudulent conveyance with respect to the transfer of Kiran Shailendra's ten percent (10%) interest in the real property in Henry County, relying on O.C.G.A § 9-11-19. In the alternative, SG seeks summary judgment on the aforementioned claim.

**1. Defendant SG Contracting, Inc.'s Motion to Dismiss**

O.C.G.A. § 9-11-19 provides: "A person who is subject to service of process shall be joined as a party in the action if in his absence complete relief cannot be afforded among those who are already parties; or he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may as a practical matter impair or impede his ability to protect that interest; or leave any of the persons who are already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest."

A party is indispensable if a case cannot be decided on its merits without prejudicing the rights of that party. Pickett v. Paine, 230 Ga. 786, 796 (1973). The test for determining whether a party's rights are prejudiced, looks to whether the party claims an interest relating to the subject of the action and is so situated that his or her ability to defend or protect the interest would be impaired. Coe v. Greenville Credit & Inv. Co., 164 Ga. App. 521 (1982).

Defendant SG contends that Heritage Bank, as a creditor with a security interest in the subject property, is an indispensable party to this action, and that a just adjudication of this claim is no longer possible because it has been released from this

case. On the other hand, Plaintiffs argue that only the transferor and the immediate transferee, both of whom are still parties to this action, are all that is needed for adjudication of this claim.

In support of the argument that a secured party is indispensable to a fraudulent conveyance action, SG points to Coe, 164 Ga. App. 521. In that case, the Court was asked to consider whether a transfer to a secured party was fraudulent and whether subsequent assignees were indispensable parties. There, the Court held that the initial assignee of a security deed and its assignee, as a present holder, were indispensable parties to an action by debtors to cancel a security interest. Id.

However, Coe is distinguishable from the facts in this case for two reasons. First, the transfer at issue was the initial conveyance of the security interest. As such, an assignee of the security interest under attack would understandably be at risk of having his rights impaired by a judgment to unwind the transaction. In contrast, the transaction at issue here is the transfer from Kiran Shailendra to SG, not the transaction to Heritage Bank creating the security interest, so Heritage Bank's rights are not directly implicated. Second, Heritage Bank was a party to this case and chose to abandon the litigation pursuant to a settlement agreement with Plaintiffs. As such, the Court finds that Heritage Bank had the opportunity to protect its interests in connection with this claim, but chose an alternative course. Accordingly, Defendant SG Contracting, Inc.'s Motion to Dismiss is **DENIED**.

## **2. Defendant SG Contracting, Inc.'s Motion for Summary Judgment**

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).

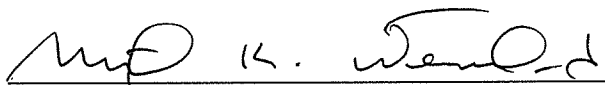
Defendant SG seeks summary judgment on the fraudulent conveyance claim, contending that Plaintiffs fail to raise a fact issue that the transfer from Kiran Shailendra amounts to actual or constructive fraud. The Georgia Uniform Fraudulent Transfers Act ("UFTA") provides a framework in which to evaluate whether certain transfers of a debtor are "fraudulent" as to its creditor. See O.C.G.A. § 18-2-70, et seq. O.C.G.A. § 18-2-74 involves a debtor's actual intent to fraudulently transfer property and O.C.G.A. § 18-2-75 involves a debtor's constructive intent to fraudulently transfer property. As to actual fraud, O.C.G.A. § 18-2-74 requires, in part:

A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditors claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation...[w]ith actual intent to hinder, delay or defraud any creditor of the debtor.

Because actual intent to defraud is difficult to prove, O.C.G.A. § 18-2-74(b) provides 11 factors (also called badges of fraud) from which courts can adduce actual fraudulent intent. These "badges of fraud" include whether the transfer was to an insider; whether the debtor retained possession or control following transfer; whether the transfer was concealed; if, prior to transfer, the debtor had been threatened with suit; whether transfer was of substantially all of the debtor's assets; whether debtor did not receive reasonably equivalent value for the exchange; whether the debtor was insolvent or became insolvent as a result of the transfer; whether the transfer occurred shortly before or after a substantial debt was incurred; and whether the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

Here, the Court finds that Plaintiffs have come forward with evidence to create fact issues on a number of the badges of fraud. Specifically, they point to the dwindling relationship of Plaintiffs and Defendants and the related threat of litigation, the fact that SG is controlled by Defendants' sons and whether reasonably equivalent value was given for the property. Upon consideration of the circumstances as a whole, the Court finds issues of fact that preclude summary judgment. Accordingly, SG's motion 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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