

6-1-2011

Order on Heritage Bank's Motion to Dismiss
(ISHTIAQ A. KHAN AND CHOICE CARE
OCCUPATIONAL MEDICINE AND
ORTHOPAEDICS, LLC)

Alice D. Bonner
Superior Court of Fulton County

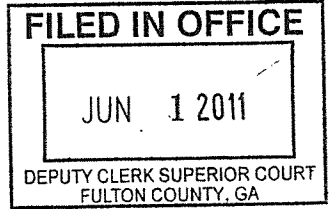
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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA



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)
SG CONTRACTING, INC.)
SG CONSULTING, INC.)
LEE'S MILL, INC.)
SG BROKERAGE, LLC)
966 INVESTMENTS, LLC)
S&S ENGINEERS, INC.)

HERITAGE BANK)

Defendants.)

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

Nominal Parties.)

Civil Action File No.
2010CV194327

ORDER ON HERITAGE BANK'S MOTION TO DISMISS

On April 29, 2011, Counsel in the above-styled case appeared before the Court to present oral argument on Heritage Bank's Motion to Dismiss. After reviewing the record of the case, the briefs submitted on this Motion, and the arguments of Counsel, the Court finds as follows.

Plaintiff Ishtiaq A. Khan (“Khan”) partnered with Defendant M. Shailendra (“Shailendra”), as a co-tenant or as a member of several limited liability companies, to invest in real estate, which Shailendra managed, personally or as manager of various limited liability companies. Khan alleges that Shailendra committed a series of improprieties in managing the various real property investments, ultimately creating a “ponzi scheme,” which netted Defendants over \$23 million 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 (Defendant Kiran Shailendra), and the Shailendra-related Defendants. Plaintiffs also contend that several third parties, including Defendant Heritage Bank, participated in furthering the scheme. Specifically, Plaintiffs allege that Heritage Bank, as the lender who financed one or more property acquisitions, aided and abetted Shailendra in the breach of his fiduciary duties by continuing to make loans to Shailendra (and the unwitting Khan), notwithstanding its knowledge, through its agent and attorney James Windham, of Shailendra’s schemes and his overall inability to pay his debts when due. In this action, Plaintiffs have asserted the following claims against Heritage Bank: 1) aiding and abetting fraud 2) aiding and abetting breach of fiduciary duty 3) avoidance of fraudulent transfers and 4) a claim for declaratory relief.¹

¹ The Court notes that the claim for declaratory relief was first asserted in Plaintiffs’
Khan, et al. v. Shailendra, et al., Civil Action No. 2010CV194327, Order on Motion to Dismiss

Prior to the initiation of this action, Heritage Bank sued Khan in the State Court of Fulton County to recover on a promissory note issued by Khan in favor of Heritage Bank. Khan asserted a counterclaim for fraud in that action, based largely on the same allegations that support the claim against Heritage Bank in this action, for aiding and abetting Shailendra's alleged fraud and breach of fiduciary duty. He also filed a third-party complaint against Shailendra for contribution in the event he was found liable to Heritage Bank on the note. Heritage Bank seeks the dismissal of Plaintiffs' claims against it on the grounds that Plaintiffs' claims are barred by the prior pending action doctrine, and because they arise out of the same transaction or occurrence as the dispute at issue in the State Court action, and thus should have been filed in that action as compulsory counterclaims.

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

In Georgia, a prior pending action "for the same cause of action between the same parties in the same or any other court having jurisdiction shall be a

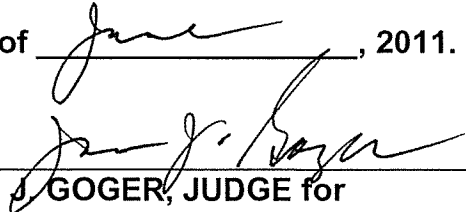
Amended Complaint filed on March 16, 2011, after the instant Motion was filed. However, because the parties addressed this claim at the hearing on Heritage Bank's Motion to Dismiss, the Court will likewise consider this claim in its ruling.

good cause of abatement.” O.C.G.A. § 9-11-44(a). As a corollary to this rule, a claim that arises out of the same transaction underlying the dispute in the prior pending action amounts to a compulsory counterclaim, and must be brought in that action. O.C.G.A. § 9-11-13; McLain Building Materials, Inc. v. Hicks, 205 Ga. App. 767, 769 (1992). At the time this motion was filed, Khan had not filed any counterclaims in the State Court action against Heritage Bank. Counsel disclosed at the hearing that the State Court has now permitted Khan to file counterclaims, which he apparently did on the eve of the hearing on this motion. As a result, Khan concedes that the tort claims against Heritage Bank in this case are part of the prior pending State Court action. Therefore, the claims in this case for aiding and abetting Shailendra’s alleged fraud and breaches of fiduciary duty stand **DISMISSED**.

With respect to the claims in this case against Heritage Bank premised on the avoidance of fraudulent transfers, Khan argues that those claims, to the extent that they involve equitable relief and cannot be adjudicated in State Court, are not subject to dismissal as compulsory counterclaims in a prior pending action. In response, Heritage Bank challenges Khan’s interest in the transactions that form the basis of the claims at issue. However, the Court finds that an inquiry into this matter would require consideration of matters outside the pleadings, which is not appropriate on a motion to dismiss. As such, to the extent that Khan’s fraudulent transfer claims seek equitable relief, Heritage Bank’s Motion is hereby **DENIED**.

In his Amended Complaint, Khan brings a claim for a declaratory judgment seeking the Court's guidance as to whether certain real property remains subject to a Deed to Secure Debt granted in favor of Heritage Bank in connection with the transaction at issue in State Court action. Khan argues that because a claim for declaratory relief is not available in State Court, this Court lacks authority to dismiss it under the prior pending action doctrine. However, "[a] declaratory judgment will not be rendered to give an advisory opinion in regard to questions arising in a proceeding pending in a court of competent jurisdiction, in which the same questions may be raised and determined." Southeast Service Corp. v. Savannah Teachers Properties, Inc., 263 Ga.App. 513, 514 (2003). According to the allegations in the Amended Complaint, the issue for determination in State Court is the effect of subsequent instruments purporting to modify or renew obligations incurred in the initial transaction between Heritage Bank and Khan in 2007. At the same time, he is likewise asking this Court to adjudicate the effect of the same instruments on the initial transaction documents executed in 2007, specifically the Deed to Secure Debt. Because the State Court action will necessarily address these issues, the Court hereby **GRANTS** Heritage Bank's Motion to Dismiss with respect to the claim for declaratory judgment.

SO ORDERED this 1 day of June, 2011.



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

Copies sent electronically to:

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