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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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KIMSO APARTMENTS, LLC, successor by merger to KIMSO APARTMENTS, INC., POONAM APARTMENTS, INC., POONAM APARTMENTS, LLC, successor by merger to POONAM APARTMENTS, INC., 185-225 PARKHILL, Fusco
LLC, successor by merger to 185-225 PARKHILL, CORP.,

Plaintiff(s)

-against-

MAHESH GANDHI,

Defendant(s)

-and-

ARLINGTON FILLER, DARSHAN SHAH, AMITY PARK ASSOCIATES, DREW INVESTMENT, INC., UNITHREE MANAGEMENT, INC., UNITHREE INVESTMENT CORP., UNITHREE SERVICES CORP., and EVEREADY SECURITY, INC.,

Additional Counterclaim Defendants.

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DCM PART 4
Present:
Hon. John A.

Index No.: 013489/03

TRIAL DECISION AND ORDER

The following papers and the Trial transcript were used in this decision:

Papers **Numbered**

Post Trial Memorandum of Law
by Plaintiff(s) Poonam Apartments, LLC
(dated April 5, 2011)…….. …. 1

Plaintiffs' Post Trial Memorandum
(dated May 3, 2011)…… 2

Defendant's Proposed Findings of Fact and Conclusions of Law
(dated May 3, 2011)…… 3

I. FINDINGS OF FACT

In the 1990s, Arlington Filler, Darshan Shah and Defendant Mahesh Gandhi (collectively, the "Individuals") formed Kimso Apartments, Inc. ("Kimso"), Poonan Apartments, Inc. ("Poonam"), and 185-225 Parkhill, Corp. ("Parkhill") (collectively referred to as the "Corporations") to purchase certain real properties located in Staten Island, New York (the "Properties") (Tr. 47-8: 21-23). Mr. Filler, Dr. Shah and the Defendant had a close, trusting and loyal relationship and were equal shareholders in the Corporations (Tr 47:18-22). The individual roles and acumen of each the men, when combined, resulted in success until of course the relationship eroded.

The Properties are residential apartment buildings containing more than 1,100 apartments, which are regulated and financed by subsidizing the rent of the occupants by the United States Departments of Housing and Urban Development ("HUD") (Tr. 487:4-7).

The Individuals, on behalf of the Corporations, wanted to ensure that the Properties remained HUD subsidized affordable housing, and sought a loan from HUD to the Corporations for approximately $20 million dollars (the "Loan") (Tr. 9:13-23; 325:12-24 and Tr. 445:23-25). A separate "Capital Loan Mortgage" and "Capital Loan Mortgage Note" evidenced the Loan. (Plaintiffs' Exs 21, 22, and 23) (Tr. 446:1-3). The Individuals consulted with the firm of Nixon Peabody on how to structure the Loan's use and the testimony as to its use was somewhat ambiguous.

Although the testimony was not clear, it appeared that approximately $11 million of the Loan was used to rehabilitate and improve the real properties owned by the Corporations in order to maximize the various rentals in accordance with the requirements of HUD Section 8.

The remaining nine million was loaned backed to the Individuals, which was allowed by HUD (Tr. 446:9-11 and Tr. 446:1-3). The Corporations then loaned to Defendant $2,970,000 (Tr. 463-64:23-11), which was evidenced by eight promissory notes (the "Notes") (Plaintiffs' Exs. 1 through 8). Defendant specifically admits that he signed the Notes, and that the Notes evidence the

loans he received (Tr. 447:2-4).

Pursuant to the terms of the Notes, the Notes were marked "non-recourse " and "non-negotiable," and the principal is to be repaid in thirty years (Tr. 539:1-3), but interest is to be paid yearly (Plaintiffs' Exs. 1-8). Thereafter, the Corporations carried the Notes on their books as shareholder loans (Tr. 209:2-4) and Defendant made interest payments on the Notes (Tr. 542:3-5). The interest payments by all Individuals were paid by the Corporations' interest payments on partner loans to the Corporations. (Def Ex. QQ, SS, UU, XX, ZZ, BBB, DDD and FFF). Nixon Peabody had structured the loans to the Individuals to be offset by the loans from the Individuals to the Corporations, so that the interest payments were not made personally. (Id.) The Defendant testified that the Notes were kept at the offices of the Corporations, but he always had control over them and took them upon his departure (Tr. 552:8-10). The Notes were not marked cancelled on the Corporation's books and records (Tr. 216:15-18).

Mr. Filler had an incredible knack of locating various investments and in basically laying out the groundwork for the same. The three principals then made the necessary monetary investments and Gandhi, at times, procured various loans, etc. as they continued to witness the growth of most of their enterprises. Their trust was such that their corporate meetings, if they can be characterized as such, took place in the cafeteria of a major hotel located in Long Island, New York. The trust in defendant Ghandi was so great that Mr. Filler and Dr. Shah gave defendant Gandhi the authority to issue checks in their name. Gandhi would then add his signature and be able to carry on the business interest of each of the various entities formed, namely Kimso Apartments, LLC successor by merger to Kimso Apartments Inc., Poonam Apartments, LLC, successor by merger to Poonam Apartments, Inc., 185-225 Park Hill, LLC, successor by merger to 185-225 Parkhill, Corp. and Amity Park Associates, Drew Investments, Inc., Unithree Management, Inc., Unithree Investments Corp., Unithree Services Corp. and Eveready Security, Inc., all of which are parties to this proceeding.

The defendant managed the Corporations until 2001 (Tr. 324:11-23). The deviation in the relationship occurred when Mr. Filler and Dr. Shah had a distrust of Mahesh Gandhi. During 2001,

Dr. Shah and Mr. Filler came to believe that Defendant had conspired with other third parties to overcharge the Corporations for supplies and repairs (Tr. 336:11-17; 343-44:23-5). Dr. Shah and Mr. Filler removed Defendant from his position as daily manager of the Corporations (Tr. 401:13-17).

In May 2002, defendant filed a petition in the Supreme Court for the County of Richmond entitled *In the Matter of the Arbitration between Gandhi and Filler*, bearing Richmond County Index No. 8169/02 (the "First Gandhi Action"), seeking, *inter alia*, to compel arbitration of the disputes between the shareholders of the Corporations. (Defendant's Ex. C)

In June 2002, the Corporations brought an action in the United States District Court for the Eastern District of New York against Defendant for RICO violations, fraud, money, laundering, breach of fiduciary duty, negligence and conversion based upon Defendant's theft from the Corporations (the "Federal Court Action") (See Plaintiffs' Ex. 47). The Corporations did not make a claim for payment on the Notes in the Federal Court Action (Tr. 345:17-21). Defendant never filed an Answer in the Federal Court Action (Tr. 345:22-25).

Thereafter, in early July 2002, Defendant filed a second legal action in Richmond County Supreme Court entitled *Gandhi v Filler*, et al., bearing Index No. 12194/02 (the "Second Gandhi Action") seeking damages for breach of contract; an order directing performance of contract; damages for conversion and damages for breach of fiduciary duty. (Plaintiffs' Ex. 48).

The First Gandhi Action, the Federal Court Action, and the Second Gandhi Action are collectively referred to as the "Litigations." The parties thereafter attempted to negotiate a settlement of their disputes (Tr. 346:7-19). Upon advice of counsel, defendant requested that any settlement agreement contain a provision canceling the Notes (Plaintiffs' Ex. 49; Tr. 362-63:20-5). Dr. Shah and Mr. Filler testified that they told Defendant that the Notes were valid obligations, and that the obligations to repay the Notes would not be released (Tr. 363:5-11).

On August 14, 2002, the parties executed a settlement agreement at the office of Defendant's counsel in the instant action (the "Settlement Agreement") (Tr. 350:18-21). The parties discussed

and made changes to the Settlement Agreement (Tr. 363-64:24-12). After the Settlement Agreement was signed, one of the Defendant's attorneys notarized Defendant's signature on the document (Tr. 519:6-21). The Individuals admitted that the subsequent agreement however, did not specifically provide for the Notes, in either fashion (Tr. 476:5-14).

The Settlement Agreement contains a release of claims which the parties "now have or that may accrue that are the subject of the Partys' (sic) lawsuits herein" (Defendants Ex. F at ¶ 9). The Corporations assert that this release is limited solely to the claims asserted in the Litigations (Plaintiffs' Ex. 146, ¶ 31, page 17). Defendant Gandhi however does disagree that the Notes are not included in the Releases.

Pursuant to the terms of the Settlement Agreement, Defendant sold his interest in the Corporations (and other related entities) for $1,648,000.00, to be paid in 120 equal monthly installments of $20,000, including interest at a rate of eight percent (Defendant's Ex. F at ¶ 4).

Thereafter, the Corporations began paying Defendant $20,000 per month pursuant to the Settlement Agreement (Tr. 365:14-17) and Defendant acknowledges receiving twenty-three payments totaling $460,000 (Tr. 520:5-7).

On the same day the Settlement Agreement was signed, Defendant executed an "Affidavit and Release" (Plaintiffs' Ex. 24) and a "Release of Shares in Escrow" (Plaintiffs' Ex. 97) (the "Releases"). The Releases were both notarized by Defendant's attorney (Plaintiffs' Exs. 24 and 97; Tr 363:16-23). Importantly, Defendant executed these two releases in addition to the release contained within the Settlement Agreement (Tr. 356-57:25-7).

By executing the Release of Shares in Escrow, Defendant released the plaintiffs, Kimso Apartments, Inc. and Poonam Apartments, Inc., from "any and all actions, causes of action [and] claims…in law, admiralty and equity" (Plaintiffs' Ex. 97). Defendant also released other non-party companies via the Affidavit and release (Plaintiffs' Ex. 24).

Defendant also released "any and all" claims against the "shareholders, officers, directors, members, and principals" of these companies which would include Dr. Shah and Mr. Filler

(Plaintiffs' Exs. 24 and 97).

Likewise, in the sixth whereas clause, the defendant, Mr. Filler and Dr. Shahs release all claims by seeking to "resolve all matters relating to the foregoing lawsuits and mutually desire to avoid future litigation" (Plaintiffs' Exs. 24 and 97). It further provided in the release provision of the Settlement Agreement, Paragraph 9, that the parties "hereby release, acquit, and forever discharge each other… of and from any and all claims, known and unknown… from the beginning of time until the present that they may now have or that may accrue that are the subject of the Partys' [sic] lawsuits herein."

Pursuant to the Settlement Agreement, and a separate Stock Escrow Agreement, Defendant was to deliver his shares in 185-225 Parkhill Corp. to the Corporations to be placed in escrow (Defendant's Ex. F at ¶ 6). In addition, Mr. Filler was to place 51% of his shares of stock in 185-225 Parkhill Corp. in escrow, pursuant to a separate "Stock Escrow Agreement #2" (Defendant's Exs. G and H). Mr. Filler's and Defendant's shares of stock in 185-225 Parkhill Corp. are collectively referred to as the "Parkhill Shares." The escrow agent designated by the parties in both stock escrow agreements was an attorney named Stewart Stein (Defendant's Exs. G and H; Tr. 508:1-2).

However, when the individuals originally purchased 185-225 Parkhill Corp., the seller gave them a second purchase money mortgage. To secure that purchase money mortgage, the seller's attorney retained the Parkhill Shares in escrow (Tr. 389:2-7; 632:11-15). Seller's attorney and escrow agent was Stewart Stein (Tr. 632-33:23-2). Although there is no direct testimony, it appears that that the parties intended the escrow agent for the seller, Mr. Stein, to retain the shares he already had, however, no one confirmed this position with Mr. Stein. Thus, although Defendant claims that the Parkhill Shares were not placed into escrow with Stuart Stein, the escrow agent, as required under the two Stock Escrow Agreements, Defendant admitted that, as far as he is aware, the Parkhill Shares were still with Stuart Stein, the escrow agent (Tr. 508:4-6; 633:18-21). Unfortunately, attorney Stein has been subsequently disbarred and his whereabouts are unknown (Tr. 389-90:8-4).

Defendant testified that he knew that if the Notes had been released by the Settlement

Agreement he was required to declare the loan monies as income on his tax returns for the year in which the release purportedly occurred and that he would have to pay income taxes on that money (Tr. 557:5-10). However, Defendant testified that he was waiting for the court to decide that issue before he paid taxes (Tr. 672:3-11; 716:7-21).

In or about November 2003, Dr. Shah and Mr. Filler through the Corporations' attorneys sent a demand notice to Defendant regarding the Notes (Plaintiffs' Ex. 138). The Corporations then filed the instant action seeking a declaration that the amount due from Defendant on the Notes could be offset against the amount due to Defendant under the Settlement Agreement. Defendant interposed an Answer with Counterclaims on or about January 14, 2004.

The Corporations ceased making payments on the Settlement Agreement in August 2004 (Tr. 527:1-4).

This action was tried during November 2010, the Court having heard ten days of testimony. Plaintiffs produced five witnesses: Steve Wallace, an attorney from the law firm Nixon Peabody (Tr. 6:6-11), Arlington Filler, Darshan Shah, Alexis Cimera and Kevin Suzsko. Defendant produced himself.

II. CONCLUSIONS OF LAW

A. Plaintiffs' First Cause of Action

Plaintiffs' claim, which requests a declaration that the amount due from Defendant on the Notes could be offset against the amount due to Defendant under the Settlement Agreement, is denied, and accordingly, plaintiffs must resume payments under the Settlement Agreement.

The issue at the heart of this claim is whether the Releases encompassed the Notes made by defendant and the alleged notes made by the Corporations due to the defendant.

After the ten-day trial and submissions by the parties, this court decides that the Releases do cover all the Notes, made by defendant and the Corporations. As is evident from the foregoing facts, the Individuals had a business relationship in which they profited greatly, but which ended abruptly. Subsequent litigation ensued and the Individuals sat down to settle their respective claims and terminate their business relationship. The Individuals executed the Settlement Agreement, the Releases, and associated documentation in their respective capacities as a final step toward separation. Thus, once all documents were executed, the relationship ended and the Individuals and Corporations were to move on.

Accordingly, the Corporations, now controlled only by Shah and Filler, made the necessary payments to Gandhi pursuant to the Settlement Agreement on a timely basis, without the payment of interest by defendant Ghandi on the Notes. However, at some point a year later, Mr. Filler and Dr. Shah decided that the Notes were not part of the settlement and declared them due and in default. It is undisputed that defendant received the funds as the loan, which had to be repaid. Yet, defendant believed Settlement Agreement released the Notes, while plaintiffs and Mr. Filler and Dr. Shah disagreed. The plaintiffs', Mr. Filler's and Dr. Shah's position is untenable.

Essentially, this position suggests that the Settlement Agreement would have defendant surrendering all of his interest in the Corporations for approximately two million, three hundred dollars, with an obligation to pay back the approximate three million dollars. Simple arithmetic would explain that defendant would then have to add **seven hundred thousand** dollars of his own

money to extradite himself from a highly profitable business arrangement pursuant to the Settlement Agreement!

This strains the credibility of the Court, especially when considering the business acumen, the professional background, the history of dealings, and all other aspects of these extremely bright business savvy gentlemen. The Court is otherwise unsatisfied with the credibility of the parties and their explanation of their true intent in the execution of the Settlement Agreement and associated documentation and the three separate Notes regarding the loans and their pay back.

To continue the logical conclusion of the position of plaintiffs, Mr. Filler and Dr. Shah, if it was the intention of the Individuals to pay back their loans, then the approximate nine million dollars outstanding on the relative notes should have been used in the calculations to determine the amount of money necessary to buyout Gandhi's interest. Therefore the gross value of monies used to buyout defendant would be increased by approximately three million dollars so that his buyout would have totaled approximately five million three hundred thousand dollars. This did not occur, thus lending further evidence as to the true intent of the parties.

Therefore, a plain reading of the Releases combined with the testimony of the Individuals leads this Court to conclude that the settlement agreement includes a release of all claims, present and future, between the Individuals and the Corporations, including the notes relative to the HUD loan. (Wilder v. Pennsylvania R.R. Co., 245 N.Y. 36, 39 [1927]). The only remaining issue now is the status of payments due defendant under the Settlement Agreement.

This issue, although not plead by defendant in his counterclaims has been an intrinsic counterclaim since the onset of this litigation. Plaintiffs claim that they were entitled to withhold payments under the Settlement Agreement because they were entitled to payment under the Notes, while defendant raised the opposite as his defense. The inverse of that argument would then state that if this Court does not find the Corporations are entitled to repayment under the Notes, the Settlement Agreement payments must be due. Based upon this logic, the issue of the past due Settlement Agreement payments was present in the litigation from the very start, even though not

specifically pled, and thus amendment of the answer is not prejudicial. (
Murray v. City of New York, 43 N.Y.2d 400, 404-405 [1977]; 715 Ocean Parkway Owners Corp. v. Klagsbrun, 74 A.D.3d 1314 [2d Dept 2010])

Thus, defendant having moved to amend is hereby permitted to amend his answer to include a counterclaim requesting the arrears with interest under the Settlement Agreement. Furthermore, upon amendment, this Court finds summary judgment in favor of the defendant on this counterclaim, since it is undisputed that all payments ceased under the Settlement Agreement in September 2004.

Of note, defendant also argued that the Notes fail because they were "non-recourse" obligations with no personal liability. (Prudential Lines Inc. v. American Steamship Owners Mutual Protection and Indemnity Association, Inc., 158 F. 3d 65 [2d Cir 1998]). If this argument were true, then the Notes may be illusory and invalid. Following this theory, the Corporations may then be entitled to restitution, which of course would be released by the Releases. This theory also fails, because defendant testified that he knew the loans were owed to the Corporations (Tr. 447:2-4).

B. Plaintiffs' Remaining Causes of Action

All other claims of plaintiffs are denied in accordance with the foregoing decision.

C. Defendant's Counterclaims

Of first note, Defendant's counterclaims against Kimso, Poonam, Shah, and Filler are barred by the releases.

Further, defendant's counterclaims, which requests the repayment of various loans to Kimso and Poonam is denied, as all claims were released by defendant in the Releases in accord with the above decision.

i. Defendant's third and eighth counterclaims

Defendant argues that he is entitled to repayment of the loans made by Parkhill, Kimso, and Poonam to defendant, evidenced by checks presented during trial. (Defendants Exibits JJ, LL, and NN.) However, in accord with the foregoing decision, the repayment of these loans is barred by the

Releases, and the counterclaims denied.

The portion of defendant's third and eighth counterclaims, in which defendant claims that he loaned money to Unithree, also fails for the foregoing reason. (Defendants Exibits PP-UU.) Further, defendant when pleading this counterclaim did not account for the payments made to him from Unithree after the loans were made and thus, this counterclaim fails (Transcript 231-4, 643-644, 658).

ii.

Defendant's eleventh counterclaim

The portion of defendant's eleventh counterclaim, which request payment of one million dollars from Mr. Filler and Mr. Shah for defendant's restructuring of a loan from the Bank of India for Plaintiffs fails. This promise to pay is not evidenced by a writing, nor was it was based, if at all, on anything but past consideration, (NY Gen. Oblig. § 5-1105; Umscheid v. Simnacher, 106 A.D. 2d 380 [2nd Dept. 1984]) and further, assuming *arguendo,* the promise to pay was valid, any claim to repayment would be barred by the Releases.

The portion of defendant's eleventh counterclaim, which requests payment of his medical insurance, is also denied. Defendant's claim that Dr. Shah and Mr. Filler promised to pay his medical insurance premiums is not supported by a writing despite its duration, (NY Gen. Oblig. §5-701; Cron v. Hargro Fabrics, 91 N.Y.2d 362, 367-368 [1998]; Meyers v. Waverly Fabrics, 65 N.Y.2d 75, 79 [1985]) and further, it is barred by the parole evidence rule, since such a promise would necessarily be included in the Settlement Agreement otherwise.

Defendant's further portion of the counterclaim for $25,000 from the sale of the Drew investment property allegedly promise by Mr. Filler fails, as there was no evidence presented of such promise, and the promise, even if valid, was gratuitous and unenforceable.

iii. Defendant's thirteenth counterclaim

The parties have abandoned the escrow agreement regarding the 185-225 Parkhill Corp. and therefore defendant's thirteenth counterclaim fails as well. Portions of the shares of Mr. Filler's stock from Parkhill were to be placed in escrow to secure the Settlement Agreement. However, during the trial it was elicited that the shares were never transferred officially to the escrow agent, yet they were presumably in the hands of the escrow agent although in a different capacity (Tr. 633: 9-13). Neither party had confirmed the availability of that person as an escrow agent before the Settlement agreement was signed (Tr. 633-5). Nor had either party confirmed the escrow after the execution of the Settlement Agreement and related documentation. (Id.) Furthermore, the escrow agent has since discontinued his practice, and his whereabouts as well as those of the Parkhill shares

are unknown. This evidence leads to the conclusion that the Escrow Agreement was abandoned (George A. Fuller Co., v. Alexander & Reed, Esqs, 760 F. Supp 381 [SDNY 1991]).

iv. Defendant's fourteenth and seventeenth counterclaims

These counterclaims fail for want of evidence.

Accordingly, it is hereby

ORDERED, that Plaintiffs' cause of action, which requests a declaration that the amount due from Defendant on the Notes could be offset against the amount due to Defendant under the Settlement Agreement, is denied; and it is further

ORDERED, that defendant having moved to amend his pleading to include a counterclaim requesting the arrears with interest under the Settlement Agreement is hereby permitted to amend his answer; and it is further

ORDERED, that upon amendment, this Court finds summary judgment in favor of the defendant on this counterclaim; and it is further

ORDERED, that all remaining claims and counterclaims are denied.

Dated: August 22, 2011

E N T E R,

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Hon. John A. Fusco, J.S.C.

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