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Order on Motion to Amend Counterclaim, Add Counterclaim Defendants, and Conduct Additional Discovery (SATISH S. LATHI)

Alice D. Bonner
Superior Court of Fulton County

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DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY, GA

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

SATISH S. LATHI, Plaintiff, v. JAY T. CLARK, Individually, PATRICIA L. CLARK, Individually, & SOUTHEAST CAPITAL PARTNERS, INC., Defendants.	)	Civil Action No.: 2006CV114892

ORDER ON MOTION TO AMEND COUNTERCLAIM, ADD COUNTERCLAIM DEFENDANTS, AND CONDUCT ADDITIONAL DISCOVERY

This case is before the Court on Defendants' Motion for Leave to File Second Amendment to Counterclaim, to Add Counterclaim Defendants, and to Conduct Additional Discovery. After having reviewed the briefs filed in conjunction with these motions and the record of the case, the Court finds as follows:

I. Facts Common to All Motions

Plaintiff Satish Lathi borrowed money in the form of a first and second mortgage on his home, the Asa Candler Mansion in Inman Park (the "Candler Park Mansion"). The first mortgage was held by Merrill Lynch and the second by Chattahoochee National Bank ("CNB"). The CNB mortgage was for $700,000 and was secured by the Candler Park Mansion along with an interest in Lathi's summer home in North Carolina. The CNB loan amount was reduced to $325,000 after a $502,094 payment and a $27,819 payment were made on Lathi's behalf by Southeast Capital Partners ("SECP"), an entity owned by Defendants Jay and Patricia Clark.

In 2004, Plaintiff Lathi and Defendants Jay & Patricia Clark entered into an Assignment and Assumption Agreement (the "Collateral Agreement"). Under the Collateral Agreement, the Clarks assumed the CNB loan obligation and the security interests associated with it, which the Clarks

recorded. In addition, the Clarks also documented several other outstanding loan obligations Lathi owed to the Clarks, as evidenced in Schedule II titled "Lathi's Existing Indebtedness," including the $502,094 payment on the CNB loan by SECP. Lathi's obligations were to be paid through a series of property sales, including the North Carolina summer home, and the realization of revenue on several outstanding real estate projects and investments. In addition to the Collateral Agreement, Plaintiff signed a restrictive covenant promising not to sell, encumber, or otherwise transfer the Candler Park Mansion without the Clarks' consent.

Pursuant to the Clarks' interpretation of the Collateral Agreement, the Clarks began receiving the revenue owed to Lathi with regard to their existing real estate projects and investments. As a result, according to Plaintiff Lathi, the Clarks caused him severe financial hardship.

In July 2005, Merrill Lynch foreclosed upon the Candler Park Mansion. Mr. Lathi prevented the foreclosure sale of the Candler Park Mansion, scheduled to take place in March, May and July, by repeatedly filing and withdrawing Chapter 13 bankruptcy petitions. Notwithstanding the foregoing, in July, Merrill Lynch filed an emergency petition to lift the bankruptcy stay claiming that on July 5, 2005, the property was purchased by Eliz Acquisitions LLC, a limited liability company owned, by Plaintiff. The pending bankruptcy petition was subsequently withdrawn.

In December 2006, Eliz Acquisitions executed a quitclaim deed transferring the Candler Park Mansion to Subhash Lathi, Plaintiff's father. Subhash Lathi subsequently took out a mortgage, secured by the home, through SunTrust Bank ("SunTrust"). At all times during this litigation, Defendants assert that Sathi Lathi and his family have resided at the Candler Park Mansion and retained its ownership of the home by facilitating straw purchases through Eliz Acquisitions and Subhash Lathi.

In May 2006, Plaintiff filed this action alleging that the Clarks breached the Collateral Agreement. In the interim, the original $325,000 debt owed to CNB (plus the accrued interest) had been paid out of SECP receipts originally owed to Lathi. Individual loans, such as the $502,094 and the $27,819 advances, however, have not been repaid.

Defendants now petition this Court for leave to amend their counterclaim asserting fraudulent transfer and mortgage by estoppel. In addition, Defendants seek to add Subhash Lathi and SunTrust as Counterclaim Defendants, and ask the Court to grant addition additional time for discovery.

II. Motion for Leave to File Counterclaim

Omitted counterclaims may be added under O.C.G.A. § 9-11-13(f) by leave of court if omitted through "oversight, inadvertence, or excusable neglect, or when justice requires...". Defendants assert that they were not aware of the facts giving rise to their allegation that Defendant Lathi, through Eliz Acquisitions and his father Subhash Lathi, retained ownership and possession of the Candler Park Mansion until after taking several depositions in this case. In the alternative, Defendants argue that if the omitted counterclaim had accrued prior to filing their original counterclaim, then it should be added as a compulsory counterclaim under O.C.G.A. § 9-11-13(a).

The counterclaim Defendants seek to add to this action alleges that the obligation incurred by the $502,094 payment by SECP on Plaintiff's behalf is equitably subrogated debt which is secured by the CNB loan, and which Defendants assumed under the Collateral Agreement. See, Davis v. Johnson, 241 Ga. 436 (1978) (holding that equitable subrogation applies where a party, without culpability or neglect, advances money to pay off encumbrances with the understanding that the advance is to be secured by the senior lien even without first priority, unless the first lien holder has equal or superior equity and would be prejudiced by such a holding). Additionally, Defendants allege that they have a priority secured interest in the Candler Park Mansion as a result of the pledge of that property as collateral under the CNB loan. See, Bowlin v. Hemphill, 180 Ga. 435 (1935) (holding that the rights of

a junior interest holder cannot be cancelled by a sale from the senior interest holder, arising under the deed, to the original owner); Federal Land Bank of Columbia v. Bank of Lenox, 192 Ga. 543 (1941) (holding that the junior lien interest remains with the property and reattaches with priority where (1) the original mortgage granted a fee interest, and (2) where the sale/purchase was done to cancel the junior mortgage holder's interest).

Plaintiff, on the other hand, opposes the addition of the counterclaim alleging unnecessary delay because the counterclaim would ultimately fail as a matter of law.

The facts giving rise to the additional counterclaim were not fully known by Defendants when the original counterclaim was filed. The questions raised in the proposed counterclaim are factually and legally related to the existing issues in this case. Therefore, the Court finds that it is in the interests of justice and efficiency that this counterclaim be added under O.C.G.A. § 9-11-13(f).

III. Motion for Leave to Add Counterclaim Defendants Subhash Lathi and SunTrust Bank

Defendants also petition the court for leave to add counterclaim defendants Subhash Lathi and SunTrust under the amended counterclaim. Pursuant to O.C.G.A. § 9-11-13(h), additional parties, including counterclaim defendants, may be brought in when their presence is required in order for the court to grant complete relief so long as jurisdiction can be maintained.

Any claim of right in the Candler Park Mansion by Defendants must be litigated with Subhash Lathi, the owner, and SunTrust, the mortgage holder. Without their involvement this Court could not determine Defendants' claims of a priority security interest in the Candler Park Mansion. In addition, this Court has personal jurisdiction over both Subhash Lathi and SunTrust, by virtue of their interest in the real property.

IV. Motion to Extend Discovery

Discovery shall be extended by sixty (60) days from the date of this Order to facilitate any necessary additional discovery as a result of the newly joined counterclaim and counterclaim defendants.

In accordance with the above stated reasoning, this Court hereby **GRANTS** Defendants' Motion for Leave to File Second Amendment to Counterclaim, to Add Counterclaim Defendants, and to Conduct Additional Discovery.

SO ORDERED this 16th day of November, 2007.

Alice D. Bonner

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

Copies to:

Ezra B. Jones III, Esq.
PENDERGAST & JONES P.C.
115 Perimeter Center Place
Atlanta, GA 30346

J. Scott Jacobson, Esq.
Scott E. Morris, Esq.
HOLT NEY ZATCOFF & WASSERMAN, LLP
100 Galleria Parkway, Suite 600
Atlanta, GA 30339

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