40TH ANNUAL REAL PROPERTY LAW INSTITUTE
VOLUME 2
FOR CONCURRENT SESSIONS ON 5/11/18

12 CLE Hours Including
1 Ethics Hour | 1 Professionalism Hour | 3 Trial Practice Hours

Sponsored By: Institute of Continuing Legal Education
Who are we?

SOLACE is a program of the State Bar of Georgia designed to assist those in the legal community who have experienced some significant, potentially life-changing event in their lives. SOLACE is voluntary, simple and straightforward. SOLACE does not solicit monetary contributions but accepts assistance or donations in kind.

How does SOLACE work?

If you or someone in the legal community is in need of help, simply email SOLACE@gabar.org. Those emails are then reviewed by the SOLACE Committee. If the need fits within the parameters of the program, an email with the pertinent information is sent to members of the State Bar.

What needs are addressed?

Needs addressed by the SOLACE program can range from unique medical conditions requiring specialized referrals to a fire loss requiring help with clothing, food or housing. Some other examples of assistance include gift cards, food, meals, a rare blood type donation, assistance with transportation in a medical crisis or building a wheelchair ramp at a residence.

Contact SOLACE@gabar.org for help.
The purpose of the SOLACE program is to allow the legal community to provide help in meaningful and compassionate ways to judges, lawyers, court personnel, paralegals, legal secretaries and their families who experience loss of life or other catastrophic illness, sickness or injury.

TESTIMONIALS

In each of the Georgia SOLACE requests made to date, Bar members have graciously stepped up and used their resources to help find solutions for those in need.

A solo practitioner’s quadriplegic wife needed rehabilitation, and members of the Bar helped navigate discussions with their insurance company to obtain the rehabilitation she required.

A Louisiana lawyer was in need of a CPAP machine, but didn’t have insurance or the means to purchase one. Multiple members offered to help.

A Bar member was dealing with a serious illness and in the midst of brain surgery, her mortgage company scheduled a foreclosure on her home. Several members of the Bar were able to negotiate with the mortgage company and avoided the pending foreclosure.

Working with the South Carolina Bar, a former paralegal’s son was flown from Cyprus to Atlanta (and then to South Carolina) for cancer treatment. Members of the Georgia and South Carolina bars worked together to get Gabriel and his family home from their long-term mission work.

Contact SOLACE@gabar.org for help.
40TH ANNUAL REAL PROPERTY LAW INSTITUTE VOL 2

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Dear ICLE Seminar Attendee,

Thank you for attending this seminar. We are grateful to the Chairperson(s) for organizing this program. Also, we would like to thank the volunteer speakers. Without the untiring dedication and efforts of the Chairperson(s) and speakers, this seminar would not have been possible. Their names are listed on the AGENDA page(s) of this book, and their contributions to the success of this seminar are immeasurable.

We would be remiss if we did not extend a special thanks to each of you who are attending this seminar and for whom the program was planned. All of us at ICLE hope your attendance will be beneficial as well as enjoyable. We think that these program materials will provide a great initial resource and reference for you.

If you discover any substantial errors within this volume, please do not hesitate to inform us. Should you have a different legal interpretation/opinion from the speaker’s, the appropriate way to address this is by contacting him/her directly.

Your comments and suggestions are always welcome.

Sincerely,

Your ICLE Staff

Jeffrey R. Davis
Executive Director, State Bar of Georgia

Tangela S. King
Director, ICLE

Rebecca A. Hall
Associate Director, ICLE
FRIDAY, MAY 11, 2018

CONCURRENT SESSION

7:00 FEAT FOR MCFEE RUN/WALK

RESIDENTIAL REAL ESTATE SESSION

PRESIDING:
Vanessa E. Goggans, Secretary/Treasurer, Real Property Law Section, State Bar of Georgia; Morris Manning & Martin LLP, Atlanta

8:30 INNOVATE, DON’T STAGNATE
Deborah S. Bailey, Bailey Helms Legal LLC, Roswell

9:00 DIRT & DIVORCE – THE EFFECTIVENESS OF THE DOMESTIC RELATIONS STANDING ORDER ON REAL ESTATE CLOSINGS
Leah J. Zammit, Richard C. Wayne & Associates PC, Atlanta

9:40 PRACTICE POINTERS AND TROUBLESHOOTING FOR THE RESIDENTIAL PRACTITIONER: MANDATORY MEMBERSHIP ASSOCIATIONS
Rachel E. Conrad, Dorough & Dorough LLC, Decatur
Katharine A. Dyott, Dorough & Dorough LLC, Decatur
Michael E. Leavey, Dorough & Dorough LLC, Decatur
Lisa A. Crawford, Dorough & Dorough LLC, Decatur

10:20 BREAK

10:35 WIRES, LIARS AND UNSCRUPULOUS BUYERS: WHAT TO DO WHEN YOU’RE THE VICTIM OF REAL ESTATE FRAUD
Vanessa E. Goggans

11:20 GETTING TO CLOSING WHEN YOUR SELLER IS AN ESTATE: BEST (AND SPEEDIEST) PRACTICES
John T. Mroczko, John T. Mroczko PC, Cartersville

12:05 IS THERE A JURIS DOCTOR IN THE HOUSE? CURING THE COMMON TITLE CLAIM
Monica K. Gilroy, The Gilroy Firm, Alpharetta

12:45 RECESS
FRIDAY, MAY 11, 2018
CONCURRENT SESSION

7:00 FEAT FOR MCFEE RUN/WALK

COMMERCIAL REAL ESTATE SESSION

PRESIDING: Chad Henderson

8:30 “DO I REALLY NEED AN ENGAGEMENT LETTER?”
Charles B. “Chuck” Waters, Jr., Aldridge Pite LLP, Atlanta

9:00 ENVIRONMENTAL DUE DILIGENCE AND BROWNFIELD CONSIDERATIONS FOR EVERYDAY TRANSACTIONS
Darren G. Meadows, Hull Barrett PC, Augusta

9:40 ADVANCED TOPICS IN DRAFTING AND MANAGING COMMERCIAL SALES CONTRACTS
Rob Brannen, Bouhan Falligant LLP, Savannah

10:20 BREAK

10:35 AFFORDABLE HOUSING: A REPORT FROM THE PUBLIC AND PRIVATE SECTORS
Patrise M. Perkins-Hooker, Past President, State Bar of Georgia; Fulton County Office of the County Attorney, Atlanta
Ted Henneman, HunterMaclean, Savannah

11:20 COMMERCIAL LEASES: TRANSACTIONAL TIPS, LITIGATION LESSONS AND RECENT CASE LAW
David S. Klein, Weissman, Atlanta

12:05 NAVIGATING A CHAPTER 11 BANKRUPTCY: STRATEGIES FOR REAL ESTATE LAWYERS AND THEIR CLIENTS
William A. Rountree, Rountree & Leitman LLC, Atlanta

12:45 RECESS
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FRIDAY, MAY 11, 2018

CONCURRENT SESSIONS

8:30

INNOVATE, DON’T STAGNATE
Deborah S. Bailey, Bailey Helms Legal LLC, Roswell
INNOVATE: DON’T STAGNATE

Deborah S. Bailey
Bailey Helms Legal LLC
Roswell, Georgia

Is innovation a new concept, is it a trendy buzz word or is it an old idea rebranded with a new name? The answer to that question will often be a reflection of how you see the world. So, whether you innovate or stagnate depends on you and the lens through which you are viewing the world.

Since the dawn of time, there have been breakthrough innovations, or that process that makes a good product or service better. Likewise, there have always been disruptive innovation, which is coined as disruption, or the process through which products or services are transformed to make them more affordable and more widely accessible to the general population.

It is important to recognize that even though I will be discussing technology, innovation doesn’t have to be technology-based and the best innovation doesn’t come from mechanical or academic approach to a problem. The best innovation comes from a quest to improve a product, process or service and it usually involve things you are generally interested in. Innovation thrive in environments of authentic connections.

Innovation isn’t a destination that lends itself to a charted course, and most innovators quickly recognize that it is difficult to change the basic DNA of an organization because although most people say they want change, they really don’t like change, they like routines or they are unwilling to make the sacrifice necessary to effect change. Humans tend to be creatures of habit.

One of the reasons successful organizations fail is that they disproportionally invest in things that provides the most immediate and tangible measure of achievement which comes at the expense of
long term goals and innovation and seldom if ever will innovation emanate from these types of environments. This is not the time to engage in short-term thinking because things and the times are changing. Transformation is happening all around us and real property lawyers are in a blind spot that causes the speed and magnitude of changes around us to be underestimated. Further compounding the problem is the reality that most of these developments that will affect our practice are occurring outside of the law.

This presentation is a brief overview of some of the emerging technologies that will have a profound effect on the real property law practice and land conveyancing. These emerging technologies are for example: online and mobile technology (mobile/smart phone technology); big data and the internet of things (devises that connect and exchange data); artificial intelligence (“AI”) and machine learning; natural voice technology (Siri, Cortana, Alexa, Google Assistant, IBM Watson . . .); and digital currency and block chain and other distributive ledger technology.
9:00  **DIRT & DIVORCE – THE EFFECTIVENESS OF THE DOMESTIC RELATIONS STANDING ORDER ON REAL ESTATE CLOSINGS**

*Leah J. Zammit*, Richard C. Wayne & Associates PC, Atlanta
Dirt & Divorce - The Effect(iveness) of the Domestic Relations Standing Order on Real Estate Closings

Leah J. Zammit, Esq.
Richard C. Wayne & Associates
Atlanta, Georgia
The Effect(iveness) of The Domestic Relations Standing Order on Real Estate Closings

Leah J. Zammit, Esq.
Richard C. Wayne & Associates
Atlanta, Georgia

I. Authority for the Standing Order

O.C.G.A. § 19-1-1

(a) As used in this Code section, the term "domestic relations action" shall include any action for divorce, alimony, equitable division of assets and liabilities, child custody, child support, legitimation, annulment, determination of paternity, termination of parental rights in connection with an adoption proceeding filed in a superior court, any contempt proceeding relating to enforcement of a decree or order, a petition in respect to modification of a decree or order, an action on a foreign judgment based on alimony or child support, and adoption. The term "domestic relations action" shall also include any direct or collateral attack on a judgment or order entered in any such action.

(b) Upon the filing of any domestic relations action, the court may issue a standing order in such action which:

(i) Upon notice, binds the parties in such action, their agents, servants, and employees, and all other persons acting in concert with such parties;
(2) Enjoins and restrains the parties from unilaterally causing or permitting the minor child or children of the parties to be removed from the jurisdiction of the court without the permission of the court, except in an emergency which has been created by the other party to the action;

(3) Enjoins and restrains each party from doing or attempting to do or threatening to do any act which injures, maltreats, vilifies, molests, or harasses or which may, upon judicial determination, constitute threats, harassment, or stalking the adverse party or the child or children of the parties or any act which constitutes a violation of other civil or criminal laws of this state; and

(4) Enjoins and restrains each party from selling, encumbering, trading, contracting to sell, or otherwise disposing of or removing from the jurisdiction of the court, without the permission of the court, any of the property belonging to the parties except in the ordinary course of business or except in an emergency which has been created by the other party to the action.

(c) Upon written motion of a party, the standing order provided for in this Code section shall be reviewed by the court at any rule nisi hearing.

(all emphasis added)

II. Recent Questions from the Real Estate Bar - The Effect(iveness) of the Standing Order

A. “What really does a ‘standing order’ cover, and does every county have one?”

See Appendix. Examples of various standing orders illustrate similarities—and differences. Included for reference are the current standing orders from:

- Fulton
- Cobb
- Forsyth
- Dekalb
- Coweta Judicial Circuit (Carroll, Coweta, Heard, Merriwether, & Troup Counties)
- The Western Judicial Circuit for Athens-Clarke & Oconee Counties
B. “Do you need court approval to sell marital property while a divorce case is pending? What about separate property? What’s the difference anyway?”

C. “Some divorce attorneys act like I am speaking in tongues when I suggest that we need the court’s approval if the settlement agreement has not yet been approved. What’s the rule?”

D. Relevant Case Law [supplement]

III. Recent Questions from the Real Estate Bar - Real World Application

A. “What to do if the parties renegotiate their settlement agreement after the divorce is final and don’t want to involve their lawyers or reopen the case with the judge?”

B. “After a divorce complaint is filed, may either party refinance property they own separately from the other party? May one party purchase property?”

C. “If a settlement agreement or decree states that an equity payment be made to non-title holder spouse upon sale of marital residence, is that considered an ‘equitable lien’ on the property that must be paid at closing (versus disbursing all funds to the selling spouse and it then becoming the obligation of the selling spouse to pay the ex-spouse)?”

D. “What if the ex-spouse is on title but executes a quit claim deed per the divorce decree/settlement agreement, without specific acknowledgment of receipt of equity from house, does the ex-spouse have an equitable lien even though he/she signed the quit claim deed?”

IV. Counseling Your Clients in Tandem with (or against) Their Divorce Attorneys

V. Discussion and Q&A
APPENDIX

Examples of Standing Orders
IN THE SUPERIOR COURT OF FULTON COUNTY  
STATE OF GEORGIA  
FAMILY DIVISION

Petitioner

and

Civil Action File No. 2015 EV- 01141

Respondent

AUTOMATIC DOMESTIC STANDING ORDER

1.

This order applies to all cases which are filed in the Family Division of the Superior Court of Fulton County and shall remain in effect up through the entry of the Final Order in this case. This Order contains provisions that regulate the parties’ conduct during the pendency of this case. The parties shall not act in a manner that would violate any provisions set out in this Order. The Parties shall further be prohibited from instructing, encouraging, or causing others to act in a manner that would violate the terms and spirit of this Standing Order.

2.

Each party is hereby required to complete the Domestic Intake Worksheet and to bring it to the 30-day status conference.

3.

All parties to a case involving a question of custody of minor children (excluding contempt or modification actions) are hereby enjoined and restrained from causing or permitting the minor child(ren) of the parties to be removed from the State of Georgia. The only exception to this prohibition shall be for vacations or excursions outside of the State of Georgia for a period not to exceed fourteen (14) days. During the above referenced fourteen (14) day period the child(ren) shall not be removed from the United States. Customary activities/events, such as camp attendance or boarding school shall also serve as exceptions to the restraints concerning the removal of the children from the State of Georgia. In the event the children are removed from the State of Georgia in accordance with the terms of this paragraph advanced written notice must be provided to the opposing party outlining the dates of travel, the travel destination(s) and contact number(s) where the children will be staying.
4.

Each party is hereby enjoined and restrained from doing any act injuring, maltreating, vilifying, threatening, molesting, or harassing the adverse party, the child(ren) of the parties, or a family member of the adverse party.

5.

Each party to a divorce or separate maintenance action is hereby enjoined and restrained from selling, encumbering, trading, contracting to sell, or otherwise disposing or removing from Fulton County, any of the property belonging to the parties except in the ordinary course of business.

6.

The parties to a divorce or separate maintenance action are prohibited from disconnecting, or causing the disconnection of water, gas, electricity or any other utility services from the marital residence.

7.

Each party to a divorce, initial custody determination or separate maintenance action is hereby enjoined and restrained from altering, suspending or terminating any insurance coverage in effect as of the date of the filing of this action, including, but not limited to, health insurance, supplemental health insurance, dental insurance, vision insurance, automobile insurance, long term disability insurance, short term disability insurance, life insurance (whole life and/or term), and/or changing any beneficiary designations on any life insurance policy(ies).

8.

Each party to a case involving a question of custody or visitation of minor children (not contempt or uncontested modification actions) is required to attend the "Families in Transition" Seminar. Failure to complete the seminar in a timely manner may subject the party to contempt or other sanctions.

9.

When a civil action is assigned to the Family Division of the Superior Court of Fulton County with an Acknowledgment of Service, the Docket Clerk will attach a copy of this Order to the original Petition, give or mail a copy of this Order to the attorney or person filing the Petition and provide a second copy to the attorney or person filing the Petition with instructions to serve the Respondent with the copy. Note: The Standing Order should be attached to all initial filings (except contempt and post judgment matters).

10.

All attorneys entering an appearance in the Family Division of the Superior Court of Fulton County shall attend at least one seminar which has been authorized by this Court as a sufficient informational seminar or shall observe at least one authorized reproduction of the same or shall read the entire materials from such a seminar.
11.

All parties and attorneys entering an appearance in the Family Division of the Superior Court shall abide by the rules of the Family Division as promulgated by this Court. Said rules are available on the Family Division website: www.fultoncourt.org/family. A hard copy of all such rules shall be made available by the Clerk upon request.

12.

This Order shall apply to all domestic civil actions (as defined by O.C.G.A. §19-1-1) which are assigned to the Family Division of the Superior Court of Fulton County and shall be the Standing Order until further order of this Court.

13.

Failure to follow a Court order, unless substantially justified, may result in sanctions or penalties as provided by statute, rule or authority of the Court, including a finding of contempt by the Court; taxation of costs or attorneys’ fee; and/or the imposition of monetary or other sanctions.

So ordered the 12th day of August, 2015.

HON. GAIL S. TUSAN, CHIEF JUDGE
ATLANTA JUDICIAL CIRCUIT
IN THE SUPERIOR COURT OF COBB COUNTY
STATE OF GEORGIA

______________________________
Plaintiff,

v.

______________________________
Defendant.

Civil Action File Number

DOMESTIC RELATIONS STANDING ORDER & RULE NISI

This case is hereby set for a hearing on ____________________________
at ___________ AM/PM in Courtroom __________________ of the Superior
Court of Cobb County, 70 Haynes Street, Marietta, GA 30090.

To Parties Without Attorneys: If you have filed this action without an attorney, or if
you plan to defend this action without an attorney, you have full responsibility for
complying with all procedural and substantive requirements of the law. The Court
will not act as your attorney, will not dispense legal advice, and will not help you
prove or defend your case. This action involves important legal rights and this
Court strongly urges you to hire an attorney.

The parties to this action, their agents, servants, and employees, and all other
persons acting in concert with the Parties are subject to the following provisions:

1. If this case involves child custody or
visitation, then except in an emergency
which has been created by another Party,
you shall not cause or permit the minor
child(ren) to be removed from the State of
Georgia for more than one week at a time
unless this Court Orders otherwise.

2. You shall not do, attempt to do, or
threaten to do any act which injures,
maltreats, vilifies, molests, or harasses or
which may, upon judicial determination,
constitutes threats, harassment, or stalking
of the adverse Party or the child(ren) of the
Parties or any act which constitutes a
violation of other civil or criminal laws of
this state.

3. You shall not sell, encumber, trade,
contract to sell, or otherwise dispose of or
remove from the jurisdiction of the court,
without the permission of the court, any of
the property belonging to the Parties
except in the ordinary course of business or
except in an emergency which has been
created by the other Party to the action.
You shall not disconnect or cause to be
disconnected any utility-providing service to
the home of the other Party. You shall not
change, cause to change, cancel, or cause
the cancellation of any insurance presently
in effect which protects the Parties or any
of their children or property. You shall not
interfere with the other Party's mail.

Page 1 of 2
4. You must attend the Seminar for Divorcing Parents. If you would like more information about the Seminar, please see this Court's Standing Order Establishing Seminar for Divorcing Parents or contact the ADR Office.

5. You must provide the following documentation to this Court by filing it with the Clerk:

a) if this case involves financial issues such as child support, alimony, division of property, allocation of debt, or contempt of a court order addressing these issues, then you must file your Financial Affidavit/Statement as required by the Uniform Superior Court Rules with the Clerk at least 15 days before the scheduled hearing.

b) if this case involves child support or child custody, then you must file your Child Support Worksheet and the schedules thereto as required by the Uniform Superior Court Rules with the Clerk at least 15 days before the scheduled hearing.

c) if this case involves an action for contempt of a previous court order or an action for modification of custody, visitation, child support, or alimony, then you must attach copies of all prior orders which you seek to enforce or modify to your initial pleadings.

d) If there has been a change in your income, employment, debts, assets, or other relevant financial circumstances since you filed a previous Financial Affidavit/Statement or Child Support Worksheet, then you must file with the Clerk and serve upon the opposing Party updated versions of either or both of those documents at least 10 days before the next scheduled hearing.

6. You must bring the following documents to each hearing in this case:

a) Documents reflecting your current income, including but not limited to a copy of your most recent paystub as well as state and federal income tax returns, W-2 forms, and 1099 forms from the last three years.

b) If this case involves child support, documents from your employer or insurance company showing how much you pay for health, dental, and vision insurance for the children at issue and health insurance cards for yourself and the children at issue. If possible, these documents should show how much you pay for insurance for each child.

If any documents that you plan to file or bring to court contain social security numbers or financial account numbers, you must redact those numbers by marking out all but the last four digits.

7. If you fail to comply with the provisions of this Order, then you may be sanctioned by or held in contempt of this Court.

SO ORDERED this day of ____________________

Judge, Superior Court of Cobb County
Cobb Judicial Circuit
IN THE SUPERIOR COURT OF FORSYTH COUNTY
STATE OF GEORGIA

Plaintiff/Petitioner,

v.

Defendant/Respondent.

) CIVIL ACTION
) FILE NO.: ___CV-_____--___

DOMESTIC RELATIONS ACTION STANDING ORDER

1.

Pursuant to O.C.G.A. § 19-1-1 the Court enacts this Domestic Relations Action Standing Order (hereinafter “DRSO”) which binds the parties in the above-styled action, their agents, servants, employees, and all other persons acting in concert with such parties. This DRSO remains in effect for as long as the case remains pending. The Plaintiff/Petitioner is responsible for ensuring that this DRSO is served upon the Defendant/Respondent at the time that the Defendant/Respondent is served with process in the underlying domestic relations action. The Court issues this DRSO in any action for divorce, alimony, equitable division of assets and liabilities, child custody, legitimation, annulment, determination of paternity, termination of parental rights in connection with an adoption proceeding filed in Superior Court, a petition in respect to modification of a decree or order except as to modification of child support, and adoption. The Court specifically excludes from application of this DRSO the following domestic relations actions: child support; any contempt proceeding relating to enforcement of a decree or order, any action on a foreign judgment based on alimony or child support; and any petition for protective order under the Family Violence Act or for stalking.¹

2.

DO NO REMOVE CHILDREN FROM STATE OF GEORGIA - Each party is hereby enjoined and restrained from unilaterally causing or permitting the minor child(ren) of the parties to be removed from the jurisdiction of this Court without prior Court approval, except in an emergency affecting the health, safety, or welfare of the child(ren) which has been created by the other party to the action.

¹ The civil docket clerk shall attach a copy of this DRSO to the original and the service copy of the domestic relations action pleading and provide a copy of this DRSO to the attorney or person filing the domestic relations action. If the action was filed by mail, the civil docket clerk shall mail a copy of this DRSO to the attorney or person filing the domestic relations action.
3.

**NO HARASSMENT OF OTHER PARTY OR CHILDREN** – Each party is hereby enjoined and restrained from doing, or attempting to do, or threatening to do, any act which injures, mal treats, vilifies, molests, or harasses or which may, upon judicial determination, constitute threats, harassment, or stalking the adverse party or the child(ren) of the parties or any act which constitutes a violation of other civil or criminal laws of this state.

4.

**NO REMOVAL OF PROPERTY** – Each party is hereby enjoined and restrained from selling, encumbering, trading, contracting to sell, or otherwise disposing of or removing from the jurisdiction of the Court, without the permission of the Court, any of the property belonging to the parties except in the ordinary course of business or except in an emergency which has been created by the other party to the action.

5.

**REQUEST FOR MODIFICATION/EXEMPTION OF DRSO** – Upon written motion of a party, the application of this DRSO shall be reviewed on a case-by-case basis at a rule nisi hearing.

It is so ORDERED, this __ day of October, 2015.

Jeffrey S. Bagley, Chief Judge
Forsyth County Superior Court
Bell-Forsyth Judicial Circuit

David L. Dickinson, Judge
Forsyth County Superior Court
Bell-Forsyth Judicial Circuit

Philip C. Smith, Judge
Forsyth County Superior Court
Bell-Forsyth Judicial Circuit

Revised October 2, 2015
PARENTING SEMINAR

Pursuant to Rule 104 of the Georgia Supreme Court, this Court enters the following Domestic Relations Action Internal Operating Procedure ("IOP") which does not deviate from the Superior Court Uniform Rules or other laws and does not constitute an experimental rule as contemplated by the Rules of the Georgia Supreme Court.

In accordance with Rule 106 of the Georgia Supreme Court, this Court submits that the purpose of this IOP is to describe to litigants, especially pro se litigants, their ongoing obligations to comply with Uniform Superior Court Rules ("USCR") 24.8. This Court has established a program designed to educate the parties to domestic relations actions, as those classes of cases are described below, in regard to the effects of divorce and custody actions on minor children of the marriage.

As such, all parties involved in any domestic relations action involving the issues of divorce, separate maintenance, legitimation, change of custody, or visitation, where the child(ren) are under the age of 18, are required to successfully complete a court-approved, certificate-bearing, parenting seminar. This requirement does not include, however, contempt actions, modification of custody actions, Uniform Reciprocal Enforcement of Support Act cases, uncontested/stipulated modifications of parenting time, or uncontested child support actions. Information about the classroom-based seminar can be obtained at: www.adr9.com and (770) 535-6909.

Minimum requirements for court-approval include: (a) four contact hours; (b) focus on developmental needs of children; (c) emphasis on fostering a child’s emotional health during periods of stress; (d) topics covered must include: include developmental stages of childhood; reactions of children to divorce; how divorce affects families; grief processes and coping skills; roles of divorced parents; co-parenting skills; financial obligations of parents; and mediation as a tool to resolve domestic disputes; and (e) verification of successful completion of the program.

A certificate of completion from a parenting seminar that is not on the Court’s approved list may be substituted if written verification is provided to the Court that the seminar includes the minimum requirements listed above.

The seminar must be successfully completed and filed prior to entry of a final order. Certificates of attendance are valid for three (3) years. The presiding judge may, for good cause

1 If the modification is brought within three (3) years of the parenting seminar having previously been completed.

Revised October 2, 2015
shown, waive the parenting seminar requirement.

In those cases where there have been allegations of domestic violence between the parties, the parties must satisfy this seminar requirement via attendance and completion of a court-approved on-line program to ensure compliance with the protective order stay-away directives. The on-line program is available at: www.childsharing.com. Parties in all other domestic relations actions may also elect to complete this requirement via the online program.

Parties are responsible for paying their own registration fees for the program and they are to be paid directly to the program coordinators prior to commencement of the parenting seminar. If payment of the registration fee creates a financial hardship upon a party the Court may, upon verified motion, waive or reduce the program fee that is administered by the Ninth Judicial District Office of Dispute Resolution or the online program that is administered by Childsharing.com.

Pursuant to Rule 104 of the Georgia Supreme Court, this Court has provided a certified copy of this IOP for filing with the Clerk of the Georgia Supreme Court.

It is so ORDERED, this \( \sqrt{ } \) day of October, 2015.

Jeffrey S. Bailey, Chief Judge
Forsyth County Superior Court
Bell-Forsyth Judicial Circuit

David L. Dickinson, Judge
Forsyth County Superior Court
Bell-Forsyth Judicial Circuit

Philip C. Smith, Judge
Forsyth County Superior Court
Bell-Forsyth Judicial Circuit

Revised October 2, 2015
IN THE SUPERIOR COURT OF FORSYTH COUNTY
STATE OF GEORGIA

IN RE: INTERNAL OPERATING PROCEDURE 2015-01.

PARTIES WITH CHILDREN

Pursuant to Rule 104 of the Georgia Supreme Court, this Court enters the following Domestic Relations Action Internal Operating Procedure ("IOR") which does not deviate from the Superior Court Uniform Rules or other laws and does not constitute an experimental rule as contemplated by the Rules of the Georgia Supreme Court.

In accordance with Rule 106 of the Georgia Supreme Court, this Court submits that the purpose of this IOR is to describe to litigants, especially pro se litigants, their ongoing obligations to comply with existing Uniform Superior Court Rules ("USCR") related to domestic relations actions as those actions are defined pursuant to O.C.G.A. § 19-1-1(a) and USCR 24.1.

1.

All parties are expected to comply with Uniform Superior Court Rules and statutory requirements regarding financial data, domestic relations financial affidavits, child support worksheets, scheduling and notice of temporary and final hearings, and parenting plans. Litigants are directed to review O.C.G.A. § 19-6-15 and USCR 24.2, 24.2A, 24.4, and 24.10.

2.

In addition to the aspirational "recognition" requirements contained in O.C.G.A. § 19-9-1(b)(1), the Court also expects the litigants in domestic relations actions filed in this judicial circuit to recognize that the safety, financial security and mental well-being of the children involved in this case are the most important concern. It is the law that except in certain rare circumstances, both parents will share parental responsibility for all minor children involved in this case. The law requires that parents share the children's time and participation together in making all important decisions concerning the children. The law expects parents to put aside their feelings and cooperate, in good faith, on all decisions involving the children. As such, the following guidelines shall also apply:

A. Children have the right to a loving, open and continuing relationship with both parents. They have the right to express love, affection and respect for one parent in the presence of the other parent;

B. Neither parent may alienate a child's affection for the other parent;

C. Parents must separate any bad feelings for one another from their duties as

Revised October 2, 2015
parents. Their duty is to share the children’s time and share in making parenting
decisions;

D. Children have the right to never hear a parent, or a relative or a friend of a parent,
belittle or degrade the other parent;

E. Children have the right to be free of guilt because the parents have decided to
separate. They are entitled to honest answers to questions about changes taking
place in the family makeup. However, unnecessary information regarding the
divorce case or other related adult subject matter should not be discussed with the
children;

F. Parents should never be so preoccupied with their own problems that they fail to
meet the children’s needs. The parties are directed to never forget that parents’
separation usually has a worse impact on the children than on the parents;

G. Each parent should openly, honestly, respectfully and regularly communicate with
the other parent to avoid misunderstandings. Parents should never argue about
the children in front of them;

H. Parents should discuss all differences between them regarding their separation,
financial issues and parenting decisions out of the children’s presence and their
hearing. Both parents shall always try to present a united front in handling any
problems with the children;

I. Children have the right to regular and continuing contact with both parents.
Parents should arrange all visitation and exchanges between themselves and not
through the children. The children should never be the messenger between the
parents;

J. Visitation plans should be kept and never cancelled unless absolutely necessary.
If plans change, children should be given an explanation, preferably in advance
and by the parent causing the cancellation;

K. Common courtesies (politeness, promptness, readiness, calling to notify if one is
going to be late) should always be observed during exchange of custody (e.g.,
picking up and dropping off children). These times can be very stressful on
children, so it is imperative that parents always behave as responsible adults;

L. Between visits, children should be encouraged to contact the absent parent by
letter, phone, text, email, Skype, etc., in a reasonably frequent and continuous
manner;

M. A parent’s access to children and child support are separate and distinct under the
law. Accordingly, a child’s right to access to his or her parent does not depend
upon the actual payment of court-ordered child support;
N. A child should never be the delivery person for support payments or other communication between the parties;

O. Both parents are entitled to participate in, and attend, all special activities in which their children are engaged, such as religious activities, school programs, sporting events and other extracurricular activities and programs;

P. Parents should share information concerning children’s activities and school information; and

Q. Even during dissolution of marriage proceedings, parents should share the responsibility for such tasks as taking children to doctor appointments unless otherwise prohibited by court order.

3.

Pursuant to Rule 104 of the Georgia Supreme Court, this Court has provided a certified copy of this IOP for filing with the Clerk of the Georgia Supreme Court.

It is so ORDERED, this ___ day of October, 2015.

"Signature"

Jeffrey S. Bagley, Chief Judge
Forsyth County Superior Court
Bell-Forsyth Judicial Circuit

David L. Dickinson, Judge
Forsyth County Superior Court
Bell-Forsyth Judicial Circuit

Philip C. Smith, Judge
Forsyth County Superior Court
Bell-Forsyth Judicial Circuit

Revised October 2, 2015
IN THE SUPERIOR COURT OF FORSYTH COUNTY
STATE OF GEORGIA

IN RE: INTERNAL OPERATING PROCEDURE 2015-03.

MEDIATION

Pursuant to Rule 104 of the Georgia Supreme Court, this Court enters the following Domestic Relations Action Internal Operating Procedure ("IOP") which does not deviate from the Superior Court Uniform Rules or other laws and does not constitute an experimental rule as contemplated by the Rules of the Georgia Supreme Court.

In accordance with Rule 106 of the Georgia Supreme Court, this Court submits that the purpose of this IOP is to describe to litigants, especially pro se litigants, their ongoing obligations to comply with the Court's mediation requirements as authorized by the Georgia Court-Connected Alternative Dispute Resolution Act (O.C.G.A. § 15-23-1 et seq.) and this judicial circuit's participation in the combined alternative dispute resolution program within the Ninth Judicial Administrative District.

Parties in contested domestic relations actions are required to attend mediation prior to any hearing or no later than ninety (90) days after service is perfected, whichever shall first occur. Unless the parties otherwise agree, in writing, at or before mediation, the parties shall be equally responsible for all mediation costs. Domestic relations actions for purposes of this IOP are defined for the respective Superior Court divisions as follows:

Division 1: All categories of domestic relations actions listed in O.C.G.A. § 19-1-1(a) except any contempt proceeding relating to the enforcement of a decree or order.

Division 2: All categories of domestic relations actions listed in O.C.G.A. § 19-1-1(a).

Division 3: All categories of domestic relations actions listed in O.C.G.A. § 19-1-1(a).

As to all Superior Court divisions, however, all actions arising under the Family Violence Act or stalking statute are exempt from the mediation requirements of this IOP.

Court-ordered mediation services may be obtained through the Ninth Judicial Administrative District Office of Dispute Resolution ("9th JAD ADR") located at 501 Candler Street, Gainesville, Georgia 30501 (Phone: (770) 535-6909). The parties may agree, however, to employ the assistance of a private mediator and to be responsible for all related fees and expenses associated therewith. Any such agreement must be in writing and filed with the Clerk.
of Superior Court with a courtesy copy faxed or emailed to the 9th JAD ADR office in advance of the scheduled mediation. Should the case involve allegations of past or current family violence, the parties shall notify the 9th JAD ADR mediation office or private mediation firm in advance of the scheduled mediation so that appropriate security measures may be employed.

Where the parties have attended mediation as set forth above prior to a temporary hearing, and either a mediated temporary order resulted or the parties proceeded to a later-scheduled temporary hearing, or other non-final hearing(s), the Court will consider the prior mediation to have been suspended and may still order the parties to re-convene the court-connected mediation at a later date, prior to a final hearing.

Pursuant to Rule 104 of the Georgia Supreme Court, this Court has provided a certified copy of this IOP for filing with the Clerk of the Georgia Supreme Court.

It is so ORDERED, this day of October, 2015.

Jeffrey S. Bagley, Chief Judge
Forsyth County Superior Court
Bell-Forsyth Judicial Circuit

David L. Dickinson, Judge
Forsyth County Superior Court
Bell-Forsyth Judicial Circuit

Philip C. Smith, Judge
Forsyth County Superior Court
Bell-Forsyth Judicial Circuit

Revised October 2, 2015
IN THE SUPERIOR COURT OF DEKALB COUNTY

STATE OF GEORGIA

PLAINTIFF/PETITIONER

vs.

DEFENDANT/RESPONDENT

CIVIL ACTION FILE NUMBER

STANDING ORDER
GOVERNING ALL DOMESTIC CASES

This Order binds the parties in the above-styled action, their agents, servants, employees and all other persons acting in concert with such parties:

1. In any domestic relations case pending as of January 1, 2007 or filed thereafter in which alimony, equitable division of property, child support or attorneys fees is an issue, either contested or uncontested, both parties must file a sworn financial affidavit in the form required by Uniform Superior Court Rule 24.2. The Office of Child Support Services is exempt from filing financial affidavits pursuant to the revised Uniform Superior Court Rule 24.2. These forms must be filed at least fifteen (15) days before any temporary or final hearing in any action for temporary or permanent child support, alimony, equitable division of property, modification of child support or alimony or attorney fees, the party requesting such hearing shall file with the Clerk of Court and serve upon the opposing party the affidavit specifying his or her financial circumstances. Within five (5) days of service, the opposing party shall file and serve the affidavit specifying his or her financial circumstances.

Additionally, when child support is at issue, the parties must also file the worksheet schedules in the form required by O.C.G.A. § 19-6-15. The parties shall comply with the responsibilities that are enumerated in the attached “Exhibit A” to this document to be served with the pleadings.

1 This is the first Standing Order under this Chief Judge Administration.
2.

In any domestic relations case in which the care, custody or support of a child under the age of 18 years of age is involved, whether contested or uncontested, all parties are required to successfully complete the Seminar for Divorcing Parents within 31 days of service of the original complaint upon the original defendant. Failure to successfully complete the Seminar as required shall subject the party to contempt or other sanctions, unless excused by the Court for good cause shown.

3.

In any domestic relations case in which the care, custody or support of a child under the age of 18 years of age is involved, whether contested or uncontested, all parties are required to either individually or jointly file a Parenting Plan pursuant to Uniform Superior Court Rule 24.10. The Parenting Plan should be tailored to fit the needs of each individual family but must at a minimum contain the information required by O.C.G.A. § 19-9-1. All plans shall be submitted in appropriate forms as set forth in Uniform Superior Court Rule 24.10.

4.

Attorneys or pro se litigants shall promptly advise the appropriate calendar clerk whenever it is apparent that physical placement of the child(ren) of the parties is contested.

5.

Where physical placement of the parties’ child(ren) is contested, the parties shall make a good faith effort to mediate these differences prior to any court hearing on custody or visitation issues. The purpose of said mediation is to reduce the tension between the parties and to seek an agreement assuring the child(ren) the proper amount of contact with each parent. The judge in a specific matter may waive this provision of the order when, in the exercise of his or her discretion, it is appropriate to do so.

6.

Two (2) hours of mediation services are available to the parties at the DeKalb County Courts Dispute Resolution Center, (404) 370-8194, at no charge. The mediator shall be a qualified person or agency designated or approved by the Court or by the Director of the DeKalb Courts Multi-Door Courthouse project. The mediation shall be conducted in accordance with the local Program Rule of Procedures for the DeKalb County Courts Multi-Door Courthouse Project.

7.
The parties and the mediator shall use their best efforts to effect a settlement of physical placement issues. With the consent of the parties, mediation may be expanded to include any contested issues.

8.

Each party is hereby enjoined and restrained from causing or permitting the minor child(ren) of the parties to be removed from the jurisdiction of this Court.

9.

Each party is hereby enjoined and restrained from doing, or attempting to do, or threatening to do, any act injuring, maltreating, vilifying, molesting or harassing the adverse party or the child(ren) of the parties.

10.

Each party is hereby enjoined and restrained from selling, encumbering, trading, contracting to sell or otherwise disposing of or removing from the jurisdiction of the Court any of the property belonging to the parties jointly or individually except in the ordinary course of business.

This Order shall apply to all domestic cases as defined by Uniform Superior Court Rule 24.1 and shall be a standing order until further action of this Court.

IT IS SO ORDERED.

This 3rd day of January, 2017.

Honorable Courtney L. Johnson
Chief and Administrative Judge
DeKalb County Superior Court
Stone Mountain Judicial Circuit
IN THE SUPERIOR COURT OF DEKALB COUNTY  
STATE OF GEORGIA  

NOTICE OF CHILD SUPPORT REQUIREMENTS  

You are hereby notified that in accordance with O.C.G.A. § 19-6-15 and Uniform Superior Court Rule 24.2, as amended, and the Standing Orders of the Stone Mountain Judicial Circuit, you must comply with the following requirements:  

The Domestic Relations Financial Affidavit (in substantially the form provided in U.S.C.R. 24.2, as amended), child support worksheets and child support schedules, in the form promulgated by the Georgia Child Support Commission¹ shall be filed and served on the opposing party:  

(a) at least fifteen (15) days prior to any temporary or final hearing;  
(b) at least ten (10) days prior to any court-ordered mediation; or  
(c) either with the answer or 30 days after service of the complaint, whichever first occurs, if no application for a temporary award is made and the parties do not attend mediation.  

In any case in which a party has previously filed and served the affidavit, worksheets, or schedules and thereafter amends, any such amendments shall be served upon the opposing party at least ten (10) days prior to the final hearing or trial and shall be filed with the Clerk of Court at or before trial. No social security numbers or account numbers shall be included in any document filed with the Court. Each account shall be specified by financial institution and a partial account number.  

Failure of any party to furnish financial information may subject a party to the penalties of contempt and may result in continuance of the hearing or other penalties.  

Any party who intends to submit a proposed worksheet and the accompanying schedules to the Court electronically shall do so in accordance with Rule 24.2, as amended, and shall provide the opposing party a copy of the submission, either electronically or by printed copy. Electronic submission is not a substitute for filing with the Clerk of Court.  

Attorney for Petitioner for Support or  
Petitioning Party, if unrepresented by counsel (Pro Se)  

¹ The requisite forms are available at www.ocse.dhr.georgia.gov/portal/site/DHR-OCSE/ and www.georgiacourts.org/cse.
STANDING ORDER NUMBER 3

IN RE: DOMESTIC RELATIONS ACTIONS

This Standing order is entered in conformity with O.C.G.A. §19-1-1-1 and Uniform Superior Court Rules 1.2 and 24.8, and shall apply to all domestic relations actions. A copy of this order shall be served on the adverse party along with the petition in every case. Should the petitioner fail or refuse to serve the adverse party with a copy of this standing order, the adverse party will not be bound, but, by filing the petition, the petitioner shall be bound.

(a) The term “domestic relations action” shall include any action for divorce, alimony, equitable division of assets and liabilities, child custody, child support, legitimation, annulment, determination of paternity, termination of parental rights in connection with an
adoption proceeding filed in a superior court, any contempt proceeding relating to enforcement of a decree or order in a prior domestic relations action, a petition in respect to modification of a decree or order in a prior domestic relations action, an action on a foreign judgment based on alimony or child support, and adoption. The term “domestic relations action” shall also include any direct or collateral attack on a judgment or order entered in any such action.

(b) Upon notice, this order binds the parties in such case, their agents, servants, and employees, and all other persons acting in concert with them, and such persons are hereby enjoined and restrained in the following particulars:

(1) From unilaterally causing or permitting the minor child or children of the parties to be removed from the jurisdiction of the Coweta Judicial Circuit (which is comprised of Carroll, Coweta, Heard, Meriwether and Troup Counties) without the permission of the court, except in an emergency which has been created by the other party to the action;

(2) From doing or attempting to do or threatening to do any act which injures, maltreats, vilifies, molests, or harasses or which may, upon judicial determination, constitute threats,
harassment, or stalking the adverse party or the child or children of the parties or any act which constitutes a violation of other civil or criminal laws of this state; and,

(3) From selling, encumbering, trading, contracting to sell, or otherwise disposing of or removing from the jurisdiction of the court, without the permission of the court, any of the property belonging to the parties except in the ordinary course of business or except in an emergency which has been created by the other party to the action.

(c) In the event custody or visitation of a child or children is put in issue by the pleadings, the parties shall, within thirty (30) days of the date of service of the petition, attend and complete a program designed to educate the parties regarding the effects of a divorce upon the children of the marriage. The following programs are approved by the Court: “Children of Divorce”, “Children of Divorce Education”, “Parents Forever”, “Parenting Through Divorce”, and “Positive Parenting Through Divorce”. The parties may also satisfy this requirement by attending some other similar program, whether within or outside the State of Georgia; provided, however, that before attending such other program, the party seeking approval shall file a motion requesting
approval, which motion shall include a syllabus setting forth the content of the program sought to be approved, and be accompanied by a proposed order with the option to allow the assigned judge to either grant the motion and approve the proposed program or to deny the motion. Proof of compliance with this paragraph shall be filed with the Clerk of Superior Court.

Upon written motion of a party, the standing order provided for in this Code section shall be reviewed by the court at any rule nisi hearing.

SO ORDERED this 12th day of Feb., 2014.

A. Quillian Baldwin, Jr.,
Chief Superior Court Judge

John T. Simpson,
Superior Court Judge

Dennis Blackmon,
Superior Court Judge

Jack Kirby,
Superior Court Judge

Bill Hamrick,
Superior Court Judge

Emory L. Palmer,
Superior Court Judge
DOMESTIC RELATIONS STANDING ORDER AND NOTICE REQUIREMENT

Pursuant to O.C.G.A. § 19-1-1(b), this Standing Order shall bind the parties in the above-styled action, their agents, servants, employees, and all other persons acting in concert with the parties in all domestic relations cases filed in this Court until and unless this Standing Order is specifically modified or superseded by further order of this Court. The PARTY FILING THE ACTION shall complete the above required information by inserting the names of the parties and the case number and shall file the order in the case. In cases where service is by the sheriff, process server, or publication, the PARTY FILING THE ACTION shall attach copies of this order to the original and service copies of the action. In cases where service is by acknowledgment, the PARTY FILING THE ACTION shall attach a copy of this order to the original complaint and give or mail a copy of the filed order to the opposing side.

1.

Each party is hereby enjoined and restrained from doing or attempting to do or threatening to do any act which injures, maltreats, vilifies, molests, or harasses or which may, upon judicial determination, constitute threats, harassment, or stalking the adverse party or the child or children of the parties or any act which constitutes a violation of other civil or criminal laws of this state.

2.

Each party is encouraged to refrain from making derogatory comments regarding any other party in the presence of the minor child or children of any party. Moreover, each party is discouraged from making any statement or taking any action which may unnecessarily place the minor child or children of any party “in the middle” of this divorce action (e.g., having a child deliver messages to another party regarding legal proceedings or sending child support payments to another party by a child, etc.). Each party shall be mindful of the routine of the minor child or children of the parties. No party shall change the day care or school, or the day care or school routine for the minor child or children other than to the extent the separation of the parties or other circumstances absolutely necessitate such a change. Each party is encouraged to continue all regularly scheduled extracurricular activities of the minor child or children.
3.
Each party is enjoined and restrained from unilaterally causing or permitting the minor child or children of the parties to be removed from the State of Georgia other than in the ordinary course of family activities, except in the event of an emergency. In non-emergency situations, the parent causing or permitting the minor child or children to leave the state in the ordinary course of a family activity shall convey to the other parent in writing the specific date(s), specific locations(s), and contact information (including address(es) and phone number(s)) for the child or children while they are outside the state.

4.
Each party is hereby enjoined and restrained from selling, encumbering, trading, contracting to sell, or otherwise disposing of or removing from the State of Georgia any of the property belonging to the parties except in the ordinary course of business or except in an emergency.

5.
Each party is herby enjoined and restrained from making any change to any policy of insurance (health, life, automobile, homeowner's or any other type of insurance) in force or being maintained at the time of the filing of this action without the express written consent of the other party.

6.
Each party is hereby advised that failure to follow any provision of this Standing Order, unless substantially justified, may result in sanctions or penalties as provided by statute, rule or authority of the Court, including a finding of contempt by the Court; taxation of costs or attorney’s fees; and/or the imposition of monetary or other sanctions.


Lawton E. Stephens, Chief Judge
Superior Courts, Western Judicial Circuit

Steve C. Jones, Judge
Superior Courts, Western Judicial Circuit

David R. Sweat, Judge
Superior Courts, Western Judicial Circuit
PRACTICE POINTERS AND TROUBLESHOOTING FOR THE RESIDENTIAL PRACTITIONER: MANDATORY MEMBERSHIP ASSOCIATIONS

Rachel E. Conrad, Dorough & Dorough LLC, Decatur

Katharine A. Dyott, Dorough & Dorough LLC, Decatur

Michael E. Leavey, Dorough & Dorough LLC, Decatur
PRACTICE POINTERS AND TROUBLE SHOOTING FOR THE RESIDENTIAL PRACTITIONER:
MANDATORY MEMBERSHIP ASSOCIATIONS

Real Property Law Institute, May 11, 2018

Lisa A. Crawford, Esq.
Rachel E. Conrad, Esq.
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PRACTICE POINTERS AND TROUBLE SHOOTING FOR THE RESIDENTIAL PRACTITIONER:
MANDATORY MEMBERSHIP ASSOCIATIONS

Lisa A. Crawford, Esq.
Rachel E. Conrad, Esq.
Katharine A. Dyott, Esq.
Michael E. Leavey, Esq.

Dorough & Dorough, LLC, Decatur, Georgia

I. Distinguishing "Common Law" Owners Associations, Property Owners Associations and Condominium Associations

1) "Common Law" Owners Associations.

"Common law" mandatory membership owners associations may be formed by recordation of a declaration of restrictive covenants in the land records of the county in which the intended community is located. The declaration should describe the real property intended to be bound thereby and should be executed by the owner(s) of the property. Typically, the association is established as a Georgia nonprofit corporation incorporated under the Georgia Nonprofit Corporation Code, O.C.G.A. §§ 14-3-101, et seq., and operates pursuant to articles of incorporation filed with the Secretary of State of Georgia and bylaws, which may be recorded along with the declaration of covenants. Owners associations formed in this manner are not subject to any applicable enabling statute regarding community associations, but rather are governed primarily by the general body of contracts law in Georgia (See Rice v. Lost Mountain Homeowners Assoc., Inc., 269 Ga. App. 351 (2004); Duffy v. Landings Association, Inc., 245 Ga. App. 104 (2000)) and the body of Georgia law specifically concerning covenants restricting the use and development of land (O.C.G.A § 44-5-60). Accordingly, these communities would not be subject to the Georgia Property Owners' Association Act, O.C.G.A. §§ 44-3-220, et seq., or to the Georgia Condominium Act, O.C.G.A. §§ 44-3-70, et seq.
Residential communities governed by common law owners associations typically are comprised of single-family detached lots or attached townhome lots that are subdivided pursuant to the laws of the county or municipality in which the community is located. Homeowners own fee simple title to the lot, including the dwelling thereon, the dirt below, and the air space above. Typically, the property located outside of individual lots, other than public roads, is conveyed to the owners association as "common property" for the common use and benefit of all homeowners. The association receives a tax bill for this property, and the costs associated with ownership of the common property, including taxes, insurance and maintenance, are generally included in common expense assessments that are allocated among the homeowners. Although the recorded declaration may provide for lien rights on each owner's lot to secure the obligation to pay common expense assessments, a paper lien should be filed in the applicable land records to put third parties on public record notice of the association's interest in the amounts owed.

2) Property Owners' Associations.

A property owners' association, as defined in O.C.G.A. § 44-3-221(16), is a mandatory membership homeowners association that has been affirmatively submitted to the provisions of the Georgia Property Owners' Association Act, O.C.G.A. §§ 44-3-220, et seq. ("POA Act"). Property owners' associations may be established in this manner upon the initial recordation of a declaration of covenants or the recordation of a duly adopted amendment to a previously recorded declaration of covenants that conforms that existing declaration to the mandatory provisions of the POA Act. (See Id. At § 44-3-222 and § 44-3-235). Submission to the POA Act is voluntary.

Property owners' associations are similar to common law homeowners associations in that the association typically is established as a Georgia nonprofit corporation under the Georgia Nonprofit Corporation Code and pursuant to Section 44-3-227 of the POA Act, and communities governed by property owners' associations typically are comprised of legally subdivided single-family detached lots or attached townhome lots.

Certain provisions of the declaration are reinforced by the POA Act. For example, Section 44-3-232 of the POA Act creates an automatic statutory lien against a delinquent owner’s lot for any sums owed to the association, and property owners’ associations need not file
liens at the county courthouse for unpaid assessments or other charges. Similarly, the POA Act provides, among other things, a statutory basis for the priority of association liens, joint liability of sellers and buyers, adoption of unrecorded rules and regulations regarding the community and the ability to collect interest, late charges and reasonable attorney's fees actually incurred in collection matters. (Id. at 44-3-232, 44-3-225 and 44-3-223). Section 44-3-225 of the POA Act provides that no lot owner other than the association shall be exempted from any liability for any assessment for any reason whatsoever, unless the owner of a lot for which a certificate of occupancy has not been issued requests that the lot expressly be made exempt from assessments and, in connection therewith, denied voting rights. Further, by statute, amendments to a declaration of covenants for a community submitted to the POA Act require the agreement of lot owners to which at least two-thirds (2/3) of the votes in the association pertain, or, if the developer has the right to annex additional property or appoint and remove officers and directors of the association, an amendment requires the agreement of the declarant and the lot owners to which at least two-thirds (2/3) of the votes in the association pertain, exclusive of any votes held by the declarant. (O.C.G.A § 44-3-226). Typically, developers and builders of a community do not submit their property to the POA Act at the onset in order to preserve any voting rights they may have as a lot owner during the time they may appoint and remove officers and directors of the association, to defer the obligation to pay assessment on unimproved lots, and to reserve rights to amend the declaration of covenants without approval of two-thirds (2/3) of the homeowners.

3) Condominium Associations.

A condominium association is a mandatory membership owners association that has been established pursuant to the provisions of the Georgia Condominium Act, O.C.G.A. §§ 44-3-70, et. seq. ("Condominium Act") and a declaration of condominium recorded in the land records where the real property is located. A condominium association must be established as a Georgia nonprofit corporation under the Georgia Nonprofit Corporation Code or, although it is seen less frequently, a Georgia business corporation. (O.C.G.A. § 44-3-100).

In a condominium, the homeowner owns fee simple title to a "unit", the boundaries of which are described and set forth in the declaration of condominium and on the recorded floor
plans prepared in accordance with the Condominium Act. Typically, a unit includes the interior area, including the dry wall, windows, doors, flooring, and the pipes, wires and other apparatus that exclusively serve the unit. The portions of the condominium located outside of the boundaries of a unit are "common elements", which typically include the building exterior, roofs, shared hallways, driveways, exterior parking areas, and landscaped areas. Each unit owner owns an undivided interest in the common elements based upon an allocation of such interest as set forth in the condominium declaration; and, together, all unit owners own the common elements as tenants in common. Accordingly, the condominium association typically does not own any real property in a condominium.

Section 44-3-96 of the Condominium Act provides, in pertinent part, that no tax or assessment shall be levied on the condominium as a whole, but only on individual condominium units. To that end, the condominium association should not receive a tax bill for any property within the condominium.

Ports of the common elements may be designated as limited common elements and reserved for the exclusive of use of a particular owner of a condominium unit as described in the condominium declaration. Examples of limited common elements may include: decks; patios; parking spaces; storage spaces; and other portions of the common elements that serve less than all of the units.

Certain provisions of the Condominium Act are similar to some of the provisions of the POA Act discussed above. For example, Section 44-3-109 of the Condominium Act creates an automatic statutory lien against a delinquent owner’s unit for any sums owed to the condominium association, and a condominium association does not need to file a lien at the county courthouse to perfect its rights to collect such amounts. The Condominium Act also provides a statutory basis for the priority of association liens, joint liability of sellers and buyers, adoption of unrecorded rules and regulations regarding the community, and prohibition, generally, of any exemption from the obligation to pay assessments. (Id. at 44-3-109, 44-3-80 and 44-3-76). Section 44-3-80 of the Condominium Act allows the declarant of a condominium to be exempt from payment of assessments for a limited time under certain circumstances, including payment of any deficit. Amendments to a declaration for a residential condominium must be approved by the agreement of unit owners to which at least two-thirds (2/3) of the votes
in the association pertain or, during the time declarant may add any additional property to the condominium or appoint officers and directors of the association, by agreement of the declarant and the unit owners to which at least two-thirds (2/3) of the votes in the association pertain, exclusive of any votes appurtenant to any units then owned by the declarant. (Id. at 44-3-93). The Condominium Act requires that certain disclosures be given to the first purchaser of a residential unit. (Id. at 44-3-111).

Real property must be submitted to the Condominium Act in order to create a condominium unit.

**Practice Pointer:** If you are involved in the purchase or financing of a single-family home, determine if the home is subject to covenants and if it is subject to the POA Act or the Georgia Condominium Act. If subject to the POA Act or the Georgia Condominium Act, closing attorneys, title examiners, purchasers or owners must contact the association for a statement of amounts owed to the association prior to concluding a purchase or refinance of the lot, or risk the existence of a lien. If the association is not contacted and paid out of the proceeds of the sale or refinance, the lien will not be released. As a result, the lien continues against the lot and may have priority over subsequent liens and mortgages.

II. Select Implications of Choosing a Condominium Form of Ownership Over a Subdivided Townhome Project

Just like you cannot judge a book by a cover, you cannot judge a community by the way it looks on the outside. The exterior of a legally subdivided townhome community may look similar to a condominium developed in a townhome configuration. Distinctions are hard to discern without reviewing the legal documents establishing the community. The differences between a townhome community that has been legally subdivided and one that is established as a condominium will likely affect how a residential practitioner approaches a closing and will also affect the expectations of the client, whether a unit purchaser or a developer, and the client's real estate broker. Even where a closing attorney represents the unit purchaser's lender and may not
be providing legal counsel to the purchaser, it is important to be able to recognize the differences in these types of developments and to understand the implications thereof.

As noted above, subdivided townhome units typically include the whole of the dwelling structure, including the foundation and roof, the dirt below the dwelling, the air above the dwelling and possibly some yard area. Condominium units, on the other hand, are bound by vertical and horizontal boundaries and typically include only interior space, for example from the face of the wall studs. (See e.g., O.C.G.A. § 44-3-83(b)), with the structural and exterior portions of the building comprising common elements that are owned by the unit owners as tenants in common, but maintained by the Association.

Where each owner of a townhome unit in a subdivided community may have an obligation to maintain the townhome unit's exterior, including the roof and foundation, and maintain casualty insurance on the structure, the structure and exterior of a condominium typically is part of the common elements that is maintained and insured by the condominium association. Obviously, communities where the owners association takes on maintenance and insurance obligations related to the individual units will have a larger operating budget and corresponding assessments.

Legally subdivided townhome projects and condominiums also differ in the manner in which they are established and the dwellings are sold. The Condominium Act sets out specific requirements for how to establish and develop a condominium, including requirements set out in the Condominium Act regarding the preparation and recordation of plats and plans (See O.C.G.A. § 44-3-83(a) and (b)); limitations on the timeframe for commencement of construction of improvements (O.C.G.A. § 44-3-83(a)); requirements regarding certain disclosures to be given to the first purchaser of a residential condominium unit, in a separately prepared disclosure package and in the purchase contract for a residential unit (See O.C.G.A. § 44-3-111 and § 44-3-117); and limitations on use of earnest money (O.C.G.A. § 44-3-112). The Condominium Act also places statutory time limits on a developer's ability to appoint and remove officers and directors of a condominium association (O.C.G.A. § 44-3-101), to remain exempt from assessments until homes are sold to new owners (O.C.G.A. § 44-3-80(d)), to annex additional property into the development (O.C.G.A. § 44-3-77(b)), and to amend the declaration (O.C.G.A. § 44-3-93).
A legally subdivided townhome project does not require recorded unit floor plans, nor does the developer need to comply with the provisions of the Georgia Condominium Act regarding disclosures to potential purchasers, mandatory contract provisions, or limitations on use of earnest money. Further, specific statutory limitations on the developer’s authority to control the homeowners association, remain exempt from common expense assessments until a home is sold to a new homeowner, expand the development by annexing additional property, and amend the declaration generally do not apply in the context of a legally subdivided project, except to the extent that the developer has elected to submit the community to the provisions of the POA Act.

In general, available financing for legally subdivided townhome units also differs from that available for condominium units. For example, currently, condominium projects must satisfy certain guidelines and procedures and obtain project approval in order to for the condominium units therein to be eligible for financing with loans insured by the Federal Housing Administration (FHA), the U.S. Department of Veterans Affairs (VA), and the Federal National Mortgage Association (FNMA). Several decades ago, these agencies required that legally subdivided, single-family detached residential developments comply with project eligibility standards and obtain project approval in order for individual homes to be qualified for such financing; however, such project approval requirements are no longer in place for legally subdivided developments.

Practice Pointers: Be careful about using the term "fee simple" when distinguishing townhomes from condominiums. Title to both subdivided townhome units and condominium units of any configuration may be owned in fee simple. Use of the term incorrectly may inadvertently promote a purchaser’s or broker’s misunderstanding of the nature of property and the rights of a homeowner.

The choice of whether to establish a residential project as a condominium or a subdivision is affected by a range of factors, which may include, applicable zoning requirements, setbacks, subdivision requirements, and, of course, the design and construction plans of the developer. If a project will be established as a condominium, the various provisions of the Condominium Act will affect the developer’s activities. If representing a developer,
understanding the client's intentions with respect to development, construction, sales and marketing of individual dwellings is of paramount importance to helping the client determine how to establish the governance structure for the community.

III. Legal Descriptions

The conveyance of a single-family detached home or townhome unit is typically made with a "short legal" description that references the conveyed property as identified on a recorded plat. Similarly, conveyances of a condominium unit should be made with a "short legal" description that references the conveyed property as described in the recorded declaration of condominium and the recorded condominium floor plans and may also reference the recorded condominium plat. Therefore, the subdivision plat or condominium plat, respectively, should contain legally sufficient information to describe the property being conveyed.

In the context of a single-family detached home, for example, the recorded subdivision plat should include metes and bounds calls around the lot on which the home is located, and additional metes and bounds calls that can be followed back to a legally valid point of commencement. Similarly, the recorded subdivision plat for townhome units should include metes and bounds calls around each townhome unit and additional metes and bounds calls that can be followed back to a legally valid point of commencement. The unit boundary may be routed around the footprint of the dwelling, as initially constructed, in which case the unit does not include any yard area, driveways or walkways. The yard area, driveways or walkways may be designated as limited common area designated for the exclusive use and enjoyment of a particular owner. In the alternative, the townhome unit boundary may run between adjacent townhome units, as constructed, and extend out to include a yard area, driveway or walkway serving the unit, in which case the townhome unit boundary may look similar to the boundary of a single family detached home. Where a townhome unit is conveyed by the footprint, a metes and bounds tie line extending from each building to a fixed point on the property boundary may be necessary to include in the plat in order to locate the townhome unit on the ground. Without such a tie line, the townhome building and all the units therein may be "floating islands" within the common area.
Some jurisdictions require recordation of a preliminary plat prior to construction of
townhome units that depicts the proposed location of the townhome units, generally, and
identifies the specific address or tax parcel identification number of each townhome unit in the
community or depicts the roadways and other infrastructure improvements as constructed.
Given that most preliminary plats of this nature are prepared prior to construction in order to
satisfy a local governmental requirement and not to convey title, such plats do not provide a
legally sufficient property description with metes and bounds calls as discussed above.
Accordingly, a recorded preliminary plat is not sufficient to properly convey title to a townhome
unit and should not be referenced in a conveyance document. If a subdivision plat showing the
as-built location of the townhome unit along with a tie line to a fixed point on the property
boundary has not been prepared or recorded, a survey of the townhome unit should be prepared
with the metes and bounds legal description of the townhome unit inserted in the conveyance
deed.

As discussed above, the legal description used in connection with conveyance of a
condominium unit may reference the recorded condominium plat. The recorded condominium
plat may look similar to a subdivision plat which identifies townhome units and, by statute,
should include a metes and bounds legal calls around the footprint of the building in which a unit
is located along with a metes and bounds tie-line extending from the building to a fixed point on
the property boundary. (See O.C.G.A. § 44-3-83(a)). However, a valid conveyance of a
condominium unit should also include the identifying number of the unit, the name of the
condominium, the name of the county or counties in which the condominium is located and the
deed book and page number where the first page of the condominium declaration is recorded.
(O.C.G.A. 44-3-73). The legal description for a conveyance of a condominium unit also should
include the recording information for the recorded floor plans for that particular unit, which floor
plans should comply with Section 44-3-83(b) of the Condominium Act.

The declaration of restrictive covenants or condominium declaration to which the
individual home or unit is subject should also contain a valid legal description to ensure that the
property is properly encumbered to the provisions thereof. In communities containing single
family detached homes and/or townhome units, the legal description may be attached as an
exhibit to the declaration as either a metes and bounds legal description taken from the
developer’s acquisition deed, boundary survey or owner’s title policy or, alternatively, a reference
to the recorded subdivision plat for the community. Often, the city or county where the
development occurs will require that the declaration be recorded as a condition to final plat
approval. If the declaration must be recorded as a condition to plat approval, it is not possible to
use a "short legal" description, and a metes and bounds legal description must be used. A "short
legal" description that references the subdivision plat, but leaves the recording information for
the subdivision plat blank in anticipation of plat recordation, is not a valid legal description and
may have the unintended result of the entire community not being properly subjected to the
provisions of the declaration.

Unlike a declaration of restrictive covenants, which allows for either a "short legal"
description or a metes and bounds description, Section 44-3-77 of the Condominium Act
specifically requires that a condominium declaration contain a metes and bounds legal
description of the submitted property. With the recent requirement that all condominium plats be
submitted for recordation electronically and the requirement in Section 44-3-74(c) of the
Condominium Act that the recording information for the condominium plat and condominium
floor plans be referenced in the condominium declaration, the recording information for the
condominium plat may be available prior to the recordation of the condominium declaration.
However, in order to comply with the Condominium Act, the condominium declaration should
still include a metes and bounds legal description of the submitted property. An exception to the
requirement from the Condominium Act for a metes and bounds description is where a
subcondominium is created within an existing condominium. (O.C.G.A. 44-3-117).

Practice Pointer: If conveying property with a "short legal" description that references a
recorded plat, review the recorded plat prior to closing to confirm that the property
description on the recorded plat is legally sufficient.

Review the legal description on the documents used in your transactions, whether a
conveyance deed, deed to secure debt, declaration of covenants or other document, to
confirm that it is complete.
Review the document to be sure you know the purpose of the exhibits. Some practitioners who prepare declaration of covenants describe all of the real property that may be annexed into the community on an exhibit attached to the declaration and the smaller portion of real property that actually is submitted to the declaration at the time of recordation within the body of the declaration.

IV. Transfer Fees; Estoppels.

Currently, the Condominium Act and the POA Act require an association subject thereto, upon written request from an owner or mortgagee or a prospective owner or mortgagee, to provide a statement setting forth "the amount of assessments past due and unpaid together with late charges and interest applicable thereto" against the property (O.C.G.A. § 44-3-109(d) and § 44-3-232(d)). The information contained in the statement is binding on the association, and failure to provide the statement in a timely manner may cause the association's lien for such assessments to become unenforceable. Requests for the estoppel statement must be in writing and delivered to the registered office of the association.

The Georgia legislature adopted HB 410 during the 2017-18 legislative session, which would amend the provisions of the Condominium Act and the POA Act regarding the issuance of an estoppel statement, by expanding the type of information that may be requested, authorizing requests to be delivered by a number of different means, including electronically, and setting limitations on certain fees charged, subject to an escalator based on the Consumer Price Index. The new legislation also applies similar requirements to most "common law" mandatory membership owners association. As of the beginning of April 2018, HB 410 is awaiting signature by the Governor. Attached to these materials is a copy of HB 410 as approved by the legislature and available at: http://www.legis.ga.gov/legislation/en-US/Display/20172018/HB/410.

Covenants requiring payment of transfer fees to a developer or similar third parties in connection with the conveyance of real property are generally disfavored and not enforceable in Georgia (O.C.G.A. § 44-14-15); however, condominium associations established under the Georgia Condominium Act, property owners' associations established under the Georgia Property Owners' Association Act, and "common law" owners associations that comply with the
provisions of the POA Act regarding the issuance of estoppel certificates may collect such fees. (Id. at 44-14-15(c)). Accordingly, the recorded governing documents of many community associations require payment of a "capital contribution" or similar transfer fee payable to the association upon the conveyance of a home to a new owner. Interestingly, it is not clear whether a transfer fee as allowed under O.C.G.A. § 44-14-15 would need to be disclosed in a statement issued by a "common law" owners associations strictly in accordance with O.C.G.A. § 44-3-232(d) to be collectable.

Practice Pointer: Look for amendments to declarations in established communities that may add a transfer fee or modify an existing transfer fee provision that changes the amount payable or applies a transfer fee to conveyances to subsequent purchasers.
Georgia General Assembly

2017-2018 Regular Session - HB 410
Condominiums; certain fees imposed on purchasers; provide for limits

Sponsored By
(1) Powell, Alan 32nd
(4) Hatchett, Matt 150th
(2) Clark, David 98th
(3) Teasley, Sam 37th

Sponsored In Senate By
Ligon, Jr., William 3rd

Committees
HC: Judiciary
SC: Judiciary

First Reader Summary
A BILL to be entitled an Act to amend Chapter 3 of Title 44 of the Official Code of Georgia Annotated, relating to regulation of specialized land transactions, so as to provide for limits on certain fees imposed on purchasers of condominiums and lots in a property owners' association; to provide for fees for statements of amounts owing to a property owners' association; to provide for the manner of providing such statements; to provide for expedited fees; to provide for related matters; to repeal conflicting laws; and for other purposes.

Status History
Apr/05/2018 - House Sent to Governor
Mar/29/2018 - House Agreed Senate Amend or Sub
Mar/23/2018 - Senate Passed/Adopted By Substitute
Mar/23/2018 - Senate Third Read
Mar/21/2018 - Senate Read Second Time
Mar/21/2018 - Senate Committee Favorably Reported By Substitute
Mar/01/2018 - Senate Read and Referred
Feb/28/2018 - House Passed/Adopted By Substitute
Feb/28/2018 - House Third Readers
Feb/15/2018 - House Committee Favorably Reported By Substitute
Feb/21/2017 - House Second Readers
Feb/17/2017 - House First Readers
Feb/16/2017 - House Hopper

Footnotes
2/28/2018 Modified Structured Rule

Votes
Mar/29/2018 - House Vote #857
Yea(155) Nay(3) NV(20) Exc(2)
Mar/23/2018 - Senate Vote #680
Yea(45) Nay(5) NV(1) Exc(5)
Feb/28/2018 - House Vote #596
Yea(153) Nay(18) NV(6) Exc(3)

Versions
HB 410/AP*
Sen ctee sub LC 29 8081ERS
Senate Floor Amendment 1 AM 29 2806
Senate Floor Amendment 2 AM 29 2805
LC 41 1439ERS/hcs
LC 41 1439ERS/ths
LC 28 8339ER/a
House Bill 410 (AS PASSED HOUSE AND SENATE)
By: Representatives Powell of the 32nd, Clark of the 98th, Teasley of the 37th, and Hatchett of the 150th

A BILL TO BE ENTITLED
AN ACT

To amend Chapter 3 of Title 44 of the Official Code of Georgia Annotated, relating to regulation of specialized land transactions, so as to provide for fees for statements of amounts owing to a condominium association, property owners' association, and similar associations that are not subject to the "Georgia Condominium Act" or "Georgia Property Owners' Association Act"; to provide for information required in a statement of account; to provide for the manner of providing such statements; to provide for fees for certain services; to provide for related matters; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

SECTION 1.

Chapter 3 of Title 44 of the Official Code of Georgia Annotated, relating to regulation of specialized land transactions, is amended by revising subsection (d) of Code Section 44-3-109, relating to lien for assessments, personal obligation of unit owner, notice and foreclosure, lapse, right to statement of assessments, and effect of failure to furnish statement, as follows:

"(d)(1) Any unit owner, mortgagee of a unit, person having executed a contract for the purchase of a condominium unit, or lender considering the loan of funds to be secured by a condominium unit shall be entitled upon request to a statement from the association or its management agent setting forth the amount of assessments past due and unpaid together with late charges and interest applicable thereto against that condominium unit. Such request shall be in writing, shall be delivered to the registered office of the association, and shall state an address to which the statement is to be directed. Failure on the part of the association to mail or otherwise furnish such statement regarding amounts due and payable at the expiration of such five-day period with respect to the condominium unit involved to such address as may be specified in the written request thereafter within five business days from the receipt of such request shall cause the lien for assessments created by this Code section to be extinguished and of no further force or
effect as to the title or interest acquired by the purchaser or lender, if any, as the case may be, and their respective successors and assigns, in the transaction contemplated in connection with such request. The information specified in such statement shall be binding upon the association and upon every unit owner. Payment of a fee not exceeding $10.00 may be required as a prerequisite to the issuance of such a statement if the condominium instruments so provided. Within ten business days after receiving a written or electronic request for a statement of account from a unit owner or the unit owner's designee, a mortgage lender, or a mortgagee of a unit or the designee of such mortgagee of a unit, the association shall issue a statement of account. Such request shall be considered received at the time it is sent if it is transmitted by electronic means or by hand delivery; within three days if transmitted by first-class mail; and upon delivery if transmitted by statutory overnight delivery. An association shall designate on its website or otherwise publish the name of a person or entity with a street or email address for receipt of a request for such statement of account. A statement of account shall be delivered by e-mail, electronic download, hand delivery, regular mail, or statutory overnight delivery to the requester on the date of the issuance of the statement of account.

(2) A statement of account shall be completed by an officer, authorized agent, or authorized representative of the association, including any authorized agent, authorized representative, or employee of a management company authorized to complete such statement of account on behalf of the board or association. A statement of account shall contain all of the following information regarding the property for which the transaction is to occur:

(A) Date of issuance;
(B) Name of the unit owner or owners as reflected in the books and records of the association;
(C) Unit designation and address;
(D) Attorney's name and contact information if the account is delinquent and has been turned over to an attorney for collection;
(E) Fee for the preparation and delivery of the statement of account;
(F) Name of the requester;
(G) Assessment and other information including:
   (i) The amount of the regular periodic assessment levied against the unit and the frequency of payment;
   (ii) The date through which the regular periodic assessment has been paid;
   (iii) The due date for the next installment of the regular periodic assessment and the amount due;
(iv) An itemized list of all assessments, special assessments, and other moneys owed to the association on the date of issuance by the unit owner for a specific unit; and
(v) An itemized list of any additional assessments, special assessments, and other moneys that are scheduled to become due for each day after the date of issuance for the effective period of the statement of account. In calculating the amount that is scheduled to become due, the association shall assume that any delinquent amount will remain delinquent during the effective period of the statement of account; and
(H) The signature of an officer or authorized agent of the association.

(3) Upon request, the following additional information shall be provided:
(A) Any open violation of any rule or regulation notice to the unit owner in the association's official records;
(B) A list of and contact information for all other associations of which the unit owner is a member by virtue of ownership of the unit;
(C) A copy of the current covenants and bylaws of the association and a copy of the rules and regulations adopted by the association;
(D) A copy of the association's certificate of insurance for any insurance provided by the association to the unit or the name, address, and telephone number of the association's insurance provider of any such insurance; and
(E) Assigned parking or garage space number, as reflected in the books and records of the association, as applicable.

(4) A statement of account that is hand delivered or sent by electronic means shall have a 30 day effective period. A statement of account that is sent by regular mail or statutory overnight delivery shall have a 35 day effective period. If additional information is needed or a mistake related to the statement of account becomes known to the association or its agent within the effective period, an amended statement of account may be delivered and become effective provided that a sale or refinancing of the unit has not been completed during the effective period. An amended statement of account shall be delivered on the date of issuance and a new 30 day or 35 day effective period, as applicable, shall begin on such date.

(5) An association shall waive the right to collect any moneys owed in excess of the amount specified in the statement of account from any person who in good faith relies upon such statement of account and from the person's successors and assigns. Any person other than a unit owner who relies on a statement of account shall receive the benefits and protection thereof.

(6) The association or its agent's failure to:
(A) Furnish a statement of account as requested and in accordance with this subsection shall result in the association's forfeiture of its fee for the preparation and delivery of the statement of account; and

(B) Disclose the correct amount of an assessment, a special assessment, or other moneys owed to the association shall result in the loss of any obligation of a buyer to pay the undisclosed sum due and loss of the lien right for the incorrect reported assessment, special assessment, or other money owed to the association.

(7)(A) An association or its authorized agent may charge a reasonable fee for the preparation and delivery of a statement of account which shall not exceed $100.00. When additional information is requested as provided in paragraph (3) of this subsection, the association or its authorized agent may charge an additional fee not to exceed $50.00. If a statement of account is requested on an expedited basis and delivered within three business days after the request, the association or its agent may charge an additional fee of $50.00. If an amended statement of account is requested, an association or its authorized agent may charge a fee of not more than $25.00 for such amended statement of account.

(B) The fees specified in this paragraph shall be adjusted every five years by the total percentage of inflation or deflation during such five-year period, as determined by the Consumer Price Index for all urban consumers, U.S. city average, all items, as published by the Bureau of Labor Statistics of the United States Department of Labor, in increments to the nearest dollar.

SECTION 2.

Said chapter is further amended by revising subsection (d) of Code Section 44-3-232, relating to assessments against lot owners as constituting lien in favor of association, additional charges against lot owners, procedure for foreclosing lien, and obligation to provide statement of amounts due, as follows:

"(d)(1) Any lot owner, mortgagee of a lot, person having executed a contract for the purchase of a lot, or lender considering the loan of funds to be secured by a lot shall be entitled upon request to a statement from the association or its management agent setting forth the amount of assessments past due and unpaid together with late charges and interest applicable thereto against that lot. Such request shall be in writing, shall be delivered to the registered office of the association, and shall state an address to which the statement is to be directed. Failure on the part of the association, within five business days from the receipt of such request, to mail or otherwise furnish such statement regarding amounts due and payable at the expiration of such five-day period with respect to the lot involved to such address as may be specified in the written request therefor shall
cause the lien for assessments created by this Code section to be extinguished and of no
further force or effect as to the title or interest acquired by the purchaser or lender, if any,
as the case may be, and their respective successors and assigns, in the transaction
contemplated in connection with such request. The information specified in such
statement shall be binding upon the association and upon every lot owner. Payment of
a fee not exceeding $10.00 may be required as a prerequisite to the issuance of such a
statement if the instrument so provides. Within ten business days after receiving a
written or electronic request for a statement of account from a lot owner or the lot owner's
designee, a mortgage lender, or a mortgagee of a lot or the designee of such mortgagee
of a lot, the board shall issue a statement of account. Such request shall be considered
received at the time it is sent if it is transmitted by electronic means or by hand delivery;
within three days if transmitted by first-class mail; and upon delivery if transmitted by
statutory overnight delivery. The board shall designate on its website or otherwise
publish the name of a person or entity with a street or email address for receipt of a
request for such statement of account. A statement of account shall be delivered by
e-mail, electronic download, hand delivery, regular mail, or statutory overnight delivery
to the requester on the date of the issuance of the statement of account.

(2) A statement of account shall be completed by an officer, authorized agent, or
authorized representative of the board, including any authorized agent, authorized
representative, or employee of a management company authorized to complete such
statement of account on behalf of the board. A statement of account shall contain all of
the following information regarding the property for which the transaction is to occur:

(A) Date of issuance;
(B) Name of the lot owner or owners as reflected in the books and records of the board;
(C) Lot designation and address;
(D) Attorney's name and contact information if the account is delinquent and has been
turned over to an attorney for collection;
(E) Fee for the preparation and delivery of the statement of account;
(F) Name of the requester;
(G) Assessment and other information including:
   (i) The amount of the regular periodic assessment levied against the lot and the
       frequency of payment;
   (ii) The date through which the regular periodic assessment has been paid;
   (iii) The due date for the next installment of the regular periodic assessment and the
       amount due;
   (iv) An itemized list of all assessments, special assessments, and other moneys owed
to the board on the date of issuance by the lot owner for a specific lot; and
(v) An itemized list of any additional assessments, special assessments, and other moneys that are scheduled to become due for each day after the date of issuance for the effective period of the statement of account. In calculating the amount that is scheduled to become due, the board shall assume that any delinquent amount will remain delinquent during the effective period of the statement of account; and

(H) The signature of an officer or authorized agent of the board.

(3) Upon request, the following additional information shall be provided:

(A) Any open violation of any rule or regulation notice to the lot owner in the board's official records;

(B) A list of and contact information for all other associations of which the lot owner is a member by virtue of ownership of the lot;

(C) A copy of the current covenants and bylaws of the board and a copy of the rules and regulations adopted by the board;

(D) A copy of the board's certificate of insurance for any insurance provided by the board to the lot or the name, address, and telephone number of the board's insurance provided of any such insurance; and

(E) Assigned parking or garage space number, as reflected in the books and records of the board, as applicable.

(4) A statement of account that is hand delivered or sent by electronic means shall have a 30 day effective period. A statement of account that is sent by regular mail or statutory overnight delivery shall have a 35 day effective period. If additional information is needed or a mistake related to the statement of account becomes known to the board or its agent within the effective period, an amended statement of account may be delivered and become effective provided that a sale or refinancing of the lot has not been completed during the effective period. An amended statement of account shall be delivered on the date of issuance and a new 30 day or 35 day effective period, as applicable, shall begin on such date.

(5) A board shall waive the right to collect any moneys owed in excess of the amount specified in the statement of account from any person who in good faith relies upon such statement of account and from the person's successors and assigns. Any person other than a lot owner who relies on a statement of account shall receive the benefits and protection thereof.

(6) The board or its agent's failure to:

(A) Furnish a statement of account as requested and in accordance with this subsection shall result in the board's forfeiture of its fee for the preparation and delivery of the statement of account; and
(B) Disclose the correct amount of an assessment, a special assessment, or other moneys owed to the board shall result in the loss of any obligation of a buyer to pay the undisclosed sum due and loss of the lien right for the incorrect reported assessment, special assessment, or other money owed to the board.

(7)(A) A board or its authorized agent may charge a reasonable fee for the preparation and delivery of a statement of account which shall not exceed $100.00. When additional information is requested as provided in paragraph (3) of this subsection, the board or its authorized agent may charge an additional fee not to exceed $50.00. If a statement of account is requested on an expedited basis and delivered within three business days after the request, the board or its agent may charge an additional fee of $50.00. If an amended statement of account is requested, a board or its authorized agent may charge a fee of not more than $25.00 for such amended statement of account. (B) The fees specified in this paragraph shall be adjusted every five years by the total percentage of inflation or deflation during such five-year period, as determined by the Consumer Price Index for all urban consumers, U.S. city average, all items, as published by the Bureau of Labor Statistics of the United States Department of Labor, in increments to the nearest dollar."

SECTION 3.

Said chapter is further amended by adding a new Code section to Article 7, relating to specialized land transactions, to read as follows:

"44-3-251.

(a)(1) As used in this Code Section, the term 'association' means a corporation or voluntary entity formed for the purpose of exercising the powers of a homeowners' association or property owners' association governing a common interest community that is not subject to Article 3 or 6 of this Chapter.

(2) This Code section shall apply to a common interest community subject to covenants restricting land to certain uses affecting planned subdivisions containing no fewer than 15 individual lots and requiring mandatory assessment payments to an association governing such subdivision, which subdivision is not subject to Article 3 or 6 of this chapter.

(b) Within ten business days after receiving a written or electronic request for a statement of account from a lot owner or the lot owner's designee, a mortgage lender, or a mortgagee of a lot or the designee of such mortgagee of a lot, the association shall issue a statement of account. Such request shall be considered received at the time it is sent if it is transmitted by electronic means or by hand delivery; within three days if transmitted by first-class mail; and upon delivery if transmitted by statutory overnight delivery. An
association shall designate on its website or otherwise publish the name of a person or entity with a street or email address for receipt of a request for such statement of account. A statement of account shall be delivered by e-mail, electronic download, hand delivery, regular mail, or statutory overnight delivery to the requester on the date of the issuance of the statement of account.

(c) A statement of account shall be completed by an officer, authorized agent, or authorized representative of the association, including any authorized agent, authorized representative, or employee of a management company authorized to complete such statement of account on behalf of the board or association. A statement of account shall contain all of the following information regarding the property for which the transaction is to occur:

(1) Date of issuance;
(2) Name of the lot owner or owners as reflected in the books and records of the association;
(3) Lot designation or address;
(4) Attorney's name and contact information if the account is delinquent and has been turned over to an attorney for collection;
(5) Fee for the preparation and delivery of the statement of account;
(6) Name of the requester;
(7) Assessment and other information including:
   (A) The amount of the regular periodic assessment levied against the lot and the frequency of payment;
   (B) The date through which the regular periodic assessment has been paid;
   (C) The due date for the next installment of the regular periodic assessment and the amount due;
   (D) An itemized list of all assessments, special assessments, and other moneys owed to the association on the date of issuance by the lot owner for a specific lot; and
   (E) An itemized list of any additional assessments, special assessments, and other moneys that are scheduled to become due for each day after the date of issuance for the effective period of the statement of account. In calculating the amount that is scheduled to become due, the association shall assume that any delinquent amount will remain delinquent during the effective period of the statement of account; and
(8) The signature of an officer or authorized agent of the association.

(d) Upon request, the following additional information shall be provided:

(1) Any open violation of any rule or regulation notice to the lot owner in the association's official records;
(2) A list of and contact information for all other associations of which the lot owner is
a member by virtue of ownership of the lot;
(3) A copy of the current covenants and bylaws of the association and a copy of rules and
regulations adopted by the association;
(4) A copy of the association's certificate of insurance for any insurance provided by the
association to the lot or the name, address, and telephone number of the association's
insurance provider of any such insurance; and
(5) Assigned parking or garage space number, as reflected in the books and records of
the association, as applicable.

(e) A statement of account that is hand delivered or sent by electronic means shall have
a 30 day effective period. A statement of account that is sent by regular mail or statutory
overnight delivery shall have a 35 day effective period. If additional information is needed
or a mistake related to the statement of account becomes known to the association or its
agent within the effective period, an amended statement of account may be delivered and
become effective provided that a sale or refinancing of the lot has not been completed
during the effective period. An amended statement of account shall be delivered on the
date of issuance and a new 30 day or 35 day effective period, as applicable, shall begin on
such date.

(f) An association shall waive the right to collect any moneys owed in excess of the
amount specified in the statement of account from any person who in good faith relies upon
such statement of account and from the person's successors and assigns. Any person other
than a lot owner who relies on a statement of account shall receive the benefits and
protection thereof.

(g) The association or its agent's failure to:

(1) Furnish a statement of account as requested and in accordance with this subsection
shall result in the association's forfeiture of its fee for the preparation and delivery of the
statement of account; and

(2) Disclose the correct amount of an assessment, a special assessment, or other moneys
owed to the association shall result in the loss of any obligation of a buyer to pay the
undisclosed sum due and loss of the lien right for the incorrect reported assessment,
special assessment, or other money owed to the association.

(h)(1) An association or its authorized agent may charge a reasonable fee for the
preparation and delivery of a statement of account which shall not exceed $100.00.
When additional information is requested as provided in paragraph (3) of this subsection,
the association or its authorized agent may charge an additional fee not to exceed $50.00.
If a statement of account is requested on an expedited basis and delivered within three
business days after the request, the association or its agent may charge an additional fee
of $50.00. If an amended statement of account is requested, an association or its authorized agent may charge a fee of not more than $25.00 for such amended statement of account.

(2) The fees specified in this paragraph shall be adjusted every five years by the total percentage of inflation or deflation during such five-year period, as determined by the Consumer Price Index for all urban consumers, U.S. city average, all items, as published by the Bureau of Labor Statistics of the United States Department of Labor, in increments to the nearest dollar."

SECTION 4.

All laws and parts of laws in conflict with this Act are repealed.
Wires, Liars and Unscrupulous Buyers: What to Do When You’re the Victim of Real Estate Fraud
Vanessa E. Goggans
WIRES, LIARS AND UNSCRUPULOUS BUYERS

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WIRES, LIARS AND UNSCRUPULOUS BUYERS

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Atlanta, GA

It is difficult to compile an exhaustive list of the types of fraud one sees in modern in real estate practice, because as technology rapidly evolves, so do the scams. For most people in the real estate industry, when we think of fraud, however, the first type to come to mind is wire fraud, which has become a national epidemic. The second type is mortgage fraud, which many experts credit as a major contributor to the burst of the housing bubble in the early 2000’s, blaming loans made to borrowers with unsubstantiated incomes and low credit ratings for high foreclosure rates. A discussion on fraud in real estate can also include a wide variety of schemes not only in the sale context, but also in the leasing arena.

Wire Fraud
To understand the various types of wire fraud, it is important to have the appropriate vocabulary. “Spear Phishing,” for example, is the fraudulent practice of sending emails ostensibly from a known or trusted sender in order to induce targeted individuals to reveal confidential information.

The most common real estate scam involving spear phishing begins when seemingly legitimate wire transfer instructions are received from someone who appears to have authority to direct funds in a real estate transaction. The email could be sent from a buyer's real estate agent with instructions on where the buyer should send a down payment, or from a seller or seller's counsel to the closing attorney. In this type of fraud, the email is fraudulent, however, and will have actually been sent by someone who has “spoofed” the correct party’s email address, or hacked their actual email account. The “spoofer” will bolster their credibility by gathering information about the legitimate party from the internet, so that if the intended victim attempts to verify the information by contacting the spoofer, the spoofer can fake the identity enough for the victim to be convinced. The innocent victim relies on the instructions and sends the money to the criminal’s account. Upon receipt of the wired funds, the thief may test the transaction via a transfer to another bank or an over-the-counter withdrawal that is typically under the $10,000 reporting threshold. If that transfer or withdrawal is successful, the remaining funds usually disappear within 24 hours.

Leasing Fraud
Just as the internet provides an easy platform for fraudsters to victimize home purchasers, it also makes it easy for the bad guys to take advantage of would-be renters.
Hijacked Ads
In this form of fraud scammers copy a legitimate rental listing by changing the contact information of the owner or leasing agent, and placing the modified ad on another website. The fraudulent ad will contain information about a real rental, but the contact information will lead to someone without actual authority to lease the property. The scammer collects money from the victim, and the victim usually does not discover the fraud until they try to move in.

Phantom Rentals
This is the “too good to be true” rental. A scammer creates a fake listing for a property that is not for rent, or perhaps, does not exist at all. The listings advertise highly attractive terms and amenities to attract hapless renters. If the fraud is successful, the scammer gets the renter’s money before the fraud is discovered.

Renting a Foreclosed Home
Occasionally desperate homeowners on the brink of foreclosure will rent out their homes, collecting security deposits and rent and pocketing the cash instead of forestalling the foreclosure. When the foreclosure actually occurs, the renter loses their security deposit and has to scramble to find a new place to live.

Application “Denied”
This form of fraud may involve a hijacked ad or a phantom rental, but here, the fraudster collects a bogus “application fee” from the victim for services the fraudster never intends to deliver.

Mortgage Fraud
Mortgage lenders and borrowers have suffered hundreds of millions of dollars in losses due to residential mortgage fraud in America. By some estimates, the number of suspected fraudulent real estate loan transactions has increased over 500% in the last decade. Besides the monetary loss, mortgage fraud has caused:

- deterioration of neighborhoods
- inflated property values in neighborhoods
- significant increases in property taxes.
- a high foreclosure rate

Interesting fact: According to the FBI, 80% of all mortgage fraud involves a real estate insider (Agent, Appraiser, Mortgage Broker, Loan Originator, or Banker).

Primary Residence vs. Investment Property
Interest rates are generally lower for a primary residence than for an investment property. A borrower in this most common scheme buys one or more pieces of property in a short period of time using his or her own credit but falsely claiming each property as his or her principal residence. The fraud goes undetected because of delays in reporting the new loans to credit agencies, because the borrower uses several different lenders and/or because the lenders from whom the borrower gets money do not regularly make reports to credit agencies. The damage
depends on what happens after the closing. One reason interest rates are higher for investors is that the default rate is higher for investor loans.

**Foreclosure Rescue Programs**

Not all Foreclosure Rescue Programs are scams, but the staggering increase in foreclosure rates during the recent Great Recession gave rise to a new opportunity for con artists. In the typical foreclosure rescue scam, a “counselor” promises immediate relief from the delinquent loan by urging the homeowner to transfer the legal interest in the property to the counselor while the counselor “assumes” the obligation to make loan payments while promising to find a third party buyer or negotiate a short sale with the lender. In many cases, the investor never intends to do either and simply puts a renter in the property, pocketing the rent until a foreclosure takes place.

Another variation involves the foreclosure counselor promising to negotiate a modification or short sale with the lender in exchange for a hefty fee, the failing to deliver any service. In the State of Georgia, only a licensed mortgage loan officer may give advice on loan terms, or a lawyer who is giving advice in conjunction with a broader representation of the client.

**Source of Funds -Whose Money is it, Anyway?**

With most loans, it is important to the lender that the underwriter verifies the source of the funds the borrower will use to pay for the property and mortgage loan. Most underwriters will not seek to confirm the source of funds farther back than three months prior to the closing. Coincidentally, three months is the approximate amount of time it takes to build a small house, at least in the Atlanta market.

Some sellers have devised a crafty inducement to purchasers to buy their homes by taking advantage of the three month rule. In this scheme, the seller places a large sum of money in a separate account under the purchaser’s name. The seller has the purchaser sign an acknowledgment that this money is a “grant” to be used by the purchaser for the purchase of the seller’s property only. The purchaser then signs a contract to purchase the home for a sales price that has been increased to allow for the large sum of money. The purchaser applies for a mortgage loan in an amount sufficient to cover the difference between the grant and the purchase price plus closing costs. The existence of the account is disclosed to the lender, but not the fact that the money does not actually belong to the purchaser. The purchaser acquires the house with essentially no money down, the seller is repaid through the sales proceeds, and the unsuspecting lender invests in a piece of property that is probably not worth the purchase price with a purchaser/borrower who is not qualified to borrow the money.

**Flip Transactions**

A flip transaction is one in which a piece of property is purchased and then resold immediately or shortly thereafter. Flips are not always illegal, but they should raise flags and trigger additional inquiry by the real estate professionals involved.

Flip transactions are potentially harmful when the second purchase price significantly exceeds the first purchase price, especially when there has been no remarkable improvement or value added to the property in the interim. Such a transaction suggests that the property is not worth the higher price and that the appraisal, and, therefore, the loan to value ratio, is inaccurate.
Payments to “Repairmen”
Payments to repairmen or third party vendors for improvements or repairs are not uncommon. They are frequently requested by purchasers and sellers as a means of providing for items not completed by the closing date. Most of these requests are innocent and legitimate, but they can also be a method of perpetrating fraud.

The scheme often involves an artificial inflation of the purchase price beyond the market value so that the contractor can be paid to improve the property. The harm in this comes when the money is not actually used for the improvements, so that the appraisal, loan amount and purchase price are based on a value that does not exist.

This scheme can be accomplished with or without the purchaser’s cooperation. The purchaser is harmed when he/she tries to resell the property and finds it is not worth what he/she thought it was. The lender is harmed if the borrower defaults on the loan and the lender finds the property is not worth what the lender thought it was worth.

Because of the dangers inherent in allowing such third party payments, many lenders strictly forbid the practice, even when it is being used legitimately.

“Straw Man” Scheme
A “straw man” is an individual who is used as a front to the real purchaser of property. For a fee, a straw man’s credit and identity is used by the criminal to acquire a mortgage loan. The straw man subsequently disappears while the true purchaser of the property absconds with the equity in the property in a subsequent refinance, or lives in the property for a short time without ever making payments on the loan.

Daycare Scam
In this scam, a criminal procures the Social Security number and other identifying information of a child from a school or daycare. A credit file is built by soliciting credit inquiries and opening accounts with falsified documents. The victim is unlikely to notice the theft until many years later when he or she reaches adulthood. By then the criminal has used the false ID for many transactions.

Two Settlement Statements, One Purchaser
In this scenario, two settlement statements are prepared for the same transaction. The true purchase price is disclosed on the settlement statement provided to the seller, but the lender is given a settlement statement that depicts a much higher purchase price. The difference between the amount actually disbursed to the seller and the amount allegedly disbursed according to the fraudulent settlement statement is then taken by the participants in the fraud.

Falsified Deeds
Fraudsters forge and file quitclaim deeds transferring property with a large amount of equity, typically unoccupied property, such as bank owned, from the rightful owners to straw sellers. They then conduct a sale to a straw buyer and share the proceeds. A variation on this scheme is when criminals file forged satisfactions of mortgages and then apply for additional mortgages on the property to draw out equity.
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Similar Names
The criminal is able to sell property by providing a picture ID with a name similar to the true owner’s name.

Who Enforces Anti-mortgage Fraud Laws?

Federal Enforcement
The F.B.I. has primary enforcement responsibility for federal mortgage fraud prosecutions and has substantially increased the number of local mortgage fraud task forces around the United States since October 2008. Their mandate is to limit the illegal misstatement, misrepresentation or omission of material facts on mortgage applications.

Mortgage fraud is punishable by up to 30 years in federal prison or $1,000,000 fine, or both. Some of the applicable Federal criminal statutes which may be charged in connection with Mortgage Fraud include:

- 18 U.S.C. § 1001 - Statements or entries generally
- 18 U.S.C. § 1010 - HUD and Federal Housing Administration Transactions
- 18 U.S.C. § 1014 - Loan and credit applications generally
- 18 U.S.C. § 1341 - Frauds and swindles by Mail
- 18 U.S.C. § 1342 - Fictitious name or address
- 18 U.S.C. § 1343 - Fraud by wire
- 18 U.S.C. § 1344 - Bank Fraud
- 42 U.S.C. § 408(a) - False Social Security Number

A person commits “Mortgage Fraud” when the person:

1. knowingly makes any deliberate misstatement, misrepresentation or omission during the mortgage lending process with the intention that it be relied on by a mortgage lender, borrower or any other party to the mortgage lending process;
2. knowingly uses or facilitates the use of the information with the intention that it be relied on by the lender, borrower or other party to the lending process;
3. receives any proceeds or any other funds in connection with a residential mortgage closing that such person knew resulted from a violation of (1) or (2) above;
4. conspires to violate any of the provisions of paragraph (1) (2) or (3) above; or
5. files or causes to be filed with the registrar of deeds in any county any document such person knows to contain deliberate misstatements, misrepresentation or omission.

Georgia (State Level) Enforcement
The “Georgia Residential Mortgage Fraud Act” was enacted to:
• Define the criminal offense of residential mortgage fraud;
• To provide penalties and authorize District Attorneys and the Attorney General to investigate and prosecute cases of Residential Mortgage Fraud;
• To provide for forfeiture of real and personal property;
• To include Residential Mortgage Fraud under the “Georgia RICO Act” so as to include the activities associated with mortgage fraud within racketeering activities.

Punishment for Violation of the Georgia Act:

• Any person violating the Act shall be guilty of a felony punishable by imprisonment of not less than 1 year or more than 10 years, by a fine not to exceed $5,000.00, or both.
• If a violation of this article involves engaging or participating in a pattern of Residential Mortgage Fraud or a conspiracy or endeavor to engage or participate in a pattern of Residential Mortgage Fraud, the violation shall be punishable by imprisonment for not less than 3 years nor more than 20 years, by a fine not to exceed $100,000.00, or both.
• Each residential property transaction subject to a violation of this article shall constitute a separate offense and shall not merge with any other crimes.

Red Flags

For sale transactions:

• Significant sales price adjustments not supported by comparable market data
• Required use of a particular appraiser
• Down payment assistance programs that charge excessive fees or put restrictions on how their participation is reported on the HUD1
• Large Seller Contributions, possibly for large decorator allowances or improvement allowances
• Mortgage brokers who refer pre-qualified purchasers to agents
• Questions as to whether purchaser will occupy the property – is purchaser retaining his current residence, or is the commute to employment from new home unrealistic?
• Purchaser has very limited credit history or repayment of prior loan did not include any interest payments
• Unrealistic income for occupation or a recent drastic increase in income due to a raise or new job

• Sales contract, appraisal and title work disagree with respect to Seller’s name, and the appraisal shows property or comparables previously sold in past year.

• Fees are required to be paid upfront.

• You receive a request to close a new deal last minute from a new, unfamiliar referral source.

• You receive a request to refund money (such as earnest money) for funds that have not had an opportunity to clear your escrow account.

• Email addresses appear slightly “off,” or emails contain incorrect spelling or grammatical errors.

• Significant transaction details, such as wiring instructions, change last minute.

For Rental Transactions:

• The leasing agent requests that the deposit, application fee, or first month’s rent be wired—this is unusual in the rental context, and it is very difficult to get the wire back once it is sent.

• The landlord or leasing agent requires a security deposit or first month’s rent before meeting, walking the property or signing a lease.

• The owner or leasing agent claims to be out of the country but has a local person to handle details like handing off keys. This isn’t per se fraud, but once a renter has sent their money overseas, it is unlikely the local agent will materialize.

How to Minimize the Potential for Falling Victim to Fraud

• Follow ALTA Best Practices. Regularly update your safety measures and security policies and have a professional review computer safeguards, such as firewalls, password policies, spam filters, and staff training programs.

• Educate your clients. Have discussions with lender, agent, buyer and seller clients about how to protect themselves. Consider adding a warning about wire fraud to your email signature.
• Look for duplicate sale or rental listings involving the property involved and make sure they are consistent.

• Avoid overconfidence and the “it couldn’t happen to me” mentality

• Do not allow a last minute increase in the purchase price so funds can be taken away at closing.

• Do not be a party to a closing with more than one closing statement.

• Do not send money overseas, at least not until the property has been delivered.

• When one or both of the purchasers or parties to a lease is signing the contract or lease remotely, insist on seeing a copy of the government issued picture ID, front and back. It’s also not a bad practice to call the person(s) on the contract to make sure they were the ones who actually signed it. If there is any doubt, do a little internet sleuthing to determine the identity of the parties involved.

• Do not allow the client to buy or lease the property sight unseen. Beware the buyer or lessee who agrees to do so.

• Take notice of those present at the closing table and question those who do not seem to have a legitimate purpose there.

• Insist that your client buy title insurance and have them sign an acknowledgement that you advised them to do so if they decline.

• Check foreclosure listings for rentals when no management or leasing company is involved.

• Do not rely on emailed wire instructions. Seek a secondary means of verification of instructions that does not involve electronic communication.

• Slow down! Do not be bullied into skipping steps necessary to insure the legitimacy of the parties to the transaction.

What Do You Do When You Suspect Fraud?

Generally
The first thing an attorney should do when he or she suspects fraud is to get as much information as possible from the parties involved. If the fraud has already occurred, contact any possible victim as soon as possible so that steps may be taken to prevent further damage, such as changing passwords, setting fraud alerts, etc. If there is a possibility your office should have or could have caught the fraud before it happened, you may need to contact your errors and omissions policy carrier.
For fraud in a sale transaction
If fraud is likely, the title insurer and lender (if applicable) should be notified immediately so that they may be given the opportunity to do their own investigation and risk assessment, and possibly decline participation in the deal. Once a high probability of fraud has been determined, local law enforcement officials and the FBI should be contacted. See www.fbi.gov/contact-us.

For wire fraud specifically
IMMEDIATELY contact the bank AND the FBI (see www.fbi.gov/contact-us) if you suspect wire fraud. The Financial Fraud Kill Chain (FFKC) is a process for recovering large international wire transfers stolen from US victim bank accounts.

Per a Federal Bureau of Investigation bulletin dated January 11, 2016

The FFKC can only be implemented if the fraudulent wire transfer meets the following criteria:

- the wire transfer is $50,000 or above;
- the wire transfer is international;
- a SWIFT recall notice has been initiated; and
- the wire transfer has occurred within the last 72 hours.

Any wire transfers that occur outside of these thresholds should still be reported to law enforcement, but the FFKC cannot be utilized to return the fraudulent funds.

See also http://grefpac.org/images/downloads/News_Articles/04.2016_ffkc_bank_outreach.pdf for the complete list of information required to be provided by the bank to initiate the Kill Chain process.

If reported within the first 24 hours, sometimes the funds may be recovered.

For rental scams
Report the scam to the local law enforcement agency, the website where the ad was posted and to the Federal Trade Commission at https://www.ftccomplaintassistant.gov/#crnt&panel1-1

Finally, if something seems amiss, it probably is. Ask questions until you are satisfied and be prepared to decline the engagement. Remember, your license, reputation, and much more are on line if your name gets tangled up with a case of fraud.
GETTING TO CLOSING WHEN YOUR SELLER IS AN ESTATE: BEST (AND SPEEDIEST) PRACTICES

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A. Jurisdiction and Venue Issues

O.C.G.A. § 53-5-1 provides that,

“(a) The probate court shall have exclusive jurisdiction over the probate of wills.

(b) The county of domicile of the testator at death shall give jurisdiction to the probate court of that county.

(c) The domicile of a testator who was in the care of a nursing home or other similar facility at the time of death shall be presumed to be the county in which the testator was domiciled immediately before entering the nursing home or other facility; provided, however, this presumption may be rebutted. If it is determined by the probate court that the testator considered or, in the absence of an impairment of mental faculties, the testator would have considered the county in which the facility is located to be the testator's domicile, then for purposes of this Code section that county shall be considered the testator's county of domicile.”

B. Laws of Intestacy/Heirship: Exceptions

The heirs of a decedent are those individuals who will inherit the decedent's property in the event that property is not disposed of by will.1 The laws of descent and distribution

1 O.C.G.A. §53-1-2(9),0
set forth the rules for determining the heirs of a decedent. As a legal term, the word "heir" has a specific meaning which may or may not match up to the use of the word in common parlance. Who the heirs of a decedent are is often the subject of confusion.

A decedent's heirs are fixed at the moment of death and the complete list of the heirs never changes. If an heir dies, the successors in interest of that heir are not "heirs" of the first decedent, even though they may be entitled to the share of the deceased heir. This is true even if they would have been heirs of the first decedent if the "deceased heir" had predeceased the first decedent. This may best be understood by an example: a man dies survived by a wife and three children. At the moment of his death, his heirs are determined, and those four people are his heirs and his only heirs; that will never change. Should one of the children die after the man, the spouse, children or beneficiaries under a will may receive the share of the deceased child, but they do not become heirs of the decedent. This, of course, differs from when the child has predeceased the parent. In the example, had a child predeceased the man, the heirs of the child are heirs of the decedent.

O.C.G.A. 53-2-1 (c) provides that

"when a decedent died without a will, the following rules shall determine such decedent's heirs:

(1) Upon the death of an individual who is survived by a spouse but not by any child or other descendant, the spouse is the sole heir. If the decedent is also survived by any child or other descendant, the spouse shall share equally with the children, with the descendants of any deceased child taking that child's share, per stirpes; provided, however, that the spouse's portion shall not be less than a one-third share;

(2) If the decedent is not survived by a spouse, the heirs shall be those relatives, as provided in this Code section, who are in the nearest degree to the decedent in which there is any survivor;
(3) Children of the decedent are in the first degree, and those who survive the decedent shall share the estate equally, with the descendants of any deceased child taking, per stirpes, the share that child would have taken if in life;

(4) Parents of the decedent are in the second degree, and those who survive the decedent shall share the estate equally;

(5) Siblings of the decedent are in the third degree, and those who survive the decedent shall share the estate equally, with the descendants of any deceased sibling taking, per stirpes, the share that sibling would have taken if in life; provided, however, that, subject to the provisions of paragraph (1) of subsection (f) of Code Section 53-1-20, if no sibling survives the decedent, the nieces and nephews who survive the decedent shall take the estate in equal shares, with the descendants of any deceased niece or nephew taking, per stirpes, the share that niece or nephew would have taken if in life;

(6) Grandparents of the decedent are in the fourth degree, and those who survive the decedent shall share the estate equally;

(7) Uncles and aunts of the decedent are in the fifth degree, and those who survive the decedent shall share the estate equally, with the children of any deceased uncle or aunt taking, per stirpes, the share that uncle or aunt would have taken if in life; provided, however, that, subject to the provisions of paragraph (1) of subsection (f) of Code Section 53-1-20, if no uncle or aunt of the decedent survives the decedent, the first cousins who survive the decedent shall share the estate equally; and

(8) The more remote degrees of kinship shall be determined by counting the number of steps in the chain from the relative to the closest common ancestor of the relative and decedent and the number of steps in the chain from the common ancestor to the decedent. The sum of the steps in the two chains shall be the degree of kinship, and the surviving relatives with the lowest sum shall be in the nearest degree and shall share the estate equally.”

C. Situs v. Ancillary

O.C.G.A. § 53-5-36 provides that “[t]he probate court of any county in this state in which is located any property owned by the decedent or any cause of action of which the
decedent was possessed at death the venue of which lies in this state shall have original or ancillary jurisdiction of a foreign or out-of-state will.”

D. **Process and Procedures**

There are six (6) main probate proceedings which might be initiated by the heirs, beneficiaries, or creditors of a deceased individual. They are (1) probate in solemn form, (2) probate in common form, (3) petition for temporary letters of administration, (4) petition for letters of administration, (5) petition for no administration necessary, and (6) petition for year's support. The facts and circumstances of each estate should help the practitioner in determining which procedure should be used by the heirs, beneficiaries or creditors.

1. **Petition to Probate in Solemn Form.**

A Petition to Probate Will in Solemn Form requires and affords legal notice to the heirs of the decedent and to the beneficiaries under any other purported will for which probate proceedings are pending.

Under Georgia law, if a decedent dies intestate (without a will), the heirs of the decedent inherit the estate of the decedent. Since the probate of a will would potentially adversely affect the interests of the heirs in the estate (their right of inheritance), notice is given to the heirs that a purported will has been offered to the court as the lawful Last Will and Testament of the decedent. The notice requires the heirs to file any written objections (caveats) to the probate of the will within a time deadline, after which they lose the right
to object. The same is true as to notice to the propounders of and beneficiaries under any other will which has been offered for probate.

The recitals in the verified petition are exactly the same for both common and solemn form probate:

(a) Full name of the testator;
(b) Domicile of the testator;
(c) Date of death;
(d) Mailing address of the petitioner;
(e) Names, ages or majority status, addresses, and relationships of all heirs;
(f) Whether, to the knowledge of the petitioner, any other proceedings with respect to the probate of another purported will of the testator are pending in this state and, if so, the names and addresses of the propounder(s) of and the names, ages or majority status, and addresses of the beneficiaries under such other purported will;
(g) If any particulars are missing, the reasons for such omissions; and
(h) A prayer (request) for issuance of Letters Testamentary.

When there has been a previous probate of the will in common form and Letters Testamentary have been issued under the common form probate, the prayers (requests)

2 O.C.G.A. §53-11-8 provides that every petition filed in the probate court must be verified by the oath of the petitioner and be sworn to or affirmed before the probate court or a notary public.
3 For any heir who is age 18 or over, it is sufficient merely to indicate that the heir has reached majority.
4 New Georgia Probate Court Standard Forms effective July 1, 2009, require that the petitioner make an affirmative statement how the listed heirs comprise the full list of heirs of the decedent.
5 O.C.G.A. §53-5-21(b).
may include that the Letters Testamentary previously issued be ratified, continued, and confirmed. However, it is usually more convenient for the executor to have new Letters that show the date of probate in solemn form. There is no need for the same executor to take a new oath if it would be identical to the oath previously taken, although, when new Letters are being issued, some courts may require a new oath. The oath might also be different when a settlement agreement which modifies the terms of the will has been approved.

2. Petition to Probate in Common Form.

Probate in common form differs from that in solemn form in that it is said to be revocable, in the sense that it may be set aside at a later date. Since no notice is given to the heirs, the probate is not immediately conclusive upon anyone interested in the estate adversely to the will. In the event that a common form probate is later set aside, the executor(s) is/are protected only in the collecting and preserving of assets and the payment of the debts of the estate. However, a purchaser from such executor(s) will be protected provided the sale was bona fide (in good faith) and without notice to the purchaser of any defect in the will or proceedings.6

There are a number of reasons why a will might be offered for probate only in common form, usually based upon circumstances: the need for immediate action for the protection of the estate (collection and securing of assets; payment of debts; management

6 O.C.G.A. §53-5-16(b).
of ongoing business, etc.; savings in costs (there are no fees for sheriff's service or publication); or savings in time (since no notice is given, there is no waiting period). If real estate is involved in the estate, however, probate in solemn form or the passage of time may be necessary to satisfy title requirements. If some immediate action needs to be taken, a will can be probated first in common form and later in solemn form when all requirements for the latter have been met.

If all the heirs acknowledge service and consent to probate immediately, there are no significant savings in court costs or time in common form probate over solemn form.

Proceedings to probate a will in common form are initiated by filing a verified petition, which must set forth the following:

(a) Full name of the testator;
(b) Domicile of the testator;
(c) Date of death;
(d) Mailing address of the petitioner;
(e) Names, ages or majority status, addresses, and relationships of all heirs;9
(f) Whether, to the knowledge of the petitioner, any other proceedings with respect to the probate of another purported will of the testator are pending in this state and, if so, the names and addresses of the propounder(s) of

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7 O.C.G.A. §53-11-8 provides that every petition filed in the probate court must be verified by the oath of the petitioner and be sworn to or affirmed before the probate court or a notary public.
8 For any heir who is age 18 or over, it is sufficient merely to indicate that the heir has reached majority.
9 New Georgia Probate Court Standard Forms effective July 1, 2009, require that the petitioner make an affirmative statement how the listed heirs comprise the full list of heirs of the decedent.
and the names, ages or majority status, and addresses of the beneficiaries under such other purported will;

(g) If any particulars are missing, the reasons for such omissions; and

(h) A prayer (request) for issuance of Letters Testamentary.\(^{10}\)

When such a petition is presented, the will may be ordered to record upon the testimony of a single subscribing witness or a self-proving affidavit and without notice to anyone.\(^{11}\) If the will is not self-proved, the testimony of the witness is usually presented by written interrogatories. If a will or codicil is self-proved, due execution is presumed without the testimony of any subscribing witness.\(^{12}\)

There is no right to appeal of the decision of the judge of the probate court on the petition to probate a will in common form, whether the decision is to admit the will or to deny probate.\(^{13}\)

If an interested party wishes to file an objection to the probate of a will which is offered for probate only in common form or which has already been probated in common form, the party must file a motion asking the court to require the propounder of the will to offer it for probate in solemn form.\(^{14}\) The party desiring to contest the will then has the opportunity to file written objections to the probate and be given a hearing on the objections. If the caveat is sustained and probate in solemn form is denied, the effect is to

\(^{10}\) O.C.G.A. §§53-5-17(b), 53-5-21(b).
\(^{11}\) O.C.G.A. §53-5-17(a).
\(^{12}\) O.C.G.A. §53-5-17(a).
revoke the probate in common form and, if no other will is admitted to probate, an intestacy is declared.\textsuperscript{15}

3. **Petition for Temporary Letters of Administration.**

A temporary administrator may be appointed by the judge of the probate court at any time and without notice to handle an unrepresented estate for the purpose of collecting the debts and personal property of the decedent, to continue until the temporary administrator is discharged or a personal representative is appointed.\textsuperscript{16} There is no appeal from the order appointing a temporary administrator.\textsuperscript{17} The judge is to appoint as the temporary administrator that person whom the judge determines to be in the best interests of the estate.\textsuperscript{18} The eligibility requirements are the same as for other personal representatives.\textsuperscript{19} The county administrator in his/her official capacity may be appointed temporary administrator if the judge finds such appointment appropriate.

The temporary administrator becomes the custodian of the estate and has the power to collect and preserve the assets and to expend funds for that purpose if approved by the judge of the probate court after such notice as the judge deems necessary.\textsuperscript{20} No private agreement may expand the authority of a temporary administrator.\textsuperscript{21}

\begin{footnotesize}
\begin{enumerate}
\item Benton v. Turk, 188 Ga. 710, 4 S.E.2d 580 (1939).
\item O.C.G.A. §§53-1-2(15), 53-6-30(a), 53-6-31.
\item O.C.G.A. §53-6-30(c).
\item O.C.G.A. §53-6-30(b).
\item O.C.G.A. §53-6-1.
\item O.C.G.A. §53-6-31.
\item Wright v. Clark, 145 Ga. 534 (1916).
\end{enumerate}
\end{footnotesize}
administrator may not interfere with real property in any way other than to protect it,\(^{22}\) except that, for good cause shown, the temporary administrator may follow the procedures for sales covered in Chapter 5, Section 3.\(^{23}\) Although a temporary administrator may not sue for recovery of real property,\(^{24}\) a temporary administrator may intervene in a suit for land,\(^{25}\) including a suit for recovery of just compensation in condemnation proceedings.\(^{26}\)

A temporary administrator may file suit to recover a debt owed to or personal property belonging to the estate, but if a permanent administrator is appointed pending the suit, the administrator may (should) be made a party in lieu of the temporary administrator.\(^{27}\)

If proper orders are secured from the judge of the probate court after due notice to all parties at interest, a temporary administrator, pending the appointment of a personal representative, is authorized:

(a) To carry out existing contracts of the decedent.

(b) To carry on the business of the decedent.

(c) To do such acts as are necessary for the protection and preservation of the estate.\(^{28}\)

Notice should be served in accordance with Chapter 11 of Title 53.

\(^{22}\) Edwards v. Collins, 207 Ga. 204.

\(^{23}\) O.C.G.A. §53-8-10(b).


\(^{25}\) Hayes v. Hayes, 137 Ga. 362 (1911).


\(^{27}\) O.C.G.A. §53-6-31.

\(^{28}\) O.C.G.A. §53-7-4.
A temporary administrator may not be appointed if a personal representative has already been appointed, except pending an appeal. However, a temporary administrator may be appointed if a will has not been probated, and the executor nominated in the will must be given preference in this appointment.

Bond is required of every temporary administrator, except when the sole asset of the estate is real property. There is no procedure for waiver of bond of a temporary administrator. The statutes requiring the filing of inventory and returns apply only to personal representatives, which does not include temporary administrators. However, as a condition of appointment, the judge of the probate court may want to require a temporary administrator to file inventory and returns.

4. **Petition for Letters of Administration.**

Administration of the estate of a decedent who dies intestate (without a will) is most commonly accomplished through a personal representative appointed by the judge of the probate court. Administration gives effect to the law of intestate succession, resulting, after the payment of all debts of the estate, in the distribution of all remaining property (real, personal and intangible) to those who are entitled to receive it, that is, the heirs of the decedent.

An administrator is a person to whom Letters of Administration have been granted by the proper court after qualification. Letters of Administration evidence the

30 O.C.G.A. §53-6-30(b).
31 O.C.G.A. §53-6-50(a).
administrator’s authority to administer the estate of a decedent. To assure the proper administration of the estate, the administrator must post a bond with a sufficient surety. The heirs may, by unanimous consent, authorize but not require the judge of the probate court to relieve an administrator of the requirements to post bond and file inventory and returns and/or to give the administrator any of the powers listed in O.C.G.A. §53-12-261. This consent may be included in the petition for Letters of Administration or may be filed by a separate petition filed after appointment. This allows the heirs to have intestate estates administered essentially without court supervision and at reduced costs.

The petition for letters of administration is filed with the judge of the probate court of the county of domicile of the decedent, if the decedent died while domiciled in Georgia; or, if the decedent was not domiciled in Georgia, in any county where the estate or some portion of the estate is located. Once a probate court of one county has assumed jurisdiction over an estate, that court is entitled to determine the proper jurisdiction, and no petition filed in another probate court may be entertained while the first court retains jurisdiction. This will mean that if a petition for administration has been filed in one county, and it is disputed whether the decedent was domiciled in that county, it is that court which has jurisdiction to determine venue. The filing of a petition in another probate (in the county where it is also alleged was the decedent’s domicile) does not give the second

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32 O.C.G.A. §§53-6-50(c), 53-7-1(b).
33 O.C.G.A. §53-6-21(a).
probate court jurisdiction to determine domicile; that issue remains in the first court unless and until the proceeding in the first court is dismissed.

The petition for letters of administration must evidence the statutory basis entitling the petitioner to be appointed, that is, state how the petitioner is eligible to serve; otherwise the petition may be dismissed on the motion of any individual with the legal right to serve.35

Every petition for letters of administration must set forth the following:

The full name of the decedent;
(a) The legal domicile of the decedent;
(b) The date of death;
(c) The mailing address and place of domicile of the petitioner;
(d) Names, ages or majority status, and addresses of the heirs, stating their respective relationships to the decedent; and
(e) If any particulars are missing, the reasons for such omissions.36

The petition must be made in writing37 and must be verified.38

Upon filing of the petition, the judge of the probate court issues a citation giving notice of the petition to the heirs of the decedent, unless citation has been waived by all heirs.39 The notice is mailed by first-class mail to each heir at least thirteen (13) days prior

35 Berry v. Smith, 85 Ga. App. 710 (1952)
36 O.C.G.A. §53-6-21(b).
37 O.C.G.A. §15-9-86.
to the date on which objections must be filed. If the address of any known heir is unknown, notice must be published 40 once each week for four weeks prior to the week which includes the date by which any objections must be filed. 41 A guardian-ad-litem must be appointed for any unknown heirs.

Any objection to the granting of Letters of Administration must be made by a person having an interest in the estate and in the choice of the administrator, either as an heir or a creditor. No objection may be filed by a person who has no interest in the assets of the estate and their distribution. 42

5. Petition for No Administration Necessary.

It is not always necessary to have formal administration of an intestate estate. When there are no debts or when satisfactory arrangements have been made for all debts to be paid, the heirs of the decedent may, by unanimous action, agree upon a division and distribution of the assets of the estate. The formal procedure for obtaining an order declaring that no administration is necessary was created as a convenient and effective method of establishing a public record of the fact of such an agreement by means of a court order to give effect to the agreement, thereby permitting title to the assets of the estate to pass to the heirs in accordance with the agreement. No administration necessary may never be granted in a testate estate. When (1) there is an intestacy, (2) no personal representative has been appointed for the estate in Georgia, (3) all debts have been paid or

40 All publications of notice must be made in the official organ of the county. O.C.G.A. §53-11-4(b).
41 O.C.G.A. §53-6-22.
all creditors have consented or withdrawn any objection, and (4) the heirs have unanimously agreed upon a division of the estate, any heir of the decedent may file a petition requesting an order that no administration is necessary. The petition is to be filed in the probate court of the county of the decedent's domicile, if a domiciliary of this state, or in any county where real property in which the decedent had an interest is located, if the decedent was not domiciled in this state.

If any creditor files an objection to the proceeding and does not withdraw that objection, whether the debt is due or not, the judge of the probate court must decline to grant the order declaring no administration necessary. The judge of the probate court has no authority to investigate whether a claim is a valid one. The mere fact that an objection is filed by a creditor and not withdrawn deprives the probate court of jurisdiction to pass an order declaring administration unnecessary. The only alternative at this point would be for an heir to file an application for administration.

However, if an order declaring no administration necessary has been granted, any creditor of the decedent may sue the heirs for the unsatisfied debt and recover from them to the extent of the value of property received by the heirs.

6. **Petition for Year’s Support.**

The proceeding for a year’s support from the estate of the decedent is a peculiar proceeding unique to Georgia. It is designed to provide, for a limited time, maintenance and support from the estate of the decedent for those individuals whom the decedent was

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43 O.C.G.A. §53-2-41(b).

44 O.C.G.A. §53-4-42.
legally bound to support during life. It is humanitarian in nature and has been called an anomaly.\textsuperscript{45} The award may be made in any form of property, including money.\textsuperscript{46} There is not (and never has been) a requirement that the spouse and minor children return to the estate any property that has not been used by them for support at the end of the 12-month period.

An award of year’s support becomes a \textit{debt of the estate} of the highest priority among debts.\textsuperscript{47} Whether the decedent died testate or intestate, whether the estate is solvent or insolvent,\textsuperscript{48} and whether the decedent was male or female, the surviving spouse, if any, and the minor child or children, if any, are entitled to a year’s support from the estate of the decedent.\textsuperscript{49}

Entitlement to a year’s support award is a matter of status and is established by demonstrating that the petitioner belongs to one of the two classes of intended beneficiaries:\textsuperscript{50} a surviving spouse who has not remarried at the time of filing; a minor child or minor children who remain dependent on the decedent (have not turned 18 or married prior to filing).\textsuperscript{51}

\textsuperscript{46} O.C.G.A. §53-3-1 (comment).
\textsuperscript{47} O.C.G.A. §53-3-1(b).
\textsuperscript{48} O.C.G.A. §53-3-1(a).
\textsuperscript{49} O.C.G.A. §53-3-1(c).
\textsuperscript{51} O.C.G.A. §53-3-2(b).
If the decedent leaves minor children by different spouses, the judge of the probate court must specify the portion of the property awarded to the children of the former spouse or spouses. Even if the surviving spouse is also the parent of the minor children, the judge has the discretion to make separate awards for the spouse and the children if the judge deems such awards to be in the best interests of the parties. These portions vest separately in the spouse and children.

The following restrictions and limitations apply to every petition for an award of year's support:

(a) All petitions must be filed within 24 months from the date of death of the decedent;

(b) All petitions by or for a surviving spouse must be filed during the time that the spouse has not remarried and during such spouse's lifetime; and

(c) The right of a minor to an award of year's support from the estate of a deceased parent is barred by the marriage or death of the minor or by the minor's attaining the age of 18 years prior to the filing of the petition.

A petition may be filed by:

(a) The surviving spouse; or

52 O.C.G.A. §53-3-8(a).
53 O.C.G.A. §53-3-8(b).
54 O.C.G.A. §53-3-5(c).
55 O.C.G.A. §53-3-2(a).
56 O.C.G.A. §53-3-2(a).
(b) A guardian or other person who is acting on behalf of the spouse and/or on behalf of a minor child or children.\textsuperscript{57}

The petition is to be filed in the county of domicile of the decedent. If the decedent was a nonresident who owned property in Georgia, a petition seeking a year’s support may be filed in any county in which property sought to be awarded is located.\textsuperscript{58} This is true even if the spouse or children are nonresidents.\textsuperscript{59}

All petitions for year's support must be filed within 24 months of the decedent’s death and contain the following information:

(a) The surviving spouse’s full name (if the decedent was survived by a spouse);
(b) The full name and date of birth of each surviving minor child; and
(c) A schedule of the property (including household furniture) that the petitioner proposes to have set aside (awarded) as year's support.\textsuperscript{60}

Where any real property is proposed to be set apart, the petition must fully and accurately describe the real property with a legal description that would be sufficient to pass title to the property under the laws of this state.\textsuperscript{61}

There is no necessity for a formal hearing on a petition for year’s support when no objection has been filed. However, the judge of the probate court should note the date of

\textsuperscript{57} O.C.G.A. §53-3-5(a).
\textsuperscript{58} Id.
\textsuperscript{59} Seiden v. Southland Chenilles’, Inc., 195 F. 2\textsuperscript{nd} 899 (5\textsuperscript{th} Circuit) (1952); Jones v. Cooner, 142 Ga. 127 (1914).
\textsuperscript{60} O.C.G.A. §53-3-5(b).
\textsuperscript{61} O.C.G.A. §53-3-5(b).
death and determine that the 24-month statute of limitations has not run. The judge should also determine that proper notice has been given and that the citation has been published as required by law. Unless there is a legal defect in the petition or it is obvious that someone for whom an award is sought is not eligible, the judge of the probate court has no authority to modify the request and must enter an order setting aside the property as applied for in the petition.62

E. **Initial Steps in the Process**

The initial step is to determine which of the six (6) main probate proceedings is appropriate for your particular estate. Once you have determined which type proceeding is the most appropriate, then determine who is entitled to notice of the proceeding.

F. **Executor Appointment; Taxpayer ID**

O.C.G.A. § 53-6-10 provides for the nomination and appointments of executors as follows:

“(a) No formal words are necessary for the nomination of an executor. An expression by the testator of a desire that the person carry into effect the testator's wishes shall amount to a nomination as executor.

(b) Unless adjudged unfit, nominated executors shall have the right to qualify in the order set out in the will.

(c) An individual who has not reached the age of majority may be nominated as an executor but may not qualify until reaching the age of majority.

(d) If the will names a person to fill a vacancy in the office of executor or provides a method of selecting a personal representative to fill the vacancy, any vacancy shall be filled or selection made as provided in the will.”

62 O.C.G.A. §53-3-7(a).0
Upon a personal representative being appointed by the Probate Court, such personal representative should immediately obtain a taxpayer identification number from www.irs.gov. The personal representative will be unable to open a bank account until such taxpayer identification number is obtained. It is easiest to obtain a taxpayer identification number by applying online, but you may also obtain a taxpayer identification number by filling out and filing a Form SS-4 with the IRS.
APPENDIX A

Relevant Title Standards through Decedents’ Estates (May 2016 Ed.)

CHAPTER 13 TITLE THROUGH DECEDENTS’ ESTATES

13.1 Judgments Against Heirs or Devisees

Judgments against the heirs or devisees of an estate do not constitute a lien on land sold by the personal representative (executor or administrator) of such estate, and the examiner need not conduct a search therefor in any of the following circumstances:

1. The sale is made by an executor pursuant to express authority in the will and the sale is made to parties other than the heirs or devisees; or

2. The sale is made by an executor with the unanimous consent of the beneficiaries under the will as evidenced by a court order; or

3. The sale is made by an executor or administrator which has been given the power of sale (and usually other powers) by court order with the unanimous consent of the beneficiaries or heirs.

Comment: The personal representative (executor or administrator) of an estate may be given the power of sale and other powers with the unanimous consent of the beneficiaries or heirs by court order pursuant to O.C.G.A. Section 53-7-1(b). The court order may simply indicate that the powers itemized in O.C.G.A. Section 53-12-232 have been granted to the personal representative.

13.2 Surviving Widow, Widower or Minor Children

Where facts show that a decedent has left a surviving widow, widower or minor children, inquiry and examination should be made concerning the rights of said widow, widower or minor children to year’s support and in case of intestacies, inquiry should be made concerning the right of the widow or widower for a child’s part in said estate.

Comment: Pursuant to O.C.G.A. Section 53-3-1(b)(1), any person who becomes widowed is entitled to a year’s support from the estate of the deceased spouse. The surviving spouse, whether husband or wife, is entitled to obtain this support. Hunnicutt v. Hunnicutt, 180 Ga. App. 798, 350 S.E.2d 770 (1986).
13.3 No Will, No Administration, Death Within Twelve Months

Where a decedent leaves no will and there has been no administration on his estate and death has occurred within twelve months, a marketable title may be conveyed by: (1) proof showing the death intestate, identifying the decedent’s heirs at law and showing them to be of age and of sound mind (such proof should be in the form of affidavits recordable under O.C.G.A. Section 44-2-20), (2) a conveyance from the above heirs at law as identified by the proof, provided that they are of age and of sound mind, (3) the entry of an order from the Probate Court dispensing with the administration upon the estate of the decedent, and (4) proof that federal estate taxes cannot result in a lien against the property.

Comment: Prior to 1998, title to real property in an intestate estate vested in the heirs immediately upon the decedent’s death “subject to be administered by the legal representative, if any....” Former O.C.G.A. Section 53-4-8. The Revised Probate Code of 1998 caused title to the real property of an intestate decedent to be treated the same as a decedent who died with a will and to vest in the administrator, who would then assent to the transfer to the heirs. O.C.G.A. Section 53-2-7 (effective January 1, 1998). In 2000, this section was again amended in an effort to reinstate the prior law but added some confusion by providing that title to the intestate decedent’s real property vests immediately in the heirs of the decedent, “subject to divestment by the appointment of an administrator of the estate.” There is no time limitation in which an administrator must be appointed under this statute.

Comment: Issues may arise when it is assumed that the decedent died intestate but a will is later offered for probate. O.C.G.A. Section 53-5-3 provides a five year period beyond which a will may not be probated. However, the five year period does not begin to run until the filing of a petition for one of the following:

1) the appointment of a personal representative (administrator) for the estate; or

2) an order for year’s support; or

3) an order that no administration is necessary.
For decedents who died prior to January 1, 1998, a will can be offered for probate until the later of such five year period or December 31, 2002.
13.4 No Will, No Administration, Death From One to Three Years Past

Where a decedent leaves no will and there has been no administration on his estate and death has occurred from one to three years past, a marketable title may be conveyed by: (1) proof showing the death intestate, identifying decedent’s heirs at law and showing them to be of age and of sound mind (such proof should be in the form of affidavits recordable under O.C.G.A. Section 44-2-20), (2) a conveyance from the above heirs at law as identified by the proof, provided that they are of age and of sound mind, (3) a public sale by the personal representative (administrator) pursuant to such court order, (3) a determination that no application for year’s support has been made, and (4) proof that federal estate taxes cannot result in a lien against the property.

13.5 No Will, No Administration, Death More Than Three Years Past

Where a decedent leaves no will and there has been no administration on his estate and death has occurred more than three years past, a marketable title may be conveyed by: (1) proof showing the death intestate, identifying decedent’s heirs at law and showing them to be of age and of sound mind (such proof should be in the form of affidavits recordable under O.C.G.A. Section 44-2-20), (2) a conveyance from the above heirs at law as identified by the proof, provided that they are of age and of sound mind, (3) a public sale by the personal representative (administrator) pursuant to such court order, (3) a determination that no application for year’s support has been made, and (4) proof that federal estate taxes cannot result in a lien against the property.

13.6 No Will, Administration Pending on Estate — Public Sale by Administrator

Where decedent leaves no will and where there is an administration pending on his estate, a marketable title may be conveyed in either of the following manners:

(A) Sale pursuant to specific court order which requires (1) a court order which sets forth the specific terms and conditions of the sale, (2) a deed from the personal representative (administrator) pursuant to such court order, (3) a determination that no application for year’s support has been made, and (4) proof that federal estate taxes cannot result in a lien against the property; or

(B) Sale pursuant to power of sale which requires (1) a court order giving the personal representative the power of sale (and usually other powers), (2) a deed from the personal representative, (3) a determination that no application for year’s support has been made, and (4) proof that federal estate taxes cannot result in a lien against the property.
Comment: A surviving spouse or minor child cannot attach a lien for a year’s support to property that is conveyed by the executor or administrator in an authorized sale. O.C.G.A. Section 53-8-13. See Comment under 13.1 above regarding the grant of powers to personal representatives by court order with the unanimous consent of the heirs.

13.7 No Will, Administration Pending on Estate-Sale by Heirs at Law with Disclaimer by Administrator

Where a decedent leaves no will and there is an administration pending on his estate, a marketable title may be conveyed by: (1) proof showing the death intestate, identifying the decedent’s heirs at law and showing them to be of age and of sound mind (such proof should be in the form of affidavits recordable under O.C.G.A. Section 44-2-20), (2) a conveyance from the above heirs at law as identified by the proof, provided that they are of age and of sound mind, (3) a conveyance from the Administrator to disclaim any administrative rights therein, (4) the furnishing of an indemnity agreement, escrow deposit or surety bond indemnifying the grantee and his successors in title against any debts of the estate of the decedent, and (5) proof that federal estate taxes cannot result in a lien against the property.

13.8 No Will, But Administrator Discharged Prior to Sale

Where a decedent leaves no will and there has been an administration on his estate but the administrator has been discharged, a marketable title may be conveyed by: (1) proof showing the death intestate, identifying the decedent’s heirs at law and showing them to be of age and of sound mind (such proof should be in the form of affidavits recordable under O.C.G.A. Section 44-2-20), (2) a conveyance from the above heirs at law as identified by the proof, provided that they are of age and of sound mind, and (3) proof that federal estate taxes cannot result in a lien against the property.

Comment: O.C.G.A. Section 53-8-15(c) provides that “In the absence of prior assent, the discharge of a personal representative shall be conclusive evidence of the personal representative’s assent.”

13.9 Will Probated in Solemn Form Authorizes Sale — Executor Qualified Within Past Six Months

Where a decedent leaves a will which has been probated in solemn form and the executor has qualified within the past six months and the will authorizes sale, a marketable title may be conveyed by: (1) a deed from the executor containing recitals showing that it is made pursuant to the power of sale conferred under the terms of the will of the decedent, joined in by the beneficiary of any specific devise of the land to be conveyed, (2 a determination
that no application for year’s support has been made, and (3) proof that federal estate taxes cannot result in a lien against the property.

Comment: A surviving spouse or minor child cannot attach a lien for a year’s support to property that is conveyed by the executor or administrator in an authorized sale before the year’s support is set aside. O.C.G.A. Section 53-3-13.

13.10 Will Probated in Solemn form Does Not Authorize Sale — Executor Qualified Within Past Six Months

Where a decedent leaves a will which has been probated in solemn form and the executor has qualified within the past six months but the will does not authorize a sale, a marketable title may be conveyed in any of the following manners:

(A) conveyance by executor and all devisees which requires (1) a deed from the executor and all devisees of the property to be conveyed, (2) a determination that no application for year’s support has been made, (3) the furnishing of an indemnity agreement, escrow deposit or surety bond indemnifying the grantee and his successors in title against any debts of the estate of the decedent, and (4) proof that federal estate taxes cannot result in a lien against the property; or

(B) conveyance by executor pursuant to a court order specifically authorizing such sale which requires (1) a court order obtained pursuant to O.C.G.A. Section 53-8-13 which authorizes the specific sale, (2) a deed from the executor pursuant to such court order, (3) a determination that no application for year’s support has been made, (4) the furnishing of an indemnity agreement, escrow deposit or surety bond indemnifying the grantee and his successors in title against any debts of the estate of the decedent, and (5) proof that federal estate taxes cannot result in a lien against the property; or

(C) conveyance by executor pursuant to a court order granting a general power of sale which requires (1) a court order obtained with the unanimous consent of the beneficiaries pursuant to O.C.G.A Section 53-7-1(b) granting the power of sale, (2) a deed from the executor pursuant to such court order, (3) a determination that no application for year’s support has been made, (4) the furnishing of an indemnity agreement, escrow deposit or surety bond indemnifying the grantee and his successors in title against any debts of the estate of the decedent, and (5) proof that federal estate taxes cannot result in a lien against the property.

Comment: O.C.G.A. Section 53-5-14 (now 53-3-13) was not intended to exempt devises and legacies from year’s support. Anderson v. Groover, 242 Ga. 50, 247 S.E.2d 851 (1978).
13.11 Will Probated in Solemn Form Authorizes Sale — Executor Qualified More Than Six Months — No Assent to Devise

Where a decedent leaves a will which has been probated in solemn form and the executor has been qualified more than six months and the will authorizes a sale, a marketable title may be conveyed by: (1) a deed from the executor containing recitals showing that it is made pursuant to the power of sale conferred under the terms of the will of the decedent, (2) a determination that no application for a year’s support has been made, (3) proof in the form of an affidavit recordable under O.C.G.A. Section 44-2-20 that the executor of the will has not assented to any general devise of the property under the will and that the property now remains in his hands for administration, (if the land to be conveyed is the subject of a specific devise, the devisee(s) should join in the deed) and (4) proof that federal estate taxes cannot result in a lien against the property.

13.12 Will Probated in Solemn Form Authorizes Sale — Executor Qualified More than Six Months — Deed From Executor and All Devisees

Where a decedent leaves a will which has been probated in solemn form and the executor has been qualified for more than six months, and the will authorizes a sale, a marketable title may be conveyed by: (1) a deed from the executor in which all of the devisees of the property to be conveyed join as grantors, (2) a determination that no application for year’s support has been made, (3) proof that all debts of the estate have been fully paid, and (4) proof that federal estate taxes cannot result in a lien against the property.

13.13 Will Probated in Solemn Form Does Not Authorize Sale — Executor Qualified For More than Six Months

Where a decedent leaves a will which has been probated in solemn form and the executor has been qualified for more than six months and the will does not authorize a sale, marketable title may be conveyed in any of the following manners:

(A) conveyance by executor and all devisees which requires (1) a deed from the executor and all devisees of the property to be conveyed under the will, (2) a determination that no application for year’s support has been made, (3) proof that all debts of the estate have been fully paid, and (4) proof that federal estate taxes cannot result in a lien against the property; or

(B) conveyance by executor pursuant to a court order specifically authorizing such sale which requires (1) a court order obtained pursuant to O.C.G.A. Section 53-8-13 which authorizes the specific sale, (2) a deed from the executor pursuant to such court order,
(3) a determination that no application for year’s support has been made, (4) proof that all debts of the estate have been fully paid, and (5) proof that federal estate taxes cannot result in a lien against the property: or

(C) conveyance by executor pursuant to a court order granting a general power of sale which requires (1) a court order obtained with the unanimous consent of the beneficiaries pursuant to O.C.G.A Section 53-7-1(b) granting the power of sale, (2) a deed from the executor pursuant to such court order, (3) a determination that no application for year’s support has been made, (4) proof that all debts of the estate have been fully paid, and (5) proof that federal estate taxes cannot result in a lien against the property.

13.14 Will Probated in Common Form

Where a decedent leaves a will which has been probated in common form on or after July 1, 1984, it is conclusive after the passage of four years except as against minor heirs. Minor heirs have four years from the later of (a) coming of age with no other disability, or (b) four years after probate of the will in common form, within which to contest the will. Where a decedent leaves a will which has been probated in common form before July 1, 1984, it is conclusive after the earlier of July 1, 1988 or the expiration of seven years from the date of probate except as against minor heirs. Minor heirs have four years from the later of (a) coming of age with no disability, or (b) the date which is the earlier of July 1, 1984 or seven years after the date of the probate. Title which is obtained through the probate of a will in common form should not be accepted unless proof is obtained that all heirs were of age at the time of the probate and four years have passed. The probate of the will in solemn form should be required where four years have not elapsed or proof should be obtained as to the identity of all heirs and the appropriate deeds should be obtained from all heirs.

Comment: Pursuant to O.C.G.A. Section 53-5-19, when a will is probated in common form and is not attacked for four years, it is conclusive against all parties except minor heirs. It will also be conclusive four years after the year in which all minors have reached the age of majority. Prior to the 1984 amendment of this Code Section, the period required for conclusiveness of the probate was seven years, but minors coming of age with no disability had four years after reaching maturity in which to interpose a caveat to the probate. See Anderson v. Green, 46 Ga. 361 (1872); Churchill v. Corker, 25 Ga. 479 (1858).

This Standard was cited in Alston v. Stubbs, 170 Ga. App. 4417, 317 S.E.2d 272 (1984), in supporting a claim for cost of litigation in defending third-party action as a result of negligence of attorney in failure to comply with this Standard.
APPENDIX B

SAMPLE FORMS AND DOCUMENTS

1. Letter to Clerk regarding Muniment of Title

Mr. Gary Bell
Clerk of the Superior Court
Bartow County Courthouse
135 West Cherokee Avenue
Cartersville, Georgia 30120

Re: Estate of Poor Miller

Dear Mr. Bell,

This firm represents the estate of Poor Miller ("decedent"). The decedent died a resident of the State of Grimm. As such, the decedent’s estate was probated in Grimm’s Fairy Tales.

Under Section 53-5-35 of the Georgia Code, a will that is probated in another state may be recorded in the deed records of this state, and shall constitute a muniment of title when (1) such will is accompanied by properly authenticated copies of the record admitting the will to probate in another state, and (2) the certified copy of the will is recorded in the office of the superior court in which the real property is located.

I have enclosed the properly authenticated copies of the record admitting the will to probate in Grimm’s Fairy Tales and a certified copy of the will of the decedent. Please record the same in the deed records of Bartow County. In addition, I have enclosed a check for the recording fees.

In the event you have any questions regarding this matter, please do not hesitate to call me at (770) 382-9591.

Very truly yours,

JOHN T. MROczKO, P.C.

John T. Mroczko
2. **Deed of Assent**

After recording, return to:
JOHN T. MROczKo, P.C.
162 West Main Street
Suite 302
Cartersville, Georgia 30120
(770) 386-8564
File No.

STATE OF GEORGIA
COUNTY OF BARTOW

**DEED OF ASSENT**

THIS INDENTURE, made this _____ day of May, 2017, between LUCKY HEIR, as Executrix of the Last Will and Testament of POOR MILLER (the “Decedent”), late of Floyd County, Georgia, deceased, (“Grantor”), and LUCKY HEIR (“Grantee”):

WITNESSETH:

That the Grantor, acting as Executrix under and by virtue of the power and authority contained in the Last Will and Testament of the Decedent, said Will having been probated in Solemn Form by Order of the Probate Court of Floyd County, Georgia, as evidence of the devise contained in Article III of the Last Will and Testament of the Decedent, has assented, transferred, granted and conveyed, and by these presents, does assent, transfer and convey unto the Grantee, their heirs and assigns, the following described property, to-wit:

SEE EXHIBIT “A” WHICH EXHIBIT IS INCORPORATE HEREIN BY REFERENCE
This deed is given subject to all easements, encumbrances, security deeds, and restrictions of record.

This deed is executed and delivered by the Grantor, as Executrix of the Last Will and Testament of the Decedent, to the Grantee, for the purpose of evidencing her assent to the devise contained in said Last Will and Testament and to transfer and convey all of the right, title and interest of the Decedent or her estate in and to said above-described property.

TO HAVE AND TO HOLD the said tract or parcel of land, with all and singular the rights, members and appurtenances thereof, to the same being, belonging, or in anywise appertaining, to the only proper use, benefit and behoof of the Grantee, their heirs and assigns, in fee simple, in as full and ample a manner as the same was held, possessed and enjoyed by the Decedent in her lifetime.

IN WITNESS WHEREOF, the Grantor has hereunto set their hand and seal the day and year first above written.

Signed, sealed and delivered in the presence of:

Unofficial Witness

LUCKY HEIR, as Executrix of the Last Will and Testament of POOR MILLER

(Notary Public)
3. **Executor’s Deed**

After recording, return to:
John T. Mroczko, Esq.
JOHN T. MROCZKO, P.C.
162 West Main Street
Suite 302
Cartersville, Georgia 30120
Telephone: (770) 386-8564

STATE OF GEORGIA
COUNTY OF CHEROKEE

**EXECUTOR’S DEED**

THIS INDENTURE, made this _____ day of April, 2017, between LUCKY STRAW, as Executor of the Last Will and Testament of POOR MILLER (the “Decedent”), late of Cherokee County, Georgia, deceased, (“Grantor”), and GET RICH QUICK, LLC, a Georgia limited liability company (hereinafter collectively referred to as “Grantee”):

WITNESSETH:

THAT WHEREAS, Grantor is the duly appointed, qualified and acting Executor of the Last Will and Testament (the “Executor”) of the Decedent, whose said Last Will and Testament (the “Will”) has been duly probated in Solemn Form and admitted to record in the Probate Court of Cherokee County, Georgia and contains the power of sale without any order of the Court; and
WHEREAS, all debts and taxes, including federal and state estate taxes, with respect to said estate have been finally determined and fully paid; and

NOW, THEREFORE, in consideration of the premises and to evidence the assent of the Grantor to said devise with respect to the property hereinafter described, the Grantor does he these presents grant, convey, transfer, assign, remise, release and forever quitclaim unto Grantees all of said Grantor’s interest in and to the following described tracts or parcels of land, and all improvements thereon, being more particularly described on Exhibit “A” attached hereto and by this reference made a part hereof.

TO HAVE AND TO HOLD the said tract or parcel of land, with all and singular the rights, members and appurtenances thereof, to the same being, belonging, or in anywise appertaining, to the only proper use, benefit and behoof of said Grantees forever in FEE SIMPLE absolute.

IN WITNESS WHEREOF, Grantor has signed and sealed this deed, the day and year first above written.

Signed, sealed and delivered in the presence of:

____________________________
(Unofficial Witness)

____________________________
(Notary Public)

Grantor:

LUCKY STRAW, as Executor of the Last Will and Testament of POOR MILLER
4. **Administrator’s Deed**

After recording, return to:
John T. Mroczko, Esq.
JOHN T. MROCZKO, P.C.
162 West Main Street
Suite 302
Cartersville, Georgia 30120
Telephone: (770) 386-8564
File No.

STATE OF GEORGIA
COUNTY OF BARTOW

**ADMINISTRATOR’S DEED**

THIS INDENTURE, made this ___ day of April, 2018, between LUCKY STRAW, as Administrator of the estate of POOR MILLER (the “Decedent”), late of Bartow County, Georgia, deceased, (“Grantor”), and GET RICH QUICK, LLC, a Georgia limited liability company (hereinafter collectively referred to as “Grantees”):

WITNESSETH:

THAT WHEREAS, Grantor is the duly appointed, qualified and acting Administrator of the estate of the Decedent, whose estate has been opened in the Probate Court of Bartow County, Georgia, and the Probate Court of Bartow County having given the Grantor the powers of sale pursuant to O.C.G.A. § 53-12-261 without any further order of the Court; and

WHEREAS, all debts and taxes, including federal and state estate taxes, with respect to said estate have been finally determined and fully paid; and
NOW, THEREFORE, in consideration of the premises and the sum of Ten Dollars ($10.00), the Grantor does he these presents grant, convey, transfer, assign, remise, release and forever quitclaim unto Grantees all of said Grantor’s interest in and to the following described tracts or parcels of land, and all improvements thereon, being more particularly described on Exhibit “A” attached hereto and by this reference made a part hereof.

TO HAVE AND TO HOLD the said tract or parcel of land, with all and singular the rights, members and appurtenances thereof, to the same being, belonging, or in anywise appertaining, to the only proper use, benefit and behoof of said Grantees forever in FEE SIMPLE absolute.

IN WITNESS WHEREOF, Grantor has signed and sealed this deed, the day and year first above written.

Signed, sealed and delivered in the presence of:

______________________________
(Unofficial Witness)

______________________________
(Notary Public)

______________________________
LUCKY STRAW, as Administrator of the estate of POOR MILLER

Grantor:
5. **Personal Representative’s Affidavit**

STATE OF GEORGIA

COUNTY OF BARTOW

**PERSONAL REPRESENTATIVE’S AFFIDAVIT**

BEFORE me came **LUCKY STRAW, ADMINISTRATOR OF THE ESTATE OF POOR MILLER**, and having been first duly sworn on oath depose(s) and say(s) as follows:

1. Deponent says that there are no unpaid or unsatisfied security deeds, mortgages, claims of lien, special assessments for sewage or street improvements, or taxes which could constitute a lien against said property described as (See Exhibit “A” attached hereto and made a part hereof), except:

   NONE

2. Deponent further says that there are no past due or outstanding utility bills, including bills for water and sewer services, for utilities servicing the property.

3. Deponent further says that no person other than the Deponent, or those persons claiming under and through the Deponent, claims the right to possession of said property.

4. Deponent further says that there is no outstanding indebtedness for equipment, appliances or other fixtures attached to said property, to the knowledge of the deponent.
5. That the lines and corners of said property are clearly marked and there are no disputes concerning the location of said lines and corners.

6. That no improvements or repairs have been made on the above described property during the three months immediately preceding this date, and there are no outstanding bills incurred for labor and materials used in making improvements or repairs on said premises, or for services of architects, surveyors or engineers incurred in connection therewith.

7. There are no estate taxes due for the ESTATE OF POOR MILLER.

______________________________
LUCKY STRAW, ADMINISTRATOR OF
THE ESTATE OF POOR MILLER

Sworn to and subscribed before me this ___ day of February, 2017.

______________________________
NOTARY PUBLIC
MY COMMISSION EXPIRES: ____________
6. **Affidavit of Descent**

After recording, return to:
John T. Mroczko, Esq.
JOHN T. MROCZKO, P.C.
162 West Main Street
Suite 302
Cartersville, Georgia 30120
(770) 386-8564

STATE OF GEORGIA
COUNTY OF COBB

**AFFIDAVIT OF DESCENT**

The undersigned deponent, being duly sworn, deposes and says on oath that she was personally acquainted with **POOR MILLER**, deceased, over a period of 69 years; that said decedent died intestate on July 4, 1976, a resident of Cobb County Georgia, that said decedent was married one time as follows:

<table>
<thead>
<tr>
<th>Name of Spouse:</th>
<th>Age and address, if living;</th>
</tr>
</thead>
<tbody>
<tr>
<td>RICH MILLER</td>
<td>Deceased on February 19, 2015</td>
</tr>
</tbody>
</table>

Deponent says on oath that the living persons named below constitute all the heirs at law of said decedent, and that all of said heirs are of age and sound mind except for the spouse who is now deceased. Deponent further states that there were only three children born between decedent and aforesaid spouse.

<table>
<thead>
<tr>
<th>Name of Heir:</th>
<th>Age and address; Relationship</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Date of death, if deceased:</td>
</tr>
</tbody>
</table>
RICH MILLER  Deceased (2/19/15)  Spouse
SON MILLER  Sui Juris   Son

This Affidavit is made from the Deponent’s own knowledge, and will testify positively to the truth of the same in any Court whenever called upon for that purpose.

This affidavit is made with the understanding that it will be relied upon by any attorney or title company willing to insure the property in the issuance of a policy of title insurance to a purchaser or lender now dealing with said owner(s).

This ______ day of June, 2016.

____________________________
AFFIANT

Sworn to and subscribed before me this ____ day of June, 2016.

__________________________
Notary Public
IS THERE A JURIS DOCTOR IN THE HOUSE?
CURING THE COMMON TITLE CLAIM

Monica K. Gilroy, The Gilroy Firm, Alpharetta
IS THERE A JURIS DOCTOR IN THE HOUSE?:
How to Cure The Common Title Claim

BY:

Monica K. Gilroy, Esquire
The Gilroy Firm, LLC
Alpharetta
Is There a Juris Doctor in the House?

Curing Common Title Claims

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**Introduction**

Title Claims in residential real estate are varied. In most instances, title defect or title clearance issues can be easily solved and avoided. As practitioners, closing lawyers are often faced with the consequences of these types of actions at the closing table and beyond. This presentation will address the most frequent types of title claims, provide practice tips on avoiding any involvement in the same and offer curative methods in the event such claims cannot be avoided.

Dealing with title issues is the biggest role that closing attorney play. Title issues Will grind the closing to a halt and come back to haunt you years later. Under most sales contract, if the “good title” contingency which is not fulfilled, it can end the contract without a penalty to either party. Most real estate contracts define what “clear title” is. If clear title cannot pass, the lender won’t most likely make the loan. Clear title is not just limited to being able to convey the property via a warranty deed. Litigation in this area often revolves around encroachments, party walls, shared driveways, all of which need to be addressed and remedied prior to closing. Also, any outstanding liens of the Sellers which must be satisfied to provide good and marketable title. What if the Seller is disputing the amount of a judgment which is clouding the title? There is an implied duty of good faith to clear it up the problem so that clear and marketable title can be conveyed.

The most common way to resolve via litigation a title defect or title clearance issue is through a declaratory judgment action brought pursuant to O.C.G.A. § 9-4-1. et. seq. or a reformation action to “reform” or correct the title to property. This process can take up to 90 days if uncontested and upwards of a year or more if contested.

**OVER THE COUNTER REMEDIES**

**Unreleased senior liens**

There may be a situation, due to a closing error or mistake, where a prior lien was not satisfied and is still outstanding (the “problem lien”). In this situation, it may be possible to proceed under the theory of “equitable subordination”. This may be utilized if the proceeds of your loan went to pay off liens prior to the problem lien. Under the theory of equitable subordination, the problem lien is subordinated to your mortgage to the extent of the proceeds that went to pay liens prior in right to the problem lien. The rationale behind this is that the holder of the problem lien would be in that same position if it would have been in before the closing error had occurred.

A mechanics lien is filed against a property when the owner didn’t pay for work he contracted for. In most cases, these liens are inferior to the mortgage being foreclosed and can be cut off in the foreclosure. However, if it is claimed that the work was commenced prior to the date of your mortgage, the holder of this lien will claim priority over your mortgage, and may even commence its own foreclosure action and name you as a defendant. In this event it is important to notify the title company so that it may
either satisfy this lien or defend this action on your behalf.

Water bill liens were recently addressed by the Supreme Court of Georgia in the case of Federal Home Loan Mortgage Corporation vs. City of Atlanta, 2009 Ga. LEXIS 91, decided on March 23, 2009. A copy of this recent opinion is attached to this paper.

IRS liens pose special problems. There is a 120 day redemption period on all filed federal liens, measured from the date of the foreclosure sale. It is a rare event when the IRS redeems a property. Many title insurers will delete the exception on a title report if the property is sold to a bona-fide third party for value.

Problems with Mortgages

Often times, especially in the foreclosure arena, the title claims arise from mortgages which are not recorded properly or have been modified but subsequently not recorded. Mortgages often contain incorrect legal description, owners not signing the mortgage or the mortgage secures the wrong parcel. Frequently, mortgages are recorded out of order which also requires curative work. Perhaps most commonly, the legal description or name on mortgage is incorrect. Usually these problems stem from a check down of title which is only limited in nature or if the whole title is not examined and incorrect prior documents are simply overlooked. Attention to detail, and full exams, help to cure this persistent problem.

Missing Half Interest:

This is the most common title issue most foreclosure lawyers see. Husband and Wife both own the property but at the time of refinance, only the Husband signs the security deed. Husband dies, leaving the lender unable to foreclose if the Wife has not probated the estate and transferred the title to herself as there is a missing half interest. Attempt always to first obtain a quitclaim deed. Probate in the name of the lender is drastic. Most likely, a reformation action filed in Superior Court, but unless you can show Wife intended to be bound by the Security Instrument, caution must be taken not to strip an innocent person of their interest in the real property. A missing partial interest can also be a problem. This is the same as missing half interest, but instead of just a spouse, there are children who share in the interest. The solution to the same is the same as missing half interest, but sometimes more difficult if the children are minors or cannot be located. Joint Tenants/Tenants in Common vs. Joint Tenants With Rights of Survivorship is a most common problem experienced by residential closing attorneys. A wife sells her home and days before closing, the title reveals her husband died and they owned the property as joint tenants but not with rights of survivorship. If there is no will, Wife’s only remedy is to probate the estate and ask for Letters of administration. Regardless if all of the heirs are in agreement, the process takes 30 days as the Court must be petitioned with a notice of publication run to ask the Court for the “full powers” contained in O.C.G.A.§ 53-7-1 to sell the property without leave of Court. If you can’t find all of the heirs, you must publish for them for 30 days. If there are already
Letters Testamentary but the property has never been conveyed out of the Decedent, and if the Administrator does not have the full power to sell the property without leave of Court, then a Petition to Sell must be filed, the sale approved and ordered by the Probate Court in order to close the transaction. This can be further complicated if there are minor children whose interests must be protected. This entire process can be avoided if there was a will, which can then be filed of record and Letter Testamentary can issue almost immediately.

**Encroachments**

Although sometimes exempt from title claims due to the exceptions on a title insurance policy, encroachments often arise post closing due to fences or other items being erected upon adjoining property and encroaching on the insured property. Often, these types of disputes will surround claims of adverse possession or prescription claims. A survey can bring forward, but also resolve, many disputes which arise under this paragraph. Encouraging Sellers to fully disclose easement or encroachment issues on the disclosure statement goes a long way to resolving disputes which arise at the closing table when the Buyer sees the survey for the first time.

**OFFICE VISIT**

**Probate and Estate Issues**

Decedent estates, Year’s Support awards and trust issues can wreck havoc at the closing table, pre-closing and at the time of foreclosure or perfection of claims in bankruptcy. Often, the title problems which arise in relation to the trust and estate issue could have been avoided with a thorough review of the probate record or inquiry into the authority which the individual conveying the security or title interest may have had.

Every county in the State of Georgia has a Probate Court. Some counties are more sophisticated than others and some are more organized than others (often the smaller, rural counties are more updated with their information as there is often a strict familiarity with the individuals who are deceased or due to the fact most real property in the county was originally held in title by only a handful of families). Checking the Probate Court is mandatory as it relates to titles. Also, since the Superior Courts hold concurrent jurisdiction as it relates to certain Probate matters, it may be wise to check the Superior Court records as well if it appears there is a decedent’s estate involved in the chain of title.

**Title in Probate**
Upon the death of an intestate decedent who is the owner of any interest in real property, the title to any such interest which survives the intestate decedent shall vest immediately in the decedent’s heirs at law, subject to divestment by the appointment of an administrator of the estate. The title to all other property owned by an intestate decedent shall vest in the administrator of the estate for the benefit of the decedent’s heirs and creditors. Upon the appointment of an administrator, the title to any interest in real property which survives the intestate decedent shall vest in the administrator for the benefit of the heirs and creditors of the decedent, and title to such property shall not revest in the heirs until the administrator assents to such revesting.

Upon the appointment of an administrator, the right to the possession of the whole estate is in the administrator, and, as long as administration continues, the right to recover possession of the estate from all other persons is solely in the administrator. The administrator may recover possession of any part of the estate from the heirs at law or purchasers from them; but, in order to recover real property, it is necessary for the administrator to show, upon the trial, either that the property which is the subject of the action has been in the administrator's possession and without the administrator’s consent is held by the defendant at the time of bringing the action or that it is necessary for the administrator to have possession for the purpose of paying the debts, making a proper distribution, or for other purposes provided for by law. An order for sale or distribution, granted by the judge of the Probate Court after notice to the defendant, shall be conclusive evidence of either fact. If an order has been entered that no administration is necessary, or if the administrator has assented to the vesting of title in the heirs, the heirs may take possession of the property or may sue for possession of the property in their own right.

**Guardianships in Probate Court 101**

Title 29 of the Georgia Code deals with Guardians appointed to represent the interests of children or incapacitated adults. Guardians are not usually fully vested with the authority to buy, sell, encumber and do otherwise with the property of the ward. Proof of the court appointed Guardianship, letters or an order indicating the authority, are mandatory. Petitions to Sell or Encumber are usually necessary and without a Court order addressing the same, the transaction could be later viewed as tainted and therefore not binding.

Perhaps more difficult in the world of title examinations, is the ability to ascertain the difference between a “guardian ad litem” versus a “guardian of person or property.” This is key to binding certain orders or actions by the Probate Court upon potential holders of prior or current interests in property. The guardian ad litem is an individual, not always an attorney, appointed by the probate court to represent a single party or more than one party or a class of parties with common or non adverse interests. It is for the Court to determine for the purpose of any particular proceeding whether the natural guardian (i.e. parent), if any, or the testamentary guardian, if any, or the duly constituted guardian of the property, if any, or the duly constituted guardian
of the person, if any, has no conflict of interest and thus may represent for the purpose of the proceeding a party who is not sui juris, who is unborn, or who is unknown. Guardian Ad Litems are mandatory when a party to a proceeding in the probate court is not sui juris, is unborn, or is unknown as such a party must be represented in the proceeding by a guardian.

Service upon or notice to a guardian shall constitute service upon or notice to the party represented and no additional service upon or notice to such party shall be required. Waivers, acknowledgments, consents, answers, objections, or other documents executed by the guardian shall be binding upon the party represented. Whenever a guardian ad litem is appointed, the court may limit the appointment or may at any time for cause appoint a successor. Unless the appointment is limited by the court, the guardian ad litem first appointed with respect to any proceeding involving the administration of the estate shall continue to serve with respect to such proceeding on behalf of the party represented until a successor is appointed, the party represented becomes sui juris, or the court terminates the appointment.

In every petition filed in the probate court, the petitioner shall specify the name of each party who requires a guardian and the name and address of any person who is acting as guardian of the party. A copy of the letters appointing the guardian shall be attached to the petition or the petition shall allege such facts as shall show the authority of such guardian to act; provided, however, that the probate court may take judicial notice of the issuance of such letters or of such authority. The most likely place an appointment of a Guardian Ad Litem could take place is in the realm of a Year's Support Petition or a Petition to Sell Real Property filed by an Administrator without the full power to sell real property without Court Approval. The Guardian Ad Litem must also approve any encumbrances of real property in the context of a Year's Support petition or intestate estate (but only again if the Administrator does not have the full power and authority granted to him by the Probate Court).

**Years Support 101**

Year's Support is an award, usually of real property to the surviving spouse and/or minor children of the Decedent and is meant to be a mechanism to provide a preferential transfer to avoid the claims of creditors. Many title issues arise in the context of Year's Support.

Year's Support usually arises in the case of intestate estates. It is unusual to have a Will which does not specifically indicate any devise to a spouse is “in lieu of an award of Year’s Support.” Any minor child who would be entitled to inherit if the child’s parent died intestate is eligible for Year's Support. The award will be considered among the necessary expenses of administration and is to be preferred before all other debts of the estate. The surviving spouse and minor children of a testate or intestate decedent are entitled to year’s support in the form of property for their support and maintenance for the period of 12 months from the date of the decedent’s death unless an “in lieu of” provision is contained in the Will. An award of Year's Support will be barred by the marriage or death of the spouse prior to the filing of the petition for Year's Support. A
minor child's right to year's support shall be barred by the marriage or death of the minor or by the minor's attaining the age of 18 years prior to the filing of the petition for Year's Support.

In solvent and insolvent estates, all taxes and liens for taxes accrued for years prior to the year of the decedent's death against the real property set apart and against any equity of redemption applicable to the real property set apart shall be divested as if the entire title were included in the year's support. Additionally, as elected in the year's support, property taxes accrued in the year of the decedent's death or in the year in which the petition for year's support is filed or, if the petition is filed in the year of the decedent's death, in the year following the filing of the petition, shall be divested if the real property is set apart for year's support.

A Year's Support is obtained through a petition filed in the Probate Court in the County where the Deceased spouse resided. Upon the death of any individual leaving an estate solvent or insolvent, the surviving spouse or a guardian or other person acting in behalf of the surviving spouse or in behalf of a minor child may file a petition for year's support in the Probate Court having jurisdiction over the decedent's estate. If the petition is brought by a guardian acting on behalf of a minor child, no additional guardian ad litem shall be appointed for such minor child unless ordered by the court. The petition shall set forth, as applicable, the full name of the surviving spouse, the full name and birth date of each surviving minor child and a schedule of the property, including household furniture, which the petitioner proposes to have set aside. The petition shall fully and accurately describe any real property the petitioner proposes to have set aside with a legal description sufficient under the laws of this state to pass title to the real property. Any petition for year's support shall be filed within 24 months of the date of death of the decedent.

Notice of the Year's Support Petition through mail and publication must be given to any "interested persons" meaning the decedent's children, spouse, other heirs, beneficiaries, creditors, and any others having a property right in or claim against the estate of the decedent which may be affected by the year's support proceedings. Upon the filing of the petition, the probate court shall issue a citation and publish a notice once a week for four weeks, citing all persons concerned to show cause by a day certain why the petition for year's support should not be granted. If there is a personal representative of the decedent's estate, then, in addition to the citation and notice required by subsection (b) of this Code section, the probate court shall cause a copy of the citation to be sent by mail to the personal representative of the decedent's estate. The copy of the citation shall be mailed not less than 21 days prior to the date and time shown in the citation. If there is no personal representative of the decedent's estate, then, in addition to the citation and notice required by subsection (b) of this Code section, the petitioner or the attorney for the petitioner shall file with the Probate Court an affidavit, upon oath, showing the name, last known address, and age if less than age 18 of each interested person and stating that the petitioner or the attorney for the petitioner has listed all known interested persons and has made reasonable inquiry to ascertain the names, last known addresses, and ages of all interested persons.
The Probate Court may award year's support as to property both inside and outside the county where the decedent was domiciled at the time of death; and title to property both inside and outside the county where the decedent was domiciled at the time of death shall vest in the surviving spouse, spouse and children, or children only, as applicable. When the Probate Court grants an order for Year's Support which awards

(1) The support available to the individual for whom the property is to be set apart from sources other than Year’s Support, including but not limited to the principal of any separate estate and the income and earning capacity of that individual; (2) The solvency of the estate; and (3) Such other relevant criteria as the court deems equitable and proper. The petitioner for year's support shall have the burden of proof in showing the amount necessary for Year’s Support.

Separate awards of Year’s Support for minor children and the surviving spouse can be made in certain circumstances. If the decedent leaves minor children by different spouses, the probate court shall specify the portion going to the children of the former spouse or spouses, which portion shall vest in those children. If the decedent leaves minor children and the surviving spouse is the parent of the minor children, the probate court may in its discretion specify separate portions for the minor children and the surviving spouse if the court deems the award of separate portions to be in the best interests of the parties, and the portions shall vest separately in the surviving spouse and the children.

Perhaps most important to title examiners, attorneys and title companies is the nature of the title to the property to be set aside. Except as it relates to secured creditors with security instruments filed against the property, title to the property set apart shall vest in the surviving spouse and child or children or, if there is no surviving spouse, in the children, share and share alike; and the property shall not be administered as the estate of the deceased spouse or parent. When property is set apart as a year's support for the benefit of the surviving spouse alone, the spouse shall thereafter own the same in fee, without restriction as to use, encumbrance, or disposition.
an interest in real property located in this state, within 30 days after granting the order the court shall cause a certificate for the order to be filed with the clerk of the superior court in the county of this state where the real property or any part of the real property is located. The certificate shall: Identify in the manner provided in Code Section 53-3-5 those individuals receiving the interest, identify the interest received, contain a legal description sufficient under the laws of this state to pass title to the real property in which the interest was received, provided that the words "Also lands in ______ County(ies)," which accurately identifies other counties within which the real property is located, shall be sufficient to describe real property located outside the county to which the order or a copy of the order was sent; and contain a certification by the probate court that the information in the certificate is correct. The clerk of any Superior Court receiving the certificate provided in subsection (a) of this Code section shall file and record the certificate upon the deed records of that county. The certificate shall be indexed according to the names appearing on the certificate as follows: The grantor is the name of decedent; and the grantee is the name of the individual or individuals to whom the award was made. The certificate shall be returned to the probate court from whom it was received, for inclusion in the probate court's permanent file. The Probate Court shall not be required to enter a certificate on the minutes of the court after the return of a certificate recorded under subsection (c) of this Code section.

If Year's Support is set apart for the benefit of any individual in or with respect to real property on which there is a recorded option to purchase or contract to sell outstanding at the time the same is so set apart, the individual and any purchasers or lessees of the real property, after the same has been so set apart, shall take the real property or any interest therein subject to all of the rights and privileges of the grantee of the option or contract and of any assignees of the option or contract if the assignment or assignments are also recorded. But, a conveyance, contract, or lien made or created by the surviving spouse or by the guardian of the minor child or children shall be superior to the title and interest of the surviving spouse or minor child or children under year's support subsequently applied for and set apart.

A secured creditor is virtually unaffected by a Petition for Year's Support and cannot be stripped of any equity through the process. Whenever the vendor of real property makes a deed to such real property and takes a mortgage to secure the purchase money for such real property, neither the surviving spouse nor the children of the vendee shall be entitled to year's support in the real property as against the vendor or the vendor’s heirs or assigns until the purchase money is fully paid.

Whenever the vendor of personal property, at the time of selling and delivering such personal property, takes a mortgage or other security interest to secure the payment of the purchase money for such personal property, neither the surviving spouse nor the minor child or children of the vendee shall be entitled to Year's Support in the personal property as against the vendor or the vendor's heirs, personal representatives, or assigns until the purchase money of the personal property is fully paid; provided, however, that the mortgage or other security interest shall expressly state that the same is executed and delivered for the purpose of securing the debt for the
purchase. Moreover, whenever a tenant dies owing a landlord for rent or for supplies for which the landlord has a special lien on the crops made on the lands rented from the landlord in the year the rent accrued or supplies were furnished, neither the surviving spouse nor spouse and minor children nor minor child or children only of the tenant shall be entitled to year's support out of the crops so planted or grown in that year as against the landlord until the accounts for the rent and supplies are fully paid, provided that the surviving spouse shall be entitled to year's support in such part of the crop as may remain after the landlord's lien for rent and supplies shall have been discharged.

A large trouble spot with Year's Support often comes when the surviving spouse attempts to encumber or refinance the property set aside for Year's Support. When property is set apart as Year's Support for the joint benefit of the surviving spouse and the minor child or children, a conveyance or encumbrance of the same or any or all parts of such property by the surviving spouse shall convey or encumber the title and interest of the spouse and shall be binding and conclusive upon the spouse. The conveyance or encumbrance of any or all the property set apart as year's support for the joint benefit of the surviving spouse and the minor child or children shall convey or encumber and be binding and conclusive upon the child or children and person claiming through or under them only when approved by the Probate Court of the county in which the year's support award was made. No such approval shall be necessary to bind a child who is sui juris and who joins with the surviving spouse in making the conveyance or encumbrance. Although the code section anticipates the purchaser or lender shall not be responsible for the proper use or application of the proceeds derived from a sale or encumbrance contemplated under this Code section, often the argument of constructive notice is raised by those who attempt to defeat the after acquired security interest.

The procedure for conveying and encumbering the property is often not correctly followed. The approval of the Probate Court is required. The surviving spouse shall petition the Probate Court, stating the purposes of the proposed conveyance or encumbrance and describing the property the spouse desires to convey or encumber the nature of the proposed conveyance or encumbrance, and the names, last known addresses, and ages of the children for whose benefit the year's support was set apart. If the surviving spouse has died, the petition may be made by the guardian for any one or more of the children for whose benefit the year's support was set apart. The Probate Court shall set a date for hearing on the petition and shall appoint a guardian ad litem who shall accept the appointment in writing to represent the minor children. Not less than ten days prior to the date set for the hearing, personal service shall be made on each child for whose benefit the year's support was set apart who has attained the age of 18 at the time the petition is filed. If the surviving spouse does not know and cannot easily ascertain the addresses of any of the children, service shall be made by publishing notice of the date and purpose of the hearing one time and by posting a copy of the notice at the courthouse not less than ten days prior to the date set for the hearing. In addition to publication, the Probate Court shall mail a copy of the notice to the last known address of each child whose current address is unknown, not less than ten days prior to the date set for such hearing. Objections, if any, shall be made in writing.
At the hearing, the Probate Court shall determine that service has been made as required by this Code section and that the purpose or purposes of the proposed conveyance or encumbrance are proper and shall pass an order reciting due compliance with this Code section and approval of the proposed conveyance or encumbrance, which order shall be final and conclusive. The proceedings shall be indexed and recorded in books to be kept for that purpose by the Probate Court in each county in which any of the property is located.

Common Probate problems

Failure to Probate an Estate:

**Problem:** Similar to the Joint Tenant Problem, someone, usually a lawyer, has advised the family “there is no need for Probate” when in fact there was.

**Solution:** Probate the Estate or obtain quitclaim deeds from all the heirs, but you need to watch out for illegitimate children. Probating the estate and giving notice to the world is often safer than assuming you know who all the heirs may be.

Failure to Obtain Court Approval:

**Problem:** The Administrator did not have the full power to sell the Property, the Administration failed to petition to Probate Court for leave to sell, the interest of the minor children was not adequately protected, the property is within the Years’ Support set aside but no permission was obtained from the Probate Court to encumber the property as there are children, or the Guardianship failed to obtain Court permission to encumber or sell.

**Solution:** A source of many title claims which are paid out, it is difficult to “turn back” the hands of time to “bless” or approve the sale, transfer or conveyance. Usually obtaining quitclaim deeds for a price (unless there are minors involved) is a solution or going to the Superior Court (Probate Court can’t fix this type of problem based upon the Georgia case law as it lacks jurisdiction to do so) with a Declaratory Judgment Action is a solution.

Failure to finalize Estate:

**Problem:** Administrator or Executor fails to transfer the interest out of the Estate via Administrator’s or Executor’s Deed and the interest remain in the decedent. Usually, one or more heirs or beneficiaries will also die after the first Decedent’s estate is.

**Solution:** Within one year of the filing of and opening of an estate, the property should be conveyed out and the estate closed. When an estate is closed, Letters of Dismissal are issued. If you represent or assist individuals who open estates, be sure you see them through to conclusion. If there is still an open estate, or you can petition to re-open the
Estate, conveying the property via an Administrator’s or Executor’s deed is the most expeditious solution. Check the title standards to see if there is any other solution depending on how much time has elapsed since the failure to close out the estate. You must always be sensitive to creditors’ claims and most importantly Federal Tax liens, which may not have been satisfied.

HOSPITAL STAY: Forgery, Fraud, Missing Witness and Notaries-Gordon

Mortgage Fraud still continues to be a pervasive area for title insurance claims. Common sense must prevail in this arena for the closing attorney and any suspicious transfers in the chain of title must be presented to the title company. Any “bad acts” committed by a title insurance agent (i.e. closing attorney) may ultimately become the responsibility of the closing attorney so great caution and care must be taken to avoid such schemes.

Wire Fraud. Please read all portions of the specific RPLI materials which relate to the current wire fraud schemes, prevention tips and how to handle your office if this happens to you. Having simple policies and procedures in place with your office staff is key to preventing wire fraud.

FRAUD/FORGERY

Forgery law in Georgia is still highly punitive. It is settled law that “[a] forged deed is a nullity and vests no title in a grantee. Vatacs Group, Inc. v. U.S. Bank, N.A. 292 Ga. 483 (2013).

MISSING WITNESS AND NOTARY

While title issues are never fun, they are especially menacing if the borrower files a bankruptcy. Issues that may ordinarily be resolved by scrivener’s affidavit or corrective documents can be fatal in bankruptcy due to the trustee’s avoidance powers. As we touched on earlier, the bankruptcy trustee steps into the shoes of the debtor with respect to any property the debtor may have an interest in. However, the bankruptcy code also vests Chapter 7 trustees with strong avoidance powers that allow the trustee to avoid liens against property based on certain defects in the liens or in the recording of the liens.

Outside of bankruptcy, these issues can typically be fixed with a corrective document, or a declaratory judgment/reformation action. However, they can be fatal if a borrower is in bankruptcy.

Title Issues specific to bankruptcy:
• Validity of security deeds taken out within 90 days of filing by borrower or while borrower in bankruptcy
As discussed earlier, upon the filing of a bankruptcy petition, all property of the debtor, with limited exception, becomes property of a bankruptcy estate. The bankruptcy trustee is then vested with certain powers that allow recovery of the property for the benefit of the estate. 11 U.S. C. §544, which is commonly referred to as the trustee’s “strong arm power,” authorizes the trustee to act as a hypothetical “lien creditor” as to all of debtor’s personal property, and as a “bona fide purchaser” as to debtor’s real property, and gives the trustee the power to avoid/invalidate any transfer that these entities could have avoided under state law. The relevant portion of §544 is as follows:

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by—

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

11 U.S. C. §544 (emphasis added)

Real-Life Examples

The borrower executed a security deed and a waiver of borrower’s rights. The security deed lacked proper attestation, but the waiver was properly attested. The court held that the deed was not recordable, that the attestation was insufficient to serve as constructive or inquiry notice, and the trustee was allowed to sell the property free and clear of the security deed.

The security deed lacked the signature of an unofficial witness. The court chastised the closing attorney for failing to take proper care in ensuring that the security deed was attested properly, and found that the deed was not recordable, such that the trustee could avoid the same.

EMERGENCY ROOM: Foreclosure, Tax Sale Imminent, Active Litigation
If you are faced with a pending foreclosure, tax sale or other active litigation in regards to a loan you closed, or a tile you cleared, it is wise to alert your title company and not try to fix it yourself. If you have a litigation department in your office, enlist their help. Deadlines and procedures must be followed precisely. Temporary Restraining Orders can be obtained to stop a foreclosure or tax sale, but the burden of proof is high. Cooperate with your title company and compile your files to assist the claims counsel assigned to the file. Call the title company first, unless the client affected is one you have a regular working relationship with.

Conclusion

Reformation, Declaratory Judgment Actions, Quiet Title actions, Mistaken cancellation Actions, Breach of contract/Breach of agency, Attorney or Title examiner negligence claims, Equitable Claims/Injunctive Relief are all legal means to judicially resolve and cure title issues. Alternative Dispute resolution is mandated in some counties in Georgia. It is possible under Superior Court Rules to ask the Court send the parties to ADR (mediation) even if the other side is not willing to voluntarily consent to the same. Many private mediators are becoming increasingly familiar with real estate matters and can be of assistance as well.

Title curative litigation increasingly becomes a specialty area of practice. Always know when, as a closing practitioner, it is time to refer the case out to a litigator. Case law in Georgia is closely watched by those who practice in this area and they provide a good source of encouragement or information if the need ever arises to advise a client on the topics contained herein. Finally, encourage ADR if a dispute arises. It is time effective and much less costly than full blown litigation. And always, keep your contact with the opposing lawyer “just business” or friendly. Don’t let your clients’ frustrations become yours.
FRIDAY,
MAY 11, 2018

CONCURRENT SESSIONS

8:30  “DO I REALLY NEED AN ENGAGEMENT LETTER?”
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DO I REALLY NEED AN ENGAGEMENT LETTER?

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A. INTRODUCTION

On more than one occasion, the author, upon telling a prospective client that he [the author] would send a proposed engagement letter for the prospective client’s review, has been met by silence at the other end of the line. This is a real estate transaction, right? There is no lawsuit or other dispute, right? Well, perhaps so, but the short answer to the question posed in the title to this paper (Do I Really Need an Engagement Letter?) is a resounding “YES!” And, while the first thing that comes to mind may be the importance of documenting what you, as the dutiful practitioner, are going to be paid (and that is indeed an important item), there are many other important items to consider as well. This paper, while not constituting legal advice and while not intended as an exhaustive compilation of all that should be included in an engagement letter1, hopefully will describe many of the most common items that a practitioner might consider including.

B. CONTENT OF LETTER

1. Identifying the Client

In many other practice areas (e.g. personal injury, criminal defense, bankruptcy), attorneys frequently represent a single client in a single matter for a defined period of time. Commercial real estate attorneys, however, often have clients that they have represented for years in multiple transactions. Be mindful, however, of who, exactly, the client is. Many times, an initial engagement is through an individual or a corporate representative that may not remain in the deal (or with the entity). For example, it is common that a certain entity (or even an individual) might enter into a purchase and sale agreement as a purchaser, fully intending on

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1 For the purposes of this paper, the author has used the term “engagement letter,” though the concepts are generally applicable to a “fee agreement,” a “fee contract,” a “legal services contract” or similar agreement.
transferring its rights to an SPE (single purpose entity) prior to closing. If a practitioner desires to have the new entity encompassed by its engagement letter, consider language such as:

*This letter shall govern any work performed by our firm for [addressee] and/or any other special/single purpose entit(ies) created by or on behalf of [addressee] in connection with such acquisition, and the term “[addressee],” as used herein, shall also refer to such other entities.*

Or, consider a circumstance where a commercial practitioner is contacted by a certain “point person,” and the practitioner later comes to learn that the subject property is owned by multiple parties (whether individuals or entities). In such a circumstance, it is wise to clarify representation; as counsel for the “Seller” of the subject property, the practitioner, by definition, is representing all such individuals or entities, and it is prudent to have all such individuals or entities agree to the terms of the engagement (and ideally to authorize a given single party to speak on their behalf). It is also wise to inform such parties that they may seek their own counsel (or other advisors) to represent them in the event of any internal conflicts between them.

It is equally important for a practitioner to clarify who he or she does not represent. A selling or purchasing entity may have multiple investors who have a financial stake in the transaction, even though their names may appear nowhere on any contract, deed or other documents, and even though they may be taking no active role in the transaction. It is wise (if accurate) for a practitioner to clarify that he or she does not represent such investors, but instead is representing only the selling or purchasing party itself. Another example is the case of a purchasing (or refinancing) entity obtaining a loan that is to be guaranteed by one or more of its principals. While common for the “purchaser’s counsel” to review the loan documents,
that attorney should articulate clearly whether he or she also represents one or more of those
principals, particularly in light of the possibility that future conflicts may arise between or
among such principals.

There are many more instances in which a seemingly straightforward issue such as who
the client is can result in confusion. A practitioner is best served when he or she is fully
informed about the circumstances and then clearly articulates his or her understanding in
writing to the client.

2. Specifying the Nature of the Representation

A practitioner is well served to include in his or her engagement letter, with as much
specificity as is practical, what he or she has been hired to do (and/or what he or she has NOT
been hired to do). If an attorney is contacted by a purchaser of commercial real estate to
“represent the Purchaser in the transaction,” what exactly does that entail? Is the attorney
advising the Purchaser on its due diligence (e.g. reviewing a Phase I report or a property
condition report)? Is the attorney counseling the client with respect to tax ramifications of the
transaction? Is the attorney advising as to the best structure for the purchasing entity? To
what degree is the client expecting the attorney to advise it on business matters? Matters such
as this are best addressed up front, in the initial letter if possible. If not in the engagement
letter itself, the attorney would be wise to at least confirm with the client by a subsequent
email or letter that the attorney is or is not performing certain tasks related to the transaction.

3. Fees and Costs

Of course, one of the most obvious reasons for an attorney to have an engagement
letter is to memorialize the manner in which the attorney is to be compensated for his or her
services. The engagement should indicate an applicable hourly rate (and, to the extent different hourly rates are charged for partners, associates, paralegals, etc., all should be stated), a flat fee, a contingent fee\(^2\) or some combination thereof. The letter should also state the manner in which the client is to be invoiced (if at all), the date by which invoices should be paid and any late fee or interest that accrues in the event of a late payment. It is also wise to confirm that, should the attorney/firm incur any out of pocket costs in connection with its representation, those costs are to be reimbursed by the client.

If an attorney collects a retainer payment from the client, the attorney should state how such retainer is to be handled. In other words, is it applied towards the attorney’s initial work or to a final invoice? Also, what are the rights of the attorney to apply the retainer towards unpaid invoices? To avoid confusion and disputes, more information is better in this regard.

In a transactional practice, it is also suggested (if consistent with the agreement between attorney and client) to confirm that, if an attorney’s fees and costs are to be paid at a closing and the transaction is terminated, the attorney is still entitled to recover his or her fees and costs. Also, if an attorney plans to bill a client on an hourly rate basis, it is prudent for the attorney to reserve the right to increase his or her hourly rate from time to time upon notice to the client. Lastly, it is recommended that an attorney reserve the right to withdraw from his or her representation (in accordance with applicable ethical guidelines) if the attorney’s fees are not paid.

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\(^2\) Note that Rule 1.5(c) of the State Bar’s Ethics and Professionalism Rules requires that a contingent fee arrangement shall be in writing.
4. Conflicts of Interest

It should go without saying that, prior to the commencement of any representation, an attorney (and/or his or her firm) must confirm that there are no conflicts of interest with respect to the representation. Should any conflicts (or potential for conflicts) exist, the practitioner will be well served to address such circumstances up front, in the engagement letter. It may well be that such conflicts (whether ethical or business) can be resolved, but it is best that the nature of such resolution be spelled out in the letter to avoid confusion (or conflict with the client) down the road.

Further, an attorney should be mindful of the potential for future conflicts and how those are to be addressed. By way of example, in a transactional practice, an attorney might undertake to represent a seller that is selling its property to “buyer x.” The attorney may dutifully run a conflict check as to “buyer x,” but if the contract falls through and the seller later seeks to enter a contract with “buyer y,” the attorney’s obligations are obviously the same with respect to a conflict or potential conflict with respect to “buyer y,” and the attorney is benefitted by addressing such circumstances with his or client up front.

5. Dispute Resolution

Unfortunately, from time to time, disputes arise between an attorney and his or her client. Both parties will benefit if the engagement letter addresses what is to happen in the event of such a dispute. The letter may (but is not required to) require the parties to work together in good faith to try and resolve the dispute prior to submitting it to a third party for resolution. Failing a compromise between attorney and client, if the dispute involves the attorney’s fee, the State Bar of Georgia provides a mechanism by which fee disputes may be
arbitrated through the Bar (see, State Bar Governance Rules, Part VI). Under these rules, the petitioner must agree to be bound by the result of the arbitration and, if the respondent also agrees to be bound, the resulting arbitration award will be enforceable under the Georgia Arbitration Code (O.C.G.A. § 9-9-1, et. seq.).

For disputes that do not involve fees (or if the parties do not choose to provide for fee disputes to be resolved through the Bar’s process), the parties may still elect to have disputes resolved through binding arbitration rather than through litigation. If this is the preference of the attorney, then he or she should make sure to spell out in detail the nature of the process (e.g. identity of arbitrator, applicable rules, number of arbitrator(s), etc.). Additionally, with such an arbitration provision, the letter should spell out which party would have the right to choose the option (i.e., may the attorney or client select that option unilaterally or must it be a mutual decision)?

6. Termination of Agreement

On occasion, either the attorney or the client may decide, even in the absence of a dispute, that he/she/it wishes to terminate the attorney’s engagement. It is prudent for the engagement letter to address such a circumstance. As a practical matter, either party has a right to terminate the agreement (although the attorney certainly has more ethical considerations of which to be aware), but the engagement letter should address exactly how the process should work.

Two of the most critical items to address in the event of a termination of an attorney’s engagement are the transition of the client’s files and the payment of the attorney’s fees. As an ethical consideration and to protect himself or herself from future conflict, an attorney
should ensure an orderly transition of the client’s file(s) to the client or to new counsel that the client has identified (no matter which party terminated the representation). This transition should be handled as promptly as possible. The engagement letter should state that an attorney would not terminate an engagement in such a manner as to jeopardize the client’s interest in a matter (e.g., a transactional attorney should not seek to terminate his or her engagement two days before a complex closing).

The engagement letter should provide for the manner in which the attorney will be paid his or her fees and expenses in the event of termination. Ideally for the attorney, he or she should set forth in the engagement letter that he or she is entitled to be paid all fees and expenses incurred up until the date and time of termination. As noted above, if it is the parties’ intent, the letter should make clear that a termination does not mean the attorney does not have the right to recover his or her fees and expenses. As a practical matter, the attorney may have to decide how much he or she wishes to belabor the point of fees (e.g., not being paid for a one-hour meeting is likely a different thought process than not being paid for months of work). The attorney should not, however, condition the transition of a client’s file upon the payment of the attorney’s fees and expenses.

C. GENERAL MATTERS

1. Merger Clause

Most attorneys who have practiced long enough have had a client say “I thought we discussed ...” or “you told me ...” When it comes to the essence of an attorney’s engagement, those are probably discussions that an attorney would prefer not to have. As with other contracts, it is wise for an attorney engagement letter to include “merger clause” language
stating that the engagement letter contains the entire agreement of the parties relating to the
engagement, that there are no verbal agreements that would prevail beyond what is in the
engagement letter and that the engagement letter may only be modified by a subsequent
written agreement.

2. Completion of Representation

Particularly with a client that the attorney does not represent on an ongoing basis, it is
important for the attorney to be mindful of when his or her representation has ended, and to
alert the client of that. When all of the work for the client has concluded, it is prudent for the
attorney to inform the client, in writing, that the attorney will be taking no further action on the
client’s behalf and that, upon final billing and payment, the attorney will be closing his or her
file. Even in instances where the attorney is representing the client on an ongoing basis, it is
wise, upon the conclusion of a given matter, to inform the client that the attorney’s work on
that matter is completed and that no further action will be taken.

D. CONCLUSION

The content above, while not intended to be an exhaustive list of matters that can be or
should be included in an engagement letter, hopefully provides some general insight as to how
a practitioner (particularly a transactional practitioner) may be aided in his or her preparation
of a letter. However extensive the letter may be, it is always beneficial for the client (and,
frankly, his or her client) to have an executed letter before the attorney commences work on a
matter.
ENVIRONMENTAL DUE DILIGENCE AND BROWNFIELD CONSIDERATIONS FOR EVERYDAY TRANSACTIONS

Darren G. Meadows, Hull Barrett PC, Augusta
Why do environmental due diligence?

- To look for environmental issues that may cost you money.
- Because your lender requires it (whether now, or later.)
- To make sure you aren’t held responsible for someone else’s mess.
Why do environmental due diligence?

- To look for environmental issues that may cost you money.
- Because your lender requires it (whether now, or later.)
- To make sure you aren’t held responsible for someone else’s mess.

Q: How can I be held liable for someone else’s mess that I can prove I did not cause?

A: Because the federal CERCLA and Georgia HSRA are strict, joint & several liability statutes. If you own it or operate it, you are liable (unless an exception applies.)

§ 12-8-96.1. Liability for cleanup costs; punitive damages; action for recovery of costs and damages; claims for contribution

Each and every person who contributed to a release of a hazardous waste, a hazardous constituent, or a hazardous substance shall be jointly, severally, and strictly liable to the State of Georgia for the reasonable costs of activities associated with the cleanup of environmental hazards, including legal expenses incurred by the state pursuant to subsection (a) of Code Section 12-8-96, as a result of the failure of such person to comply with an order issued by the director. Any such person shall be so liable notwithstanding the absence of the issuance of an order to such person pursuant to subsection (a) of Code Section 12-8-96 if the director is unable to identify such person prior to the commencement of clean-up action after making a reasonable effort to do so pursuant to such Code section, or if such person contributed to a release which resulted in an emergency action by the director and issuance of such an order would cause a delay in corrective action that could endanger human health and the environment. The person may, in addition, be liable for punitive damages in an amount at least equal to the costs incurred by the state and not more than three times the costs incurred by the state for activities associated with the cleanup of environmental hazards. Costs and damages incurred by the state may be recovered in a civil action instituted in the name of the director. All costs recovered by the state pursuant to this Code section shall be deposited into the hazardous waste trust fund.
§ 12-8-92. Definitions

- Unless otherwise defined in this part, the definition of all terms included in Code Section 12-8-62 shall be applicable to this part. As used in this part, the term:
  - (9) "Person who has contributed or who is contributing to a release" means:
    - (A) The owner or operator of a facility;
    - (B) Any person who at the time of disposal of any hazardous waste, hazardous constituent, or hazardous substance owned or operated any facility at which such hazardous waste, hazardous constituent, or hazardous substance was disposed of;

§ 12-8-96.1 (continued)

(c) No person shall be liable for costs or damages pursuant to this Code section if he can show by a preponderance of the evidence that the release of a hazardous waste, a hazardous constituent, or a hazardous substance was caused solely by:
  - (1) An act of God;
  - (2) An act of war;
  - (3) An act or omission of a third party other than an employee or agent of the person or other than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the person, if the person establishes by a preponderance of the evidence that:
    - (A) He had no relationship with the third party nor exercised any control over activities of the third party; and
    - (B) He took precautions against foreseeable acts or omissions and the consequences that could foreseeably result from such acts or omissions; or
  - (4) Any combination of paragraph (1), (2), or (3) of this subsection.

(d)(1) For purposes of paragraph (3) of subsection (c) of this Code section, a contractual relationship may be conclusively established by, but not limited to, land contracts, deeds, or other instruments transferring title or possession, unless the real property on which the disposal or release of hazardous wastes, hazardous constituents, or hazardous substances has occurred or is occurring was acquired by the person after the disposal or release of the hazardous wastes, hazardous constituents, or hazardous substances and one or more of the following circumstances are established by a preponderance of the evidence:
  - (A) At the time the person acquired the site, the person did not know and had no reason to know that any hazardous waste, hazardous constituent, or hazardous substance had been disposed of or released at the site;
  - (B) The person is a government entity which acquired the site by escheat, through any other involuntary transfer or acquisition, or through the exercise of eminent domain by purchase or condemnation; or
  - (C) The person acquired the site by inheritance or bequest

So, what is “All Appropriate Inquiry?”

At minimum, a Phase I Environmental Site Assessment American Society for Testing and Materials Protocol (ASTM E1527-13)
§ 12-8-96.1 (d) (continued)

• (2) To establish that the person had no reason to know as provided in subparagraph (A) of paragraph (1) of this subsection, the person must have undertaken, at the time of acquisition, all appropriate inquiries into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability. For purposes of the preceding sentence, the finder of fact shall take into account any specialized knowledge or experience on the part of the person, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection.

• (3) Nothing in this subsection shall diminish the liability of any previous owner of such property who would otherwise be liable under this part. Notwithstanding this paragraph, if a person obtained actual knowledge of the disposal or release of a hazardous waste, hazardous constituent, or hazardous substance at the site when the person owned the real property and then subsequently transferred ownership of the property to another person without disclosing such knowledge, the person so transferring the property shall be treated as liable under subsection (a) of this Code section, and no defense under subsection (c) of this Code section shall be available to such person. Nothing in this subsection shall affect the liability under this part of a person who, by any act or omission, causes or contributes to the disposal or release of a hazardous waste, a hazardous constituent, or a hazardous substance which is the subject of the action relating to the site.

So, what is “All Appropriate Inquiry?”

At minimum, a Phase I Environmental Site Assessment
The environmental assessment has identified a REC.

Now what? Is my deal dead?

- A REC does not automatically require sampling to be conducted.
- A REC does not automatically expose a buyer to liabilities. (EXAMPLE – a gasoline underground storage tank facility nearby.)

TO SAMPLE OR NOT TO SAMPLE, THAT IS THE QUESTION.

- Should be addressed in the contract originally, or by carefully considered amendment. Don’t try to squeeze environmental sampling into a 15 or even 30 day due diligence period.

- If you represent Seller, stipulate that the data is not to be shared with anyone, including Seller, unless Seller specifically requests it or unless required by law.

- If you represent Buyer, try to reserve right to extend due diligence to allow ample time for sampling and interpretation of the data.

- Who pays for it? Depends on which party is more motivated.
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Samples are back. Chemicals found in soil and/or groundwater. Now what??

- Buyer has no duty to disclose results to EPD.
- Seller only has duty if they have knowledge of a release that exceeds specific quantities as defined in regulations.
- For commercial properties, some levels of contamination won’t necessarily invoke regulatory liability.

---

### FORMER KINSEY AUTOMOTIVE SITE

**PART IV – GROUNDWATER RELEASE INFORMATION**

Please provide the following information for EACH regulated substance released to the groundwater at the site and submit the laboratory analytical sheets for all samples analyzed from the site. Use additional sheets if necessary.

<table>
<thead>
<tr>
<th>Regulated Substance</th>
<th>CAS Registry Number</th>
<th>Highest Detected Concentration (ppm)</th>
<th>Sample Depth Below Ground Surface (ft)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cadmium</td>
<td>7440-43</td>
<td>0.0077 mg/L</td>
<td>15</td>
</tr>
<tr>
<td>Chromium</td>
<td>7440-73</td>
<td>2.75 mg/L</td>
<td>15</td>
</tr>
<tr>
<td>Lead</td>
<td>7439-92</td>
<td>0.947 mg/L</td>
<td>15</td>
</tr>
<tr>
<td>Mercury</td>
<td>7439-97</td>
<td>0.0036 mg/L</td>
<td>15</td>
</tr>
<tr>
<td>Selenium</td>
<td>7784-90</td>
<td>0.0076 mg/L</td>
<td>15</td>
</tr>
<tr>
<td>Bis (2-ethylhexyl) phthalate</td>
<td>117-811</td>
<td>1380 ug/L</td>
<td>13</td>
</tr>
<tr>
<td>1,2-Dichloroethane</td>
<td>107-062</td>
<td>20.6 ug/L</td>
<td>13</td>
</tr>
<tr>
<td>1,2-Dichloropropane</td>
<td>78875</td>
<td>164 ug/L</td>
<td>13</td>
</tr>
<tr>
<td>Bis (2-chloroethyl) ether</td>
<td>111444</td>
<td>19.4 ug/L</td>
<td>13</td>
</tr>
</tbody>
</table>
EPD MEMO
NO LISTING ON HSI DETERMINATION

40th ANNUAL REAL PROPERTY LAW INSTITUTE VOL 2
159 of 384

Georgia Department of Natural Resources

MEMORANDUM

FROM: Dr. Dr. [Redacted]
TO: [Redacted]
SUBJECT: Former Kinsey Automotive Site

June 3, 2009

The Former Kinsey Showroom, known as the Former Kinsey Automotive Site, was evaluated for probable contamination. The ground-water pathway score for this site is 8.1, and the soil pathway score is 6.0. Perimeter 1

Background

The Former Kinsey Showroom Program evaluated the Former Kinsey Showroom for possible contamination. The program evaluated a number of factors, including potential for contamination and the need for remediation. The EPD RQS for this site is the Former Kinsey Automotive Site. The RQS is based on the EPA RQS for the Former Kinsey Automotive Site.

The Former Kinsey Showroom Program evaluated the Former Kinsey Showroom for possible contamination. The program evaluated a number of factors, including potential for contamination and the need for remediation. The EPD RQS for this site is the Former Kinsey Automotive Site. The RQS is based on the EPA RQS for the Former Kinsey Automotive Site.

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Vogue Cleaners

- SOIL RELEASE INFORMATION

Vogue Cleaners

PART III - SOIL RELEASE INFORMATION

Please provide the following information for each soil sample collected at the site:

1. Soil sample number
2. Soil sampling date
3. Soil sampling location
4. Soil sampling depth
5. Soil sample type
6. Soil sample weight
7. Soil sample volume
8. Soil sample moisture content
9. Soil sample 

Regulated Substance

<table>
<thead>
<tr>
<th>Substance</th>
<th>Concentration (mg/L)</th>
<th>Action Level (mg/L)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Benzene</td>
<td>10</td>
<td>50</td>
</tr>
<tr>
<td>Toluene</td>
<td>50</td>
<td>500</td>
</tr>
<tr>
<td>Ethylbenzene</td>
<td>100</td>
<td>1000</td>
</tr>
</tbody>
</table>

Note: X uses an additional sheet for additional information.
EPD
NO-LISTING
LETTER

• BROWNFIELD EXAMPLE 1:
  • MedNow – Washington Road, Augusta, Georgia
  • Former gas station, high traffic area.
  • Original contract price of $635,000.
  • Phase I determined USTs not active, but not properly closed, out of compliance.
  • Contract extended for Phase II.
  • Because Seller was out of compliance with UST regs, Trust Fund coverage not available.
  • Buyer agreed to pay for removal of tanks (~$32,000) with Seller signing all documents as Owner/Operator.
  • Contaminated soil removal costs split, Seller paid ~$62,000, Buyer ~$17,000.
  • Groundwater sampling, Seller paid $9,000.
  • Work was all done prior to closing, in order to make sure Buyer did not undertake any UST liability. Seller had no money to pay for their part, so Buyer contracted for work, but Seller's payment obligations collected at closing out of proceeds of sale.
  • Both Buyer's (conventional) and Seller's (individual) lenders were also involved and cooperated to get the deal done.
  • From time of agreement on terms to closing was less than 90 days.
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BROWNFIELD EXAMPLE 2:

Former McTeer Fuel – Augusta, Georgia

- Gas Station in pre-foreclosure by Bank. Borrower walked away.
- USTs properly secured, still functional and in compliance.
- Environmental issue was not petroleum, it was lead contamination in soil, found to be widespread in the area due to historic use of contaminated fill dirt to reclaim area.
- Property listed on Hazardous Site Inventory due to the lead contamination.
- Bank wanted to restore marketability.
- We demonstrated to EPD that the soil contamination was widespread, but was not affecting groundwater, that removal of contaminated soil would far exceed the reasonable value of the property.
- Site was already covered in asphalt, to enhance protection, the cap was improved and a recorded Covenant proposed to require annual inspection and maintenance.
- Because Bank had never foreclosed, Bank was able to file as Brownfield Prospective Purchaser prior to initiating foreclosure.
- Subsequent Purchaser was lined up and the property sold within weeks of obtaining EPD approval on the Brownfield CAP.

Brownfield Example 3:

Indian Trail Plaza – Gwinnett County

- Former gas station, USTs properly closed, converted to used car lot.
- Bank had obtained via foreclosure of loan assigned to it by failed bank.
- Phase II by potential buyer detected TCE (typically a dry cleaning fluid/degreasing solvent.)
- Buyer gave data to Bank, triggering notification obligation under HSRA.
- Dry cleaner across street likely source, had recently submitted notification to EPD.
- Bank completed more complete site investigation to support a Brownfield Application, which was then used to market the property and provided to the Buyer so they could obtain with the Brownfield protections.
- Site not listed on the HSI, Brownfield certification approved. No remediation required.
- Total consultant costs ~$35,000
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Please call or e-mail with any questions:

Darren G. Meadows
Hull Barrett, PC
Tel. 706 722 4481
dmeadows@hullbarrett.com
ADVANCED TOPICS IN DRAFTING AND MANAGING COMMERCIAL SALES CONTRACTS

Rob Brannen, Bouhan Falligant LLP, Savannah
Advanced Topics in Drafting and Managing Commercial Sales Contracts

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I. INTRODUCTION

When I talked about Sales Contracts at the RPLI in 2008, my focus was on clients that called their attorneys and said “GET ME OUT OF THIS CONTRACT”. So we focused on drafting and managing a contract in a manner that would make it unbreakable. In the last few years, however, the contract problems I see have changed. Sellers and Purchasers don’t want to get out of contracts much anymore. They are more focused on money and time. By money, I mean that they want to maximize profitability and limit liability, and by time, I mean that they are concerned more about the timing of transactions to the extent that they cost or save money. Enforceability of the contract is still important, but today I want to focus on some of the provisions dealing with money and time.

For example, I had a contract for an expensive property last year that required a long due diligence period to confirm zoning and other entitlements. My clients were paying about $150,000 a month in property taxes, so every month reduced their profit. I spent a lot of time calculating what I thought was a fair due diligence period, because I knew the purchasers needed time to get their entitlements. The purchasers later became frustrated when we were reluctant to grant additional extensions for free, but I felt like we had negotiated a fair allocation of cost, and was trying to protect my client’s money.

Before I go any further, I want to make a quick professionalism point. When I am negotiating a contract, I don’t look for ways to “get” or “trick” the other party. I am trying to come up with a fair contract that clearly and accurately reflects the business deal. Tricking somebody is the quickest way to end up in litigation, which
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Protecting money and time requires awareness of the factors affecting the negotiating strength of the parties, drafting an enforceable contract around those factors, and then continually reviewing and managing the contract between contract signing and closing to insure fulfillment of the terms. So, I am going approach this issue as a two-step process of (1) Drafting and (2) Managing.

First, in the drafting phase, we cannot just accept the form contracts that are proposed or sometimes even signed by our clients. As soon as we are asked to negotiate, draft, review, or even close an existing contract, we need to consider the business points that affect our client’s money and time, and evaluate the contract provisions needed to protect those priorities. If you don’t know those business points, meet with your client first to discuss what is important to them, and then draft accordingly.

Let’s start by considering factors that affect the negotiating strength of the parties. When I was a boy, I remember my Dad complaining that his lawyers understood the law, but they didn’t understand his business. If your job is to protect money and time, you have to understand the things that affect them. Let’s consider an example:

Lender selling acreage which is an REO property that it foreclosed to Developer that plans to develop lots out of acreage and sell lots to
Homebuilder buying lots to build and sell homes

In our example, some questions to ask are:

**Lender**

**Money:**
- How much was owed on the loan?
- How much did it recover?
- How much has it already written off on its financial statement?
- What is the appraised value of the property on their books?
- What are its carrying costs for taxes, HOA dues, insurance, etc.

**Time:**
- How long has it held the property?
- When are its financials published, and does it need to sell the property by a certain date to make financial projections?
- Is it under any kind of Federal Reserve order that creates time parameters, i.e., such as a requirement to dispose of a certain amount of REO property by a certain date.

**Developer**

**Money:**
- What is the cost of land? Can it buy the land in Phases?
- What are the soft costs like engineering, taxes and insurance?
- What are financing cost (i.e., down payment, closing costs and interest)?
- What will infrastructure construction cost?
- What are its carrying costs for taxes, HOA dues, insurance, etc.

**Time:**
- How long will it take to complete entitlements and permitting so they can start construction (i.e., zoning, geotechnical, wetlands, water and sewer, plan approval, building permits)?
- How long will construction take?
- How fast can they sell the lots (i.e., the estimated take down rate)?
- When does their financing mature so that it would have to be refinanced?
Homebuilder buying Lots:

Money:

What are their construction financing costs?
How much will the houses it builds cost?
How much can it sell the houses for?
What will be the carrying costs of the house once built?

Time:

How long will it take to get permitting?
How long will it take to build?
How long will it take to sell?

As you start answering these questions, you will see that each party has different priorities related to time and money. As you draft the contract, you want to consider how you can resolve these issues in a way that is most favorable to your client. For example, the lender may want a single sale of all of the property by the end of the year so it will show up on its 2018 financial statement, while it might be cheaper for the developer to take down the land in phases. So, maybe the lot price for a bulk sale should be less than the lot price for a phased sale.

Second, we need to manage the transaction during the period between contract signing and closing. During this time, facts and conditions are changing in ways that could cost your client money or time. We need to anticipate these circumstances, and proactively react to them. I refer to this as the managing phase.

This paper will address questions and tips for you to consider as you draft and manage your contracts, in order to protect your client’s money and time.
II. THE DRAFTING PHASE

A. ESSENTIAL COMPONENTS OF A CONTRACT

Whether you are drafting a contract or reviewing a contract that has already been signed, you must confirm that the essential components of a real estate contract are correctly included. The main components are:

a. Must be a signed writing to avoid the statute of frauds

b. Parties

c. Consideration

d. Purchase Price and terms of payment

e. Legal Description

f. Closing Date and giving of possession (Reasonable time assumed, but why risk it)

STATUTE OF FRAUDS

Rule: Real estate contract must be in a signed writing, with few exceptions.

The Statute of Frauds requires certain obligations to be in writing and to be signed by the person enforcement is sought against (or someone lawfully authorized by them) in order to be binding. These obligations include contracts for sale of, interest in, or concerning lands.

Land contracts may be excused from the Statute of Frauds requirements where (1) the contract has been fully executed; (2) one side has performed, and the other side has accepted that performance in accordance with the contract; or (3) there has been sufficient partial performance of that contract, such that it...
would be fraud of the party refusing to honor the contract if the court did not compel performance.

Rule: An electronic record or signature is legally effective and enforceable between parties who have agreed to conduct transactions by electronic means, and that agreement may be determined from the context and surrounding circumstances, including the parties conduct. See Uniform Electronic Transactions Act.

DRAFTING TIP: Electronic communications can create binding contracts. Be aware that parties can unintentionally create binding contracts using text and e-mail correspondence.

PARTIES

Rule: All sellers and the purchaser must sign, and all parties must be persons or legal entities capable of contracting.

1. All title holders sign contract
   DRAFTING TIP: Cross check sellers by asking names of sellers, reviewing tax records, performing a preliminary grantor and grantee search on clerk’s cooperative

2. Authority of executor, trustee, officer or attorney in fact to sign
   DRAFTING TIP: Ask questions about authority and determine whether proof of authority or additional investigation warranted
3. Existence of entity or entity not dissolved  
DRAFTING TIP: Search secretary of state website for existence of entity.  
Individual might still be liable.

4. Competence or minority of seller  
DRAFTING TIP: Be wary of children selling property and signing  
documents for elderly parents. Ask them about competency and  
determine whether additional investigation is warranted. You might need  
to have a guardian ad litem appointed.

5. Ability of purchaser to perform  
DRAFTING TIP: You should consider whether a single purpose entity  
without assets or a poorly capitalized individual is likely to be able to  
perform. If they fail to perform, and are judgment proof, are your  
remedies adequate?

EARNEST MONEY AND CONSIDERATION  
Rule: Contract must be supported by valuable consideration. Some cases hold that the  
agreements to buy and sell are adequate consideration, and some cases hold that the  
consideration is valid, even if not paid, because the seller can always sue for payment.
1. Recite nominal consideration.

**DRAFTING TIP:** Nominal consideration has been deemed sufficient even if not paid, because it creates the obligation to pay.

2. Confirm failure to deliver earnest money is specified as a default with adequate remedies.

**DRAFTING TIP:** Seller may want to maintain that the contract is binding even if the earnest money is not delivered. Is there other consideration? If the purchaser cannot deliver significant earnest money immediately, ask the purchaser to pay nominal consideration of $10.00 at signing. If the earnest money is not necessarily the consideration, a failure to pay the earnest money may not necessarily void the contract.

3. Review obligations of escrow agent if a default.

**DRAFTING TIP:** Consider duties of escrow agent in the event of a dispute. Should escrow agent have initial authority to decide who gets earnest money and notify parties of decision? How difficult will it be to recover earnest money? Can we make it more favorable?

4. Consider mandatory retention of a portion of earnest money.

**DRAFTING TIP:** A free look contingency that allows the purchaser to terminate the contract and receive back all of his earnest money means that the purchaser has nothing at risk during the free look period and
raises a consideration issue. The contract is similar to an option, but the earnest money consideration for the option is refundable. Allowing the seller to retain $100 of the earnest money if purchaser terminates is a common way to address the consideration issue. (See the GAR form free look contingency referring to an option to purchase)

PURCHASE PRICE

Rule: The contract must either state the price to be paid for the property or set forth criteria by which it may be calculated.

1. Confirm formulas are precise
   DRAFTING TIP: Include an example in the contract explaining how the formula is to be applied based on fictional data as a method of clarifying a difficult formula.

2. If price is based on acreage, confirm how acreage to be determined.
   DRAFTING TIP: A survey to be prepared can determine acreage, but confirm who will prepare and if the other party has objection rights.

3. If price based on density dependent on a zoning decision not yet made, confirm final determinate of density.
   DRAFTING TIP: Include specific requirements for timing and content of zoning application, and date of determinate decision by municipal body.

What happens if appeal?
4. If Seller financing portion of purchase price or purchaser assuming existing loan, define financing in detail.

DRAFTING TIP: Include terms of loan, including amount, interest rate, terms of payment, maturity date, description of collateral and additional documents to be executed.

LEGAL DESCRIPTIONS

Rule: A contract must describe the land to be sold with the same degree of certainty as that required of a deed conveying realty, or provide a key to determining said land based on evidence in existence at the time of execution.

1. Legal description attached?

DRAFTING TIP: Do not rely on other parties to attach legal description. Locate and attach legal description before signing.

2. Does legal description adequately and correctly describe the property?

DRAFTING TIP: Search for vesting deed on clerk’s cooperative website when preparing legal description.

DRAFTING TIP: Avoid using non-specific drawings, site plans or master plans without additional information
3. Are multiple descriptions consistent?

DRAFTING TIP: Attorneys have different theories about multiple descriptions. I prefer multiple descriptions because if one contains an error, the other descriptions will protect you. Other attorneys point out that multiple descriptions can result in conflicting descriptions, which could result in an ambiguity in your contract.

My preference is to first reference a lot or parcel and a recorded plat; second, I provide that the lot or parcel is more particularly described according to the following metes and bounds based on the same plat; third, I include a derivation clause indicating that the property is all or a part of property conveyed in a previous deed, and fourth, I indicate that the property is all or part of the property contained in a tax identification number. I think that you can include all of these provisions in a way that protects you from inconsistencies. I typically do not favor addresses, which can change, and which don’t really describe the boundaries of the property, but I will use them in residential contracts for the convenience of residential purchasers, lenders and appraisers as an addition to my legal.

4. Is the property to be described by a plat to be prepared in the future?

DRAFTING TIP: A contract containing a legal description relying on a plat to be prepared in the future is not valid, because the key relied upon must be sufficient to provide identification by reference to extrinsic
evidence, which exists at the time the contract is entered into by the parties.

In this case, try starting with a legal description that includes the property, attach a site plan or drawing showing how the property is to be divided, and describe points of reference (monuments, fences, trees, etc.) to add specificity to your drawing. Then, provide that your makeshift legal will automatically be replaced by a legal based on the survey when it is prepared and approved by the parties. Finally, amend the contract to attach the new legal when available.

5. Are lots reflected by a recorded subdivision plat?

DRAFTING TIP: You cannot describe lots based on a plat to be prepared in the future, but you can use a metes and bounds legal description based on a plat that is prepared but not recorded. Be careful that your contract is amended to reference the final plat when recorded and that it has not changed since you prepared your legal. Be aware that conveying property based on an unrecorded subdivision plat could be a violation of your local subdivision ordinance, which is usually a misdemeanor.

6. Are improvements adequately described?

DRAFTING TIP: A legal description in a sales contract must often describe more than just real property. For example, if lots are being developed, you need to define a finished lot. With improvements, I
typically at least refer to a list of plans and specifications in the contract that will often refer to plans and specifications that the parties have initialed someplace else. Most plans and specifications have a contents page on the front that you can copy and attach to your document. However, I have also started using a checklist to try and fill the gaps not addressed in the plans and specifications. You might ask the engineer what work is outside the scope of the plans and specifications.

7. Have condominium units been defined by recording appropriate documentation?

DRAFTING TIP: A condominium must be described by reference to a plat showing the footprint, an architectural plan that shows the vertical boundaries, and a declaration describing the appurtenant percentage interest in the common elements. If the condominium or any of the recreational facilities are not complete as of the execution of the contract, the seller must make copies of the plans and specifications available to the purchaser for inspection.

8. Describing the indescribable.

DRAFTING TIP: In some cases, we have to describe property that simply cannot be described with sufficient certainty. In a lot takedown contract, for example, the property might be acreage that has been generally site planned. The purchaser has an obligation to purchase lots to be selected
when the property is subdivided. The rule is that the contract must have a legal description that would be adequate if it were attached to a deed, and that if it is ambiguous, it must provide a key that can be used to determine the legal description as of the date of execution of the contract. The best you can do in this situation is to start with a legal description of something that you can describe. For example, you can attach a description of the acreage tract, and indicate that the property to be sold is a portion of this acreage tract that will be subdivided according to the general site plan. Such a legal description would probably not be sufficient if it were attached to a deed. In this case, you must inform your client that there is some risk this contract might not be enforceable because the legal description is not specific enough.

CLOSING DATE

Rule: Reasonable time for performance can be implied where it’s missing from the contract.

1. Is closing date included?

DRAFTING TIP: Even though reasonable closing date is implied, you do not want to rely on a court to set your closing date.
2. Is closing date specified by date?

DRAFTING TIP: If you want a specific closing date, use a date rather than calculating the closing date based on another event such as expiration of an inspection period.

3. Is closing date specified by reference to other event?

DRAFTING TIP: Consider implications if closing date is tied to an event that fails to occur. An example would be a closing date thirty days after completion of certain improvements. If the improvements are never completed, the closing date might never arrive, allowing the purchaser to tie up the property indefinitely.

DRAFTING TIP: Consider whether extension of other event, such as inspection period, will change closing date.

DRAFTING TIP: Always include an absolute date by which everything must happen. Uncertainty is typically more detrimental to a seller than a purchaser, because it prevents the sale of the property to someone else.

4. Does closing date say “on or before” the date.

DRAFTING TIP: Consider whether an early closing could cause your client to be in default if he has not yet satisfied his conditions precedent.
5. Does contract say time is of the essence?
DRAFTING TIP: If it doesn’t say “time is of the essence”, it’s not unless the context requires it. Generally, the clause applies to all parties, so make sure sellers constructing improvements or having other conditions precedent really want this clause. If the seller might need extra time to satisfy a condition, draft the automatic extension into the seller condition only.

DRAFTING TIP: In new construction, the purchaser wants to know when his house will be ready, but most builders want some flexibility to deal with construction delays. Consider a “Target Date” for the purchaser’s benefit, with the actual closing date to be determined by notice from seller based on some construction event such as completion of sheetrock. Nevertheless, always include an outside closing date so that you have some parameters for determining whether or not the seller was prepared to close within a reasonable time.
B. OTHER SECTIONS TO WATCH

TITLE

Rule: Seller generally must convey to the purchaser good and marketable fee simple title to the property.

1. Define good and marketable fee simple title.
   
   DRAFTING TIP: Define good title by reference to a title standard that you know the property will satisfy. The Georgia Bar Association title standards are used as a reference in a lot of contracts. Also, title that a national title company will insure at standard rates without exception, other than the general exceptions and easements, covenants and restrictions of record is a common standard. Be careful with representations and warranties title is marketable without more specificity.

2. Know the status of your title.
   
   DRAFTING TIP: If you are fortunate enough to be involved at the beginning of the project, have a full title examination and a good survey performed and spend time cleaning up the title in the beginning. Then, you are in a position to attach a list of permitted title exceptions to your contract that the purchaser generally must accept.
3. Limit the title objection period.
   DRAFTING TIP: Provide for a short title objection period, not because
   you want to give the purchaser a bad title, but because you want to force
   the purchaser to raise any title objections early in the due diligence
   process. This gives you time to fix problems, and it prevents the purchaser
   from making up title objections as an excuse to avoid its obligations under
   the contract late in the process.

4. Provide seller options that include the right to correct the problem and the
   right to terminate the contract.
   DRAFTING TIP: The contract should allow your seller adequate time to
   fix any title objection, or, if the title objection is too expensive or time
   consuming to correct, the right to terminate the contract and start over.

5. Give the seller the right to extend the closing date to correct a title
   objection.
   DRAFTING TIP: Do not underestimate the amount of time it will take to
   fix a title objection. A unilateral right to extend the closing date can be a
   valuable benefit to the seller.

6. For complex or problem titles, control the title examination process.
   DRAFTING TIP: If a title policy has already been issued on a difficult title,
   you should provide in the contract that the title will be examined and that
the title insurance will be issued by the agent or company that has already provided title insurance. They will typically tie into their existing policy and automatically insure over the problem areas.

7. Make title exceptions to be created during the contract period permitted exceptions.

DRAFTING TIP: If you are drafting restrictive covenants that will be recorded prior to closing and will be an exception to title, you should list the restrictive covenants as a permitted exception in the contract and retain the right to draft and record the document. If the restrictive covenant is already recorded, you might want to retain the right to amend it during the contract period without the purchaser’s consent. The condominium act requires that notice of material amendments to the condominium declaration be given to purchasers that have executed contracts, which could re-start their statutory time period to cancel the agreement.

8. Include a list of fees and assessments that will be due on the lot in the contract, but provide that the fees and assessments may change from time to time according to the documents creating them.

DRAFTING TIP: I sometimes prepare a “neighborhood addendum” for each neighborhood that I am working on for the purpose of identifying all of the covenants, the current association dues and charges, water and
sewer fees that might be due at closing, and other charges that the purchaser will incur to prevent objection at closing.

CONDITIONS PRECEDENT

Rule: Conditions precedent must be performed before the contract becomes absolute and obligatory on the other party.

1. Distinguish contingencies from conditions to closing.

DRAFTING TIP: A contingency clause typically requires some action or approval by a third party, might or might not happen, and can result in termination of the contract with neither party being in default (i.e. a financing contingency).

On the other hand, a condition clause is typically within the control of the seller, is supposed to happen, and the failure to complete the condition results in a seller default, but does not necessarily terminate the contract (i.e. a requirement that the seller’s representations and warranties be correct)

Limit contingencies that are out of your client’s control. Avoid including conditions that you are not absolutely certain will be satisfied.

2. Confirm that the contract contains mutual obligations.

DRAFTING TIP: In order for a bi-lateral contract to be valid, both sides must have mutual obligations. A unilateral contract such as an option or
an unlimited free look can only be enforced against one of the parties.

Generally, contingencies do not prevent the contract from having mutuality, because the cases hold that as long as there is mutuality prior to the date that the contract is to be enforced, the contract is enforceable.

Watch out for provisions that give one party broad discretion to terminate the contract without consequences. For example, if the purchaser’s only remedy for a seller default is return of the earnest money, the seller can refuse to close without consequences. Also, think about how contingencies to be determined in one party’s sole discretion might threaten mutuality.

3. Limit a free look contingency.

DRAFTING TIP: As long as the purchaser has a free look contingency, your contract is really only an option that is not binding on the purchaser, and should be treated like one. In other words, your seller should not take actions or make commitments based on the enforceability of the contract.

Avoid giving purchaser the right to terminate for any reason by limiting the free look to confirmation that the property is suitable for purchaser’s intended use. A free look contingency should always be strictly limited in time, and replaced with specific contingencies if any issues are still outstanding at the end of the time period. Avoid extending free look contingencies for outstanding minor issues. Instead, replace the free look contingency with specific contingencies.
4. Contingencies must be very specific.

DRAFTING TIP: A financing contingency must include the minimum loan amount to be obtained, the minimum term of the loan, and the maximum interest rate or it could be deemed ambiguous and void the entire contract.

The same exactness should be utilized when drafting any contingency. Also include a specific time period for it to be accomplished and an easy way to confirm whether it has been accomplished. For example, you could require delivery of the loan commitment for a financing contingency, or approval of the zoning resolution by the municipality for a zoning contingency.

5. Contingencies must contain affirmative and measurable duties to pursue. 

DRAFTING TIP: For example, if your purchaser has a site plan approval contingency, consider requiring him to hire an engineer by a certain date, provide seller with a review copy by a certain date, file the application by a certain date and deliver a copy of it to the seller, and generally pursue said action diligently. Give the seller an opportunity to terminate the contract after notice to the purchaser if purchaser fails to pursue satisfaction of the contingency.
6. Contingencies can be absolute or optional.

PRACTICE TIP: I prefer an optional contingency so that the contract is not inadvertently terminated when one party or the other is willing to close anyway. For example, a financing contingency might provide that a failure to obtain financing gives the purchaser the option to terminate the contract in writing or to close with some other type of financing. If the seller does not think that the purchaser will be able to close without the financing, he might also want the option to terminate the contract if the financing contingency fails rather than wait for a purchaser default later.

7. Contingencies can be for the benefit of the seller, the purchaser, or both.

DRAFTING TIP: The only thing worse than a purchaser that does not close is a purchaser that drags the seller along for months, and then does not close. If the purchaser’s contingency is optional, consider giving the seller the right to terminate the contract if it fails.

8. Construction conditions precedent should reflect the construction process.

DRAFTING TIP: Specific conditions precedent regarding the completion of improvements are difficult to draft, because you must define the work to be completed, and define when that work is completed.

If the improvements are a residence, define the work by reference to the plans and specifications, and provide that the seller determines
6. Contingencies can be absolute or optional. PRACTICE TIP: I prefer an optional contingency so that the contract is not inadvertently terminated when one party or the other is willing to close anyway. For example, a financing contingency might provide that a failure to obtain financing gives the purchaser the option to terminate the contract in writing or to close with some other type of financing. If the seller does not think that the purchaser will be able to close without the financing, he might also want the option to terminate the contract if the financing contingency fails rather than wait for a purchaser default later.

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8. Construction conditions precedent should reflect the construction process. DRAFTING TIP: Specific conditions precedent regarding the completion of improvements are difficult to draft, because you must define the work to be completed, and define when that work is completed. If the improvements are a residence, define the work by reference to the plans and specifications, and provide that the seller determines substantial completion by notification to the purchaser. Sometimes we require issuance of a certificate of occupancy, but a certificate of occupancy may just consider life safety issues and might not really indicate that a house is substantially completed. I usually include a definition of substantial completion related to the purchaser's ability to use the premises for the intended purpose. Avoid allowing third parties such as architects, engineers or municipal inspectors to determine substantial completion.

Conditions precedent regarding the completion of infrastructure improvements on undeveloped land require a thorough understanding of the construction and permitting process. Again, my preference is for the seller to establish substantial completion, but if the purchaser disagrees, you need some basis for resolving the conflict. Sometimes, we describe the work in great detail, which requires the assistance of your seller’s engineer. Sometimes we simply tie completion to final approval by the municipality, but I have found that the municipality often delays approval for bureaucratic reasons long after the improvements are substantially completed and available for use by the purchaser. Sometimes, we tie final approval to a certification from the seller’s engineer, but an engineer concerned about liability might be hesitant to make that decision. It is often helpful to provide that in the event the property is usable by the purchaser, the closing can occur, even if seller has to escrow funds to
guarantee completion. In this situation, it is difficult for the purchaser to reverse the transaction, even if the work is never completed by the seller.

   DRAFTING TIP: If the seller has to provide a septic tank permit for each of 70 lots, but can only get permits for 69 lots, require the purchaser to close on the 69 lots. You could make such a provision more acceptable to a purchaser by requiring that a certain percentage of the lots satisfy the contingency.

10. Review seller’s representations and warranties with seller in detail to confirm they are accurate and prevent claims of misrepresentation or the failure of a condition.
    DRAFTING TIP: Sellers do not read contracts carefully and will often skim over items that appear to be boilerplate. Review every representation and warranty with your client and make adjustments where required.

11. Pay special attention to financing and inspection contingencies.
    DRAFTING TIP: Always identify financing and inspection contingencies as provisions purchasers might use to avoid their obligations under the contract. The GAR forms contain numerous addendums for addressing these issues that are worth considering. In the end, we want these contingencies to be short in duration, specific, contain affirmative duties
to pursue resolution, require prompt notifications to the seller, and give the seller as much control as possible to react to issues that will arise. Look for ways to give your seller control over the resolution of these contingencies.

**REPRESENTATIONS AND WARRANTIES**

**Rule:** Representations and warranties merge into the general warranty deed unless the contract provides that said representations and warranties will survive.

**DRAFTING TIP:** Representations and warranties have two primary functions. They provide information that the purchaser needs for their due diligence, and they allocate post-closing risk. If the representations and warranties are intended to allocate post-closing risk, the contract should specifically address survival.

**Rule:** Best knowledge limitations in representations and warranties can include a duty to conduct a reasonable investigation, awareness of facts or situations that might affect said knowledge, or imputed knowledge of other officers or employees.

**DRAFTING TIP:** Limit representations and warranties by adding definition of knowledge and limiting to specific persons and time periods.

**Rule:** “As Is” clause is enforceable to negate implied warranties in the absence of fraud.
DRAFTING TIP: Carefully review representations and warranties with your client, and inquire about conflicting information that might have been provided outside of the contract and could be a basis for a fraud claim.

REMEDIES
Rule: A seller has the remedies of compensatory damages, specific performance, and rescission, unless limited by the contract. Liquidated damages, attorney’s fees and other unusual remedies must be specifically included in the contract.

1. Understand your possible remedies and draft your contract with the objective of insuring enforceability of your contract without litigation.

Compensatory Damages – The measure of damages for the breach of a contract to sell property is usually the difference between the contract price and the fair market value at the time of the breach. Only closely related expenses that could be anticipated by the purchaser, such as the cost of the survey and title examination may sometimes be recovered. Since sellers usually sell for fair market value, compensatory damages are often minimal.

Liquidated Damages – A fixed amount of damages agreed to by the parties in the contract, usually equal to the amount of the earnest money. When
liquidated damages are provided, additional damages are generally precluded, and provisions that allow additional damages could void your liquidated damages provisions. The court will apply a three part inquiry to determine if the liquidated damages provision is enforceable:

1. The damages must be difficult or impossible of accurate estimation;
2. The parties must intend to provide for damages rather than for a penalty;
3. The sum stipulated must be a reasonable pre-estimate of the probable loss.

**Specific Performance** - Specific performance requires the purchaser to close on the property, but it is usually a difficult remedy for a seller. Most sellers do not want to tie their property up in litigation for an extended period of time, and it is difficult to force a purchaser to close on property if they do not have financing in place or cash to close. Nevertheless, providing for specific performance can be beneficial to a seller, because it creates a loss situation for the purchaser other than the earnest money.

The requirements for obtaining specific performance are:

1. Definiteness – the contract must identify the land to be sold with reasonable definiteness by describing the particular tract or by furnishing a key by which it may be located with the aid of extrinsic evidence. The requirement of
definiteness also extends to the parties’ consideration, and the time and place of performance, where these are essential.

2. Substantial Compliance – Seller must have substantially complied with its obligations under the contract, and all of seller’s and purchaser’s conditions precedent must have been satisfied, unless waived.

3. Ready, willing and able to close – Seller should appear at a scheduled closing and deliver the documents necessary for closing, unless purchaser has made it clear that it will not perform.

If the contract is silent, the remedy of specific performance remains available. Although a seller may pursue alternative remedies of specific performance and damages, if a seller obtains an award of specific performance, he is not also entitled to an award of damages. The seller should plead alternative remedies.

Rescission- Either party can rescind the contract on the grounds of non-performance only where both parties can be restored to their condition before the contract was made. This is typically a purchaser remedy that is generally granted for breach of warranties by the seller or in the event of a misrepresentation.
Suits for Fraud – Fraud can be based on affirmative misrepresentation of facts or, in some circumstances, fraudulent suppression or passive concealment. This is also typically a purchaser remedy, unless the purchaser has misrepresented its intention to close or its ability to obtain financing.

2. Include provisions that increase the costs of delay or default by the purchaser. Your objective should be to increase the risk of a bad result for the purchaser in addition to forfeiting the earnest money. Consider:

Payment of Brokers Commissions – Requiring a defaulting purchaser to pay brokers’ commissions provides an incentive for a purchaser to perform because it increases the cost of nonperformance.

Increases in the Purchase Price for Delay – If a purchaser delays a closing, but the seller is not willing to terminate the contract, a provision increasing the purchase price for each day of delay can provide an incentive for the purchaser to close more quickly.

Reimbursements of Costs - If the seller must incur specific expenses in order to facilitate the closing (i.e. obtain a survey or subdivision plat), add the reimbursement of these costs as a recoverable expense if you pursue
the remedy of specific performance, but be careful that such a provision cannot be construed as damages in addition to the liquidated damages.

**Attorneys Fees and Expenses:** If the parties intend for the prevailing party to recover its attorney’s fees and expenses of litigation, this must be expressly stated.

3. Evaluate your liquidated damages for reasonableness.

   **DRAFTING TIP:** The desire to obtain as much earnest money as possible is in direct opposition to the requirement that the liquidated damages be a reasonable pre-estimate of actual damages and not a penalty. Estimate actual losses as a means of testing the reasonableness of your earnest money, and compare the amount to what is customary in your market. The liquidated damage clause should contain a statement that the parties have agreed that each of the conditions for liquidated damages has been satisfied.

4. Consider specific performance as an alternative remedy.

   **DRAFTING TIP:** Liquidated damages are easier to recover and generally higher than compensatory damages, but they are often not sufficient to make your client whole. If you try to increase your liquidated damages too much, you risk making them unreasonable and thus unenforceable.
Therefore, do not just assume that liquidated damages will be your only remedy.

You cannot include compensatory damages and liquidated damages in the same contract, but you can include specific performance as an alternative remedy, which will also allow you to pursue attorneys’ fees and expenses. Lay the groundwork for this remedy by removing conditions and contingencies, and obtaining proof of available financing. Although it is unlikely that the seller will ultimately pursue this remedy, the availability of the remedy increases the risk of a default to the purchaser.

5. Consider alternative remedies for different types of default.

If a purchaser does not perform an action necessary for closing, such as obtaining a survey needed to measure acreage, or applying for financing, give the seller the right to take the action on the purchaser’s behalf and recover the costs, or add the costs to the purchase price. Not only does this increase the purchaser’s cost of default, it puts the seller in a better position to pursue specific performance. Assigning different remedies to different types of default gives the seller more flexibility.

Be careful, however, that you do not violate the liquidated damages rules by calculating damages rather than costs. The liquidated damages rules provide that the liquidated damages must not be capable of easy estimation.
6. Consider mandatory alternative dispute resolution requirements for specifically identified conditions or defaults to avoid the cost and delay of litigation.

DRAFTING TIP: If completion of development of a building lot in accordance with plans and specifications is a condition to closing, consider a provision allowing an unrelated third party such as an engineer to review the plans and specifications, obtain information from both parties, inspect the site and make a binding determination as to whether the lot is complete.

7. Give the purchaser adequate remedies so that you avoid claims of lack of mutuality.

DRAFTING TIP: If the purchaser’s only remedy is the return of the earnest money, the seller can default on the contract without losing anything, and the contract might lack mutuality.

Some courts have held that the Federal Interstate Land Sales Full Disclosure Act requires that the purchaser have adequate remedies if the seller is claiming the single family residence exemption or the 100 lot exemption. If adequate remedies are not included, the purchaser may have the right to revoke the contract.
STATUTORY TERMINATION RIGHTS

Rule: The Georgia Condominium Act and the Federal Interstate Land Sales Full Disclosure Act provide for statutory rights to terminate a contract if certain disclosures are not made.

1. A purchaser has 7 days after receipt of a condominium disclosure package to terminate the contract when buying from the original developer.

DRAFTING TIP: The Georgia Condominium Act requires that certain documents and disclosures be provided to the first bona fide purchaser of each residential condominium unit for residential occupancy by the purchaser. These requirements do not apply to subsequent sales. The condominium disclosure package must include the floor plan, declaration, articles of incorporation and bylaws, a budget and possibly certain other items, and must be provided as a bound document with an index. The contract must contain certain disclosures including disclosure of the purchaser’s right to void the contract within seven (7) days. Always include an acknowledgement for the purchaser to sign indicating receipt of the required documents and disclosures.

2. A purchaser has 7 days after receipt of a HUD Disclosure package to void the contract when buying a residential lot from the original developer unless an exemption applies. In addition, if the developer is claiming the single family residence exemption, the contract must contain certain
provisions, including requiring a closing no more than 180 days after the execution date, and seller’s duty to provide an owner’s title insurance policy.

DRAFTING TIP: Make sure that your client has the appropriate documents to provide to the purchaser and that the appropriate disclosures are contained in the contract. On every sale by a residential developer, you should comply with the registration process, or understand the exemption you are claiming. Consider requiring the purchaser to certify in the contract information required to satisfy the exemption. For example, if you are claiming an exemption for sales to contractors, have the contractor certify that he is a residential building contractor purchasing the lot for resale. If the Interstate Land Sales Full Disclosure Act is not within your field of expertise, obtain assistance from an attorney specializing in these requirements.

III. THE MANAGING PHASE

STATUTE OF FRAUDS

1. Consider whether contract process involved electronic communications that could be considered part of the contract.

MANAGEMENT TIP: Amend contract to specify the extent to which electronic communications will be binding, and confirm that all of the
parties agreements are incorporated in the written contract. Consider agreeing that electronic communications between attorneys will be binding on the parties only if the communication specifically states that it is intended to be a binding part of the agreement, but always supplement such communications with a written amendment.

EARNEST MONEY AND CONSIDERATION

1. Confirm earnest money or letter of credit delivered.

   MANAGEMENT TIP: Have escrow agent sign contract to acknowledge receipt of earnest money. Check expiration dates on letter of credit to make sure expires after closing date.

EXECUTION AND DELIVERY

Rule: Execution alone does not convert a piece of paper into a contract if it is not delivered.

1. Did the parties execute the same agreement?

   MANAGEMENT TIP: When the contract has involved multiple offers and counter offers, or has been executed in counterparts, circulate a final contract for everyone to execute.
2. Has the contract been delivered to all parties?

MANAGEMENT TIP: Failure to deliver a signed contract to all of the parties provides an opportunity for a party to argue that his offer was never accepted, and withdraw his most recent offer, thus avoiding the agreement. Deliver signed agreement by Federal Express so you have a record of delivery.

3. Were pages changed after execution?

MANAGEMENT TIP: Even if you make changes or add exhibits to a signed contract with your client’s or the other attorney’s permission, you risk an argument that the document was not executed properly. Consider circulating a final contract for everyone to execute or get an amendment ratifying the changes. Signed counterparts are okay, so long as the counterparts are exactly the same.

TITLE

1. Address title objections promptly and amend contract to confirm resolution.

MANAGEMENT TIP: If you receive a title objection letter, respond in writing to every objection that you do not intend to correct, and immediately take steps to correct valid objections. Confirm your
resolution of said items with an amendment to the contract. Do not let title objections carry through to the closing date.

2. Beware of title objections that might be raised by an ALTA survey.

 MANAGEMENT TIP: ALTA surveys take a long time to prepare and are often delivered late in the contract process. Require early delivery if possible to give you time to address title issues, and provide for a right to extend the closing date to allow time to address legitimate issues. Be cautious about accepting all matters as legitimate exceptions, rather than reviewing each item for validity according to the terms of the contract. Sometimes, you can agree to try and fix a matter that is not really a valid objection, and then have the purchaser delay closing because it has not been corrected by the closing date.

CONDITIONS PRECEDENT

1. Calendar and react to contract deadlines.

 MANAGEMENT TIP: Contact your seller as deadlines approach to make sure the seller has taken any required actions, but also to react to actions not taken by the purchaser. Do not let deadlines pass without an amendment to the contract, if appropriate.
2. Address repairs to improvements specifically.

 MANAGEMENT TIP: If a purchaser requires a repair to an improvement, confirm in writing how your client intends to facilitate the repair and that the method is acceptable before proceeding. For difficult repairs where the purchaser might have room to question the appropriateness of the repair, consider shifting the burden to repair to the purchaser in exchange for a sum certain credit against the purchase price.

3. Look for ways to make your contract more specific, and amend the contract if appropriate.

 MANAGEMENT TIP: For example, if acreage is based on a survey to be prepared, amend the contract to describe the property based on the new survey, include the specific acreage and the specific purchase price when the survey becomes available.

4. Address potential seller defaults promptly and amend contract to confirm resolution.

 MANAGEMENT TIP: If you become aware of a potential seller default, immediately take steps to correct the situation. Confirm your resolution with an amendment to the contract. Do not let potential defaults carry through to the closing date.
5. Remove conditions precedent.

MANAGEMENT TIP: A failed seller condition precedent, such as the failure of a representation, allows the purchaser to not close without being in default, or declaring the seller in default. Absent such a condition precedent, the purchaser would arguably either have to proceed to closing or declare the seller in default under the contract. Consider whether this gives the purchaser options that the seller wants to take away.

6. Stay informed regarding post-contract client negotiations, and changing conditions, and memorialize the changes in an amendment if appropriate.

MANAGEMENT TIP: Clients are continually changing deals, but often do not memorialize those changes contractually resulting in disputes later in the process. Also, additional information or a changed condition with respect to the property that affects the transaction may need to be added to the contract. Stay alert.

7. Remove satisfied contingencies from the sales contract.

MANAGEMENT TIP: If a contingency is satisfied, amend the contract to remove it. Your goal is to convert the contract into a cash sale, no contingency deal. This is also the objective of the GAR form, which now includes the free look contingency. Once the free look period expires, the contract should be binding.
8. Train your client to control the contingencies.

MANAGEMENT TIP: It is no accident that many large builders are now affiliated with lenders that do most or all of the financing on their sales. Work with your client to take control over or lead the purchaser through the financing process, especially if you are working with inexperienced purchasers.

9. Train your client’s sales staff regarding compliance with statutory requirements.

MANAGEMENT TIP: If you create a condominium disclosure package or a contract designed to satisfy an exemption under the Federal Interstate Land Sales Full Disclosure Act, you must also train your client’s sales staff to administer the forms. Otherwise, purchasers will try to avoid their obligations under the contract by claiming that the required disclosures were not properly made.

REPRESENTATIONS AND WARRANTIES

1. Be alert for representations and warranties that become untrue after contract signing, especially if they are conditions to closing.

MANAGEMENT TIP: Include provision for amending representations and warranties in original contract without triggering a default of a condition, and amend the contract promptly when such an event occurs.
REMEDIES

1. Look for reasons to make a portion of the earnest money non-refundable and pay it to the seller prior to closing.

   MANAGEMENT TIP: Possession of the earnest money facilitates recovery in the event of a default. In consideration for extensions to the inspection period, contingency periods or the closing date, provide that a portion of the earnest money is being paid to the seller as consideration for said extension and is non-refundable under any conditions, and have the escrow agent distribute the funds. The reality is that the funds might still be refundable in the event of a seller default.

2. Aggressively pursue the resolution of an earnest money dispute.

   MANAGEMENT TIP: Delay in resolving an earnest money dispute often favors the purchaser, because the property is still subject to the contract, and a lawsuit might result in a lis pendens being filed against the property which prevents the sale of the property. Consider immediately terminating the contract, and filing suit. This starts costing the purchaser money, and clears the property for resale, thus facilitating the sale of the property to someone else, and the resolution of the dispute.
3. Be careful when dealing with letters of credit.

   MANAGEMENT TIP: Be aware of the requirements for calling a letter of credit held as earnest money, and do not wait until the last day to call it. Also, you can use the possibility of calling a letter of credit as leverage, since calling a letter of credit is tantamount to a loan default for the purchaser.

4. You can save your client money and time by resolving disputes quickly and amicably.

   MANAGEMENT TIP: If you have a disagreement over contract performance, start with a sit down meeting between all of the parties rather than with a default letter. Help your client understand that legal posturing often exacerbates the situation.

IV. CONCLUSION

Taking a proactive approach to contract drafting and management can improve your client’s positions regarding money and time. Understand your client’s business objectives so you can draft and manage your contracts to maximize those benefits.
AFFORDABLE HOUSING: A REPORT FROM THE PUBLIC AND PRIVATE SECTORS

Patrise M. Perkins-Hooker, Past President, State Bar of Georgia; Fulton County Office of the County Attorney, Atlanta

Ted Henneman, HunterMaclean, Savannah

Low Income Housing Tax Credits and Impact on Community Revitalization

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Evidence links LIHTC investments to positive economic growth for communities, social and educational benefits for families and reductions in homelessness.
ICLE PRESENTATION
2018 REAL PROPERTY LAW INSTITUTE
AMELIA ISLAND, FLA.

The need for affordable housing has never been greater, and national efforts to address affordable housing have been varied in form and structure, with mixed results. Certainly the last 30 years have seen a move away from the traditional public housing/housing authority managed structure toward efforts to incentivize private developers to develop affordable housing through public/private partnerships. The Low-Income Housing Tax Credit (“LIHTC”) is the most important resource for creating affordable housing in the United States today because without the incentive, affordable rental housing projects would not generate sufficient profit to attract investment. Over the last 23 years, my practice has concentrated on representing developers of affordable housing through the use of LIHTCs.

I. What is an LIHTC?

The LIHTC was promulgated under Section 42 of the I.R.C and was enacted as part of the Tax Reform Act of 1986. The LIHTC became effective January 1, 1987 initially as a temporary credit that had to be renewed by Congress. In 1993, the Omnibus Reconciliation Act of 1993 permanently extended the LIHTC, effective July 1, 1992.

The LIHTC is not an appropriation, but rather is a subsidy which provides a dollar for dollar federal income tax credit in exchange for providing financing to develop affordable housing. Because of (i) the documented success of the program,¹ and (ii) the fact that it is not an appropriation, the Credit has generally seen bipartisan support since its enactment.

Under the LIHTC program, the Internal Revenue Service allocates federal tax credits to State Housing Credit Agencies based on the State’s current population. The State Housing Credit Agency in the State of Georgia is the Georgia Department of Community Affairs (“GDCA”). In 2017, GDCA estimates that $23 million dollars of federal credits are available for the 2018 funding cycle.² Credits are allocated to projects one of two ways: either through a competitive application process, which in Georgia, results in the announcement of the award of credits in November or December of the calendar year, or through a noncompetitive allocation to federally subsidized projects. Federally subsidized projects are generally projects financed through private activity bonds.

II. How does the LIHTC work? How do you determine whether a Project is eligible for LIHTCs?

The LIHTC creates an economic incentive for private developers to construct and develop affordable rental housing for low income tenants. To qualify for the LIHTC, a

¹ Evidence links LIHTC investments to positive economic growth for communities, social and educational benefits for families and reductions in homelessness.
development must be a “qualified low income building.” The building must satisfy one of two minimum set-aside tests, which are known as the 20/50 test and the 40/60 test.

Under the minimum set-aside tests, a building is generally a qualified low-income building if at least 20 (or 40) percent of the units are both rent restricted and are occupied by tenants whose income is less than or equal to 50 (or 60) percent of area median gross income. The applicable minimum set-aside test must be satisfied by the end of the first year of the credit period for the building and then must be met continuously throughout the entire compliance period.

The LIHTC is claimed prorata, annually over a 10-year period (the “Credit Period”), which begins when a building is placed in service or, at the irrevocable election of the taxpayer, in the succeeding taxable year. The low-income portion of a project must be maintained for fifteen years, beginning with the commencement of the Credit Period (the “Compliance Period”), or the credits will be subject to recapture.

III. How does the LIHTC create an Economic Incentive? Who are the Players?

A LIHTC Project will have a minimum of three participants: the Developer (who is almost always the Owner/Operator of the Project), a Lender (providing construction and permanent financing), and Investors (who ultimately claim the tax credits on their federal income tax returns). LIHTC projects are structured as limited partnerships or limited liability companies to limit financial risk exposure for Investors. This structure permits LIHTC benefits and real estate losses to pass through to Investors. Under federal income tax law, LIHTCs may be claimed only by property owners who have the benefits and burdens of ownership.

In Georgia, the GDCA distributes the LIHTCs to Developers who, in exchange, agree to make a portion of their units available to low-income renters. The Developers who receive the LIHTCs sell them to Investors to help finance the actual development of the housing units. The Investor pays the Developer/Owner equity in exchange for a partnership interest in the Partnership that owns the Building, and through that partnership interest receives an allocation of LIHTCs. Under the terms of the Owner’s Partnership Agreement, the LIHTCs are specially allocated to the Investors, who claim the credits annually during the Credit Period. The equity paid to the Partnership by the Investor allows the Partnership to obtain less construction and permanent financing, thereby reducing operating costs, which allows the Project to be economically viable with restricted rents.

IV. How many LIHTCs can a Project receive?

To calculate the LIHTC, the Owner must determine the “Qualified Basis” of the Project. Qualified Basis is the amount of eligible basis that will be used to generate LIHTCs multiplied by the Applicable Fraction (generally a project’s low-income occupancy percentage). The amount of LIHTCs that a building owner may claim in the initial year is the product of Qualified Basis and the Applicable Fraction.
Basis times the Credit Percentage. The Credit Percentage is a present value calculation which is released by the Internal Revenue Service each month.4

A. What is Eligible Basis?

Eligible Basis generally equals the adjusted basis for the building, excluding land and including most amenities and common areas. Costs that may be included in LIHTC eligible basis must be depreciable. Eligible Basis generally includes construction related costs. Fees associated with permanent loan financing, entity organizational costs and land costs are not included in Eligible Basis. Developer Fees are included in Eligible Basis.

B. What is the Applicable Fraction?

The Applicable Fraction is the number of qualified low-income units over total units. A property that dedicates all of its units to affordable housing will have an applicable fraction of 100% and its qualified basis will equal its eligible basis.

V. How successful has the program been? How many affordable housing units have been constructed through the use of LIHTCs.

Since its inception, the LIHTC Program has generated approximately 3 million units of affordable housing, adding approximately 100,000 units each year.5 Since the program’s inception in 1986, it has served approximately 13.3 million residents. In 2014, the National Association of Home Builders estimated that in a typical year, the program supports approximately $3.5 billion in federal, state, and local taxes; $9.1 billion in economic income from wages and business income; and 95,700 jobs across various U.S. industries.6

VI. In the current political climate, and in light of the recent tax reform bill, how legislatively safe are LIHTCs?

The LIHTC Program has enjoyed decades of bipartisan support since its inception. While the program was not at risk during the drafting of the new Tax Reform Law,7 House Republicans proposed to eliminate private activity bonds as a means of defraying costs of cutting individual and corporate tax rates. Because the LIHTC is often paired with private activity bonds, the impact of the LIHTC was very much at risk while tax reform was negotiated. According to one analysis, the repeal of the tax exemption for private activity bond finance would have reduced the future supply of affordable rental housing by nearly one million units.8 At the end of the day, as a result of a significant and concerted lobbying effort by the tax credit industry, private activity bonds were preserved so bond financed tax credit projects remain an attractive and often used form of affordable housing development.

5 National Council of State Housing Agencies State HFA Factbook: NCSHA Annual Survey Results 2016.
6 National Association of Home Builders, Eye on Housing, The Economic Impact of the Affordable Housing Credit 2014.
Tax reform will have some impact on the market for LIHTCs because of the reduction of the corporate tax rate to 21%. Lower corporate tax rates result in lower demand for LIHTCs. However, in my experience, Investors have anticipated the impact of the lower corporate tax rate on their projected returns. In every project that our firm closed in 2017, Investors had already calculated their internal rate of return with an assumed 20% corporate tax rate. While the lower corporate rate affected pricing for LIHTCs, stretching pro-formas a little thinner, particularly on bond deals which are eligible for fewer credits, in our experience, the reduced rate did not affect demand for LIHTCs. There were plenty of Investors in the market in 2017.

We do not expect any dip in the Investor market in 2018. Our clients are just beginning the process of soliciting bids for equity investment in their 2018 projects. The pricing that I have seen recently is around $0.92 per LIHTC for the federal credits, and we expect pricing at that level to continue in 2018.

VII. Examples of the LIHTC’s impact on local community revitalization efforts.

A. West Highlands – Atlanta, Georgia. Atlanta Housing Authority.

West Highlands is the comprehensive redevelopment of the former Perry Homes public housing site in northwest Atlanta. The development has transformed the former site of 1,300 barracks style public housing buildings into a successful mixed-income community of mixed-income apartments, single family homes, and community amenities. The ultimate build-out will include over 600 for-sale homes and more than 700 units of rental housing. The project has been developed through a partnership of the Atlanta Housing Authority, Columbia Residential, and Brock Built. The City of Atlanta has supported the development of the site infrastructure through a tax allocation district, bond funds, and additional land acquisition. Total public and private on-site investment will exceed $250 million. See Appendix A for Before and After Photos.

B. Mechanicsville Cityside – Atlanta, Georgia. Atlanta Housing Authority.

Mechanicsville Cityside is the comprehensive redevelopment of the former McDaniel Glen public housing site in downtown Atlanta. The project consists of 66 new construction, single family homes being built on acquired vacant land and on land where formerly vacant single-family homes were demolished. The ultimate build-out includes over 813 multi-family units. The project has been developed through a partnership of the Atlanta Housing Authority, Columbia Residential, RHA Housing, SUMMECH, Inc. and the Annie E. Casey Foundation. The development was financed through a combination of HOPE VI Funds, LIHTC equity investment, conventional financing and GHFA Home mortgages. See Appendix B for Before and After Photos.

C. Savannah Gardens – Savannah, Georgia. CHSA/City of Savannah.

Tax reform will have some impact on the market for LIHTCs because of the reduction of the corporate tax rate to 21%. Lower corporate tax rates result in lower demand for LIHTCs. However, in my experience, Investors have anticipated the impact of the lower corporate tax rate on their projected returns. In every project that our firm closed in 2017, Investors had already calculated their internal rate of return with an assumed 20% corporate tax rate. While the lower corporate rate affected pricing for LIHTCs, stretching pro-formas a little thinner, particularly on bond deals which are eligible for fewer credits, in our experience, the reduced rate did not affect demand for LIHTCs. There were plenty of Investors in the market in 2017.

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C. Savannah Gardens – Savannah, Georgia. CHSA/City of Savannah.

Located in Savannah’s historic neighborhood, Savannah Gardens is the redevelopment of the Josiah Tattnall Homes/Strathmore Estates, a 45-acre site that contained 380 units of substandard rental housing located on Savannah’s east side. Mercy Housing partnered with CHSA Development and the City of Savannah to redevelop this community, first built in the 1940s. Savannah Gardens Phase I completed construction in December 2011 and includes 115 units of affordable family housing. A large public park is in the center of the development. The entire Savannah Gardens project is part of an EarthCraft Costal Community ensuring sustainable development and energy efficiency. See Appendix C for Before and After Photos.
Appendix A

West Highlands – Atlanta, Georgia
WEST HIGHLANDS
Update -- December 2012
West Highlands is the comprehensive redevelopment of the former Perry Homes public housing site in northwest Atlanta. The development has transformed the former site of 1,300 barracks style public housing buildings into a successful mixed-income community of mixed-income apartments, single family homes, and community amenities. The ultimate build-out will include over 600 for-sale homes and more than 700 units of rental housing. The project has been developed through a partnership of the Atlanta Housing Authority, Columbia Residential, and Brock Built. The City of Atlanta has supported the development of the site infrastructure through a tax allocation district, bond funds, and additional land acquisition. Total public and private on-site investment will exceed $250 million.
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Columbia Estates
Appendix B

Mechanicsville Cityside – Atlanta, Georgia
Mechanicsville Revitalization
Atlanta, Georgia

Neighborhood Transformation

2005

2009
Mechanicsville Revitalization
Atlanta, Georgia
Mechanicsville Revitalization
Atlanta, Georgia

AWARD-WINNING MASTER PLAN DEVELOPMENT

MIXED-INCOME / MIXED-USE

- Mixed income rental housing (5 phases)
- For-sale SF Homes and townhomes
- Elementary School
- Early Childhood Education Center
- Community Park and Community Center

PARTNERS:

- Atlanta Housing Authority
- City of Atlanta
- Columbia Residential
- RHA Housing
- SUMMECH, Inc
- Annie E. Casey Foundation
- City of Atlanta
- Columbia Residential
- RHA Housing
- SUMMECH, Inc
- Annie E. Casey Foundation

- Total Multifamily Units – 813
- Income Mix
  - 29% Public Housing Units
  - 33% Project Based Rental Assistance
  - 26% Market Rate
  - 13% LIHTC
- Sources of Funds
  - HOPE VI Funds
  - LIHTC Equity
  - Conventional Financing
  - GHFA HOME
Mechanicsville Revitalization
Atlanta, Georgia
Appendix C

Savannah Gardens – Savannah, Georgia
Evolution of Affordable Housing and Modern Day Mixed-Income Models

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2018 GEORGIA BAR REAL PROPERTY LAW INSTITUTE
AMELIA ISLAND, FLA.

I. Affordable Housing – A Brief Overview

A. What is it?

- Generally accepted definition is: Housing which is deemed affordable to those with a median household income as rated by the national government or a local government by a recognized housing affordability index.¹

- “Affordable” is further defined by HUD as: Housing that costs 30% or less of (area median) household income.

- HUD’s affordability standard is used as basis for qualifying for various low-cost financing (bonds/tax credits) and economic subsidies discussed later in presentation.

B. What’s the Need/What is it designed to address?

- Providing “safe, decent and affordable housing” to those persons/families least able to pay and considered most in need.

- Per HUD, Families paying more than 30% of income for housing are considered cost burdened and have difficulty affording other life necessities, such as food, clothing, transportation and medical care.

- An estimated 12 million renter and homeowner households now pay more than 50% of their annual incomes for housing, thereby increasing the burden on publicly subsidized medical care, transportation, etc.²

- Certain minimum housing standards to qualify for bonds/tax credits, including providing separate and complete facilities for eating, sleeping, bathing and cooking.

¹ See e.g.: Hulchanski, J. David (October 1995). “The Concept of Housing Affordability: Six Contemporary Uses of the Expenditure to Income Ratio”
² See e.g.: CNN Money “Real Estate Special Report” June 16, 2017 issue.
C. A Brief Historical Perspective:

- Housing supply for the poor/impoverished (Buildings/Complexes referred to as “the Projects”)
- Purpose to provide “safe, decent, affordable housing” to America’s underserved/impoverished populations (largely minority, largely inner-city)
- Overseen by HUD
- 100% Subsidized
- Owned and managed by approx. 3,100 local public housing agencies across USA
- This early model lead to creation of serious, detrimental “human” and social issues, linked primarily to concentration of poverty in one location:
  - Crime
  - Drugs
  - Isolation
  - Educational underperformance
  - Cycle of poverty

(Ref. Appendices “A” & “B”)

D. Transitional Efforts (30 sec.):

- Paradigm and perception shift from “Low Income Housing” to “Affordable Housing”
- Demolition and rebuilding of original housing beginning during the 70’s and again in the 90’s via creation of “Public/Private Partnerships” between Fed. Govt. and Private Sector, utilizing enhanced public subsidies:
  - HUD “Section 8” project-based and individual voucher rent subsidies
  - HOPE VI Project funding
  - LIHTC’s
- Enhanced use of Section 8 “vouchers” allowing low/moderate income persons and families to better integrate with “market rate” homeowners and tenants
- Greater push to incentivize private investment into revamping and new construction of formerly public housing stock
- (Ref. Appendix “C”)

II. The New Model

- PPP structure utilizing local housing authority and private developers who co-own/co-manage properties. (AHA/Russell-Integral produce first national model with Centennial Place Apts.)
• Full resources of each partner utilized (minent domain power, construction/development expertise, Hud Section 8 vouchers/HAP, bonding capacity, public & private funds combined, etc.)
• Mixed-income communities
• Decentralization of poverty/ New Model” Started in Atlanta via Centennial Place Apts.
• (Ref. Appendix “D”)

III. In the News/Current Headlines

(See Links to Articles in Appendix “E”)
Appendix A

Techwood/Westside Apartments – Atlanta, Georgia (1930’s)
Appendix B

Carver Homes Atlanta – Pre-Revitalization
Appendix C

End of Demolition of Atlanta Public Housing (2011)
Appendix D

The “New Model” of Affordable Housing
Appendix D (Cont.)

(The New “Villages at Carver)
Appendix D (Cont.)

(Centennial Place Apartments, Atlanta)
Appendix D (Cont.)

(Centennial Place Apartments, Atlanta)
Appendix E
Recent Articles/News Publications
(Public/Private Development of Affordable Housing)

1. “Battle Over Empty Land Touches in Atlanta’s Approach to Affordable Housing” -
   https://www.wabe.org/battle-empty-land-touches-atlantas-approach-affordable-housing/

2. “Atlanta Developer Egbert Perry fires back at Mayor Kasim Reef, Atlanta Housing Authority: -

3. “Is HUD’s $6B Mixed-Income Housing Strategy To Blame for Housing Shortage?” -
11:20  COMMERCIAL LEASES: TRANSACTIONAL TIPS, LITIGATION LESSONS AND RECENT CASE LAW

David S. Klein, Weissman, Atlanta
COMMERCIAL LEASES: TRANSACTIONAL TIPS, LITIGATION LESSONS AND RECENT CASE LAW

David S. Klein, Esq.
Real Property Law Institute
Amelia Island, Florida
May 2018
COMMERCIAL LEASES: TRANSACTIONAL TIPS,
LITIGATION LESSONS AND RECENT CASE LAW

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Commercial leases are much more flexible than residential leases. In general, the parties to a commercial lease can agree on the terms of the lease without being superseded by statute or case law. In this economy, landlords and property management companies generally have the upper-hand against tenants, since demand has been outpacing supply. This paper and presentation will be more landlord and property management company focused, but will also include tips for commercial tenants during the drafting phase of the lease. The paper and presentation will also address litigation tips and recent case law from Georgia courts which affect commercial leases and the commercial landlord-tenant relationship.

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(Commercial Letter of Intent (For Lease of Premises)). These forms include several standard-type clauses and a number of check boxes allowing for customization. Parties may also add special stipulations to the forms to further customize them. Again, if a party is using a GAR broker, these forms are a good starting point.

Many commercial real estate attorneys have lease and other forms that they have been using and updating for several years of their practice. If the parties to the lease are more sophisticated, generally the landlord or property management company will begin with a standard form provided by their counsel to begin negotiations with the tenant. If the landlord or property management company is utilizing the services of an attorney, it is wise that the tenant also retain an attorney. Lease clauses inserted by either party may have a drastic effect on scenarios during the term of the lease, and knowledge and expertise during the negotiation and drafting phase of the lease is critical to the future rights of the parties.

b. What is a lease?

In general terms, a lease is a written contract which grants the tenant an interest to occupy and use real property for a period of time, subject to default which may result in the lease and therefore interest being terminated at an earlier date. The lease duration generally begins on the commencement date, which is usually after the lease is executed and delivered by the parties. The commencement date is the date upon which the tenant can begin possession and use of the real property, usually referred to as the premises. There may, however, be obligations that take place before the commencement date, such as the payment of a security deposit, posting of a letter of credit, or pre-payment of rent.

The lease will contain various definitions, usually at the beginning. Those definitions may then be described more specifically throughout the lease. The terms of the lease will usually contain at a minimum: (i) a description of the real property to be leased, (ii) the term of
the lease, (iii) the payments due under the lease, (iv) how the premises may be used by tenant, (v) the obligations of the landlord and the tenant during the lease term, (v) the events which lead to a default and therefore premature termination of the lease, and (vi) the remedies that the parties may take in the event of such default.

c. **What is being conveyed in the lease?**

In Georgia, there is a presumption that a five-year lease conveys an estate for years, but the terms of the lease ultimately govern. *Henderson v. Tax Assessors, Camden County, 156 Ga.App. 590 (1980)*. If only a usufruct is conveyed, this only grants the tenant the right to use and enjoy the property for itself during the term of the lease. The tenant cannot assign or transfer any rights connected with the usufruct without the express consent of the landlord. A usufruct does not impose on the tenant any responsibility for repairs, improvements, or tax payments unless the lease states otherwise. If the lease is for more than five years, then it is presumed it is an estate for years. An estate for years vests the tenant with more rights and obligations. The tenant may also assign or otherwise convey its rights to the estate without the consent of the landlord. The tenant is also responsible for maintaining and improving the property and for paying taxes. If the lease is for more than five years, it is important that the landlord or property management company determine whether they wish to convey only a usufruct or an estate for years and clearly define this within the terms of the lease.

d. **Defining the landlord, the tenant, and their relationship**

O.C.G.A. § 44-7-1 outlines the definitions for landlord, tenant, and the relationship between them. O.C.G.A. § 44-7-1(a) provides that “[t]he relationship of landlord and tenant is created when the owner of real estate grants to another person, who accepts such grant, the right simply to possess and enjoy the use of such real estate either for a fixed time or at the will of the grantor.” So, generally, the landlord is the owner of the premises to be leased, and the tenant is
the occupant of the premises. However, the landlord is required to disclose prior to entering into a lease with the tenant, the “owner of record of the premises or a person authorized to act for and on behalf of the owner for the purposes of serving of process and receiving and receipting for demands and notice; and […] the person authorized the manage the premises.” O.C.G.A. § 44-7-3(a)(1)-(2). If the landlord fails to comply with this provision, then the person who enters into a lease on behalf of the landlord may be considered the landlord. O.C.G.A. § 44-7-3(b). If only a usufruct is conveyed then a landlord-tenant relationship exists. Duke Galish, L.L.C. v. Arnall Golden Gregory, L.L.P., 288 Ga.App. 75 (2007). An estate for years does not involve a landlord-tenant relationship and therefore the provisions of O.C.G.A. § 44-7-50 et seq. may not apply. See id.; O.C.G.A. § 44-6-101. Presumably, the landlord may have to bring some type of an ejectment action or use self-help as defined under the lease in order to regain possession of the premises if an estate of years has been conveyed.

The written lease may further define the term landlord and tenant, but the statutes mentioned above will ultimately control during a later dispute. It is therefore critical in limiting the liability of a property management company to ensure compliance with the statutes. The landlord should be listed as the owner of the premises and the property management company should be listed as the manager of the premises. Failure to do so could result in the property management company becoming the landlord, and therefore assume liability for actions for which the owner of the premises usually would only be liable (i.e., failure to repair the premises, failure to return the full amount of the security deposit).

e. Defining the premises

In order to be enforced, the description of the premises in the lease must satisfy the statute of frauds. This means that the premises must be described with reasonable definiteness. If the description is unclear, but furnishes a key to the identification of the land, it may be
supplemented by parol evidence. *Sewell v. Aggregate Supply Co.*, 214 Ga. 543 (1958). For instance, if the lease only designates a street and number without stating the city or county, this is invalid under the statute of frauds; however, possession by the tenant may create a tenancy at will and allow the landlord to establish what rent is due. *Smith v. Helms*, 140 Ga.App. 267 (1976).

The best practice is to include not only a full description of the address, building number, and suite number for the premises, but also to include a floor plan or reference to a plat as an exhibit to the lease. The exhibit should be attached and incorporated into the lease.

f. **Use of the premises**

It is important to define the tenant’s use of the premises. The use may also include certain rules and regulations which the tenant must uphold in order to remain in possession. Use of the premises can be permissive, excluded, exclusive, mandatory, specific or general. At a minimum, the lease will generally include a clause that states the tenant shall only use the premises for business purposes. If the premises includes shared utilities, common area, parking, or shared HVAC and other systems, those items should be defined within the lease. There may also be requirements for the tenant to obtain a permit before operating its business. Most of these use-type clauses are in the lease for the protection of the landlord or the property management company. For instance, if the tenant is operating the premises as something other than for business purposes, then any citations by a municipality will likely only be against the tenant, not the owner of the premises.

g. **Repairs**

Unlike a residential lease, a commercial tenant may be obligated to repair the premises as opposed to the landlord or property management company. *See Baird v. Kelley*, 250 Ga.App. 393 (2001) (the parties to a commercial lease are free to contract as to their various
responsibilities for repair, maintenance and improvements). A tenant’s repair obligations must be included in the lease or in another signed document; otherwise the statutory provision at O.C.G.A. § 44-7-13 will be the default. See Swift Loan & Finance Co., Inc. v. Duncan, 195 Ga.App. 556 (1990). The decision regarding repair obligations really comes down to the control landlord wishes to maintain during the term of the lease. If the lease is in effect a ground lease where the tenant controls services and maintenance, then these obligations should be spelled out specifically in the lease. If the tenant makes improvements to the premises, as opposed to repairs, then unless set out in the lease otherwise, the landlord is not liable to reimburse the tenant. See Capital Mechanical, Ltd. v. Dobbs Houses, Inc., 151 Ga.App. 142 (1979).

h. Assignability and subleasing

The lease should contain clauses concerning assignability of the lease and subleasing. Generally, the lease will contain a clause that the lease cannot be assigned or the premises subleased absent consent from the landlord. Sometimes the clause will provide that such consent not be unreasonably withheld. If the clause contains unreasonably withheld language, this could easily create a jury question if a dispute arises under the lease. See Pakwood Industries, Inc. v. John Galt Associates, 219 Ga.App. 527 (1995). If the premises are subleased, the tenant and subtenant should insist on the landlord providing a written document evidencing such consent. The landlord’s election to sublease the premises may be effected by an express recognition of the subtenant or be implied from affirmative acts and conduct. The election establishes privity of contract between the subtenant and the landlord and renders the subtenant liable to the landlord as tenant occupying under and bound by the provisions of the lease. See Allen v. Peachtree Airport Park Joint Venture, 231 Ga.App. 549 (1998).
i. **Events of default**

   **i. Failure to pay**

   These are the most common events of default. Generally, the lease will provide that if the tenant fails to pay rent or additional amounts by a certain date, the lease automatically goes into default. Monetary events of default are usually not provided a cure period. While a failure to pay event of default seems straightforward, the landlord or property management company should take care to define (i) what constitutes a failure to pay, and (ii) when the failure to pay constitutes an event of default. If the clause is ambiguous, it may not be upheld, as Courts may construe the term in favor of the tenant if the landlord or property management company drafted the lease.

   **ii. Failure to uphold covenant or obligation**

   The same careful drafting techniques apply to an event of default due to failure to uphold a covenant or obligation. The landlord or property management company should take care to reference certain sections of the lease which include covenants or obligations, as opposed to making a blanket statement. Unlike monetary defaults, these events of default generally do include a cure period of a few days after notice from the landlord or property management company. That is because usually a non-monetary default can be cured by the tenant as opposed to a monetary default.

   **iii. Clauses which terminate the lease upon the filing of bankruptcy by the tenant**

   Most commercial leases contain a clause which automatically places the tenant into default upon the commencement of a bankruptcy action. Such a clause may read as follows:

   This Lease shall terminate, without notice, (i) **upon the institution by or against either party of insolvency, receivership or bankruptcy proceedings or any other proceedings for the settlement of either**
party’s debts, (ii) upon either party making an assignment for the benefit of creditors, or (iii) upon either party’s dissolution or ceasing to do business.

Surprisingly, even though many leases contain these type of provisions, they are generally unenforceable. The Bankruptcy Code generally renders these type of ipso facto clauses void. This is because at the moment a bankruptcy action is commenced, any interest of the tenant in property becomes “property of the estate.” 11 U.S.C. § 541(c). That code section further provides that the interest becomes property of the estate despite a provision in an agreement: “that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor’s interest in property.” Furthermore, Section 365(e)(1) explicitly voids such clauses.

Despite their unenforceability, these clauses continue to frequently appear in commercial leases. One reason for this may be to deter an otherwise less sophisticated tenant from filing bankruptcy. While it does not hurt to include these clauses in leases, practitioners, landlords, and property management companies need to be aware of their general unenforceability in the event a tenant files for bankruptcy.

j. Remedies upon an event of default

i. The landlord or property management company

Unlike a residential lease, the parties to a commercial lease are generally free to contract their remedies in the event of default. In Georgia, a commercial landlord “may contract to avoid [the statutory notice and other requirements of dispossessory proceedings set forth in O.C.G.A. § 44-7-50 et seq.].” Colonial Self Storage, etc. v. Concord Properties, 147 Ga.App. 493, 495
(1978). This means that the landlord or property management company may include a clause that states upon an event of default and without notice, the landlord or property management company may, without terminating the lease, enter upon and rent the premises. Despite being able to include such a clause within a lease, it is generally recommended to still use the dispossessory process against tenants. If the landlord uses self-help in violation of the terms of the lease, then the landlord can be held liable from trespass or wrongful eviction. See Swift Loan, etc., Co. v. Duncan, 195 Ga.App. 556 (1990).

The landlord or property management company may also include a clause which provides for the acceleration of base rent and other fees due through the end term of the lease if the tenant defaults. The landlord or property management company, however, needs to be mindful that such a clause not be construed as a penalty, and instead be construed as a liquidated damages provision. The general rule is that a tenant is not liable for rent accruing after the landlord resumes possession of the premises. However, if the parties include “an explicit and detailed provision ... which clearly and unequivocally express[s] the parties’ intention to hold the [tenant] responsible for after-accrued rent” then such clause may be enforceable. Peterson v. P.C. Towers, L.P., 206 Ga.App. 591, 592 (1992). The following requirements must be met in order for the clause to be enforced: (1) the injury caused by the breach of the lease is difficult or impossible to estimate accurately, (2) the parties intend to provide for damages rather than a penalty, and (3) the stipulated sum is a reasonable pre-estimate of the landlord’s probable loss. Id. at 593(3). The measure of damages must be the difference between what the tenant would have had to pay in rent for the balance of the term and the fair rental value of the premises for the balance of the term. There must also be an analysis concerning the likelihood of reletting the premises. Id. at 594. In sum, the clause must provide landlord “with payment [] bearing [a]
reasonable relation to actual damages.” *Id.* at 594. The enforceability of such a clause is a question of law for the Court, rather than being a jury issue. *Id.* at 592-593.

The landlord may also recover attorney’s fees and interest incurred in pursuit of the default under O.C.G.A. § 13-1-11. A lease is considered “evidence of indebtedness” within the meaning of O.C.G.A. § 13-1-11. *Holmes v. Bogino*, 219 Ga.App. 858 (1996). The attorney’s fee clause should include specific reference to recovering of attorney’s fees being fifteen percent (15%) of the total amount due under the lease. In addition, prior to initiating any action against the tenant, under O.C.G.A. § 13-1-11(a)(3), the landlord or property management company must give notice to the tenant that it has ten (10) days from receipt of the notice to pay the amounts due under the lease without inclusion of attorney’s fees and interest. If the landlord has already filed a lawsuit, then that notice can be included in the pleadings and will be sufficient. Substantial compliance with the notice provisions of O.C.G.A. § 13-1-11 is required. If the landlord or property management company omits the phrase “receipt” from its notice, then enforcement of the attorney’s fees clause under O.C.G.A. § 13-1-11 may not be upheld by the Court. *See Professional Cleaners v. Phenix Supply Co.*, 201 Ga.App. 632 (1991).

**ii. The tenant**

A commercial lease generally will not spell out the specific remedies for a tenant upon default of the landlord. The remedy available to tenant is generally one for breach of contract due to a material default by the landlord.

As of 2016, the tenant no longer has the remedy of breach of the covenant for quiet enjoyment of the premises, unless it involves the landlord’s title. The Court of Appeals in *George v. Hercules Real Estate Services, Inc.*, 339 Ga.App. 843 (2016) disapproved of over one-hundred (100) years of case law in holding that the covenant of quiet enjoyment only applies to claims arising from a landlord’s title. In essence, the tenant now has to show that the landlord
did not have good title to lease the premises in order to state a claim. Previously, this argument could be used by tenants to effectively state a constructive-eviction type claim against the landlord. The tenant may still state a claim for constructive eviction where an eviction by the landlord occurs.

In terms of security deposits, if the tenant alleges that the landlord or property management company has wrongfully withheld a portion or all of its security deposit, the tenant is not protected by O.C.G.A. § 44-7-34, which generally only applies to residential leases. The tenant must proceed under a breach of contract theory. In some instances, a claim for conversion may be asserted against the landlord.

k. Personal guarantees

Well-prepared landlords and property management companies will perform asset searches on a prospective commercial tenant before entering into a lease. Alternatively, the prospective tenant may be asked to sign a financial affidavit or provide a financial statement with certain warranties and representations under oath. If a commercial tenant has significant assets or an excellent rental history, a personal guarantee may not be required. However, if the tenant is a start-up company, smaller business, or has limited or no assets, the landlord or property manager may require a personal guarantee from one or more owners.

There are several different types of guarantees, including absolute, conditional, payment, collection, performance, and continuing, but that discussion is outside the scope of this paper. A personal guarantee associated with a lease generally imposes liability on an individual person (or possibly an entity with assets) for debts incurred under the lease by a commercial tenant. These debts may include rent, late fees, CAM fees, property taxes, or other amounts. Sometimes the personal guarantee may cover only a certain period of the term of the lease, while others may
cover the entire term. It depends on various factors which the landlord or the property manager should always take into consideration before entering into a lease.

In the event a tenant files for bankruptcy, the automatic stay generally does not apply to separate legal entities, such as corporate affiliates, partners in debtor partnerships, to codefendants in pending litigation, sureties, guarantors, co-obligors, or others with a similar legal or factual nexus to the debtor. See In re Mohr, 538 B.R. 882, 888 (Bankr. S.D.Ga. 2015) (citations omitted). In addition, a co-debtor stay does not extend to personal guarantors on commercial leases since it does not apply to business debts. 11 U.S.C. § 1301(a).

Accordingly, even if a commercial tenant files for bankruptcy, the landlord may pursue the personal guarantor for debts which accrued under the lease without having to ask the bankruptcy court for permission to do so.

2. **Litigation Tips**

   a. **The demand letter**

      The lease will usually require that a demand letter be sent either providing notice of a default and the remedies the landlord is seeking. If the landlord is terminating possession, it should be so stated in the demand letter. Under O.C.G.A. § 44-7-50 et seq. prior to filing a dispossessory action, a demand for immediate possession of the property must be placed in the mail prior to filing the action. Also, landlords and property management companies need to be

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1 But it may apply in situations where “unusual circumstances” are present, generally where the non-debtor and debtor enjoy such an identify of interests that the suit against the non-debtor is essentially a suit against the debtor, or where an action against the non-debtor will have an “adverse impact” on the debtor’s ability to accomplish reorganization. In re Philadelphia Newspapers, LLC, 407 B.R. 606 (E.D.Pa. 2009).
aware of the notice requirements under the lease. The lease may call for demand letters and other notices to be sent a particular way – either through certified mail or overnight mail. It is always good practice to at least send the demand letter by certified mail, so the landlord or property management company can later show evidence of the letter being mailed.

The demand letter at a minimum should (1) the amounts due or events of default, (2) if an amount is due where payment should be made, (3) references to the lease for the events of default, (4) a demand for attorney’s fees and interest, and (5) reservation of rights language.

Include a demand for attorney’s fees and interest under O.C.G.A. § 13-1-11 if the lease contains such a provision. As noted above, the demand under O.C.G.A. § 13-1-11 should state that if the amounts demanded are paid within ten (10) days of receipt of the letter, then no attorney’s fees or interest shall be included in the amount due. If the word sending is instead used, a Court may find that the landlord or property management company failed to substantially comply with O.C.G.A. § 13-1-11.

The landlord or property management company should also state that it reserves any and all rights and remedies under the lease and/or Georgia law. Another helpful statute to reference would be O.C.G.A. § 13-4-4 which provides notice to the extent there has been a deviation from the terms of the lease, that the landlord intends to return to the exact terms of the lease.

b. Filing the complaint

While you can always amend the complaint later in Georgia state courts, it is important to include all possible claims in the complaint at the time it is filed. The complaint can be filed in either Magistrate Court, State Court, or Superior Court. Filing a complaint in Magistrate Court is cheap and fast. A hearing will take place usually within a week or two after service. However, the parties have the right to file a de novo appeal in the event of an adverse ruling. The case is then heard anew by the State Court or Superior Court. Filing a complaint in State Court or
Superior Court allows the parties to conduct discovery (a period which usually lasts around 6 months under the Uniform Rules) and file dispositive motions, such as a motion for summary judgment. Any appeals from a final judgment entered in State Court or Superior Court are made to the Georgia Court of Appeals. If the complaint contains claim for equitable relief, it must be filed in Superior Court, as that court has exclusive jurisdiction to hear equitable claims.

c. **Discovery**

During the discovery phase of the action, the parties will exchange written discovery requests and also take depositions. The depositions will likely consist of Rule 30(b)(6) witnesses if the parties are entities rather than individuals. The discovery phase usually lasts six (6) months, unless extended by the Court.

d. **Dispositive motions**

In a lease dispute, it is rare that the Court will entertain a motion to dismiss. However, that will depend on the pleadings. Therefore, the most likely dispositive motions that will be filed are either motions for judgment on the pleadings or motions for summary judgment. On a motion for summary judgment, the Court usually will interpret the language of the lease. However, if the lease is ambiguous, the Court could find a jury question and deny summary judgment. The drafter of the lease should take time to make sure there are no ambiguous clauses found therein. If the amount of rent is at issue, the landlord needs to be sure to submit a proper affidavit which allows the introduction of business records as a hearsay exception. If the affidavit is unclear on whether the affiant has knowledge about the business records and that the business records were made in the usual course of business, then the Court may not consider it or at the very least the non-movant may raise an objection. If a non-monetary default is at issue, it could easily become a “he said, she said” type situation, where summary judgment is usually denied because there is a disputed issue of fact.
e. **Trial**

There could be an extended period of time between the filing of the action and the Court scheduling a trial. Generally, either party may demand a jury trial. However, many lease disputes which concern money only are tried with the Judge sitting as the finder of fact, as this allows a more streamlined process. If possession is still an issue during the time leading up to trial, O.C.G.A. § 44-7-54 allows a landlord to file a motion to compel payment of rent into the registry of the Court. In the motion, the landlord may ask for rent, fees, and/or utilities to be paid into the registry of the Court until possession can be determined. Once possession has been determined by the Court and the losing party files an appeal, another motion to compel payment of rent into the registry of the Court can be filed under O.C.G.A. § 44-7-56.

3. **Recent litigation decisions involving commercial leases**


      i. Summary of the facts: A pecan company filed suit against a landowner alleging that the parties had entered into an agreement to allow the pecan company to harvest pecans on property that the landowner was purchasing. The pecan company asserted that the landowner had failed to execute the lease agreement and sought equitable relief in court, including but not limited to, the landowner being unjustly enriched after he harvested a pecan crop that the pecan company had fertilized and cultivated. The pecan company had an agreement with the deceased prior owner to harvest pecan crops on the property. The landowner, prior to purchasing the land, signed an agreement with the pecan company which stated that the parties would sign a lease agreement upon purchase of the
property for the pecan company to harvest the crops through the end of 2012. After the landowner purchased the property, he sent a letter to the pecan company asserting that the lease had expired, and the landowner moved forward with harvesting the pecans from his property.

ii. Holding: The Court of Appeals found that the agreement signed between the parties prior to the landowners’ purchase of the property constituted a valid lease on its own. The agreement adequately described the parties, described the property, and explained how proceeds would be calculated to the landowner as consideration for the lease, and stated the lease term. The parties’ statement that they intended to sign a lease agreement upon the landowner’s purchase of the property did not mean they did not intend to be bound by the essential terms to which they already agreed. The lease therefore expired at the end of 2012 and the landowner was free to harvest crops after such expiration.


i. Summary of the facts: Pargar, LLC was formed in December 1998 and had two members – Dan Forsman and Prudential Real Estate Financial Services of America, Inc. Prudential loaned Pargar a significant sum of money, secured by a first priority blanket security interest in Pargar’s assets and a pledge of all of Pargar’s membership interests not already owned by Prudential. Pargar also obtained an unsecured loan from Forsman. In 2007, Pargar entered into a lease concerning certain property in Dunwoody for a term of ten (10) years. Georgia Commercial
subsequently purchased the property, assumed the lease, and became Pargar’s landlord. Pargar was unable to repay the loan to Prudential, however Pargar did pay back the outstanding balance on the Forsman loan. Prudential then foreclosed its security interest in Pargar’s assets and on the remaining membership interests. Pargar made monthly lease payments to the landlord through the foreclosure by Prudential, but afterwards Pargar defaulted and vacated the leased property. The landlord was notified of the Prudential foreclosure sale and sale of Pargar’s assets, but not the payment made to Forsman. The landlord then sued Pargar for the rent due for the remaining term of the lease and obtained a judgment in excess of $1 million. The landlord then found out about the payment to Forsman and sued him for imposition of a constructive trust, disgorgement of the payment, breach of fiduciary duty and violation of the Uniform Fraudulent Transfers Act.

ii. Holding: The Court of Appeals held that the landlord presented sufficient evidence on summary judgment that when Forsman caused Pargar to pay him, he owed a fiduciary duty to Pargar’s creditors arising out of Pargar’s insolvency. The Court further found that a sufficient jury issue existed as to whether Forsman’s action of causing Pargar to pay him was the proximate cause of its injury. On the fraudulent transfer claims, the Court found that the landlord presented sufficient evidence of the “badges of fraud” under the UFTA to create a jury issue. Forsman was an insider of Pargar, Pargar sent a letter to the landlord omitting the payment to
Forsman, and at the time of payment to Forsman, Pargar had defaulted on the Prudential loan, was unable to repay its debts, and its debts exceeded the fair market value of the company’s assets.


i. Summary of the facts: A tenant leased commercial property from a landlord in Glynn County. The lease created only a usufruct, not an estate for years. In 2015, the landlord filed with Glynn County an application for rezoning the property to obtain authority to construct an addition to the rear of one of the existing buildings in the development, the building in which the tenant leased its space. The rezoning application and site plans were approved in early 2016. The tenant opposed the new development and filed a petition for judicial review of the rezoning application and site plan.

ii. Holding: The Court found that the terms of the lease controlled and therefore only a usufruct had been conveyed to the tenant. A usufruct has been referred to merely as a license in real property, rather than an interest. The tenant did not have the ability to challenge the rezoning application or the site plans, since it did not have a substantial interest in the rezoning decision sufficient to grant the tenant standing to challenge the decision. The tenant also could not rely on the restrictive covenants burdening the property to establish standing to challenge the zoning decision because it was not an intended beneficiary of same under the terms of the lease. The tenant, however, could pursue the landlord for
breach of contract and injunctive relief, if it could show that the landlord’s
decision to make changes to the real property pursuant to the rezoning
decision would otherwise violate the lease.


i. Summary of the facts: A tenant was shot by unknown assailants during a
home invasion. The tenant then brought a premises liability action against
the apartment complex manager.

ii. Holding: The Court disapproved of over one-hundred (100) years of case
law concerning the covenant of quiet enjoyment of the premises. The
covenant for quiet enjoyment of the premises is implied in every lease, but
only goes to the extent of representing that the landlord has good title and
can give a free and unencumbered lease of the premises for the term. A
claim based upon this covenant must therefore involve an allegation that
the landlord did not have paramount title to the premises leased. To
pursue a claim for constructive eviction the tenant had to establish that the
landlord had committed some act or omission with regard to the property
so “grave in character … it renders the premises untenable or unfit for …
use.” The defense of constructive eviction cannot be premised upon the
action of a third party.


i. Summary of the facts: In 2010, the tenant entered into a lease which
required him to make certain necessary repairs to the premises. The
landlord was “out-of-posssession.” The landlord agreed to repair and
maintain major mechanical systems. Two years later the tenant was injured in the collapse of a staircase on commercial premises leased from the landlord. The tenant and his wife asserted claims for defective construction, failure to repair, failure to warn, and loss of consortium. The trial court granted summary judgment to landlord.

ii. Holding: In terms of the defective construction claim, the Court found that summary judgment should not have been granted by the trial court. A landlord may be held liable if the alleged defect "constitutes the type of structural defect that would be discovered during a pre-purchase building inspection." The tenant presented evidence from his expert that supported this contention. In terms of the failure to repair claim, an out-of-possession landlord’s liability for failure to repair arises only in instances where there is a duty to repair and notice has been given of the defect. While there was a dispute as to whether the tenant had been assigned the duty to repair the staircase, there was no evidence that the tenant ever gave notice to the landlord of the defective condition. In terms of the failure to warn claim, O.C.G.A. § 44-7-14 exempts an out-of-possession landlord for being held liable for such claim. Because the defective construction claim survived summary judgment, the claim for loss of consortium also survived since it was dependent on tenant’s right to recover against the landlord.

i. Summary of the facts: The lease between the parties required the tenant to obtain specific insurance before the lease commencement date, that the lease would not commence until possession had been delivered to tenant, and that the tenant’s failure to obtain insurance would be a default and entitle the landlord to terminate the tenant’s right to possession. After execution of the lease, the tenant discovered that the specific insurance was unavailable, and requested that the landlord cancel the lease and return its security deposit. In the alternative, the tenant asked the landlord to revise the insurance requirements in the lease. The landlord refused and brought an action for money damages in State Court against the tenant for lost rent even though it had never delivered possession to the tenant. The tenant asserted a counterclaim alleging impossibility of performance, rescission of the lease, and a return of its security deposit. The trial court granted the tenant’s summary judgment motion, rescinded the lease, and ordered the security deposit be returned to the tenant.

ii. Holding: The tenant sought equitable rescission of the lease, and therefore the State Court did not have jurisdiction to hear such equitable claim. That claim could only be brought in Superior Court. The rescission claim was equitable in nature because the tenant sought to undo the contractual transaction and therefore place the parties in a position of had the lease never been signed. Rescission at law, which a State Court could decide, would only occur by the action of a party to the contract, typically by the
tender of contractual benefits. The tenant never could tender or offer to tender to effectuate a rescission at law, because possession had never been delivered nor had the tenant ever paid rent.

iii. Dissent: Judge McFadden issued a long dissent. He believed that the rescission attempted by the tenant would qualify as an action at law under O.C.G.A. § 13-4-62 and therefore the State Court had jurisdiction to reach the merits of the dispute.


i. Summary of the facts: The parties entered into a commercial lease for a term which, as renewed, extended from October 10, 2007 through September 30, 2011. Negotiations took place between the tenant and the landlord’s real estate broker. On September 30, 2010, the tenant sent an e-mail to the broker asking that rent be reduced. The broker forwarded the e-mail to the landlord. The tenant testified that on October 18, 2010, he sent a letter to the broker exercising a purported option, the terms of which had been communicated to him orally by the broker, to extend the lease for an additional three (3) years at a reduced rental amount per month. The broker testified that he never received that letter, never communicated an offer to extend the lease term to the tenant, and that he was not authorized by the landlord to extend the lease. From October 2010 through September 2012, the tenant tendered rent checks to the landlord for the reduced rental amount. The landlord sold the property in September 2012. The tenant then received a letter from the new landlord
that his lease had expired, that he was a tenant at will, and providing sixty (60) days notice to terminate the tenancy at will. After receiving the letter, the tenant filed a declaratory judgment action. The old landlord counterclaimed for past due rent and other charges due under the lease. The new landlord counterclaimed for damages caused by the tenant’s continued occupancy of the premises. The jury did not find an agreement to extend and also awarded damages to the new landlord in the amount of $312,286.25 in lost profits and also attorney’s fees.

ii. Holding: The Court of Appeals held that the new landlord’s evidence of lost profits was speculative and that the trial court erred denying a motion for directed verdict and judgment notwithstanding the verdict filed by the tenant. The new landlord had failed to present sufficient evidence that its business had a proven record of profitability and a showing of anticipated revenues and expenses for a restaurant it had intended to operate on the premises. The Court otherwise affirmed the judgment and found that the damages for lost profits were ascertainable from the special verdict form, and therefore a new trial would not be required.


i. Summary of the facts: The parties entered into a commercial lease in September 2011. The tenant’s principal guaranteed the tenant’s performance of the lease. The landlord then alleged that the tenant began violating state and local laws, permitting customers to vandalize the premises, and failed to pay for work performed on the premises which
resulted in a lien being filed. On January 5, 2013, the landlord took possession and control of the premises and secured all personal property within. In an e-mail to the tenant, the landlord referred to the lease to support its authorization to seize the premises and provided the tenant with five days to become compliant or the lease would be terminated. The tenant’s agent (and also guarantor) indicated the tenant’s desire to terminate the lease. The landlord then brought an action against the guarantor seeking repayment of amounts due under the lease. The guarantor filed an answer and counterclaim alleging declaratory judgment, wrongful eviction, trespass, conversion, breach of contract, punitive damages, and attorney’s fees. The trial court denied the landlord’s motion for summary judgment as to the guarantor’s claims for wrongful eviction and trespass, and awarded summary judgment to the guarantor finding the landlord liable for wrongful eviction and trespass.

ii. Holding: The Court of Appeals vacated the trial court’s order. The Court found that a right of reentry did exist under the lease upon the tenant’s default, but that a genuine issue of material fact existed as to whether the tenant was in default on the payment of late fees for the month of October 2012. The lease called for the payment of late fees in the amount of $25.00 for each day after the rent was received after the first day of the month. The guarantor tendered a check for October 2012 rent to the landlord on October 4, 2012. On October 8, 2012, the landlord sent the guarantor an e-mail informing him that the tenant had been three days late
on October rent and thus owed him $75.00 in late fees. The tenant paid the late fee on October 10, 2012. The next day, the guarantor discovered that the bank did not honor the rent check given to the landlord. The guarantor then sent a new check, along with an additional $150 in late fees. However, the next day, the bank honored the first rent check. The Court found that the amount of late fees owed and whether or not those late fees were in fact paid, and therefore whether the landlord had the right to reenter the premises, remained at issue and summary judgment was not proper on these claims.

i. West Asset Management, Inc. v. NW Parkway, LLC, 336 Ga.App. 775 (2016)

i. Summary of the facts: The parties executed a twenty (20) year lease. The lease was a so-called “triple net lease” which made the tenant responsible for “all expenses for the entire property and building[] of any nature whatsoever during the term of this lease.” The tenant acknowledge the premises were in “good order and repair” at commencement of the lease, and agreed to turn over possession at the termination of the lease in good condition as received, normal wear and tear excepted. The lease also provided the tenant with the option of terminating it at five (5) year intervals as long as it was not in default under the lease. Upon termination under this option, the tenant would continue to pay rent for an additional six (6) months and vacate the premises by the end of that period. A few years into the lease, the landlord obtained a professional inspection of the premises. The inspector determined that the roof had issues that needed to
be replaced. The landlord then requested that the tenant make these repairs, including by replacing the roof. The tenant responded that the landlord had the obligation to replaced the roof and that the tenant only had the obligation to maintain the roof in as good condition as received. The tenant did not replace the roof. The landlord then terminated the lease after expiration of a cure period. The landlord filed a lawsuit seeking damages and an emergency restraining order to compel the tenant to allow the replacement of the roof and other necessary repairs. The trial court entered such requested order. The landlord then performed the roof replacement at a cost of $384,226.00. The tenant sent the landlord an early termination letter. The landlord rejected the early termination on the basis that the tenant was in default due to its failure to pay for the roof and other repair expenses. The trial court granted summary judgment partially to the tenant on the basis that it was not in default of the lease because it did not have an obligation to replace the roof, and entered a declaratory judgment that the tenant could exercise early termination of the lease. The trial court did not reach the issues of whether the tenant breached the lease or what damages, if any, the landlord could recover. Eventually, the Court allowed the tenant to deposit the roof costs into the registry of the Court.

ii. Holding: The Court of Appeals in prior action had already reversed the trial court’s grant of partial summary judgment. On this appeal, the Court found that (i) no jury question existed regarding whether the tenant satisfied conditions for terminating the lease as the issue had been decided
in a prior appeal, (ii) the tenant’s depositing of amount into the registry did not cure its breach, (iii) the landlord’s conduct did not amount to an acceptance of the tenant’s surrender, (iv) the tenant’s obligation to pay rent necessarily ended when the landlord sold the property, (v) a fact question as to whether late-charges provision in the lease constituted an unenforceable penalty precluded summary judgment on claim for late fees, (vi) where issue had been decided in prior appeal, no jury question existed regarding whether tenant breached the lease, (vii) fact question as to whether tenant acted in bad faith precluded summary judgment on the landlord’s claim for attorney’s fees, (viii) tenant would not be heard to have reasonably relied on signed acknowledgment of original lessee that the premises were in good order and repair at the beginning of the assumed lease, and (ix) the tenant failed to establish a fact question precluding summary judgment on claim of gross negligence.


i. Summary of the facts: The parties entered into a commercial lease. The lease was signed by both individuals representing the tenant (identified as guarantors in the lease). The guaranty signed by the two individuals was attached to the lease and incorporated therein by reference. The guaranty cross-referenced the lease, identified the two individuals as guarantors, and also identified the landlord and the tenant. A new landlord acquired the old landlord and became the landlord of the premises. The tenant then bounced a check and failed to pay rent for several months. A few months
later, the tenant closed its business and vacated the premises without the new landlord’s consent. The new landlord filed suit against the guarantors and the tenant.

ii. Holding: On appeal, the guarantors argued that the new landlord did not lay a proper foundation to admit the lease and the guaranty into evidence. The new landlord, in support of its motion for summary judgment, submitted the affidavit of its assistant general counsel and attached to the affidavit the lease and guaranty. The assistant general counsel did not testify establishing her familiarity with the new landlord’ method of keeping business records, her personal knowledge about the transactions, or that the lease and guaranty were made in the regular course of business. She therefore failed to lay the proper foundation for introduction of the documents into evidence under the business records exception to the hearsay rule under O.C.G.A. § 24-8-803. In a reply brief, however, the new landlord attached a second affidavit which cured those deficiencies in the original affidavit. The Court found that the second affidavit was sufficient to lay a foundation for the documents to be admitted into evidence. The guarantors also argued that the second affidavit was not timely served under O.C.G.A. § 9-11-6(d), which requires that an affidavit be served along with the motion. The trial court, however, did have the authority to consider the second affidavit, which it clearly did in granting summary judgment to the new landlord. There was no surprise to the guarantors of the second affidavit, because it had been filed eight (8)
months before entry of the order by the trial court and none of the parties requested a hearing on summary judgment. Finally, the guarantors argued that the guaranty was incomplete and they did not intend to be personally liable for the lease. The Court found the guaranty enforceable because it was in writing, identified all the essential parties and obligations, and the guarantors signed the guaranty.


   i. Summary of the facts: The landlord filed a dispossessory action against the tenant. The tenant filed counterclaims seeking damages in excess of the $15,000 jurisdictional limit of magistrate court. The dispossessory action was dismissed and the counterclaims were dismissed with prejudice after the parties reaffirmed the lease. The tenant then filed an action in superior court against the landlord for breach of the lease. The trial court granted partial summary judgment in favor of the tenant and denied the landlord’s motion for summary judgment.

   ii. Holding: The landlord argued that the trial court erred by denying its motion for summary judgment on all ten (10) counts of the tenant’s complaint on the basis of defenses asserting that the tenant’s suit for breach of the lease was barred by the doctrine of res judicata. The Court of Appeals found that because the magistrate court did not have jurisdiction to hear the tenant’s counterclaims in the prior dispossessory action which exceeded the $15,000 jurisdictional limit, that the doctrine of res judicata did not bar the tenant’s claims in its superior court action.
The primary issue in the superior court action was whether the landlord unreasonably withheld consent to a proposed sublease. The evidence showed that the landlord found that the proposed subtenant was financially capable and otherwise acceptable as a tenant. The Court therefore found that summary judgment in favor of the tenant was inappropriate and that this issue should have been presented to the jury. The Court also agreed that summary judgment in favor of the tenant on the landlord’s counterclaim for past due rent was proper. The tenant had surrendered the premises and therefore rent obligations ceased in May 2012. The tenant had received a written demand for possession of the premises from the landlord and that the tenant complied with such request. This effectively discharged the tenant from liability for future rent.

David S. Klein frequently represents commercial landlords and property management companies and appears in Georgia courts on their behalf. For additional information on this topic, contact David at (404) 310-3371.
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*187 Ronald Edward Daniels, Warner Robins, for Appellant.

William F. Jourdain, Michael James McNeill, Dalton, for Appellee.

Opinion

Reese, Judge.

*188 Cook Pecan Company, Inc. (“Cook Pecan”) filed suit against William McDaniel, alleging by amended complaint that McDaniel had signed a contract agreeing to enter into a lease agreement with Cook Pecan to allow Cook Pecan to harvest pecans on property that McDaniel was purchasing. Cook Pecan asserted that McDaniel failed to execute the lease agreement and sought equitable relief on various grounds, including that McDaniel was unjustly enriched after he harvested the pecan crop that Cook Pecan had fertilized and cultivated. Cook Pecan appeals from the grant of summary judgment in favor of McDaniel. For the reasons set forth, infra, we affirm.

We have previously reviewed this case on appeal from a summary-judgment ruling, and our prior opinion (*Cook Pecan I*) sets forth many of the facts relevant to the instant appeal. But by way of review (and viewing the evidence in the light most favorable to Cook Pecan, the nonmoving party), the evidence shows the following:

Cook Pecan, owned by Mark Cook, farms and harvests pecan crops from lands leased to the company but owned by other entities. In the summer of 2012, McDaniel agreed to purchase a 20-plus-acre pecan orchard from Sara Pyles. Upon learning of the impending sale, Cook informed McDaniel and Pyles that Cook had an agreement with Pyles’ deceased husband to harvest the crops on the property. On July 31, 2012, Cook, McDaniel, and Pyles executed a written agreement providing that, upon acquiring the property, McDaniel would sign a lease agreement with Cook that would allow Cook Pecan to maintain and harvest the crops on the property through the end of 2012. Cook Pecan did not harvest the pecan crop prior to December 31, 2012. On January 3, 2013, McDaniel sent a letter to Cook Pecan informing the company that the lease agreement expired. McDaniel subsequently harvested the pecans on his property from January 7 to January 23, 2013.
Specifically, the July 31, 2012 contract, signed by Pyles, McDaniel, and Mark Cook, provided:

A. Bill McDaniel will purchase the 20+ acre pecan orchard owned by Sara Pyles which is currently being maintained by Cook Pecan Company.

B. At the time of closing, Bill McDaniel will sign a lease agreement with Mr. Cook that allows Cook Pecan Company to continue with the maintenance and harvesting of the pecans through the end of 2012. The terms of the lease will require that the orchard be maintained using good husbandry practices and properly fertilized, watered, pruned and sprayed in accordance with recommended pecan maintenance practices. Cook Pecan Company’s share of proceeds will be 75% and orchard owner’s share will be 25%.

When McDaniel refused to allow Cook Pecan to harvest the crops after December 31, 2012, Cook Pecan sued for breach of contract, later amending its complaint to seek equitable relief. In June 2015, the trial court granted summary judgment in favor of McDaniel, finding that “[t]he phrase ‘through the end of 2012’ was capable of only one meaning: the contract expired on December 31, 2012.” Because Cook Pecan failed to harvest the pecans prior to that date and there was no evidence of any subsequent agreements to extend the date, the trial court concluded that McDaniel was entitled to judgment as a matter of law.

In Cook Pecan I, we affirmed as to Cook Pecan’s breach-of-contract claim, stating: “Assuming without deciding that the agreement to enter a future leasing agreement is enforceable, any contractual right that Cook had to harvest the crops on McDaniel’s property expired on December 31, 2012.” In light of the absence of a clear ruling on whether there was ever a valid contract between the parties and noting that a claim of unjust enrichment would lie only if there was no legal contract, we remanded for the trial court to address Cook Pecan’s equitable claims.

On remand, the trial court granted summary judgment in favor of McDaniel on all of Cook Pecan’s remaining claims in its complaint, as amended. The trial court explicitly found that the July 31, 2012 contract was enforceable and was “legally identical” to the contract before the Supreme Court of Georgia in Newman v. Newman. The court noted that, because the parties had a legal, enforceable contract, Cook Pecan was precluded as a matter of law from recovering under the equitable theories of unjust enrichment, quantum meruit, and money had and received.

Further, the trial court found that the “stranger doctrine” defeated Cook Pecan’s claim for tortious interference with business relations because the claim was directly related to its contractual relationship with McDaniel and to McDaniel's actions concerning the object of that contract, i.e., the pecans, after the contract expired. Alternatively, the court found that there was no evidence that McDaniel had acted wrongfully or with malicious intent, which is required to prevail on a tortious interference claim. Cook Pecan appeals these rulings.

“On appeal from the grant of summary judgment, this Court conducts a de novo review of the evidence to determine whether there is a genuine issue of material fact and whether the undisputed facts, viewed in the light most favorable to the nonmoving party, warrant judgment as a matter of law.” With these guiding principles in mind, we turn now to Cook Pecan's specific claims of error.

1. Cook Pecan argues that the trial court erred by concluding as a matter of law that the contract between the parties was legally enforceable. Specifically, it contends that the 140-word agreement simply referred to a forthcoming lease agreement and did not contain all of the terms and conditions typically found in commercial lease agreements.

In Hewitt Associates, cited in Cook Pecan I, we held that “[u]nless an agreement is reached as to all terms and conditions and nothing is left to future negotiations, a contract to enter into a contract in the future is of no effect. Thus, an agreement to reach an agreement is a contradiction in terms and imposes no obligation on the parties thereto.” In that case, a company never signed an extension of a contract with its employee benefits plan administrator. While it expressed a willingness to enter into an extension, there was no testimony that it ever overcame its objection to a penalty clause. Thus, we concluded that there was no evidence of more than an agreement to agree.
By contrast, in *Newman*, the Supreme Court of Georgia affirmed a trial court's order granting a wife's motion to enforce a prenuptial agreement, even though the parties had added a handwritten provision acknowledging “certain ambiguities” that they agreed to clarify and rewrite within 30 days of execution. Despite the parties' belief that the agreement contained ambiguities, “nothing in the language of the agreement itself demonstrate[d] it was incomplete or tentative. At the time it was executed.” Moreover, “[the] husband ha[d] not identified any essential term left to future negotiation.”

1. We agree with the trial court that, similar to the prenuptial agreement at issue in *Newman*, the July 31, 2012 contract in this case is enforceable. As in *Newman*, “[t]he language of the [contract] itself presents no lack of certainty which would render the entire [contract] unenforceable.” The parties' statement that they intended to sign a lease agreement upon McDaniel's purchase of the orchard did not mean they did not intend to be bound by the essential terms to which they already agreed. The contract adequately identified the parties, described the property, explained how proceeds would be calculated and distributed to McDaniel as consideration for the lease, and stated the lease term. The July 31, 2012 contract thus met the requirements for a valid lease and is enforceable on its own. Because the language is clear and unambiguous, we need not look to parol evidence.

2. Cook Pecan contends that, based on its erroneous conclusion that the contract was enforceable, the trial court also erred in granting summary judgment against Cook Pecan on its claims for unjust enrichment, quantum meruit, and money had and received. Based on our holding in Division 1, supra, the trial court properly granted summary judgment in favor of McDaniel on these claims.

3. Cook Pecan argues that the trial court erred in granting summary judgment on its claim for tortious interference with business relations and applied an overly broad definition of “directly related” in applying the stranger doctrine. Cook Pecan contends that the business relationship with which McDaniel tortiously interfered was that between Cook Pecan and its consumers.

To recover for tortious interference with business relations, a plaintiff must establish that the defendant: (1) acted improperly and without privilege; (2) acted purposely and with malice with the intent to injure; (3) induced a third party or parties not to enter into or continue a business relationship with [the plaintiff]; and (4) caused the plaintiff financial injury. To sustain a claim for intentional interference with business relations, the tortfeasor must be an “intermeddler” acting improperly and without privilege. To be liable for tortious interference with business relations, one must be a stranger to the business relationship giving rise to and underpinning the contract. But, where a defendant had a legitimate interest in either the contract or a party to the contract, he is not a stranger to the contract itself or to the business relationship giving rise thereto and underpinning the contract. Nor does the fact that a defendant did not sign the contract preclude a finding that he was no stranger to the contract. In sum, all parties to an interwoven contractual arrangement are not liable for tortious interference with any of the contracts or business relationships.

The trial court properly found that the stranger doctrine precludes Cook Pecan's claim for recovery under this theory because the claim was directly related to its contractual relationship with McDaniel and to McDaniel's actions concerning the pecans after the contract expired. The trial court also did not err in granting summary judgment on a separate and independent ground, i.e., that no evidence existed that McDaniel had acted wrongfully or with malicious intent with regard to his handling of the parties' contract, which had expired before he harvested the pecans.
Accordingly, we affirm the grant of summary judgment in favor of McDaniel. 

Judgment affirmed.

Miller, P. J., and Doyle, P. J., concur.

Footnotes

4 The court noted that this phrase was consistent with OCGA § 44-12-240, which specifically refers to the harvesting of pecans and defines “harvesting season” as “that portion of each calendar year beginning on October 1 and ending [on] December 31.”
6 See Cook Pecan Co., 337 Ga. App. at 192 (3) (b), 786 S.E.2d 852 (declining to affirm under the right-for-any-reason doctrine in part because McDaniel had not addressed the quantum meruit claim in the trial court).
8 Leone, 311 Ga. App. at 702, 716 S.E.2d 720 (punctuation and footnote omitted).
10 Id. at 601, 602 (1), 669 S.E.2d 551.
11 Id. at 602 (1), 669 S.E.2d 551.
12 Id.
13 291 Ga. at 635, 732 S.E.2d 77.
14 Id. at 636, 732 S.E.2d 77.
15 Id.
16 See OCGA § 13-3-1 (“To constitute a valid contract, there must be parties able to contract, a consideration moving to the contract, the assent of the parties to the terms of the contract, and a subject matter upon which the contract can operate.”).
17 See Newman, 291 Ga. at 637, 732 S.E.2d 77 (citations omitted).
18 See id.
20 See id.
21 See Porter Communications Co. v. SouthTrust Bank, 268 Ga. App. 29, 32 (2), 601 S.E.2d 422 (2004) (“Where the terms of a written lease are clear and unambiguous, the court will look to the lease alone to find the intention of the parties.”) (footnote omitted).
22 See Fernandez v. WebSingularity, Inc., 299 Ga. App. 11, 13-14 (2), 681 S.E.2d 717 (2009) (“An action for money had and received, although legal in form, is founded on the equitable principle that no one ought to unjustly enrich himself at the expense of another, and is a substitute for a suit in equity. Such a claim exists only where there is no actual legal contract governing the issue.”) (punctuation and footnotes omitted); Kwickie/Flash Foods v. Lakeside Petroleum, 246 Ga. App. 729, 730, 541 S.E.2d 699 (2000) (“Recovery in quantum meruit is not authorized when ... the claim is based on an express contract[.] Neither does an unjust enrichment theory lie where there is an express contract.”) (citations and footnote omitted).
24 See id.
25 We note, as McDaniel points out, that Cook Pecan failed to attack this alternative ground in its appellate brief. “Grounds that are not attacked as erroneous will not be considered on appeal and are presumed to be binding and correct. An appellant's failure to attack alternative bases for a judgment results in the affirmance of that judgment.” Brown v. Fokes Properties 2002, 283 Ga. 231, 233 (2), 657 S.E.2d 820 (2008) (citation and punctuation omitted).
Accordingly, we affirm the grant of summary judgment in favor of McDaniel.

Judgment affirmed.

Miller, P. J., and Doyle, P. J., concur.

Footnotes


See *Cook Pecan Co.*, 337 Ga. App. at 187, 786 S.E.2d 852.

The court noted that this phrase was consistent with OCGA § 44-12-240, which specifically refers to the harvesting of pecans and defines “[h]arvesting season” as “that portion of each calendar year beginning on October 1 and ending [on] December 31.”


See *Cook Pecan Co.*, 337 Ga. App. at 192 (3) (b), 786 S.E.2d 852 (declining to affirm under the right-for-any-reason doctrine in part because McDaniel had not addressed the quantum meruit claim in the trial court).


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Id. at 636, 732 S.E.2d 77.

Id.

See OCGA § 13-3-1 (“To constitute a valid contract, there must be parties able to contract, a consideration moving to the contract, the assent of the parties to the terms of the contract, and a subject matter upon which the contract can operate.”).

See *Newman*, 291 Ga. at 637, 732 S.E.2d 77 (citations omitted).

See id.


See id.

See *Porter Communications Co. v. SouthTrust Bank*, 268 Ga. App. 29, 32 (2), 601 S.E.2d 422 (2004) (“Where the terms of a written lease are clear and unambiguous, the court will look to the lease alone to find the intention of the parties.”) (footnote omitted).

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*Kwickie/Flash Foods v. Lakeside Petroleum*, 246 Ga. App. 729, 730, 541 S.E.2d 699 (2000) (“Recovery in quantum meruit is not authorized when ... the claim is based on an express contract[.] Neither does an unjust enrichment theory lie where there is an express contract.”) (citations and footnote omitted).


See id.

We note, as McDaniel points out, that Cook Pecan failed to attack this alternative ground in its appellate brief. “Grounds that are not attacked as erroneous will not be considered on appeal and are presumed to be binding and correct. An appellant’s failure to attack alternative bases for a judgment results in the affirmance of that judgment.”

GEORGIA COMMERCIAL STORES, INC. v. FORSMAN.
Forsman v. Georgia Commercial Stores, Inc.
A17A0727

*542 Court of Appeals of Georgia.

Synopsis

Background: Judgment creditor brought action against managing member of debtor limited liability company (LLC), alleging that member authorized LLC's payment of $239,011 to himself during LLC's alleged insolvency, asserting claims for breach of fiduciary duty and intentional fraudulent transfer in violation of the Uniform Fraudulent Transfers Act (UFTA), and seeking imposition of constructive trust and disgorgement of the payment. The Superior Court, Gwinnett County, Conner, J., granted summary judgment for member as to the breach of fiduciary duty claim and denied summary judgment to member as to the UFTA claim. Creditor appealed and member cross-appealed.

Holdings: The Court of Appeals, Barnes, P.J., held that:

1. Fact issue remained as to whether member breached a fiduciary duty;

2. Fact issue remained as to whether member's authorization of payment proximately caused injury to creditor; and

3. Fact issue remained as to whether LLC made payment with actual intent to defraud creditor.

Affirmed in part and reversed in part.

Attorneys and Law Firms

**807 Burbage & Weddell, Bruce B. Weddell, for Georgia Commercial Stores, Inc.
Knight Johnson, James M. Johnson, Sherri G. Buda, for Forsman.

Opinion

Barnes, Presiding Judge.

*542 Georgia Commercial Stores, Inc. (“Georgia Commercial”), is a judgment creditor of Pargar, LLC, an insolvent company. Daniel T. Forsman was the managing member of Pargar who controlled its day-to-day operations. Unable to collect on its debt from Pargar, Georgia Commercial sued Forsman to recover an alleged preferential payment that Forsman authorized Pargar to make to himself when Pargar was insolvent and faced foreclosure on all of its assets. Georgia Commercial alleged several causes of action against Forsman, including breach of fiduciary duty and violation of Georgia's Uniform Fraudulent Transfers Act, OCGA § 18-2-70 et seq. (“UFTA”). 1 The trial court granted summary judgment to Forsman and denied it to Georgia Commercial on the latter's breach of fiduciary duty claim. The trial court denied summary judgment to Forsman on Georgia Commercial's UFTA claim. The parties now appeal the summary judgment rulings in these companion cases.

In Case No. A17A0727, we conclude that genuine issues of material fact exist as to whether Forsman breached his fiduciary duty to conserve and manage the assets of Pargar in trust for its creditors by causing Pargar to pay him $239,011 when the company was insolvent and faced foreclosure on all of its assets. Accordingly, we reverse the trial court's grant of summary judgment to Forsman on Georgia Commercial's breach of fiduciary duty claim, and we affirm the trial court's denial of summary judgment to Georgia Commercial on that claim.

In Case No. A17A0728, we conclude that genuine issues of material fact exist as to whether the $239,011 payment to Forsman was made with the intent to defraud Pargar's creditors and therefore affirm the trial court's denial of summary judgment to Forsman on Georgia Commercial's UFTA claim.
Summary judgment is appropriate only if the pleadings and evidence “show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” OCGA § 9-11-56 (c).

Summary judgments enjoy no presumption of correctness on appeal, and an appellate court must satisfy itself de novo that the requirements of OCGA § 9-11-56 (c) have been met. In our de novo review of the grant or denial of a motion for summary judgment, we must view the evidence, and all reasonable inferences drawn therefrom, in the light most favorable to the nonmovant.

(Citation and punctuation omitted.) Essien v. CitiMortgage, 335 Ga. App. 727, 728, 781 S.E.2d 599 (2016).

So viewed, the record reflects that Pargar was a Georgia limited liability company formed in December 1998. Pargar had two members, Forsman and the Prudential Real Estate Financial Services of America, Inc. (“Prudential”), with Prudential controlling a majority of the membership interests. Forsman, a certified public accountant with significant prior experience as a controller and chief financial officer, managed Pargar’s day-to-day operations and served as its sole Director, President, Treasurer, and Secretary. Prudential, however, had to approve all of Pargar's significant financial transactions.

Upon its formation, Pargar purchased an existing realty company that was valued at over $16 million. Pargar funded the purchase in part through an $11,750,000 loan obtained from Prudential. The Prudential loan was secured by a first priority blanket security interest in all of Pargar’s assets and a pledge of all of Pargar’s membership interests not already owned by Prudential. The Prudential loan had an original maturity date of December 31, 2005, which was later extended to June 30, 2012. Pargar also later obtained a $250,000 loan from Forsman pursuant to an unsecured promissory note.

*544 During 2007, Pargar entered into a written lease agreement to rent certain property in Dunwoody for a period of 10 years, with a lease termination date of July 31, 2017. Georgia Commercial subsequently purchased the property, assumed the lease, and became Pargar's landlord.

Several years later, when the Prudential loan to Pargar matured on June 30, 2012, Pargar was unable to repay it. Pargar's financial records reflect that it was insolvent both on a “going concern” basis because it was unable to repay all of its debts as they matured and on a “balance sheet” basis because its debts exceeded the fair valuation of its assets. According to Pargar's financial records, the total value of Pargar's assets was $7,223,403, but it still owed $8,496,012 on the Prudential loan.

During this same time period in 2012, Forsman, acting in his capacity as Pargar’s managing member, had Pargar pay him $239,011 to satisfy the outstanding balance of the unsecured loan he had previously extended to the company. The payment to Forsman was made with the knowledge and approval of Prudential.

In March 2013, when the Prudential loan remained unpaid and Pargar's insolvent financial condition remained unchanged, Prudential **809 foreclosed on its first priority security interest in Pargar's assets and on Forsman's membership interest in Pargar. Prudential then sold Pargar's remaining assets and began winding down the company's affairs.

Pargar made monthly lease payments to Georgia Commercial through March 2013 when Prudential conducted the foreclosure, but Pargar defaulted on its payments to Georgia Commercial from that point forward and vacated the leased property. Georgia Commercial was notified of Prudential's foreclosure and sale of Pargar's assets, but not of the $239,011 payment made to Forsman.

Georgia Commercial sued Pargar for the rent due for the remaining term of the lease and obtained a judgment against Pargar in the principal amount of $1,051,702, plus interest. During post-judgment discovery, Georgia Commercial first learned of the $239,011 that Pargar paid to Forsman in 2012 based on his previous loan to the company.

Georgia Commercial subsequently filed the instant action against Forsman, contending that Georgia Commercial
had been unable to collect on its judgment against Pargar in part because of the allegedly improper $239,011 payment to Forsman that occurred when Pargar was insolvent and foreclosure on its assets was imminent. Georgia Commercial sought imposition of a constructive trust and disgorgement of the $239,011 from Forsman, and it alleged multiple causes of 

*545 action against him in its complaint, as amended, including breach of fiduciary duty and intentional fraudulent transfer in violation of the UFTA.

After the parties filed cross-motions for summary judgment, the trial court granted summary judgment to Forsman and denied it to Georgia Commercial on the latter's breach of fiduciary duty claim, concluding that Georgia Commercial had failed to prove a sufficient causal connection between the alleged breach and its alleged injury. 2 The trial court denied summary judgment to Forsman on Georgia Commercial's UFTA claim for intentional fraudulent transfer, concluding that genuine issues of material fact existed as to whether the payment to Forsman in 2012 was made with the actual intent to hinder, delay, or defraud Pargar's creditors. These appeals followed. 3

*546 “In a solvent, going concern, directors are the agents or fiduciaries of the corporation, not of its creditors.” McEwen v. Kelly, 140 Ga. 720, 724 (3), 79 S.E. 777 (1913). In contrast, when a company becomes insolvent, “the directors stand in a trust relation toward creditors.” Id. See Bank Leumi-Le-Israel v. Sunbelt Indus., 485 F.Supp. 556, 559 (S.D. Ga. 1980) (“In the case of an insolvent corporation[,] the directors and officers stand as trustees of corporate properties for the benefit of creditors[,]”). Hence, “the directors of an insolvent corporation, who originally stood in a fiduciary relation to the company, become placed in a fiduciary relation to its creditors.” (Citation and punctuation omitted.) Lowry Banking Co. v. Empire Lumber Co., 91 Ga. 624, 631, 17 S.E. 968 (1893).

Relevant here is that Georgia courts have recognized that the managing officers and directors of a corporation are charged with the duty of conserving and managing the remaining assets of an insolvent corporation in trust for the creditors. Accordingly, when a corporation becomes insolvent its directors are bound to manage the remaining assets for the benefit of its creditors, and cannot in any manner use their powers for the purpose of obtaining a preference or advantage to themselves. Thus, corporate officers and directors may not give preference to existing debts which the corporation owed to other persons, and for which such officers and directors were primarily liable unless a preference or payment is

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**140 Ga. 720, 724 (3), 79 S.E. 777 (1913).

1. Georgia Commercial contends that the trial court erred in granting Forsman's motion for summary judgment, and denying Georgia Commercial's cross-motion for summary judgment, on Georgia Commercial's breach of fiduciary duty claim. Because genuine issues of material fact exist that preclude the grant of summary judgment to either party, the trial court erred in granting summary judgment in favor of Forsman on Georgia Commercial's claim for breach of fiduciary duty.


A fiduciary or confidential relationship arises where one party is so situated as to exercise a controlling influence over the will, conduct, and interest of another or where, from a similar relationship of mutual confidence, the law requires the utmost good faith, such as the relationship between partners, principal and agent, etc. Such relationship may be created by law, contract, or the facts of a particular case.
made in the performance of an agreement entered into at or prior to the time when the liabilities to the creditors were incurred, or before the insolvency of the corporation. Consistent with this duty, any scheme or device [.] the purpose of which is to indemnify the owners, officers, or directors of a corporation against loss, whether as creditors or as endorsers of notes given by the corporation or otherwise, constitutes legal fraud.


[9] [10] 547 If the managing officers and directors violate their fiduciary duty to the creditors of the insolvent corporation by making a preferential transfer of corporate assets to themselves, 5 a creditor may bring an action against the officers and directors seeking to set aside the transfer and recover the monies paid to them as impermissible preferences. See Hodge v. Howes, 260 Ga. App. 107, 110 (4), 578 S.E.2d 904 (2003); Randall & Neder Lumber Co. v. Bowen-Rogers Hardware Co., 202 Ga. App. 497, 499 (1), 414 S.E.2d 718 (1992). See also McEwen, 140 Ga. at 724 (3), 79 S.E. 777 (noting that, “aside from statutory provisions,” creditors have the right to sue the directors of the insolvent corporation based on the theory of a trust or quasi-trust relationship).

[11] [12] “The management duties of the ... managers of a limited liability company are similar to the duties of the directors of a corporation.” Kaplan’s Nadler, 2 Ga. Corporations, Limited Partnerships & Limited Liability Companies, § 18-17 (Oct. 2016 update). Thus, like corporate directors of an insolvent corporation, the managing members of an insolvent limited liability company owe a fiduciary duty to the company’s creditors to conserve and manage the remaining assets of the company in trust for the benefit of those **811 creditors. See In re McCook Metals, 319 B.R. 570, 595 (3) (a) (Bankr. N.D. Ill. 2005) (concluding that the duties of directors

in managing the assets of insolvent corporations “are fully applicable to managers of insolvent limited liability companies”). We therefore conclude that if a managing member of an insolvent limited liability company breaches his fiduciary duty to the company’s creditors by making an improper preferential transfer of company assets to himself, a creditor may bring an action against the member to set aside the transfer and recover the funds impermissibly paid to that member. See *548 McEwen, 140 Ga. at 724 (3), 79 S.E. 777; Hodge, 260 Ga. App. at 110 (4), 578 S.E.2d 904; Randall & Neder Lumber Co., 202 Ga. App. at 499 (1), 414 S.E.2d 718.

[13] Applying these principles to the present case, we conclude that Georgia Commercial came forward with sufficient evidence to support a finding that when Forsman, in his capacity as managing member, caused Pargar to pay him $239,011, he owed a fiduciary duty to Pargar’s creditors arising out of Pargar’s insolvency. As previously noted, Georgia Commercial presented evidence that at the time of the payment, Pargar was insolvent both on a “going concern” basis because it was unable to repay all of its debts as they matured and on a “balance sheet” basis because its debts exceeded the fair valuation of its assets. Georgia Commercial presented further evidence that during the same time period, Pargar defaulted on its loan to Prudential and was liable to Prudential in an amount that exceeded its assets by over $1 million. This combined evidence, when construed in favor of Georgia Commercial, would support the conclusion that Pargar met the definition of an insolvent company at the time of the alleged preferential payment, thereby triggering Forsman’s fiduciary duty to conserve and manage the assets of Pargar in trust for the benefit of its creditors.

Georgia Commercial also presented evidence that Forsman breached his fiduciary duty owed to Pargar’s creditors, including Georgia Commercial. 6 Construed in favor of Georgia Commercial, the evidence would support a finding by a jury that Pargar, acting at the direction of managing member Forsman and with the approval of its other member Prudential, made the $239,011 payment to Forsman when Pargar was insolvent and faced foreclosure in which all of its remaining assets would be sold and the proceeds taken by Prudential to the exclusion of all other creditors. Furthermore, the evidence reflects that while Pargar informed Georgia Commercial by letter about the foreclosure and distribution of the proceeds of
the foreclosure sale to its member Prudential, it omitted any reference to its distribution of funds to its other member Forsman and never disclosed that distribution to Georgia Commercial. Given this combined evidence, a jury could find that Pargar paid Forsman in an effort to indemnify and protect him against any loss resulting from the impending foreclosure and dissolution of the company in preference to all of Pargar's outside secured and unsecured creditors. “It thus becomes a jury question, under these allegations, whether payment to [Forsman] of sums due [him], at a time when the corporation was insolvent[,] ... was in fact a mere scheme and device on the part of [Forsman] to indemnify [himself] against loss, and as such constituted a legal fraud.” *Ware, 97 Ga. App. at 839 (3), 104 S.E.2d 555.

Finally, Georgia Commercial presented evidence that it suffered an injury as a proximate result of Forsman's alleged breach of fiduciary duty. The evidence shows that Georgia Commercial is a judgment creditor of Pargar owed more than $1 million for Pargar's lease payment obligations. And, given the allegedly $239,011 preferential pay out to Forsman by Pargar, Georgia Commercial was left without the ability to look to those funds as a source for repayment from Pargar to partially satisfy its consent judgment. Under these circumstances, *Georgia Commercial came forward with sufficient evidence that Forsman's alleged breach of fiduciary duty proximately caused it damage. See *United States Capital Funding VI, 137 F.Supp.3d at 1376 (II) (C) (concluding that plaintiff could prove that it was damaged as a proximate result of the director defendants' breach of fiduciary duty through evidence that the alleged improper transfer by the defendants "left [the plaintiff] without the ability to look to that asset as a source of funds for repayment") (punctuation omitted).

The trial court, however, concluded that Forsman was entitled to summary judgment on Georgia Commercial's breach of fiduciary duty claim because Georgia Commercial failed to come forward with sufficient evidence to create a jury issue over causation. In moving for summary judgment, Forsman argued that the proximate cause of Georgia Commercial's injury was Prudential's foreclosure and sale of all of Pargar's assets, which caused Pargar to stop making lease payments, rather than the $239,011 paid to Forsman. Forsman also argued that Georgia Commercial could not establish proximate cause because Prudential and another creditor, Prudential Real Estate Affiliates, Inc. (“PREA”), held security interests in all of Pargar's assets and would have been entitled to the $239,011 in funds rather than Georgia Commercial, if those funds had not been paid out to Forsman. The trial court accepted Forsman's arguments and concluded that Georgia Commercial had failed to establish causation as a matter of law. The trial court's conclusion was erroneous.

As an initial matter, the fact that Prudential's foreclosure on its security interest and sale of Pargar's assets was a proximate cause of Georgia Commercial's inability to collect on its consent judgment against Pargar does not end the matter. It is well-established that “there may be more that one proximate cause of an injury.” (Citation omitted.) *Walker v. Giles, 276 Ga. App. 632, 643 (2), 624 S.E.2d 191 (2005). And, as our Supreme Court has explained

the general rule is that if, subsequently to an original wrongful act, a new cause has intervened, of itself sufficient to stand as the cause of the misfortune, the former must be considered as too remote, still if the character of the intervening act claimed to break the connection between the original wrongful act and the subsequent injury was such that its probable or natural consequences could reasonably have been anticipated, apprehended, or foreseen by the original wrong-doer, the causal connection is not broken, and the original wrong-doer is responsible for all of the consequences resulting from the intervening act.... Moreover, it is axiomatic that questions regarding proximate cause are undeniably a jury question and may only be determined by the courts in plain and undisputed cases.

[18] Guided by these causation principles, we conclude that the evidence created a jury issue as to whether the $239,011 payment to Forsman and the subsequent foreclosure sale by Prudential were concurring proximate causes of Georgia Commercial’s injury. In this regard, when the evidence is construed in favor of Georgia Commercial, a jury would be authorized to find that Forsman could have reasonably anticipated or foreseen, when he caused Pargar to make the $239,011 payment to him, that Prudential would foreclose on all of Pargar’s assets, given Pargar’s insolvency and its default on the loan from Prudential, and given that Forsman was the managing member of Pargar who controlled its day-to-day operations. Likewise, Pargar could have reasonably anticipated or foreseen, when the payment was made to Forsman, that Prudential would foreclose on all of its assets, given that Forsman and Prudential were members of Pargar whose knowledge could be imputed to the company. See Graphic Arts Mut. Ins. Co. v. Pritchett, 220 Ga. App. 430, 431 (1), 469 S.E.2d 199 (1995) (“A company is chargeable with the composite knowledge acquired by its officers and agents acting within the scope of their duties.”) (citation and punctuation omitted). Consequently, a jury could find that Prudential’s foreclosure of Pargar’s assets did not break the chain of causation between the payment to Forsman and Georgia Commercial’s inability to collect on its consent judgment, but rather that the Forsman payment and subsequent foreclosure were concurrent proximate causes. **813 Summary judgment to Forsman on the *551 basis that the foreclosure sale was the sole proximate cause of Georgia Commercial’s injury therefore was inappropriate. See Ontario Sewing Mach. Co., 275 Ga. at 686-687 (2), 572 S.E.2d 533. Compare Cieplinski v. Caldwell Elec. Contractors, 280 Ga. App. 267, 276, 633 S.E.2d 646 (2006) (uncontroverted evidence showed that intervening act could not have reasonably been foreseen, and thus intervening act was sole proximate cause of plaintiff’s injury as a matter of law).

The trial court also erred in concluding that Georgia Commercial could not establish causation because Prudential and PREA held security interests in Pargar’s assets that were superior to Georgia Commercial’s rights as a judgment creditor, such that Prudential and/or PREA rather than Georgia Commercial would have been entitled to the $239,011, if those funds had not been paid out to Forsman. The claims of a creditor that diligently pursues a cause of action challenging a preferential transfer made to an officer, director, or managing member of an insolvent company are not reduced or defeated by the hypothetical claims of other creditors who have slept on their rights and have failed to challenge the preferential transfer. See McLarty v. Enhart Corp., 227 Ga. 104, 106 (2), 179 S.E.2d 46 (1970). And, here, there is no evidence of record that any creditor other than Georgia Commercial has pursued any claims against Forsman for the alleged preferential payment.

For these combined reasons, we conclude that Georgia Commercial presented evidence sufficient to create a genuine issue of material fact as to whether Forsman breached his fiduciary duty to Pargar’s creditors, including Georgia Commercial, by authorizing the $239,011 payment to himself when Pargar was insolvent and faced foreclosure, and as to whether the payment to Forsman proximately caused an injury to Georgia Commercial. The trial court thus erred in granting summary judgment to Forsman on Georgia Commercial’s claim for breach of fiduciary duty.

Case No. A17A0728

2. In his cross-appeal, Forsman contends that the trial court erred in denying his motion for summary judgment on Georgia Commercial’s claim of intentional fraudulent transfer in violation of the UFTA, OCGA § 18-2-74 (a) (1). According to Forsman, the uncontroverted evidence of record demonstrates that Pargar did not make the $239,011 payment to him with the actual intent to hinder, delay, or defraud Georgia Commercial or other creditors. Given the standard applicable on summary judgment, we are unpersuaded.


[19] “Because actual intent to defraud is difficult to prove, the [UFTA] lists 11 nonexclusive factors (sometimes called
‘badges of fraud’) that can be considered in determining whether funds were transferred with the actual intent to defraud a creditor.” *SRB Investment Svs. v. Branch Banking & Trust Co.*, 289 Ga. 1, 3-4 (2), 709 S.E.2d 267 (2011). Specifically, OCGA § 18-2-74 (b) provides:

In determining whether a transfer was made with the actual intent to defraud a creditor, consideration may be given, among other factors, to whether: (1) The transfer or obligation was to an insider; (2) The debtor retained possession or control of the property transferred after the transfer; (3) The transfer or obligation was disclosed or concealed; (4) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit; (5) The transfer was of substantially all the debtor’s assets; (6) The debtor absconded; (7) The debtor removed or concealed assets; (8) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred; (9) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred; (10) The transfer occurred shortly before or shortly after a substantial debt was incurred; and (11) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

The existence of badges of fraud is “relevant evidence as to the debtor’s actual intent, from which the finder of fact may draw an inference of actual intent to defraud.” (Citation, punctuation, and footnote omitted.) **SRB Investment Svs., 289 Ga. at 4 (2), 709 S.E.2d 267.**

[20] Construed in favor of Georgia Commercial, the evidence in this case reflected the existence of at least three badges of fraud (namely, 1, 3, and 9) from which the jury could draw an inference that Pargar acted with the actual intent to defraud its creditors in making the $239,011 payment to Forsman. First, Forsman was the managing member of Pargar who controlled its day-to-day operations and served as its sole Director, President, Treasurer, and Secretary. **Forsman thus was an “insider” of Pargar as that term is defined in the UFTA. See OCGA § 18-2-71 (8) (B) (i)-(iii) (an “insider” of a debtor corporation includes an “director,” “officer,” or “[a] person in control of the debtor”). It follows that there was evidence that the transfer at issue was made to an insider, the first badge of fraud as set forth in OCGA § 18-2-74 (b) (1).**

Second, the evidence reflects that Pargar sent a letter to Georgia Commercial describing the foreclosure and distribution of the proceeds of the foreclosure sale to its member Prudential, but omitting any reference to the distribution of funds to its other member Forsman. Georgia Commercial learned of the $239,011 payment to Forsman only later, while conducting post-judgment discovery in the litigation it had commenced against Pargar. This evidence, viewed in the light most favorable to Georgia Commercial, reflected that the payment to Forsman was concealed rather than disclosed to outside creditors, which falls under the third badge of fraud as set forth in OCGA § 18-2-74 (b) (3). **Forsman argues that because Prudential was Pargar’s creditor with a first priority security interest in all of Pargar’s assets. Pargar therefore met the definition of an insolvent insider** of Pargar as that term is defined in the UFTA. **Suppression of a material fact which a party is under an obligation to communicate constitutes fraud. The obligation to communicate may arise from the confidential relations of the parties or from the particular circumstances of the case.”**

Third and finally, the evidence reflects that at the time of the payment to Forsman, Pargar had defaulted on the Prudential loan, was unable to repay all of its debts as they matured, and its debts exceeded the fair valuation of its assets. Pargar therefore met the definition of an insolvent company under the UFTA. **See OCGA § 18-2-72 (a), (b); Target Corp. v. Amerson, 326 Ga. App. 734, 741-742 (1), (g) 755 S.E.2d 333 (2014) (plaintiff seeking to prove that debtor was insolvent under the UFTA “was required to establish that, at the time of the conveyance, the sum of [the debtor’s] debts was greater than all of [its] assets, at a fair valuation,” or that the debtor was “generally not paying [its] debts as they became due”) (citation and punctuation omitted). Hence, there also was evidence of the ninth badge of fraud as set forth in OCGA § 18-2-74 (b) (3).**

[21] Given the existence of these badges of fraud, we conclude that Georgia Commercial came forward with sufficient evidence to create a jury issue regarding whether Pargar acted with an actual intent to defraud its creditors in making the $239,011 payment to Forsman. **Forsman v. Sapp, 340 Ga. App. 116, 120, 796 S.E.2d 740 (2017). That question.” (Citation and punctuation omitted.)**
“Because fraud is inherently subtle, it may be proved by slight circumstances, and whether a misrepresentation is fraudulent and intended to deceive is generally a jury question.” (Citation and punctuation omitted.) Maxey v. Sapp, 340 Ga. App. 116, 120, 796 S.E.2d 740 (2017). That is the situation here, as the trial court properly concluded when it denied Forsman's motion for summary judgment on Georgia Commercial's UFTA claim.


McMillian and Mercier, JJ., concur.

All Citations

342 Ga.App. 542, 803 S.E.2d 805

Footnotes
1 UFTA was revised and renamed the Uniform Voidable Transactions Act in 2015 but those revisions are not applicable here. See OCGA § 18-2-70; Ga. L. 2015, p. 996, § 4A-1/SB 65. See also Ga. L. 2015, p. 996, § 7-1(d)/SB 65 (Uniform Voidable Transaction Act does not apply to transfers made or obligations incurred before July 1, 2015).
2 The trial court granted summary judgment in favor of Forsman on several other claims brought against him by Georgia Commercial, but those claims are not at issue in these appeals.
3 These appeals originally were filed in the Supreme Court of Georgia, which transferred them to this Court.
4 The rule that directors owe a fiduciary duty to manage the remaining assets of an insolvent corporation for the benefit of its creditors originated in the common law and was later extended by Georgia courts to apply not only to directors, but also to managing officers and sole owners of an insolvent corporation. See Tindall v. H&S Homes, No. 5:10-CV-044, 2011 WL 5827227, at *4-5 (II) (M.D. Ga. Nov. 18, 2011) (discussing history of the rule). See also Milledgeville Banking Co. v. McIntyre Alliance Store, 98 Ga. 503, 506, 25 S.E. 567 (1896) (“It is a principle recognized in equity from time immemorial, that a trustee can derive no personal benefit to himself from the exercise of powers conferred upon him under the trust; and as the directors of an insolvent corporation hold its assets as a trust fund for the benefit of creditors, equity will not allow such directors to secure themselves from loss to the injury of the creditors whom they represent in the capacity of trustees.”); Lowry Banking Co. v. Empire Lumber Co., 91 Ga. 624, 624 (2), 17 S.E. 968 (1893) (syllabus by court) (noting that rule arose out of “principles of general law”); Ware, 97 Ga. App. at 838 (2), 104 S.E.2d 555 (applying rule to managing officers of insolvent corporation); Fountain, 160 Ga. App. at 263-264 (2), 287 S.E.2d 39 (applying rule to sole owner and president of insolvent corporation).
5 A debtor corporation is considered insolvent if, at the time the preferential transfer was made to the officer or director, “the property left or retained by the debtor [was] not ample to pay [its] existing debts.” (Citations and punctuation omitted.) Randall & Neder Lumber Co., 202 Ga. App. 497, 499 (1), 414 S.E.2d 718.
6 Georgia Commercial was a creditor of Pargar at the time of the alleged preferential payment to Forsman based on the contractual payment obligations that Pargar owed to Georgia Commercial under the long-term lease. See OCGA § 18-2-1 (“Whenever one person, by contract or by law, is liable and bound to pay to another an amount of money, certain or uncertain, the relation of debtor and creditor exists between them.”). As previously noted, Georgia Commercial later became a judgment creditor of Pargar.
7 “Suppression of a material fact which a party is under an obligation to communicate constitutes fraud. The obligation to communicate may arise from the confidential relations of the parties or from the particular circumstances of the case.” OCGA § 23-2-53. See Inland Atlantic Old Nat. Phase I v. 6425 Old Nat., 329 Ga. App. 671, 676 (2), 766 S.E.2d 86 (2014) (suppression of material financial information by fiduciary constitutes fraud). As discussed supra in Division 1, a fiduciary relationship arose between Forsman and Pargar's creditors, including Georgia Commercial, in light of Pargar's insolvency.
8 Forsman argues that because Prudential was Pargar's creditor with a first priority security interest in all of Pargar's remaining assets and Pargar did not have sufficient assets to satisfy its obligations to Prudential, Pargar was not focused on its outside creditors like Georgia Commercial and did not intend to defraud them when it made the payment to Forsman. However, given the existence of several badges of fraud, a genuine issue of material facts exists as to Pargar's intent, and Forsman's argument is best left for a jury to consider.

301 Ga. 492

Editor's Note: Additions are indicated by Text and deletions by Text.

Supreme Court of Georgia.

The STUTTERING FOUNDATION, INC.
v.
GLYNN COUNTY, et al.
The Stuttering Foundation, Inc.
v.
Glynn County, et al.

S17A0405
S17A1163
Decided: June 19, 2017

Synopsis
Background: Tenant petitioned for judicial review of county's approval of landlord's site plan and application for rezoning of commercial property for purpose of constructing addition to building or, in the alternative, for mandamus reversing county's approval. The Superior Court, Glynn County, Stephen G. Scarlett, J., dismissed the complaint. Tenant sought discretionary appeal, which was granted.

Holdings: The Supreme Court, Benham, J., held that:

[1] trial court order was final judgment that was immediately and directly appealable;

[2] tenant whose five-year lease conveyed only a usufruct and did not convey an interest in property did not have substantial interest in rezoning decision sufficient to grant tenant standing to challenge decision; and

[3] tenant was not intended beneficiary of restrictive covenants burdening property and, thus, could not rely on covenants to establish standing to challenge rezoning decision.

Affirmed in part and vacated in part.

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Attorneys and Law Firms
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Opinion

**796 Benham, Justice.

*492 These appeals arise out of the same trial court case and involve common issues. The Stuttering Foundation, Inc. ("Foundation") is the tenant of office space in a commercial development in Glynn County that is owned by Lucas Properties Holdings III, LLC ("Lucas"). In September 2015, Lucas filed with the appropriate Glynn County agency an application for rezoning of the property for the purpose of obtaining authority to construct an addition to the rear of one of the existing buildings in the development, the building in which the Foundation leases its office. It also sought approval of a site plan for the proposed construction. Both were approved on March 17, 2016.

For various reasons, the Foundation opposed the new development, and on April 15, 2016, the Foundation filed a petition for judicial review of the rezoning application and Site Plan, or in the alternative, for mandamus reversing the County's approval. 1 Both the County and Lucas filed a motion to dismiss the complaint on its merits, and on July 7, 2016, the trial court entered an order granting the County's motion to dismiss, concluding that the Foundation lacked standing to raise its objections to the rezoning. This Court granted the Foundation's application for discretionary appeal, the case was docketed as Case No. S17A0405, and it was later briefed and orally argued by all parties, including Lucas. 2 In the interim, on December 12, 2016, the trial court entered an order granting Lucas's motion to dismiss. This Court granted the Foundation's application *493 for discretionary appeal of this second dismissal order and
the case was docketed as Case No. S17A1163. Again, all parties filed briefs in the case, including the County.

Case No. S17A0405

[1] 1. First, we address the County's assertion that this appeal should be dismissed because the Foundation failed to follow the requisite interlocutory appeal procedure. The County argues that the trial court order granting the County's motion to dismiss was not a final order since it did not adjudicate all the claims against the multiple parties in the case, nor did it contain an express determination of finality with respect to the County as required by OCGA § 9-11-54 (b) in order to make the order one that is final and immediately appealable. But the assertion that the trial court order is not immediately appealable as a final order pursuant to OCGA § 5-6-34 (a) (1) is irrelevant. The order also dismissed the Foundation's claim for mandamus relief, and therefore was, at the time the notice of appeal was filed, immediately and directly appealable to this Court pursuant to OCGA § 5-6-34 (a) (7). All other judgments and rulings raised on appeal are thus properly before this Court. See OCGA § 5-6-34 (d).

2. The Foundation states that it appeared at the public hearing on Lucas's application for rezoning and presented evidence and argument opposing the application. When the County approved the application, the Foundation then filed its petition in the superior court. In the petition, the Foundation alleged the application for rezoning should have been denied due to various deficiencies in Lucas's application and because various details of the rezoning request did not comply with the applicable zoning ordinance and other regulations. The Foundation further asserted that the property is subject to easements and restrictive covenants created and recorded by the previous owner of the property, and that various details of the plan would violate the terms of these recorded easements and covenants and would thereby require the prior written consent of the owners of other lots within the tract covered by the easements **797 and restrictions. **798 The Foundation alleged these violations would diminish the value of its leasehold interest in the property. The trial court granted the County's motion to dismiss, finding that the Foundation, *494 as a tenant of the property's owner, lacks standing to challenge a rezoning decision made at the request of the fee simple owner. It also found the Foundation was not entitled to mandamus relief.

[2] [3] [4] (a) The parties agree that the proper standard to apply when determining a party's standing to challenge a rezoning decision is the "substantial interest-aggrieved citizen" test. By this test, "there [are] two steps to standing: First, a person claiming to be aggrieved must have a substantial interest in the zoning decision, and second, ... this interest [must] be in danger of suffering some special damage or injury not common to all property owners similarly situated." DeKalb County v. Wapensky, 253 Ga. 47, 48 (1), 315 S.E.2d 873 (1984). See also Brand v. Wilson, 252 Ga. 416, 417 (1), 314 S.E.2d 192 (1984) ("[T]he gauge for standing ... is simply this: that a citizen must have a substantial interest, which must suffer substantial damage by reason of the contested zoning change.")

The threshold issue posed in this case is whether the Foundation's status as a short-term tenant 5 confers upon it a "substantial interest" in the zoning decision sufficient to create standing to challenge it. 6 The parties cite no Georgia cases, and we have found none, that address whether a short-term tenant of real property has standing to challenge a zoning decision made at the request of the tenant's landlord. 7

[5] *495 (i) The Foundation's lease expressly states: "This Lease shall create the relationship of Landlord and Tenant between the parties hereto; no estate shall pass out of Landlord and this Lease shall create a usufruct only." Whether a lease passes an estate in land or merely a usufruct depends upon the intent of the parties, and in a case like the one now before us involving private parties, **798 the terms of the lease control. See Macon-Bibb County Bd. of Tax Assessors v. Atlantic Southeast Airlines, Inc., 262 Ga. 119, 119-120, 414 S.E.2d 635 (1992). Even the Foundation appears to agree that the lease between Lucas and the Foundation creates a usufruct, not an estate for years. Under Georgia law, a significant distinction exists between the interest conveyed by a usufruct and the interest conveyed by an estate for years. Distinctions between an estate for years and usufruct are set forth in various Georgia statutes. The grant by one person to another of an estate for years is usually termed a lease, but an estate for years concerning realty does not involve the relationship of landlord and tenant. The relationship of landlord
and tenant is created when the owner of real estate grants to another person the right simply to possess and enjoy the use of such real estate.... In such a case, no estate passes out of the landlord and the tenant has only a usufruct which may not be conveyed except by the landlord's consent and which is not subject to levy and sale. A usufruct has been referred to as merely a license in real property, which is defined as authority to do a particular act or series of acts on land of another without possessing any estate or interest therein. On the other hand, an estate for years carries with it the right to use the property in as absolute a manner as may be done with a greater estate, provided that the property or the person who is entitled to the remainder or reversion interest is not injured by such use.


**496** A lease that conveys a usufruct creates a right to possess and enjoy the use of real property, but it does not convey an estate or interest in real property. See OCGA § 44-7-1 (a). Consequently, the courts of this State have drawn distinctions between the rights and duties of a holder of a usufruct and those of a title holder. For example, a usufruct is not subject to ad valorem taxation pursuant to OCGA § 48-5-3. See Macon-Bibb County, supra, 262 Ga. at 119, 414 S.E.2d 635. As another example, because a tenant who holds a usufruct is not one who owns real property, or any interest in real property, that interest is not sufficient to satisfy the statutory requirements of OCGA § 44-9-40 (b) to authorize the tenant to seek an easement by necessity over adjacent property. See Read v. Georgia Power Co., 283 Ga. App. 451, 453, 641 S.E.2d 680 (2007). By comparison, in Hollberg v. Spalding County, the Court of Appeals held that an individual who was not yet a title holder to an estate to land at the time he filed a challenge to a zoning decision, but was the devisee of a life estate in that property, had standing to challenge a zoning decision relating to adjacent property. The Court of Appeals reasoned that the devisee's inchoate title to the real property was sufficient to give him a substantial interest in the zoning decision that was sufficient to satisfy the first prong of the test for standing to appeal the decision. Id. That reasoning, however, does not apply to persons holding a usufruct. As noted, a usufruct does not pass an estate in real property.

[6] Those cases in which the Georgia appellate courts have found a zoning decision challenger to have a substantial interest in the zoning decision, which satisfies the first prong of the standing test, have all involved holders of vested or inchoate title to real property. See, e.g., DeKalb County v. Wapensky, supra, 253 Ga. at 49 (1), 315 S.E.2d 873; Brand v. Wilson, supra, 252 Ga. at 417 (1), 314 S.E.2d 192; Hollberg v. Spalding County, supra, 281 Ga. App. at 773 (2) (a), 637 S.E.2d 163. A number of cases have found a challenger who has no estate or interest in real property has no standing because he can show no substantial interest in the zoning decision. See, e.g., Miller v. Fulton County, 258 Ga. 882, 883 (1), 375 S.E.2d 864 (1989) (a husband who did not have an ownership interest in the property owned by his wife, which was allegedly injured by the zoning decision, lacked standing to join his wife in challenging the zoning decision, and this Court rejected the husband's argument that his marital status bestowed upon him an equitable interest sufficient to establish standing); Bersch v. Hauck, 122 Ga. App. 527, 177 S.E.2d 844 (1970). See also Lindsey Creek, etc., Assn. v. Consolidated Govt. of Columbus, 249 Ga. 488, 292 S.E.2d 61 (1982) (a civic association comprised of members who own affected property lacks standing to challenge a zoning decision unless joined in the suit by a plaintiff who owns affected property). Because the usufruct granted in the Foundation's lease does not convey an interest in real property, the Foundation has no cognizable interest in this zoning decision that it could assert adversely to the actual property owner's interest. Under these circumstances, it cannot be said that the tenant has a substantial interest in this zoning decision that grants it standing to challenge the decision.

[7] As the trial court noted, the terms of a lease may impose a duty on the landlord to seek or oppose a zoning decision in order to effectuate the intent of parties, but such a duty is contractual and may be enforced by an
action against the landlord. Conversely, if the landlord obtains or resists a zoning decision such that the tenant's rights under the lease are adversely impacted or damaged, the tenant may have a remedy against the landlord for breach of contract.

The Foundation cites case law from other jurisdictions to support its assertion that a tenant has standing to challenge a zoning decision. But the only cases cited involving a tenant are inapposite. And, in any event, reliance upon cases from other jurisdictions is unpersuasive because Georgia's landlord and tenant law is unusual in that it is based not on the common law but upon the statutory provision that the grant of a right simply to possess and enjoy the use of real estate passes no estate to the tenant but only a usufruct. See OCGA § 44-7-1 (a); Thompson v. Crownover, 259 Ga. 126, 127 (1), 381 S.E.2d 283 (1989).

(ii) The Foundation's efforts to analogize its right to contest the County's decision to grant the property owner's request for rezoning of its property to the rights of a tenant in a condemnation proceeding are unavailing. A condemnation proceeding involves the constitutional right to fair compensation for a governmental entity's taking of private property for a public use. See Ga. Const. of 1983, Art. I, Sec. III, Par. I (a) (“[P]rivate property shall not be taken ... for public purposes without just and adequate compensation being first paid.”). In that context, the value of a tenant's contract right under a lease to possess and use the condemned property may constitute an additional aspect of the taking over and above the property rights taken from the fee simple owner. See, e.g., Franco's Pizza, etc. v. Dept. of Transportation, 178 Ga. App. 331 (1), 343 S.E.2d 123 (1986) (both a leasehold and a usufruct involve a property right that “cannot be taken for public use without first paying just and adequate compensation”); Ellis v. Dept. of Transportation, 175 Ga. App. 123, 333 S.E.2d 6 (1985). Eminent domain cases apply a broad definition of “property rights” that extends beyond an interest in real property to encompass, for example, contract rights that are impacted by a governmental taking. See, e.g., DeKalb County v. United Family Life Ins. Co., 235 Ga. 417, 419, 219 S.E.2d 707 (1975) (a mortgagee's contractual right to a prepayment penalty is a property right to be compensated in a condemnation proceeding); Dept. of Transportation v. Arnold, 243 Ga. App. 15, 16 (1), 530 S.E.2d 767 (2000) (the good will of a business operated on condemned property is an intangible property interest for which the business owner may seek damages). What the Foundation contests, however, is not a taking of its contract rights for public use by condemnation but a decision by the County to grant the real property owner's petition for rezoning so the owner can put the property to a different use. In truth, the County has taken nothing from the Foundation.

If Lucas exercises its right to develop its property in accordance with the new zoning decision and the approved site plan, and if by doing so Lucas impairs or destroys the value of the Foundation's usufruct interest, it is not without a remedy. Nothing prevents the Foundation from seeking damages from Lucas. The Foundation argues contract damages would not provide adequate relief because the rezoning decision could not be reversed in an action against the landlord and would remain in place. That is true, but it does not alter the fact that the Foundation has no standing to challenge the rezoning decision, as demonstrated by its petition. If a tenant can demonstrate its landlord has taken action that impairs its contractual rights, however, it may be able to recover damages from the landlord. See, e.g., Myung Sung Presbyterian Church, Inc. v. North American Assn. of Slavic Churches & Ministries, Inc., supra, 291 Ga. App. 808, 812 (3), 662 S.E.2d 745. The Foundation has a remedy for the damages it alleges it will suffer, but it lacks standing to pursue a reversal of the County's zoning decision.

(b) That is not to say that a tenant can never establish standing to challenge the rezoning of the property it leases. In fact, the Foundation asserts that additional grounds beyond its mere status as a tenant of the subject property exist to establish its standing in this case. The Foundation asserts it is a beneficiary of the recorded easements and restrictive covenants (“Declarations”) that burden Lucas's property, and that its interest in the Declarations will be harmed if Lucas makes the changes authorized by the County's decision. According to the Foundation, these circumstances create a substantial interest in the zoning decision sufficient to satisfy the first prong of the standing test, when considered in conjunction with its status as a tenant. But we are unpersuaded that the recorded Declarations contemplate short-term tenants of the owners of the burdened property to be beneficiaries of the easements and restrictive covenants created in that document.
Citing Lee v. City of Atlanta, the Foundation first asserts that easement rights are property interests, and that is true with respect to a taking of an easement by eminent domain. Id. But this case does not involve a condemnation proceeding. Even if the Declarations grant beneficiary status to the Foundation with respect to easements (which we reject, below), it does not create a property interest in those easements or establish that the Foundation has a substantial interest in the zoning decision so as to create standing to challenge it. The Foundation's status as a holder of a usufruct interest, as opposed to a party with property interests in the leased premises, is governed by the lease. The Foundation's remedy for the landlord's interference or violation of its easement rights, if any, is a claim for breach of contract. Again, no public taking of the Foundation's rights is involved in this case.

Citing Barton v. Atkinson, the Foundation asserts that a beneficiary of recorded covenants has standing to challenge a rezoning that would allegedly violate the covenants. Barton involved a challenge by neighboring landowners who sought to enjoin the defendant from acting in reliance on a zoning ordinance that, according to the plaintiffs, violated certain recorded covenants that burdened the defendant's property. But this Court determined the plaintiff landowners lacked standing to invoke the covenants because, according to the terms of the instrument, they were not the owners of the property benefitted by the covenants. Id. at 734 (2), 187 S.E.2d 835. Unlike the restrictive covenants involved in this case, the recorded restrictive covenants in the Barton case expressly referenced both the owners and lessees of the real property as parties to which the covenants related and identified them as beneficiaries of the covenants. Consequently, the reference to the rights of lessees mentioned in Barton is inapplicable to the Foundation, and the Foundation cannot show that it, as the holder of a usufruct interest in Lucas's property, is an intended beneficiary of the restrictive covenants at issue in this case.

In construing the intent of restrictive covenants, the courts look to the intent of the parties, “which is to be collected from the whole instrument, and the circumstances surrounding its execution.” (Citation omitted.) White v. Legodais, 249 Ga. 849, 849 (1), 295 S.E.2d 99 (1982). See also Charter Club on River Home Owners Assn. v. Walker, 301 Ga. App. 898, 900-901, 689 S.E.2d 344 (2009) (when construing restrictive covenants courts consider the entire document and not merely one provision in question). The restrictive covenants in this case are not ambiguous; the document was recorded by Lucas's predecessor-in-interest, and states that the easements and restrictions are for the benefit of that owner as well as the “subsequent owners and the successors in title” to the real property identified in the Declarations. The document states the Declarations “may be enforced by any Owner,” and further states the Declarations may not be amended to modify the rights or obligations relating to any real property described in the document “without the prior written consent of each Owner and Mortgagee shown by the Public Land Records to have a recordable interest in such Tract unless otherwise provided herein.” The clear intent of the recorded document is to create burdens and benefits for the owners and others with a recordable interest in the various tracts of the property covered by the Declarations. The Foundation is not a successor-in-title to any tract of the real property identified in the Declarations, and its short-term lease does not convey a recordable interest in the property.

Nevertheless, the Foundation argues that the terms of the Declarations in this case demonstrate the Foundation is an express third-party beneficiary. The recorded document is comprised of three parts, and after carefully examining the document to determine if the Foundation's assertion is supported by the record, we conclude it is not. Part I of the Declarations sets forth “Preliminary Matters.” Section 1.2 in Part I, titled “Purpose and Binding Effect,” states “it is intended and understood” that the burdens and benefits of the easements and restrictions are “binding upon and inure to the benefit of the record owner in fee simple (the ‘Owner’) of each ... Tract and the heirs, executors, legal representatives, successors, successors-in-title, and assigns of such Owner.” Section 1.4 (a) (viii) states that the Declarations may be enforced by any “Owner.” Part II sets forth the easements created by the document. They include, among other things, driveway easements, parking easements, and drainage easements, each of which the Foundation claims will be violated by any construction authorized by the rezoning ordinance. Part III sets forth “Restrictions.” Section 3.1 in Part III, titled “Effect and Purpose,” includes the provision that each tract covered by the Declarations shall be leased subject to
the restrictive covenants applicable to that tract. It further states:

The Restrictions shall operate as covenants running with the title to the lands benefited and burdened thereby, shall inure to the benefit of and be binding upon the Parties hereto and their respective successors-in-title, and all those holding under them, and shall survive the sale or other transfer of the ownership of any Tract described herein.

We reject the argument that this language in Section 3.1 reflects an intent to make a short-term tenant of a title holder a beneficiary of the restrictive covenants. As noted, Section 1.2 of the Declarations, addressing their “binding effect,” clearly expresses the document's intent for the easements and restrictions to inure to the benefit of the record owners and their successors-in-title and those holding under them. The Foundation holds no interest in the title to the benefitted land. Its rights derive solely from its lease, which grants it only a license to use the leased premises pursuant to the lease’s terms.

At other places in the Declarations the phrase “holding under” is used with regard to burdens imposed by the easements and restrictive covenants. For example, in the sections relating to easements for the use of garbage facilities, the owners of certain lots covered by the Declarations are obligated to pay certain other lot owners a share of the amount charged for the lease of a dumpster that is to be placed on the lots, but only during “such time as any building located on [the identified lots whose owners are obligated to share dumpster rental charges are] physically occupied by Owner or any Person holding under such Owner, including without limitation any tenant, employee, agent or invitee of such Owner.” It makes sense that the identified lot owners are obligated to pay for garbage collection expenses only during periods when their property is physically occupied by a person or entity lawfully entitled to occupy it, such as a tenant. We conclude the phrase “holding under” as used in these sections of the Declarations does not indicate a general intent to grant status as a beneficiary of easements and restrictions to a short-term tenant, given the other terms of the document that expressly limit the burdens and benefits of the covenants to the fee simple owners and their successors-in-title. The Foundation also cites to other provisions of the Declarations that prohibit the owner, and persons “holding under” an owner, from obstructing a driveway or a parking easement. The Foundation argues that this shows it is burdened by the terms of those easements, and thus it must also be deemed to benefit from the easements and have a right to enforce them. But the driveway and parking easements do not, in fact, establish that a tenant is burdened by the Declarations. Instead, these easements demonstrate that the owners are obligated to prevent others who are in lawful possession of their property from violating the terms of the easements which bind the owner, or that the owners will be deemed to have violated the terms of the easements if an owner’s “tenant, employee, agent or invitee” obstructs a parking or driveway easement. But the Foundation fails to demonstrate it is burdened by the terms of the Declarations.

The Foundation is not a party to the recorded Declarations. It is, however, a party to its lease, which contains no reference to the Declarations and does not obligate the Foundation to comply with its terms. Although the Declarations may reasonably be read as requiring owners to lease the property subject to the restrictions set forth in the document, the Foundation fails to show, and does not even allege, that it relied upon the terms of the Declarations or the benefits that inured to its landlord, Lucas (or even those who “hold under” Lucas), pursuant to the terms of that document when it executed the lease.

[13] [14] The Foundation also argues it is not unfair to subject Lucas to the terms of the declarations and easements. While that may be true, the Foundation fails to demonstrate it has standing to enforce the terms of the document. In fact, the Declarations expressly state that an owner of a tract covered by the agreement may enforce it. It identifies no other person or entity that is entitled to enforce its terms. As stated earlier, the Foundation may have a cause of action against Lucas for breach of the lease agreement, but it has not demonstrated a right to enforce the Declarations against Lucas, the owner of the property who seeks to have its property rezoned. In fact, a short-term tenant lacks standing to challenge enforcement of the terms of recorded restrictive covenants that attach to the title of the leased property. *Bowman v. Walnut Mountain Property Owners Ass'n, Inc.*, 251 Ga. App. 91, 553 S.E.2d 389 (2001). See also *Turner...*
Advertising Co. v. Garcia, 252 Ga. 101, 102 (1), 311 S.E.2d 466 (1984) (“To maintain an action to enforce restrictive covenants, an individual must be the owner of, or have a direct interest in, the premises.”). We reject the assertion that the Foundation holds rights under the Declarations that establish its standing to challenge the County’s zoning decision in this case. Again, we conclude the Foundation has failed to demonstrate a substantial interest in the zoning decision, one of the two requirements under the “substantial interest-aggrieved citizen” test to establish standing to challenge this zoning decision. 14 Zoning decisions require certainty and finality, and a party whose only claim to an interest in a zoning decision is that its short-term usufructuary interest in the subject property will be damaged shall not be entitled to delay the enforcement of a duly rendered zoning decision. 15

[15] [16] A trial court’s determination on the issue of standing in a zoning case will not be disturbed unless its factual determinations are clearly erroneous. City of Marietta v. Traton Corp., 253 Ga. 64, 65 (1), 316 S.E.2d 461 (1984). And the trial court’s application of law to the facts is subject to de novo appellate review. See Murray v. Murray, 299 Ga. 703, 705, 791 S.E.2d 816 (2016). Although the trial court’s order in this case granting the County’s motion to dismiss did not expressly apply the “substantial interest-aggrieved citizen” test when it reached the conclusion that the Foundation lacked standing to challenge the *504 zoning decision, no “magic language” is necessary in an order finding a party lacks standing to challenge a zoning decision. What matters is that the trial court considered the relevant factors and arrived at the proper conclusion.

[17] 3. Standing, and its requirement “that a person claiming to be aggrieved have a ‘substantial interest’ in a zoning decision,” also applies to a party who seeks equitable relief in an attack on a zoning determination. (Citation and punctuation omitted.) Massey v. Butts County, 281 Ga. 244, 245, 637 S.E.2d 385 (seeking injunctive and declaratory relief). See also Tate v. Stephens, 245 Ga. 519, 520-521, 265 S.E.2d 811 (1980). The Foundation asserts that this standard applies only to claims for mandamus relief pursuant to OCGA § 9-6-24, relating to the interest required to enforce a public right; and it claims its complaint nevertheless states a claim for mandamus relief pursuant to OCGA § 9-6-25, which states that a plaintiff may enforce a private right by mandamus if it can “show pecuniary loss for which he cannot be compensated in damages.” We note, however, that the order dismissing the petition for writ of mandamus references a pending action filed by the Foundation against Lucas, and suggests that the Foundation’s claim for relief should be pursued in this pending action, in which the Foundation seeks damages for breach of contract and also injunctive relief. We reject the Foundation’s assertion that the **804 trial court erred in dismissing its claim for mandamus relief because it will suffer pecuniary loss for which it cannot be compensated in damages in this separate pending action. As discussed above, even though the Foundation has demonstrated no right to contest the rezoning decision, if the Foundation can show that its contractual rights are or will be violated or damaged by changes Lucas makes to its real property pursuant to the rezoning decision, the Foundation may be entitled to monetary compensation or other relief.

[18] In any event, mandamus relief is available only if the claimant establishes both that “(1) no other adequate legal remedy is available to effectuate the relief sought; and (2) the applicant has a clear legal right to such relief.” (Citation and punctuation omitted.) SJN Properties, LLC v. Fulton County Bd. of Assessors, 296 Ga. 793, 800 (2) (b) (ii), 770 S.E.2d 832 (2015). Because the Foundation’s trial court petition fails to demonstrate it has a substantial interest in the zoning decision, we have concluded it lacks standing to mandamus relief. Accordingly, we affirm the trial court’s order granting Glynn County’s motion to dismiss the Foundation’s petition for a writ of mandamus.

*505 Case No. S17A1163

4. The County’s motion to dismiss sought dismissal of the complaint, not simply dismissal of the claims against the County. The trial court granted that motion to dismiss. Accordingly, the first dismissal order disposed of the entire case and was a final order. The later order granting Lucas’s motion to dismiss is, therefore, a nullity, and is vacated.

Footnotes

1. The Foundation's petition named as respondents Glynn County, its Board of Commissioners, and also the board members in their individual capacities. For ease of reference, all the parties related to Glynn County are referenced together as “Glynn County” or the “County.” The petition also named Lucas and its principal, Arthur M. Lucas. For ease of reference, these two parties are referenced together as “Lucas.”

2. After the Foundation's application for discretionary review was granted, the appropriate Glynn County entities issued a building permit and a land disturbance permit by which Lucas was authorized to commence the construction opposed by the Foundation.

3. A copy of the easements and restrictions was attached as an exhibit to the Foundation's amended petition. The Foundation's petition also relied on its rights under its lease, and a verified copy of it was filed in the proceeding by Lucas.

4. The “historical saga” of the evolution of this test is summarized in *Massey v. Butts County*, 281 Ga. 244, 246-248, 637 S.E.2d 385 (2006), in which this Court noted that, although the test was originally created by statute and addressed the right to judicial review of the decisions of a board of adjustment and the decisions of a board of zoning appeals, it was later applied by this Court to rezoning decisions by local governing authorities.

5. The Foundation contends it is not a “short-term” tenant because its lease is for a term of five years, and further contends it has exercised an option to renew the lease for an additional five years. Although a presumption exists that a five-year lease conveys an estate for years, the intention of the parties as expressed by the terms of the lease agreement governs. See *Henderson v. Tax Assessors, Camden County*, 156 Ga. App. 590, 275 S.E.2d 78 (1980). Here, the lease agreement clearly states it conveys a usufruct and that the lease does not convey an estate in land. Accordingly, the Foundation is properly considered a short-term tenant.

6. A controversy also exists regarding whether the Foundation is, at this time, merely a tenant at sufferance holding over after the expiration of the lease contract. The Foundation asserts it timely exercised its right to renew the lease, and Lucas asserts it timely notified the Foundation that the lease would terminate upon its expiration date, December 31, 2016. A separate lawsuit was filed in the superior court relating to this dispute, and the trial court’s rulings in that dispute are currently the subject of an appeal pending in the Court of Appeals. See Court of Appeals Case No. A17A1259.

7. The Foundation relies on *Sneakers of Cobb County v. Cobb County*, 265 Ga. 410, 455 S.E.2d 834 (1995), for its assertion that a tenant has standing to challenge a zoning decision. Nothing in the opinion, however, establishes that the appellant in that case was a tenant of the property covered by the zoning ordinance at issue in that case. This Court held in *Sneakers* that because the appellant was no longer in possession of the property, its claims for injunctive relief were moot. Having disposed of the case as moot, the Court did not address or consider whether the appellant had actually held an interest in the property that would confer standing to challenge the zoning ordinance. See also *Simmons v. Dept. of Transportation*, 225 Ga. App. 572, 577-578, 484 S.E.2d 332 (1997) (Andrews, J., dissenting), in which the *Sneakers* case was characterized as one in which the property owner lacked standing to contest a zoning decision because it had been disposed of the property.


9. See *Myung Sung Presbyterian Church, Inc. v. North American Assn. of Slavic Churches & Ministries, Inc.*, 291 Ga. App. 808, 812 (3), 662 S.E.2d 745 (2008) (affirming the trial court's denial of the landlord's motion for directed verdict in a trial in which the tenant sought damages for the landlord's failure to seek a zoning variance that was required to permit the tenant's use of the property as contemplated in the lease, which was the landlord's implied duty under the terms of the lease).

10. See *Metroweb Corp. v. Lake County*, 130 Ill. App. 3d 934, 85 Ill. Dec. 940, 474 N.E.2d 900 (1985) (a tenant that held a lease that was contingent upon the approval of the tenant's conditional use permit application lacked the requisite possessory interest in the property to have standing to bring an action for declaratory relief with respect to a zoning decision); *Iowa Coal Mining Co. v. Monroe County*, 555 N.W.2d 418 (Iowa 1996) (tenant mining company had standing to bring an inverse condemnation case (not a challenge to a zoning decision) against a governmental entity as a result of new zoning laws that prohibited the company's use of the land it leased); *Sun-Brite Car Wash, Inc. v. Bd. of Zoning & Appeals, etc.*,
We reject the Foundation's argument that it, alone, can challenge the rezoning and address the risk of flooding and other damage allegedly posed by the rezoning. Its status as short-term tenant does not give the Foundation an interest in the real property that it can assert against the owner.

Consequently, we need not address whether the Foundation has satisfied the second requirement of the standing test—that its interest must be in danger of suffering some special damage not common to all similarly situated property owners. Under this Court's precedent, both prongs of the standing test must be satisfied. See DeKalb County v. Wapensky, supra, 253 Ga. at 48 (1), 315 S.E.2d 873.

The analysis will be different if the challenger to a zoning decision is a long-term tenant who is the holder of an estate in real property, in which case the challenger may be able to meet the first prong of the standing test and show it has a substantial interest in the rezoning decision. Likewise, if, as in Barton v. Atkinson, supra, the restrictive covenants that burden the property involved in the zoning decision expressly include lessees within the definition of those to whom the benefits of the restrictions run, even a short-term tenant may be able to demonstrate standing to challenge a zoning decision that the tenant claims will adversely impact its rights under restrictive covenants. Those facts are not present in this case, however.
339 Ga.App. 843
Court of Appeals of Georgia.

GEORGE
v.
HERCULES REAL ESTATE SERVICES, INC.
A16A1090
November 18, 2016
Reconsideration Denied December 15, 2016
Certiorari Denied June 30, 2017

Synopsis
Background: Tenant who was shot by unknown assailants during home invasion brought premises liability action against apartment complex manager, and asserted claims for negligence, nuisance, and punitive damages, and manager counterclaimed for unpaid rent and other fees. The Superior Court, Fulton County, McBurney, J., granted summary judgment to manager as to all claims, and tenant appealed.

Holdings: The Court of Appeals, Doyle, J., held that:

[1] apartment manager's failure to provide more security patrols, or to properly repair lock on tenant's door after it was kicked in during a previous burglary, was not the proximate cause of tenant's injuries in subsequent home invasion, as an element of tenant's negligence claim;

[2] failure to provide more security patrols, or to properly repair lock on tenant's door after it was kicked in during a previous burglary, was not the proximate cause of tenant's injuries in subsequent home invasion, as an element of tenant's nuisance claim;

[3] any failure by apartment manager to provide additional security or properly repair tenant's door after it was kicked in during a prior burglary did not constitute a breach of the implied covenant of quiet enjoyment;


[5] apartment manager's purported failure to provide adequate security or to properly secure defendant's front door lock did not constitute constructive eviction, and thus, did not relieve him of his obligation to pay rent.

Affirmed.

Peterson, J., filed opinion concurring in part and in the judgment, joined by Dillard, McMillian, Mercier, JJ.

Miller, P.J., filed opinion dissenting in part and concurring in part, joined by Barnes and Phipps, P.JJ., and McFadden, J.

Barnes, P.J, filed opinion dissenting in part and concurring in part, joined by Miller and Phipps, P.JJ., and McFadden, J.

Attorneys and Law Firms

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James Peter Myers, Brynda Rodriguez Insley, Atlanta, Gregory Young Shin, Insley & Race, for Appellee.

Opinion

Doyle, Chief Judge.

*843 Derrick George filed a premises liability action against Hercules Real Estate Services, Inc. (“Hercules”), the manager of the apartment complex in which George lived when he was shot by unknown assailants during a home invasion. George asserted claims for negligence, nuisance, and punitive damages. Hercules answered and filed a counterclaim for unpaid rent and other fees. The trial court granted summary judgment to Hercules as
to all of George's claims and as to Hercules's counterclaim, and George appeals. For the reasons that follow, we affirm.

Summary judgment is proper when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. OCGA § 9-11-56 (c). A de novo standard of review applies to an appeal from a grant of summary judgment, and we view the evidence, and all reasonable conclusions and inferences drawn from it, in the light most favorable to the nonmovant. 1

So viewed, the record shows that George moved into an apartment in The Villas at Lakewood in November 2010. On June 11, 2011, while he was not home, George's apartment was burglarized between the hours of midnight and 2:00 a.m. In response to the burglary, Hercules repaired George's damaged front door and installed a metal burglar guard, which made the door more secure when locked, but also made it difficult to engage the deadbolt. The apartment complex also had an alarm system that was monitored 24 hours per day and included a front-door panic button in each unit, including George's. 2

According to George, after the burglary, he obtained a shotgun and kept it beside the front door for protection because he believed the complex was not safe.

In the early morning hours of July 27, 2011, George was home with a friend when someone knocked on his door. George turned on the front porch light, looked through the peephole, and asked who was there; he could see only the silhouette of a single individual, and he could not hear the person on the other side of the door. Although he was not expecting anyone at the time, George opened the door, propping his foot against it out of concern for his safety. When George opened the door, a second individual emerged, and he and the first man tried to force their way into George's apartment. George pushed back and tried to lock the door, but he was unable to engage the deadbolt. George grabbed his shotgun and fired at the intruders. The intruders fired back, shooting George four times. The police never apprehended or identified the intruders. After the shooting, George did not return to his apartment nor did he pay rent for the apartment.

Hercules was aware of prior crimes at the apartment complex 2 and employed a private security service during day hours. Prior to the shooting, in May 2011, Hercules's on-site manager requested that the corporate office provide additional security for the complex, but Hercules did not comply with the request.

George sued Hercules, asserting claims for negligence, nuisance, and punitive damages. With regard to his negligence claims, he alleged that Hercules failed to (1) keep the premises in proper repair; (2) provide adequate security; and (3) keep the premises safe. Hercules asserted a counterclaim against George for unpaid rent and moved for summary judgment on all claims. The trial court granted summary judgment to Hercules on all claims, and this appeal followed.

1. George's claims. Because the record is devoid of any competent evidence to create a question of fact on the element of causation, Hercules was entitled to summary judgment as to George's claims. 3

(a) Negligence. There are four elements to a negligence claim in Georgia:

(1) A legal duty to conform to a standard of conduct raised by the law for the protection of others against unreasonable risk of harm; (2) a breach of this standard; (3) a legally attributable causal connection between the conduct and the resulting injury; and, (4) some loss or damage flowing to the plaintiff's legally protected interest as a result of the alleged breach of the legal duty. 4

On the issue of the fact of causation, as on other issues essential to the cause of action for negligence, the plaintiff, in general, has the burden of proof. The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to grant summary judgment for the defendant. 5

As the movant, Hercules offered evidence that as part of a $7 million renovation of the property, it installed a monitored security alarm equipped with a panic button

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in each unit; added exterior security cameras around the property; employed security guards in varying hours seven days a week; provided a twenty-four-hour phone number for maintenance and security issues; added an entry gate and landscaping to prevent unauthorized entry; and worked with the resident community, neighborhood watch, and police department to increase involvement and presence in the complex. Hercules also pointed to the lack of expert or other testimony in the record that any additional security measures would have prevented George from *846 being shot after voluntarily opening his door to a stranger after midnight. Stated another way, Hercules argued that there is a lack of evidence on causation—that there is no evidence that its alleged failure to provide adequate security caused George’s injuries. 6

In response, George points only to the testimony of Celina Nyack, Hercules’s community manager, and Joe Bulat, the owner of the security company. While George states that the security company recommended additional security measures, a review of Bulat’s deposition belies this assertion. When asked whether he made any recommendations, Bulat replied: “I would have liked to have had more hours, of course, but if I said, do you want to increase the hour? No, they had a budget.” 7

Similarly, George claimed that Hercules’s on-site manager “requested more security and surveillance because the tenants were ‘at the mercy of criminal activity on the property.’” A closer look at the email written by Nyack shows that on May 21, 2011, she requested more security on weekend days and weekday evenings “[d]ue to the school year ending and the weather inclement **86 [sic].” 8 Nonetheless, there is no evidence or testimony that reducing or increasing security would have affected the crime rate in general or the particular crime that injured George. Rather, the evidence showed that security patrol *847 hours had remained consistent, and the internal incident reports show that crime varied from month to month and year to year. 9

This evidence is insufficient to create a question of fact on whether George’s injuries were proximately caused by any act or omission of Hercules. 10 For example, in Johns v. Housing Authority for the City of Douglas, *848 a tenant was raped after an assailant entered her apartment through a window in which she had placed cardboard to fill a gap between the window and an air conditioning unit she installed. 12 There was no evidence indicating how the assailant entered the complex or whether he was a resident. 13

To support its motion for summary judgment, the [defendant] Housing Authority pointed to: the lack of evidence showing that any of the allegedly unsafe conditions presented by its failure to repair the fence or increase common area lighting or security patrols proximately caused the attack; evidence that [the plaintiff] had equal or superior knowledge of the allegedly unsafe conditions; and evidence that the unsafe condition that actually allowed the assailant *848 to enter her apartment (i.e., the manner in which she installed the air conditioner window unit) was created by [the plaintiff]. 14

The Court pretermitted the issues of superior knowledge and foreseeability of the attack and assumed that the Housing Authority breached its duty by not making the repairs or improvements suggested by the plaintiff. **87 Nonetheless, we affirmed the grant of summary judgment to the Housing Authority because there was no evidence that any such breach caused the plaintiff’s injuries:

[A] jury would have to speculate that improvements to security patrols and lighting, and a repair to the fence, would have prevented the assailant from approaching [the plaintiff’s] apartment unit and reaching through her window to gain entry into her apartment. Speculation that raises a mere conjecture or possibility is not sufficient to create even an inference of fact for consideration on summary judgment. 15

Here, a request for more security based upon school ending for the summer and inclement weather, along with a comment that the property along the fence lines and behind the buildings was at the mercy of criminals,
coupled with the security company's desire for more hours (though without any request for more), simply
does not provide evidence that Hercules proximately
caused George's injuries sustained when he was shot after
voluntarily opening his door to an unknown person after
midnight. Because George failed to meet his burden of
demonstrating a triable issue of fact as to proximate cause,
summary judgment in favor of Hercules on his negligence
claim is proper.

[5] (b) Nuisance. Proximate cause is also an essential
element in a nuisance claim. As we held in Division 1 (a), George failed to meet his burden of demonstrating
a triable issue of fact on this issue; therefore summary
judgment in favor of Hercules on his nuisance claim is
proper.

damages is derivative in nature and will not lie in the
absence of a finding of compensatory damages on an
underlying claim.” Because George's negligence and
nuisance claims fail, his claim for punitive damages also
fails.

2. Hercules's counterclaim. George contends that the trial
court erred by granting summary judgment to Hercules on
its counterclaim that he breached the lease agreement to
pay rent after he was injured. We disagree.

In response to Hercules's motion, George argued that
questions of material fact exist as to whether Hercules's
actions and failure to secure his apartment from criminals
relieved him of his contractual obligation to pay past-
due rent. Specifically, George argued that he should be
excused from paying his rent because Hercules's alleged
failure to provide adequate security or to adequately
repair the lock on his door (1) breached an implied
cooperative in the lease, and/or (2) constituted constructive
eviction. For the reasons that follow, neither of these
defenses relieved George of his contractual obligation to
pay rent.

[7] **88 (a) Breach of implied covenant of quiet
enjoyment. In support of his argument, George cited to
this Court's decision in Jaraysi v. Sebastian, arguing
that Hercules's actions and failures "constitute[d] a breach
of the covenant of quiet enjoyment." This argument is
without merit.

[8] [9] [10] (i) “A general warranty of title against the
claims of all persons includes three separate covenants:
(1) a covenant of a right to sell, (2) a covenant of
quiet enjoyment, and (3) a covenant of freedom from
encumbrances.” “To constitute a breach of the
covenant of warranty, or for quiet enjoyment, an eviction
or equivalent disturbance by title paramount must occur,
and the mere existence of an outstanding paramount title
will not constitute a breach.” Further, “[a] covenant
for quiet enjoyment of the premises is necessarily implied
in every lease and goes to the extent of [representing]
that the landlord has a good title and can give a free
and unencumbered lease of the premises for the term
stipulated.” Thus, to establish a breach of the covenant of quiet
enjoyment, George had the burden to prove that Hercules
did not have good title to lease him the premises or that
someone else had paramount title. George's complaints
about The Villas, however, do not concern the issue
of a paramount title and, therefore, do not implicate
the covenant of quiet enjoyment. Accordingly, George's
defense of breach of the implied covenant of quiet
enjoyment failed as a matter of law, though for reasons
other than those stated by the trial court.

[11] (ii) In granting summary judgment to Hercules on its
claim for unpaid rent, the trial court relied on language
in this Court's decision in Jaraysi to conclude that the
actions of third-party criminal actors could not support
a finding that Hercules breached the covenant of quiet
enjoyment and, therefore, did not relieve George of his
obligation to pay rent in this case. We recognize the basis
for the trial court's confusion because we have conflated
the defenses of breach of the covenant of quiet enjoyment
and constructive eviction in our case law, and we take this
opportunity to clarify the issue.

The Jaraysi decision, upon which the trial court relied,
arose out of a series of cases dating back to a case issued by
this Court a century ago—Adair v. Allen. In Adair, this
Court addressed the implied covenant of quiet enjoyment
in a lease and held that the covenant “does not amount to an
undertaking on [the landlord's] part that the premises
leased are suitable or fitted for the particular use for which
they are intended by the lessee[.]” This Court then went
on to hold that the implied covenant of quiet enjoyment
relevant defenses relieved George of his contractual obligation to pay rent. **90

Accordingly, we affirm the trial court's grant of summary judgment to Hercules on its counterclaim for unpaid rent. **91

*853 Judgment affirmed.

Andrews, P.J., Ellington, P.J., Boggs, Ray, Branch, and Rickman, J.J., concur. Dillard, McMillian, Mercier, and Peterson, J.J., concur fully in Division 1 and in judgment only in Division 2. Barnes, P.J., Miller, P.J., Phipps, P.J., and McFadden, J., dissent to Division 1 and concur fully in Division 2.

does not apply to a tenant's claims arising from a nuisance created and maintained by a third-party—in that case a co-tenant. **851

Since 1923, this Court has issued a series of cases that have misinterpreted Adair and have been relied upon for the erroneous proposition that the covenant of quiet enjoyment encompasses non-title based claims, such as the defense of constructive eviction. **89 But as stated above, the covenant of quiet enjoyment applies only to claims arising from a landlord's title and does not encompass a non-title constructive eviction defense. **30

Thus, Jaraysi, Myung Sung, Rucker, Topvalco, Hardwick, Albert Properties, Kulman, Smith, Feinberg, Parker, and their progeny are disapproved to the extent they can be interpreted to hold otherwise.

(b) Constructive eviction. We turn now to George's argument that Hercules's failure to provide adequate security or to properly secure his lock constituted constructive eviction, thereby relieving him of his contractual obligation to pay rent. This argument is also without merit.

A claim for constructive eviction involves the tenantability of leased property and the nature of the repairs required to restore the property to a safe and tenantable condition. **31

Two essential elements must be shown to establish the defense of constructive eviction. They are: (1) that the landlord in consequence of his failure to keep the rented building repaired allowed it to deteriorate to such an extent that it had become an unfit place for the tenant to carry on the business for which it was rented, and (2) that it could not be restored to a fit condition by ordinary repairs which could be made without unreasonable interruption of the tenant's business. **32

In other words, to prove a constructive eviction that excuses the payment of rent, there must be proof of either an actual expulsion of the tenant, or some act of a grave and permanent character done by the landlord with the intention of depriving the tenant of the use of the demised premises. An act may be considered grave in character if it renders the premises untenantable or unfit for the use and benefit of the tenant in accomplishing one or more of the substantial purposes of the lease. **33

Thus, for George to meet his burden as the nonmovant with regard to his defense of construction eviction, he was required to identify evidence showing a fact question as to whether Hercules committed some act or omission with regard to the property so "grave in character ... it renders the premises untenantable or unfit for ... use." **34 Based on the record before us, George failed to do so. The defense of constructive eviction cannot be premised upon the action of a third party, **35 and there is no evidence that Hercules committed the criminal acts in question. And Hercules's alleged failure to provide security or to properly repair his lock do not constitute "act[s] of a grave and permanent character" **36 committed with the intention of depriving George of the use of his apartment such "that it could not be restored to a fit condition by ordinary repairs which could be made without unreasonable interruption" of George's activities, **37 nor did they render the apartment uninhabitable. **38

*852
Peterson, Judge, specially concurring.

I join the majority opinion as to Division 1 in its entirety. For the reasons that follow, I concur in the judgment only as to Division 2 of the majority opinion.

The majority may very well be right that our case law regarding the implied covenant of quiet enjoyment went somewhat awry beginning in 1923. It may also be wrong. But regardless of the merits of that question, the majority’s analysis does not convince me that the subsequent century of precedent must now be set right. The majority ignores stare decisis, which in my view counsels against overruling what, by this time, some might call a venerable principle of Georgia law. Accordingly, I respectfully disagree with the conclusion of Division 2(a)(ii) overruling a near-century of our caselaw and, thus, cannot join in the analysis that follows it.

“The bench and bar are entitled to rely on long-standing case law,” Norred v. Teaver, 320 Ga.App. 508, 515, 740 S.E.2d 251 (2013) (Andrews, P.J., concurring), and so it is here. The rule the majority overrules today is long-standing case law. The majority does not attempt to explain why that rule is unworkable, or how the last century of experience has shown it to be unwise. Instead, the majority simply declares that the rule developed in error as though that were the end of the matter. But the principle of stare decisis does not even begin to apply until we have already concluded that a prior decision was wrong. “Indeed, stare decisis has consequence only to the extent it sustains incorrect decisions; correct judgments have no need for that principle to prop them up.” Kimbie v. Marvel Entm’t, LLC, —U.S. —, 135 S.Ct. 2401, 2409, 192 L.Ed.2d 463 (2015). For that reason, “it is not alone sufficient that we would decide a case differently now than we did then. To reverse course, we require as well what we have termed a special justification—over and above the belief that the precedent was wrongly decided.” Id. (citations and punctuation omitted).

Our Supreme Court has identified several factors to consider in deciding whether stare decisis counsels in favor of retaining a precedent that differs from what we might hold if approaching the question with a clean slate. These include “(1) the age of the precedent, (2) the reliance interests at stake, (3) the workability of the decision, and, most importantly, (4) the soundness of its reasoning.” Harrison v. McAfee, 338 Ga.App. 393, 401 (2) (c), 788 S.E.2d 872 (2016) (citing State v. Jackson, 287 Ga. 646, 658 (5), 697 S.E.2d 757 (2010)); see also Benefield v. Tominich, 308 Ga.App. 605, 613, 708 S.E.2d 563 (2011) (Blackwell, J., concurring dubitante) (considering other factors). The majority considers nothing beyond the correctness of the long-standing case law it now overrules. At no point in the appellate briefing or oral argument did the parties challenge our precedent in any way (a failure that is itself a factor that we have recognized counsels strongly against overruling, see Benefield, 308 Ga.App. at 613, 708 S.E.2d 563 (Blackwell, J., concurring dubitante)), much less explain why stare decisis does not apply. And my own independent weighing of the applicable factors suggests little reason to overrule anything in this case.

A final consideration also supports my conclusion. Stare decisis applies with the least force to constructions of the United States and Georgia Constitutions. See Smith v. Baptiste, 287 Ga. 23, 30, 694 S.E.2d 83 (2010) (Nahmiar, J., concurring) (stare decisis “is less compelling when ... the issue is the meaning of a constitutional provision”). “That is because it is much harder for the democratic process to correct or alter [a court's] interpretation of the Constitution than [its] interpretation of a statute or regulation.” Id. And although stare decisis applies more strongly in cases of statutory construction, see id, faithful adherence to the separation of powers counsels us that it is unwise lightly to persist in erroneous constructions of validly-enacted statutes. See Harrison, 338 Ga.App. at 401–02 (2)(c), 788 S.E.2d 872; cf. Jackson, 287 Ga. at 659 (5) n.8, 697 S.E.2d 757 (it is “perilous to rely heavily on legislative silence and inaction to conclude that a court's interpretation of a statute is correct”). But here, the precedent we consider has not interpreted the Constitution or a statute; it has instead merely answered questions the General Assembly had not yet addressed. In such a case, separation of powers considerations are at their nadir, leaving stare decisis to operate more forcefully.

The trial court faithfully applied long-standing precedents of this Court. I would leave those precedents undisturbed and affirm. For these reasons, I concur in the judgment only as to Division 2.

Peterson, Judge, specially concurring.
Miller, Presiding Judge, concurring in part and dissenting in part.
I must respectfully dissent to Division 1 of the majority's opinion because there is a genuine issue of material fact for the jury to resolve on the element of causation. Although the trial court found that Hercules breached its duty to George, the trial court's order clearly made no finding as to causation. Where a jury question remains, summary judgment is improper. Consequently, I would reverse the trial court's judgment.

George's apartment complex, The Villas, was infected by rampant crime. These crimes included a homicide, a sexual assault, armed robberies, and 66 break-ins to both occupied and vacant units. Hercules's management was aware of each of these crimes at the apartment complex, yet it still failed to notify the tenants that many of these crimes occurred.

Moreover, despite these numerous crimes, Hercules's management refused to employ security guards after hours or overnight, when the crimes were most prevalent, and it even rejected its own on-site manager's specific request for additional security. In fact, Hercules's management failed to tell its tenants that the security guards who were present were hired only for the purpose of protecting the property in units that were being refurbished, not for the purpose of protecting tenants and guests.

Although the apartment complex was a “gated community,” the front “gate” was only a 1x6 board, which did not deter foot traffic. Moreover, even though Hercules's management knew that the property adjacent to the apartment complex had a high crime rate, and that the areas behind the complex and along its fence line were “at the mercy” of criminals, the management only sporadically repaired the frequent holes in the fence. Importantly, the night before George's home invasion, an armed robber fled through a hole in the fence after robbing someone, and a police report completed after George was shot showed that the suspects fled on foot toward a road adjacent to one of the holes in the fence. Although there were security cameras on the property, the cameras were positioned too high to distinguish faces or license plates in the recordings, and for reasons unknown Hercules had rejected a former property manager's request to fix that problem.

Given the evidence in the record that Hercules's management knew that its security measures had failed to remedy the rampant crime at the apartment complex, this Court should not conclude that this is a “clear and indisputable case” that removes the issue of causation from the jury's purview. See Woodbury v. Whitmire, 246 Ga. 349, 350 (1), 271 S.E.2d 491 (1980). Accordingly, the majority's conclusion that summary judgment is proper on this ground as to George's claims for negligence, nuisance, and punitive damages is legal error.

This conclusion does not end this Court's inquiry, however, because the trial court based its ruling on its erroneous finding that George assumed the risk of harm as a matter of law. With regard to assumption of the risk, Georgia law is clear that “[i]f the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover.” OCGA § 51-11-7.

The important focus in this analysis is the scope of George's knowledge of the risk he faced at the apartment complex. For George's recovery to be barred, he must have had knowledge of “the specific, particular risk of harm associated with the activity or condition” that proximately caused his injury. (Citation and punctuation omitted; emphasis supplied.) Monitronics Int'l., Inc. v. Veasley, 323 Ga.App. 126, 139 (4), 746 S.E.2d 793 (2013) *857 As with causation, assumption of risk is ordinarily a question for the jury. Desai v. Silver Dollar City, Inc., 229 Ga.App. 160, 166 (5), 493 S.E.2d 540 (1997).

Here, the trial court erred in finding that George assumed the risk of harm as a matter of law. Certainly, a jury could find that George's decision to open the door that night bars his claims; however, a jury could also find that George did not appreciate the specific risk of armed home invaders when he decided to answer the door to his own home in response to someone knocking. Thus, whether George assumed the risk of harm is for the jury to decide.
The trial court's reliance on Landings Ass'n, Inc. v. Williams, 291 Ga. 397, 399, 728 S.E.2d 577 (2012) is misplaced because that case is entirely distinguishable on its facts. In Landings, our Supreme Court relied on the plaintiff's knowledge that alligators are dangerous to conclude that the plaintiff knowingly assumed the risk of harm by walking around areas she knew were inhabited by wild alligators. Id.

Here, George was injured when he opened the door to his own home and was shot by unknown criminals. To conclude that George assumed the specific risk of harm would establish a standard in which a person opening the door to his own home is, as a matter of law, at the mercy of whomever lurks on the other side. This is not the current state of the law in Georgia, and thus the trial court erred in granting summary judgment on this ground.

For the above reasons, the trial court's order must be reversed. Accordingly, I respectfully dissent to Division 1 of the majority opinion.

I am authorized to state that Presiding Judge Barnes, Presiding Judge Phipps, and Judge McFadden join in this dissent.

Barnes, Presiding Judge, concurring in part and dissenting in part.
I concur fully and completely with the majority in Division 2, disapproving the cases conflating the doctrines of quiet enjoyment and constructive eviction but finding no constructive eviction in this case. I fully join Presiding Judge Miller's well-stated dissent to Division 1, as I am also unprepared to hold as a matter of law that opening the door at night automatically absolves a landlord of all responsibility for its failure to stem a pervasive crime wave or to effect adequate repairs. I write to further emphasize that, in addition to evidence that the management company breached its duty of ordinary care with its tepid response to the rampant crime wave on its property, a jury could also find that it breached its duty by making a substandard repair to George's door after burglars kicked it in.

*858 George presented evidence that the shoddy repairs made it difficult to lock the door and prevented him from throwing the deadbolt to secure the door against the invaders, who then pushed their way inside and shot him. Photographs of the door and strike plate taken by the police after the home invasion reveal just how badly the repair was made. The strike plate was crooked, was missing screws, and partially blocked the hole in the doorframe into which the deadbolt should seat. The deadbolt was the only lock on George's front door; the knob was for a passage door, “like a closet,” and did not have a lock built into it.

Expert testimony is not required to determine whether the burglar wrap was installed in a way that could make it difficult for the bolt to seat into the doorframe. Determining whether the hole into which the deadbolt should seat is misaligned or partially blocked by a metal wrap is akin to a child determining whether a round block fits into a square hole. See Demarest v. Moore, 201 Ga.App. 90, 91–92, 410 S.E.2d 191 (1991) (alleged statement by police at local meeting that deadbolt was insufficient to prevent break-ins unless the hardware was secured to a structural member of doorframe with 3½" screws was sufficient to create jury question where the deadbolt to plaintiff's burgled apartment was attached with 3/8" and ½" screws). Whether that repair—which caused the deadbolt to become misaligned with the hole into which it should seat—caused or contributed to George's inability to close and bar the door against the armed intruders is a question well within the ken of an ordinary juror.

For these reasons, as well as those expressed in Presiding Judge Miller's dissent, I dissent in part to the majority opinion.

I am authorized to say that Presiding Judge Miller, Presiding Judge Phipps, and Judge McFadden join in this dissent.

All Citations
339 Ga.App. 843, 795 S.E.2d 81

Footnotes
The summary of incident reports between 2009 and 2011 showed the incidents involved mostly break-ins or unlawful entries to both occupied and empty units. Incident reports also showed armed robberies, a shooting by a tenant's grandson with no injuries, and "the improper handling of a female sexually." In 2009, a non-resident's body was found dead at the gate with a gunshot wound. The incident report summary also showed that there was no reported crime between August 5, 2008, and December 19, 2008, or between August 9, 2010, and April 20, 2011.

Although the trial court granted summary judgment to Hercules on separate grounds, Hercules raised the lack of proximate cause as its lead argument in support of its motion for summary judgment. We review the grant or denial of summary judgment de novo, and "a judgment right for any reason will be affirmed." Cieplinski v. Caldwell Elec. Contractors, 280 Ga.App. 267, 276, 633 S.E.2d 646 (2006).


George's allegations are that Hercules should have provided more security patrols and failed to properly repair the lock on his door after it was kicked in during a previous burglary. George concedes, however, that the lock was functional after it was repaired, contending instead that the door was tighter and more difficult to close after the repair. His reliance on the maintenance supervisor's admission that the entire front door should have been replaced is unpersuasive because the supervisor testified that he would have replaced the door "because it's ugly." More importantly, the door was locked when George's assailants knocked on it, and with knowledge that it was more difficult to lock, he voluntarily opened it, rendering moot the question of the functionality of the lock. Any suggestion by George that the tightness resulting from the lock repair prevented him from re-locking it while in a scuffle with armed men forcing entry into his home is simply too speculative to raise a triable issue of fact.

The other two record citations George provided to support his contention that the security company recommended more hours do not address this issue.

Nyaak's email reads in its entirety as follows:

Good Afternoon All[,] Due to school year ending and the weather inclement, I want to be able to have more coverage either with additional security or more hours. The current schedule is as follows: Mon- Thursday -1pm-11 [] Friday- Sunday- 8pm-6am or 7am[.] Iona or Joe please correct me if I'm wrong.[] My concern is the weekends during the weekdays and the weekdays in the evenings.

Also, we have roughly 6-10 cameras down and also the cameras that are working need to be repositioned and refocused[.] Due to my observations and feedback from residents and staff we have reach[ed] the conclusion that the above is necessary to better reduce liabilities on the property. We need to step up security and surveillance. We are limited right now to foot patrol and observation and along the fence line and behind buildings, we are at the mercy of criminal activity on the property.

For example, as stated previously, in 2008, there was no reported crime between August 5 and December 19. Similarly, there was no reported crime for almost nine months between August 9, 2010, and April 20, 2011.

See Johns, 297 Ga.App. at 870–871, 678 S.E.2d 571; Fallon v. Metro. Life Ins. Co., 238 Ga.App. 156, 158–159 (2), 518 S.E.2d 170 (1999) (physical precedent only) ("expert's opinion that security personnel would have a 'strong deterrent effect on the type of crime that occurred'" was "a conclusory statement" insufficient to create an issue of fact on causation); Post Properties, Inc. v. Doe, 230 Ga.App. 34, 38–39, 495 S.E.2d 573 (1997) (physical precedent only) (to conclude that a witness's contentions regarding insufficient security at an apartment complex, without any evidence of how the plaintiff's assailant accessed the complex, demonstrated a lack of causation that "would require a jury to engage in pure speculation and guesswork. This is neither required nor allowed in this state."); Collins v. Shepherd, 212 Ga.App. 54, 56 (2), 441 S.E.2d 458 (1994) (physical precedent only) ("Plaintiff presents no evidence to show that defendant could have prevented the incident from occurring with a different security system in place. A landowner does not become an insurer of safety by taking some security precautions on behalf of invitees. Undertaking measures to protect patrons does not heighten the standard of care; and taking some measures does not ordinarily constitute evidence that further measures might be required.") (punctuation omitted). Cf. The Bethany Group, LLC v. Grobman, 315 Ga.App. 298, 302 (1) (b), 727 S.E.2d 147 (2012) (affirming denial of summary judgment because there was a question of fact regarding proximate cause based upon evidence of the landlord's knowledge of prior armed robberies and the testimony of the
security company manager “that such incidents increased after [the landlord] reduced its security”). But see *FPI Atlanta, L.P. v. Seaton*, 240 Ga.App. 880, 884 (2), 524 S.E.2d 524 (1999) (physical precedent only) (finding proximate cause due to the foreseeability of the criminal act without analyzing whether a jury question was raised as to causation specifically).

See id.

Id. at 870, 678 S.E.2d 571.

See id. at 871–872, 678 S.E.2d 571. The Court also noted that the intruder was able to enter the plaintiff’s apartment because she left a rear window unsecured, not because the Housing Authority failed to improve security and lighting. See id. at 871, 678 S.E.2d 571. Similarly, in the instant case, the assailants were able to enter George’s apartment because he unlocked and opened the door for them.


George did not assert either a defense of constructive eviction or breach of the implied covenant of quiet enjoyment in his answer to Hercules’s counterclaim for unpaid rent.

We note that George’s defenses arise out of contract claims, which are entirely separate from any tort claims that may have arisen out of the same conduct.

George did not argue that Hercules’s actions and inactions constituted a breach of an express contractual provision. And there is no evidence that Hercules breached an express term of the lease such that George was relieved of his obligation to pay rent. To the contrary, the lease did not require Hercules to provide security:

*[Hercules does not offer or provide security or law enforcement services for resident’s protection or protection of resident’s personal property. [George] agrees to look solely to public law enforcement, emergency services, or fire services for security services or protection. [George] acknowledges that he has an obligation to exercise due care for his own safety and welfare and that [Hercules] is not liable for the criminal acts of other persons.]*

(emphasis supplied).


(Citations, punctuation and emphasis omitted.) *Whited*, 261 Ga.App. at 788, 584 S.E.2d 59.

(Citation and punctuation omitted; emphasis supplied.) *Dwyer v. McCoy*, 236 Ga.App. 326, 329 (5), 512 S.E.2d 70 (1999).

See *Cieplinski*, 286 Ga.App. at 276, 633 S.E.2d 646 (“a judgment right for any reason will be affirmed”).


(Emphasis supplied.) Id. at 636 (2), 89 S.E. 1099.

See id. at 637 (6), 89 S.E. 1099.


See *Adair*, 18 Ga.App. at 636, 89 S.E. 1099; OCGA § 44-5-62.


*(Punctuation and footnotes omitted.)* *Jenkins*, 231 Ga.App. at 844 (1), 499 S.E.2d 734.
George's defenses arise out of his answer to Hercules's counterclaim for unpaid rent. To the contrary, the lease did not require Hercules to provide security: there is no evidence that Hercules breached an express term of the lease such that George was relieved of his obligation to pay rent. To the contrary, the lease did not require Hercules to provide security:

There is no evidence that Hercules breached an express term of the lease such that George was relieved of his obligation to pay rent. To the contrary, the lease did not require Hercules to provide security: there is no evidence that Hercules breached an express term of the lease such that George was relieved of his obligation to pay rent. To the contrary, the lease did not require Hercules to provide security:

George did not assert either a defense of constructive eviction or breach of the implied covenant of quiet enjoyment in his answer to Hercules's counterclaim for unpaid rent.
339 Ga.App. 334
Court of Appeals of Georgia.

PAJARO et al.
v.
SOUTH GEORGIA BANK.

A16A1125
November 4, 2016

Synopsis
Background: Tenant brought action against out-of-possession landlord, alleging defective construction, failure to repair, failure to warn, and loss of consortium after tenant was injured in collapse of staircase on leased commercial premises. The Superior Court, Liberty County, Stewart, J., granted summary judgment to landlord. Tenant appealed.

Holdings: The Court of Appeals, McFadden, J., held that:

[1] fact issue precluded summary judgment on defective construction claim, and

[2] landlord could not be held liable for failure to repair, absent evidence that anyone had notified landlord of problem with staircase or requested a repair, or knowledge on part of landlord of any defect or hazard posed by staircase.

Affirmed in part and reversed in part.

Attorneys and Law Firms

**210** James R. Francis, Farah & Farah, for Appellants.


Opinion

McFadden, Judge.

*334 Julio Pajaro was injured in the collapse of a staircase on commercial premises that he leased from South Georgia Bank (hereinafter, the landlord). He and his wife (collectively, the appellants) brought this action against the landlord, asserting claims for defective construction, failure to repair, failure to warn, and loss of consortium. As detailed below, we affirm the grant of summary judgment on the claims for failure to repair and failure to warn, because there are no genuine issues of material fact as to those claims. We reverse the grant of summary judgment as to the claims for defective construction and loss of consortium, however, because genuine issues of material fact exist as to those claims.

"On appeal from the grant of summary judgment this court conducts a de novo review of the evidence to determine whether there is a genuine issue of material fact and whether the undisputed facts, viewed in the light most favorable to the nonmoving party, warrant judgment as a matter of law." *335 Campbell v. Landings Assn., 289 Ga. 617, 618, 713 S.E.2d 860 (2011) (citations omitted). So viewed, the evidence shows that the landlord acquired the premises at issue in December 2009. At that time, Pajaro leased the premises for his medical practice. The landlord did not have the premises inspected either before or after the acquisition, but a representative of the landlord did a walk-through of the premises with Pajaro and Pajaro requested that the landlord paint a wooden, exterior staircase at the back of the premises that led to the second floor.

In January 2010, Pajaro and the landlord entered into a lease of the premises. As to repairs, the lease provided:

During the lease term, Tenant shall make, at Tenant's expense, all necessary repairs to the Leased Premises. Repairs shall include such items as routine repairs of floors, wall, ceilings, and other parts of the Leased Premises damaged or worn through normal occupancy, except for major mechanical systems or the roof, subject to the obligations of the parties otherwise set forth in this Lease. Landlord at its own expense shall make all necessary repairs to major mechanical systems, including
but not limited to HVAC Units, plumbing and septic system.

On May 3, 2012, as Pajaro stepped from the second floor space onto the back exterior staircase, the staircase collapsed, causing Pajaro to fall more than 15 feet to the ground and injuring him. Before that point, Pajaro had not perceived any structural or safety problem with the staircase.

The appellants’ expert witness, a licensed commercial and residential contractor, opined that construction defects had caused the staircase to collapse; he opined that the staircase had been built with non-galvanized nails that had rusted over time, and that portions of wooden posts had not been properly sealed and caulked, leading them to rot. It is undisputed that the landlord was not in possession of the property, was not involved in the construction of the staircase and, at the time of Pajaro’s fall, had never made any repairs or modifications to the staircase. The appellants’ expert witness opined, however, that “the unsafe conditions of the staircase could and would have been discovered if the staircase had been completely inspected by the [landlord] when it acquired title to the property.[J]”


The trial court granted summary judgment on claims for defective construction, failure to repair, failure to warn, and loss of consortium.

1. Defective construction.

[2] [3] [4] The general rule is that “the liability of a landlord for defective construction exists only in cases where the structure is built by [the landlord] in person or under [the landlord's] supervision or direction.” Martin v. Johnson–Lemon, 271 Ga. at 124 (2) (b), 516 S.E.2d 66 (citations and punctuation omitted). Our courts have recognized a limited exception to this rule in circumstances where the defective structure was “constructed by a predecessor in title, and the landlord knew or by the exercise of reasonable diligence could have known of its improper construction before the tenancy was created.” Flagler Co. v. Savage, 258 Ga. 335, 337 (2), 368 S.E.2d 504 (1988) (citation and emphasis omitted). In such circumstance, the landlord “would be answerable to the tenant ... for injuries sustained by reason of [the landlord's] failure to put the premises in a safe condition, if the person sustaining the injuries could not have avoided the same by the exercise of ordinary care.” Id. (citation and emphasis omitted). Our Supreme Court has explained that, although this limited exception “at first glance ... would appear to contradict the precise terms of OCGA § 44–7–14[,]” the exception could be supported because a purchaser of rental property has “unparalleled opportunities ... to discover defects in structures erected by predecessors-in-title” through means such as structural inspections. Martin v. Johnson–Lemon, 271 Ga. at 126 (4) n. 16, 516 S.E.2d 66. See also Gainey v. Snacky's Investments, 287 Ga.App. 529, 531 (2) (b), 652 S.E.2d 167 (2007); Rainey, 255 Ga.App. at 301, 565 S.E.2d 517. While there is “no absolute duty of inspection upon a landlord to discover defects in the premises prior to leasing them,” Leonard v. Cooper & Sugrue Props., 214 Ga.App. 862, 864, 449 S.E.2d 348 (1994) (citations omitted), the landlord may be liable if the alleged defect “constitutes *337 the type of structural defect that would be discovered during a pre-purchase building inspection[.]” Rainey, 255 Ga.App. at 302, 565 S.E.2d 517.

In his affidavit, the appellants' expert witness opined that a pre-purchase structural inspection would have led the landlord to discover the defects that, in the expert witness's opinion, caused the staircase to collapse. The trial court held that this opinion was conclusory and did not create a genuine issue of material fact as to whether the landlord
had constructive knowledge of the defects, noting that the expert witness was not a home inspector and that his opinion “provided no insight into inspection practices.” The trial court apparently considered the expert witness's opinion but found it irrelevant to the issue of the landlord's knowledge, rather than rejecting the expert witness as unqualified or his testimony as failing to satisfy the requirements of OCGA § 24–7–702 for expert opinion testimony in civil actions. Compare Groutas v. McCoy, 219 Ga.App. 252, 254 (1), 464 S.E.2d 657 (1995) (landlord's liability under OCGA § 44–7–14 for failure to keep premises under repair “may be limited as between the parties by a lease containing contrary stipulations”) (citations omitted) (construing predecessor to OCGA § 44–7–14).

[5] We are not convinced that the expert's opinion is irrelevant. The expert was a licensed commercial and residential contractor. Unlike in Gainey, 287 Ga.App. at 532 (2) (b), 652 S.E.2d 167, cited by both the trial court and the landlord, here the appellants' expert opined that the defects that led to the collapse of the staircase would have been discovered during an inspection. Although the expert was not himself a home inspector, he was an expert in residential construction. It was for the jury to determine whether to credit his opinion that an inspection would have disclosed the construction defects. Likewise, although the landlord challenges the opinion because the expert based it on photographs taken after the collapse, it was for the jury to assess the foundation of that opinion. “[A]ny deficiencies in the expert's opinion go to the weight and credibility of his testimony.” Toyo Tire North American Mfg. v. Davis, 333 Ga.App. 211, 217 (2), 775 S.E.2d 796 (2015). If a jury were to find the opinion credible, the jury could find that the landlord, in the exercise of ordinary care, could have discovered the construction defects that caused the staircase to collapse. Accordingly, summary judgment is not appropriate as to the defective construction claim.

2. Failure to repair.

[6] An out-of-possession landlord's “[l]iability for failure to repair arises only in instances where there is a duty to repair and notice has been given of the defect.” Gainey, 287 Ga.App. at 530 (2) (a), 652 S.E.2d 167 (citation and punctuation omitted). The parties dispute whether their lease assigned to Pajaro the duty to repair the staircase. See Gainey, 255 Ga.App. at 300, 565 S.E.2d 517 (“nothing prohibits a landlord of commercial premises from assigning by contract its duty to repair”) (citations omitted); Groutas v. McCoy, 219 Ga.App. 252, 254 (1), 464 S.E.2d 657 (1995) *338 “[T]he owner of property not used as a ‘dwelling place’—as was the case here—can contract to avoid the duty[y] to repair ... the property set forth in ... OCGA § 44–7–14.”) (citation omitted); Tribble v. Somers, 115 Ga.App. 847, 849, 156 S.E.2d 130 (1967) (landlord's liability under OCGA § 44–7–14 for failure to keep premises under repair “may be limited as between the parties by a lease containing contrary stipulations”) (citations omitted) (construing predecessor to OCGA § 44–7–14).

[7] We need not decide whether the landlord assigned its duty to repair the staircase, however, because even if the landlord retained that duty, the appellants “offered no evidence that anyone notified [the landlord] of a problem with the staircase or requested a repair, and [the landlord] specifically testified that [it was not aware of any defect in or hazard posed by the staircase].” Gainey, 287 Ga.App. at 530–531 (2) (a), 652 S.E.2d 167. Pajaro testified that the only time he mentioned the staircase to his landlord was during his initial walk-through with the landlord, when he asked for the staircase to be painted. “Under these circumstances, [the appellants] failed to raise a question of fact as to liability for failure to repair.” Id. at 531 (2) (a), 652 S.E.2d 167.

3. Failure to warn.

[8] The trial court properly concluded that failure to warn is not a ground upon which an out-of-possession landlord can be held liable under OCGA § 44–7–14. Gainey, 287 Ga.App. 529, 532 (2) (c), 652 S.E.2d 167. Accordingly, the trial court properly granted summary judgment on this claim. Id.

4. Loss of consortium.

[9] The right of Pajaro's wife to recover for loss of consortium is dependent upon Pajaro's right to recover against the landlord. Groutas, 219 Ga.App. at 254 (2), 464 S.E.2d 657. Because genuine issues of material fact preclude summary judgment on Pajaro's claim for defective construction, the landlord is not entitled to summary judgment on his wife's claim for loss of consortium.

Judgment affirmed in part and reversed in part.

Miller, P.J., and McMillian, J., concur.

Ellington, P.J., concurred in the judgment only.

[ Holding: ] The Court of Appeals, Boggs, J., held that Gwinnett County, Brown, J., granted tenant's motion.

Both parties filed motions for summary judgment. The State Court, Gwinnett County, Brown, J., granted tenant's motion. Landlord appealed.

[ Holding: ] The Court of Appeals, Boggs, J., held that request for rescission was equitable in nature, and therefore, state court lacked jurisdiction.

Vacated and remanded with direction.

Ellington, P.J., concurred in the judgment only.

McFadden, J., filed a dissenting opinion.

Synopsis

Background: Commercial landlord brought action against tenant, seeking money damages for lost rent. Tenant asserted a counterclaim seeking rescission of the lease agreement and return of its security deposit. Parties filed motions for summary judgment. The State Court, Gwinnett County, Brown, J., granted tenant's motion. Landlord appealed.

[ Holding: ] The Court of Appeals, Boggs, J., held that request for rescission was equitable in nature, and therefore, state court lacked jurisdiction.

Vacated and remanded with direction.

Ellington, P.J., concurred in the judgment only.

McFadden, J., filed a dissenting opinion.

Attorneys and Law Firms

**807** Wiles & Wiles, John J. Wiles, Victor Wayne Newmark, Marietta, for Appellant.

Wagner, Johnston & Rosenthal, Kenneth I. Sokolov, Atlanta, for Appellees.

Opinion

Boggs, Judge.

*235* Thor Gallery at South DeKalb, LLC (“Thor Gallery”) appeals from an order of the State Court of Gwinnett County that rescinded a commercial lease between Thor Gallery and Monger Investment Group, LLC, and Monger Entertainment Group, Inc. (collectively “Monger”) and required Thor Gallery to return Monger's security deposit. One of Thor Gallery's arguments on appeal is that the State Court of Gwinnett County lacked jurisdiction to provide Monger with the remedy of equitable rescission. For the reasons explained below, we agree and therefore vacate the state court's order and remand this case with direction that it be transferred to the Superior Court of Gwinnett County.

The record shows that the lease between the parties required Monger to obtain specified insurance before the lease commencement date, that the lease would not commence until Thor Gallery delivered possession to Monger, and that Monger's failure to obtain insurance would be considered a default entitling Thor Gallery to terminate Monger's right of possession without terminating the lease. When Monger discovered shortly after the lease was signed that the specified insurance was unavailable, it requested that Thor Gallery cancel the lease and return its security deposit. In the alternative, it requested that Thor Gallery revise the insurance requirements in the lease.

Thor Gallery refused to alter the insurance requirements and filed suit against Monger seeking money damages for lost rent even though it had never delivered possession of the premises to Monger. Monger asserted a counterclaim alleging impossibility of performance and damages in the amount of the security deposit paid to Thor Gallery. Both parties filed motions for summary judgment in their favor, and Monger's motion asserted that the lease should be rescinded. Following oral argument, the state court granted Monger's summary judgment motion and “rescinded the lease agreement between these parties and [found] that [Monger] was entitled to the return of the initial payment/security deposit in the amount of $12,197.00.” See OCGA § 13–3–5 (“[i]mpossible, immoral, and illegal conditions are void and binding upon no one”); *Woody's Steaks v. Pastoria*, 261 Ga.App. 815, 819(2), 584 S.E.2d 41 (2003) (insurance requirement in lease is condition precedent).

1. Thor Gallery contends the state court lacked jurisdiction to order rescission and a return of the security deposit. We agree.

Georgia's state courts, created pursuant to OCGA § 15–7–2, exercise comprehensive jurisdiction over a wide range of claims,
including, inter alia, landlord/tenant disputes, misdemeanor offenses (including driving under the influence), contract and tort cases, and cases involving real property and small claims, but excluding only felony criminal cases, certain domestic cases, equity matters, and land title cases. See OCGA §§ 15–7–4, 15–6–8.

*237 (Emphasis supplied.) In the matter of: Inquiry Concerning a Judge, 265 Ga. 843, 846–847, 462 S.E.2d 728 (1995). State courts, as well as this court, can exercise jurisdiction over certain cases involving rescission where no affirmative equitable relief is asserted. See Walsh v. Campbell, 130 Ga.App. 194, 196, 202 S.E.2d 657 (1973). But that is not the case here because Monger sought affirmative equitable relief in his motion for rescission. Cf. Goodman v. Little, 96 Ga.App. 110, 99 S.E.2d 517 (1957) (court without equity jurisdiction cannot address petition praying “for relief which only a court of equity, or a court of law exercising full equity powers, could administer, such as the rescission of contracts, the cancellation of promissory notes, injunction, etc.”)

[4] The dissent cites Brown v. Techdata Corp., 238 Ga. 622, 234 S.E.2d 787 (1977), in support of the conclusion that this case involves a rescission at law. But Brown in fact supports the conclusion that the rescission claim here is equitable in nature. As Brown explains, “[i]n the rescission ‘at law’ the tender itself effectuates the rescission” and the purchaser is entitled to the return of the purchase price “without taking any independent proceeding in equity to rescind the contract.” Id. at 626, 234 S.E.2d 787. “In these instances, the plaintiff rescinds the contract himself by restoring, or making a bona fide offer to restore, to the defendant the fruits of the contract.” Id.

[5] In equitable rescission, in contrast, the plaintiff “seeks to invoke the affirmative powers of a court of equity to rescind, or undo, the contractual transaction.” (Emphasis supplied.) Brown, supra at 627, 234 S.E.2d 787. As explained in the same treatise on remedies relied upon by the dissent:

Recession in equity is a very different matter. Plaintiffs are frequently permitted to resort to equity courts for a rescission without much serious concern for the usual rule that equity jurisdiction is based upon the inadequacy of a legal remedy. In equity the suit is not on rescission, but for rescission; it is not a suit based upon the rescission already accomplished by the plaintiff, but a suit to have the court decree a rescission.... Since rescission is not accomplished “in equity” until the court so decrees, the plaintiff has no obligation before suit to make restitution of goods or money he received from the defendant.... [T]he judge must act to assure that each party is restored to his pre-contract position, at least as far as possible to do.


*238 In this case, that is precisely what occurred. Monger asked the court for the affirmative relief of rescission, the trial court decreed a rescission in its order, and required Thor Gallery to restore Monger by returning the security deposit. Monger did not sue on rescission based upon a tender already made. In the lease agreement at issue, the landlord Thor Gallery agreed to allow the use of its property for 15 years and the tenant Monger agreed to pay a certain amount of rent each month, with the amount to increase each year after the third year. But Thor Gallery never delivered possession of the property, and Monger never paid any rent. Accordingly, there was nothing for Monger to tender or offer to tender to effectuate a rescission at law. Rather, Monger sought “the affirmative powers of a court of equity to rescind, or undo, the contractual transaction.” (Emphasis supplied.) Brown, supra, 238 Ga. at 627, 234 S.E.2d 787. Cf. Regents of the Univ. of System of Ga. v. Carroll, 203 Ga. 292, 293 (1) (b), 46 S.E.2d 496 (1948) (no equitable rescission where defendants do not seek affirmative equitable relief, but ask for dismissal with costs, a “purely defensive matter”). We must therefore vacate the state court’s order and remand this case with direction that it be transferred to superior court. See Blackmon v. Tenet Healthsystem Spalding, 284 Ga. 369, 371, 667 S.E.2d 348 (2008).
The cases cited by the dissent do not require a different result. Four of the five cases relied upon do not address the issue of jurisdiction and whether the case involved legal or equitable rescission. See Medical Staffing Network v. Connors, 313 Ga.App. 645, 722 S.E.2d 370 (2012); Crowell v. Williams, 273 Ga.App. 676, 615 S.E.2d 797 (2005); Intl. Software Solutions v. Atlanta Pressure Treated Lumber Co., 194 Ga.App. 441, 390 S.E.2d 659 (1990); Cutcliffe v. Chesnut, 122 Ga.App. 195, 176 S.E.2d 607 (1970). Instead, they are simply cases in which a magistrate court or state court addressed a rescission claim below, or rescission is discussed generally. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been decided so as to constitute precedent. [Cit.]" Tolbert v. Whately, 223 Ga.App. 508, 513, 478 S.E.2d 587 (1996). And we cannot determine from our opinion in Hann v. Harpers Boutiques Intl., 284 Ga.App. 531, 644 S.E.2d 337 (2007), whether any tender was made or offered in connection with the rescission claim over which the state court had jurisdiction. Additionally, we stated there that the rescission claim at issue was based upon fraudulent inducement that is "legal in nature and not equitable." Id. at 533 (2), 644 S.E.2d 337. This case does not involve a rescission based upon fraudulent inducement.

Additionally, the fact that Monger cited a statute, OCGA § 13–4–62, 2 in support of its rescission claim does not automatically render it a claim “at law.” Indeed, the Georgia Supreme Court has recognized that the restoration contemplated by the predecessor of this statute is equitable in nature. Jones v. Gaskins, 248 Ga. 510, 512, 284 S.E.2d 398 (1981). See also Lanier Home Center v. Underwood, 252 Ga.App. 745, 746, 557 S.E.2d 76 (2001) (“Georgia law allows equitable rescission for nonperformance of a contract: ‘A party may rescind a contract without the consent of the opposite party on the ground of nonperformance by that party but only when both parties can be restored to the condition in which they were before the contract was made.’ OCGA § 13–4–62. [Cit.]”).

**810 2. Thor Gallery's remaining enumerations of error are rendered moot by our holding in Division 1.

Judgment vacated and case remanded with direction.

Phipps, P.J., Dillard, Branch, McMillian, Mercier and Peterson, JJ., concur.

Ellington, P.J., concurs in the judgment only.

McFadden, J., dissents.

McFadden, Judge, dissenting.

I respectfully dissent. The trial court had jurisdiction to rule in this action. So I would decide the merits.

As detailed below, I would affirm the trial court's denial of summary judgment to both Thor Gallery's claims and Monger's counterclaim. I also would affirm the trial court's grant of summary judgment to Monger on Thor Gallery's claims. Because a factual issue exists as to whether Monger was entitled to rescind the contract and recover its security deposit, however, I would reverse the trial court's grant of summary judgment to Monger on its counterclaim.

1. Trial court's jurisdiction.

The majority correctly states that state courts do not have jurisdiction over cases in equity. But not every case involving rescission of a contract is a case in equity. “[A]n instrument may be voided by an action at law.” Walsh v. Campbell, 130 Ga.App. 194, 196, 202 S.E.2d 657 (1973). As our Supreme Court described in Brown v. Techdata Corp., 238 Ga. 622, 626–627, 234 S.E.2d 787 (1977), two types of rescission are available to parties to a contract: rescission in equity and rescission at law. And if a contract is rescinded at law, a party may seek in an action at law to recover the property which has been retained by the other party under the rescinded contract, Brown, 238 Ga. at 626–627, 234 S.E.2d 787, even though, as the majority states, the right to restoration of one's property under a rescinded contract is an equitable right. See Jones v. Gaskins, 248 Ga. 510, 512 (1), 284 S.E.2d 398 (1981). See generally Dobbs, Handbook on the Law of Remedies, § 4.3, p. 255 (1973) (Where rescission at law is accomplished by the unilateral act of the plaintiff, that party must then bring suit to obtain restitution of his money, but “[i]n such a case there is no need for equity intervention [.][]). State courts have jurisdiction to entertain rescission claims that are legal in nature. Hann v. Harpers Boutiques Intl., 284 Ga. App. 531, 533 (2), 644 S.E.2d 337 (2007). See
Judgment vacated and case remanded with direction.

were before the contract was made. OCGA § 13–4–62. Both parties can be restored to the condition in which they nonperformance of a contract: ‘A party may rescind a

restoration contemplated by the predecessor of this statute not automatically render it a claim “at law.” Indeed, § 13–4–62, in support of its rescission claim does

we stated there that the rescission claim at issue was

644 S.E.2d 337 (2007), whether any tender was made

the court nor ruled upon, are not to be considered as

lurk in the record, neither brought to the attention of

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(1970). Instead, they are simply cases in which a magistrate

Cutcliffe v. Chesnut

, 122 Ga.App. 195, 176 S.E.2d 607

v. Connors

v. Atlanta Pressure Treated Lumber Co., 194 Ga. App. 441, 443, 390 S.E.2d 659 (1990) (affirming state court's conclusion that plaintiff was entitled to rescission, for nonperformance, of contract and refund of money paid to defendant for computer system, conditioned upon plaintiff's return of computer system to defendant).

Accordingly, the question of the state court's jurisdiction in this case turns on whether the contract was rescinded at law or in equity. A rescission at law occurs by the action of a party to the contract, typically by the tender of contractual benefits. See Brown, 238 Ga. at 626, 234 S.E.2d 787 (“[n] the rescission ‘at law’ the tender itself effectuates the rescission”); see also Jesinoski v. Countrywide Home Loans, — U.S. —, —, 135 S.Ct. 790, 190 L.E.2d 650 (2015) (in rescission at law, party to contract effects rescission by returning what he received under contract); Sherzer v. Homestar Mtg. Sves., 707 F.3d 255, 261, n. 4 (3d Cir. 2013) (rescission at law “occurs automatically when parties have taken [a] requisite action”) (citation **811 omitted). See generally Dobbs, Handbook on the Law of Remedies, § 4.3, p. 255 (1973) (in a rescission at law, “the plaintiff may unilaterally rescind against the will of the defendant, assuming the plaintiff has good substantive grounds for doing so”). In contrast, a rescission in equity requires the action of a court to undo the contractual transaction. Brown, 238 Ga. at 627, 234 S.E.2d 787; see also Jesinoski, — U.S. at ——; Sherzer, 707 F.3d at 261. See generally Dobbs, Handbook on the Law of Remedies § 4.8, pp. 292–294 (1973) (discussing role of court in rescission at law versus rescission in equity).

In its counterclaim and motion for summary judgment, Monger sought to rescind the lease for Thor Gallery's nonperformance under OCGA § 13–4–62, which permits a party to take action to rescind a contract. That Code section provides that “[a] party may rescind a contract without the consent of the opposite party on the ground of nonperformance by that party but only when both parties can be restored to the condition in which they were before the contract was made.” OCGA § 13–4–62 (emphasis supplied.) The record shows that both parties could be restored to the condition in which they were before the contract was made. And a party may invoke its right to rescind under this Code section in a court proceeding. See Intl. Software Solutions, 194 Ga. App. at 442, 390 S.E.2d 659 (1990).

Nevertheless, as the majority points out, Monger made no tender to Thor Gallery of benefits that it had received under the contract. It was impossible for Monger to make a tender of benefits such as money or possession of the premises to Thor Gallery, because Thor Gallery had not given any such benefits to Monger under the lease. By opting to rescind rather than seek to recover under the lease, however, Monger did relinquish its ability to hold Thor Gallery to its obligations thereunder. Moreover, we have held:

Where money is paid on a contract which is executory on the party of him who receives the money, and the party so receiving fails to fulfill his part of the contract, the injured party may elect either to bring action on the contract and recover damages for nonperformance, or to consider the contract as rescinded and recover the money paid.

Cutcliffe, 122 Ga.App. 195, 202 (2), 176 S.E.2d 607 (1970) (citation and punctuation omitted; emphasis supplied). And our courts have recognized exceptions to the requirement that a party offer restoration in order to rescind a contract under OCGA § 13–4–62 “where nothing of any value is received by the party seeking to rescind” or “where the amount received under the contract sought to be rescinded may be less than the amount actually due the party seeking to rescind.” 2010–1 SFG Venture LLC v. Lee Bank & Trust Co., 332 Ga.App. 894, 905 (3) (a), 775 S.E.2d 243 (2015) (citation omitted). *242 A rescission may be at law even though tender is not possible for one of these reasons. See Dobbs, Handbook on the Law of Remedies § 4.8, p. 295 (1973).

The majority cites Walsh v. Campbell, supra, 130 Ga.App. 194, 202 S.E.2d 657, for the proposition that state courts “can exercise jurisdiction over certain cases involving rescission where no affirmative equitable relief

is asserted.” Maj. Op. at 237, 789 S.E.2d 806. The *Walsh* decision does not hold, however, that a case is one in equity rather than at law simply because the plaintiff seeks to recover property retained by the other party under a rescinded contract. Such a holding would conflict with our Supreme Court's holding in *Brown*. See *Brown*, 238 Ga. at 626, 234 S.E.2d 787.

For these reasons, Monger's rescission of the lease for nonperformance under OCGA § 13–4–62 was a rescission at law. Consequently, the trial court had jurisdiction over this case and we must address the merits of Thor Gallery's appeal from the state court's ruling.

2. Summary judgment.

In her order, the trial court denied Thor Gallery's motion for summary judgment (which had addressed both Thor Gallery's claims and Monger's counterclaim), granted Monger's motion for summary judgment (which had also addressed both parties' claims), held that the lease was rescinded, and ordered Thor Gallery to return Monger's security deposit. Summary judgment is appropriate where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to **812** material fact and that the moving party is entitled to a judgment as a matter of law[].” OCGA § 9–11–56 (c). “On a motion for summary judgment the plaintiff [or counterclaim plaintiff], as movant, has the burden of establishing the absence or non-existence of any defense raised by the defendant [or counterclaim defendant].” *Greenstein v. Bank of the Ozarks*, 326 Ga. App. 648, 649 (1), 757 S.E.2d 254 (2014) (citation and punctuation omitted). This court “review[s] a grant or denial of summary judgment de novo and construe[s] the evidence in the light most favorable to the nonmovant. Because this [dissent] addresses cross-motions for summary judgment, [I] will construe the facts in favor of the nonmoving party as appropriate.” *Krieger v. Bonds*, 333 Ga. App. 19, 20, 775 S.E.2d 264 (2015) (citation and punctuation omitted).

(a) Thor Gallery's claims.

In its action against Monger, Thor Gallery alleged that Monger breached the lease by failing to take possession of the premises and failing to pay rent as it became due, and it alleged that individual defendant Sampson

Monger breached a personal guaranty to pay Monger's rent. The trial court denied Thor Gallery's motion for *243* summary judgment and granted Monger's motion for summary judgment on these claims. I find no error, because the evidence shows that Thor Gallery did not comply with the lease requirement that it provide Monger with notice of and an opportunity to cure any defaults.

The lease pertinently provides that Monger's failure to make a rent payment or to observe or perform any other term or condition of the lease constitutes a default and permits Thor Gallery to seek remedies under the lease, unless such failure is cured within a specified period “after [Thor Gallery] has sent notice of such failure to [Monger.]” The lease requires that every notice or demand given by either party to the other ... shall be in writing and ... shall be served personally or by a courier service that provides a signed delivery receipt, or United States registered or certified mail, return receipt requested, postage prepaid, addressed, if to [t]enant, at the address first set forth in this [l]ease[].

To the extent the requirements of these provisions are ambiguous, they must be construed against the drafter, Thor Gallery. *Zions First Nat. Bank v. Macke*, 316 Ga.App. 744, 753 (4) (a), 730 S.E.2d 462 (2012).

The record contains two letters that Thor Gallery sent by certified mail to Monger. First, a March 19, 2014 letter instructed Monger to “take notice” of three things: (1) that Thor Gallery could invoke the remedy for default under contract). (2) that Thor Gallery could rescind the lease and asked to recover its security deposit. In its second letter, this letter

Monger argues

while waiting to receive the insurance policies, and therefore deemed the “Lease Commencement Date,” as defined in the lease, to be March 19, 2014; and (3) that if Monger “continue[s] to fail to comply with the [l]ease as described above, [Monger] will be in default of the [l]ease and [Thor Gallery] will seek all applicable remedies under the [l]ease.” (Emphasis supplied.) Notably, this letter identified Monger's noncompliance as a failure to provide insurance policies, not as a failure to take possession of the premises or a failure to pay rent. Moreover, the
letter expressly stated that Monger “will be” in default if it continued to fail to comply with the insurance policy requirement, implying that at the time Monger was not in default. The March 19, 2014 letter was not sufficiently specific to constitute notice under the lease of Thor Gallery’s claim that Monger defaulted by failing to take possession of the premises and failing to make rent payments.

*244 Second, a July 11, 2014 letter purported to notify Monger that it was in default for failing to provide Thor Gallery with insurance policies and failing to pay rent as it became due and payable. This letter also failed to provide notice of the specific breaches upon which Thor Gallery bases this action. As with the earlier letter, this letter identified Monger’s noncompliance as a failure to provide insurance policies, not as a failure to take possession of the premises, and the ambiguity arising from this lack of precision must be construed against Thor Gallery. See Zions First Nat. Bank, 316 Ga. App. at 753 (4) (a), 730 S.E.2d 462. **813 While the letter did identify Monger’s failure to pay rent as a ground for default, in fact at that time Monger was not in breach of any provisions regarding rent payment, as Thor Gallery subsequently conceded, because Monger’s obligation to pay rent under the lease had not yet begun.

Because there is no evidence that Thor Gallery provided Monger with notice of and an opportunity to cure the breaches it alleges in its complaint, as required by the lease, the trial court did not err in denying summary judgment to Thor Gallery and granting summary judgment to Monger on Thor Gallery’s breach of contract and breach of guaranty claims. See Zions First Nat. Bank, 316 Ga. App. at 753 (4) (a), 730 S.E.2d 462 (holding that party must comply with notice and cure provisions before seeking remedy for default under contract).

(b) Monger’s counterclaim.

In its counterclaim, among other things, Monger alleged that Thor Gallery had not performed obligations under the lease and asked to recover its security deposit. In its summary judgment motion, Monger argued that it was entitled to this remedy under OCGA § 13-4-62, which permits a party to a contract to “rescind [the] contract without the consent of the opposite party on the ground of nonperformance by that party but only when both parties can be restored to the condition in which they were before the contract was made.” However, “Georgia courts have refused to allow rescission when a [party seeking rescission] has materially breached the contract or when [that party’s] nonperformance justified [the other party’s] subsequent nonperformance [.]” Martin v. Rollins, Inc., 238 Ga. 119, 120 (1), 231 S.E.2d 751 (1977) (citations omitted). As detailed below, there exist genuine issues of material fact about whether both Thor Gallery and Monger failed to perform under the lease. These facts preclude summary judgment to either party on Monger’s counterclaim. Accordingly, the trial court correctly denied summary judgment to Thor Gallery on the counterclaim but erred in granting summary judgment to Monger.

(i) Thor Gallery’s alleged nonperformance. Monger argues that Thor Gallery failed to perform under the lease because it did not give *245 Monger notice of and opportunity to cure defaults and because it charged Monger rent but did not deliver possession of the premises.

As to notice (as discussed above in Division 2 (a) of this dissent), the evidence shows that Thor Gallery did not provide Monger with the required notice of and opportunity to cure the alleged defaults. While this nonperformance precluded Thor Gallery’s claims against Monger, it did not authorize Monger to rescind the lease under OCGA § 13–4–62 because the nonperformance was not “so substantial and fundamental as to defeat the object of the contract.” Yi v. Li, 313 Ga. App. 273, 277, 721 S.E.2d 144 (2011) (citation and punctuation omitted).

As to delivery of possession of the premises, Thor Gallery argues that it was excused from this obligation because Monger did not obtain the insurance coverage required under the lease. The lease provisions relevant to these arguments provided: (1) that Thor Gallery could begin charging rent the earlier of the date Monger opened for business to the public or 150 days after the “Lease Commencement Date”; (2) that the “Lease Commencement Date” occurred when possession of the premises was delivered to Monger; (3) that Monger “shall deliver” to Thor Gallery certain documents pertaining to insurance “prior to the [‘Lease Commencement Date’]”; and (4) that Thor Gallery could invoke the “Lease Commencement Date” while delaying delivery of possession of the premises if the delay arose “from the acts or omissions of [Monger] or of any person or entity acting on behalf of, or at the direction of, [Monger].”
I am not convinced by Thor Gallery's argument that these provisions established Monger's delivery of the insurance documents as a condition precedent to Thor Gallery's delivery of the premises. Compare Yi, 313 Ga. App. at 277, 721 S.E.2d 144 (provision expressly conditioning closing in purchase of ice cream store franchise upon obtaining franchisor's consent was a condition precedent to the transaction). To the extent delivery **814 of the insurance documents was a condition precedent to anything, it was a condition precedent to the “Lease Commencement Date,” which under the lease was usually but not always the same date as the date of delivery of possession of the premises. And Thor Gallery waived that condition precedent when it deemed the “Lease Commencement Date” to be March 19, 2014, even though it had not received the insurance documents. (See discussion of March 19, 2014 letter in Division 2 (a) of this dissent.) See Dental One Assoc. v. JKR Realty Assoc., 269 Ga. 616, 618 (2), 501 S.E.2d 497 (1998) (party can waive condition precedent).

Nevertheless, the above referenced lease provisions, taken together, permitted Thor Gallery to invoke the “Lease Commencement Date” and charge Monger rent despite failing to deliver possession of *246 the premises to Monger if the failure to deliver possession of the premises arose from Monger's acts or omissions. And a fact question exists as to whether Thor Gallery's failure to deliver possession of the premises arose from Monger's acts or omissions. Thor Gallery has presented evidence that it did not deliver possession of the premises to Monger because Monger had not obtained the insurance required by the lease. Monger has presented evidence that such insurance was unavailable, but it offers no explanation as to why the insurance was unavailable. The evidence does not reveal whether or not the insurance was unavailable due to some act or omission of Monger. Consequently, Monger has not met its burden, as counterclaim plaintiff, of showing that there is evidence demanding a judgment that Thor Gallery failed to perform an obligation to deliver possession of the premises.

(ii) Monger's alleged nonperformance. Even if Thor Gallery did not perform its obligation to deliver possession of the premises under the lease, Monger cannot recover under OCGA § 13–4–62 if Monger also materially breached the lease or acted in a way that justified Thor Gallery's nonperformance. See Martin, 238 Ga. at 120 (1), 231 S.E.2d 751. Thor Gallery argues that Monger did not perform its obligations under the lease to obtain insurance and to provide Thor Gallery with certain construction permits, plans, and specifications. Monger has presented evidence that it could not satisfy these obligations because the required insurance was unavailable (the fact of which Monger informed Thor Gallery before Thor Gallery signed the lease) and because, without possession of the premises, it could not procure the required construction documents. Fact questions remain as to whether this unavailability rendered performance of the condition impossible such that the condition was void under OCGA § 13–3–5. Additionally, whether Monger's failure to obtain insurance and construction documents under the circumstances “was such a material breach of the [lease] so as to bar rescission depends on the resolution ... of issues of fact concerning the causes and nature of the [failure], and its contribution, if any, to the alleged breach of [Thor Gallery].” Martin, 238 Ga. at 121 (1), 231 S.E.2d 751. Accordingly, neither party is entitled to summary judgment on the counterclaim.

All Citations
338 Ga.App. 235, 789 S.E.2d 806

Footnotes
1 If Monger had received possession of the property, he would have had something to tender or offer to tender to Thor Gallery to rescind the lease at law. The fact that Monger had not been given possession of the property distinguishes this case from a typical landlord/tenant dispute over which a state court generally has jurisdiction.

2 This Code section provides: “A party may rescind a contract without the consent of the opposite party on the ground of nonperformance by that party but only when both parties can be restored to the condition in which they were before the contract was made.”

3 For convenience, in this dissent I treat the appellees as a single party and adopt the majority's collective use of the term “Monger” to describe them. I note that Thor Gallery brought this action against three defendants: the two entities that entered into the lease and an individual, Sampson Monger, who signed a personal guaranty of the lease.
337 Ga.App. 834
Court of Appeals of Georgia.

NATEGHI
v.
BEAUFORD PROPERTIES, LLC et al.

A16A0374
July 8, 2016

Synopsis
Background: Lessee brought action against lessor and subsequent purchaser of property, seeking declaration affirming validity of agreement outlined in his letter, in which he exercised purported option to extend lease for additional three years. Lessor counterclaimed for past due rent and other charges under lease. Purchaser counterclaimed for damages caused by lessee’s continued occupancy of property. The Superior Court, Fulton County, Ellerbe, J., entered judgment on jury verdict finding that purchaser suffered damages caused by wrongful occupancy in amount of $312,286.25 for lost profits and awarded purchaser $97,319.64 in attorney fees. Lessee appealed.

Holdings: The Court of Appeals Ellington, P.J., held that:
[1] evidence was insufficient to support jury’s award of lost profits, but
[2] award of damages for lost profits did not warrant new trial.

Affirmed in part, reversed in part, and remanded with direction.

Attorneys and Law Firms

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Opinion

Ellington, Presiding Judge.

*834 This appeal arises out of a declaratory judgment action by lessee Mehdi Nateghi, who sought to affirm the validity of an alleged agreement to extend the term of his lease for the premises located at 887 Marietta Street in Atlanta (the “Property”). The jury found for defendants Beauford Properties, LLC (“Beauford”), the original owner and lessor of the Property, and 887 Marietta, LLC (“Marietta”), the subsequent purchaser of the Property, on the issue of whether there was an agreement between Nateghi and Beauford to extend the terms of the lease. The jury, in a special verdict, also found for Beauford and Marietta on their counterclaims, and awarded Marietta, as pertinent to this appeal, $312,286.25 in damages for lost profits caused by Nateghi’s wrongful occupancy of the Property, and $97,319.64 in attorney fees. On appeal, Nateghi contends that the trial court erred in denying his motions in limine, for a directed verdict, and for a judgment notwithstanding the verdict. He also contends the court erred in awarding attorney fees. For the reasons set forth below, we find that the trial court erred in denying Nateghi’s motions for a directed verdict and for a judgment notwithstanding the verdict on the issue of Marietta’s damages for lost profits, and we direct that such damages be stricken from the judgment. However, we affirm the award of attorney fees. Accordingly, we reverse in part, affirm in part, and remand the case with direction.

*835 Construed to uphold the jury’s verdict, 1 the evidence shows that Beauford leased the Property to Nateghi under a Commercial Lease Agreement (the “Lease”) for a term which, as renewed, extended from October 10, 2007, through September 30, 2011. Nateghi negotiated the Lease with Howard Perling, a real estate broker. On September 30, 2010, Nateghi sent an e-mail to Perling asking that the rent be reduced to $1,800 per month. Perling, who was then managing the Property for Beauford, forwarded the e-mail to Beauford, which instructed Perling to “stay on [Nateghi] and try to get the money[.]”

According to Nateghi, he signed and personally hand-delivered a letter, dated October 18, 2010, to Perling in which he exercised a purported option, the terms of which had been orally communicated to him by Perling, to extend the Lease for an additional three years at $1,800...
rent per month. Perling testified that he never received this letter, that he never communicated to Nateghi an offer to extend the Lease term, and that he was not authorized by Beauford to extend the Lease. Two officers of Beauford also testified that Beauford never offered to change the terms of the Lease.

From October 2010 through September 2012, Nateghi tendered rent checks to Beauford in the amount of $1,800. Beauford sold the Property to Marietta in September 2012. In early October 2012, Nateghi received a letter from Marietta which informed him that the Lease had expired on September 30, 2011, that he occupied the Property as a tenant at will, and that the letter served as 60 days' notice of the termination of his tenancy. After receiving the letter from Marietta, Nateghi filed a petition for declaratory judgment against Beauford and Marietta seeking an order affirming the validity of the agreement outlined in Nateghi's letter of October 18, 2010, and his good faith performance thereunder. Beauford answered and **912 counterclaimed for past due rent and other charges under the Lease. Marietta answered and counterclaimed for, among other things, damages caused by Nateghi's continued occupancy of the Property. 2

The trial court and the parties agreed to bifurcate the trial. Following the initial phase of the trial, the jury rejected Nateghi's contention that there was an agreement between Beauford and **912 Nateghi to extend the term of the Lease for three years beyond its specified expiration date of September 30, 2011.

[1] Following the second phase of the trial, the jury found in a special verdict that, among other things, Marietta suffered damages caused by Nateghi's wrongful occupancy of the Property in the amount of $312,286.25 for lost profits. 3 The jury also found that Marietta was entitled to recover attorney fees. The trial court entered final judgment in accordance with the jury's verdict, as well as on Beauford's post-trial motion for attorney fees, and Nateghi appeals. 4

[2] 1. In related claims of error, Nateghi contends that the trial court erred (a) in denying his motions for directed verdict on Marietta's claim for damages for anticipated or lost profits and for judgment notwithstanding the verdict, 5 and (b) in denying his motion in limine to exclude evidence of Marietta's lost profits.

In determining whether the trial court erred by denying [Nateghi's] motion for a directed verdict and motion for *837 judgment n.o.v., this court must view and resolve the evidence and any doubt or ambiguity in favor of the verdict. A directed verdict and judgment n.o.v. are not proper unless there is no conflict in the evidence as to any material issue and the evidence introduced, with all reasonable deductions therefrom, demands a certain verdict.

(Citation, punctuation, and footnote omitted.) Wolf Camera v. Royter, 253 Ga.App. 254, 255, 558 S.E.2d 797 (2002).

So viewed, the evidence showed that Marietta purchased the Property with the intent **913 to operate a restaurant thereon. Marietta's principals had previously opened a restaurant at another location. When Marietta acquired the Property it also bought an adjacent tract because, as explained by John Amend, Marietta's principal, “one wasn't available without the other.” The Property had a building with heat, electricity, gas, and running water. The building on the adjacent tract had none of those things.

After it became clear to Marietta in December 2012 that it would not have access to the Property within a reasonable period of time, it decided to develop the adjacent building, rather than the Property. Marietta opened its restaurant on the neighboring site on July 2, 2014. Amend testified that, but for Nateghi's decision to hold over on the Property, it would have taken six months to develop the Property for purposes of opening its restaurant and not the almost two years that was required to develop the adjacent tract.

As to the damages Marietta claimed for lost profits, Amend testified:
I’ve looked at the revenue that we generated over the last year and I looked at the revenue that we generated at the location. I do have a lot of experience in what restaurants should be doing in terms of their profit, and I took that at 20 percent. I believe it’s over 15 months. Again, it’s in my notes which I think you have. From a simple standpoint, that’s about what we would have done in terms of profit during that time. Part of it is that I would have been six months in development. Instead of taking almost two years, it was a year and ten months. So that difference [in profit] is what I tried to capture.

[6] [7] [8] As a general rule, “the expected profits of a commercial venture are not recoverable as they are too speculative, remote, and uncertain.” Johnson County Sch. Dist. v. Greater Savannah Lawn Care, 278 Ga.App. 110, 112, 629 S.E.2d 271 (2006). See *838 SMD, L.L.P. v. City of Roswell, 252 Ga.App. 438, 441, 555 S.E.2d 813 (2001) (accord). As an exception to this rule, “when the type of business and history of profits make the calculation of profits reasonably ascertainable, lost profits may be recovered. Thus, generally speaking, lost profits may be recovered by a business only if the business has a proven track record of profitability.” (Punctuation and footnotes omitted.) EZ Green Assocs., LLC v. Georgia Pacific Corp., 331 Ga.App. 183, 187–188, 770 S.E.2d 273 (2015). Further, “[i]n order to establish lost profits, the jury must be provided with information or data sufficient to enable them to estimate the amount of the loss with reasonable certainty. Generally speaking, this means that they must be provided with figures establishing the business’s projected revenue as well as its projected expenses.” (Citation and punctuation omitted.) Founds v. Hosp. Auth., 197 Ga.App. 598, 599, 399 S.E.2d 92 (1990) (Exclusion of evidence of revenues could not have been harmful in light of plaintiff’s failure to prove his expenses, which precluded the determination of lost profits.). Compare Bennett v. Smith, 245 Ga. 725, 727, 267 S.E.2d 19 (1980) (Where expenses remained unchanged during a work stoppage, the jury would have been authorized to award lost revenues as damages without deducting production expenses therefrom.).

[9] [10] [11] Here, the evidence showed that Marietta established a restaurant at essentially the same location as the Property, and that its principals had established another restaurant at a second location. In calculating the amount of lost profits attributable to Nateghi’s having held over on the Property, Amend assessed “revenues generated,” but he did not testify that there was a record of profits at either of the restaurant locations, or by Marietta’s business. Rather, according to Amend, he had “experience in what restaurants should be doing in terms of profits” and he “took that at 20 percent.” Nor did Marietta present evidence of projected revenues and expenses for a restaurant operating at the Property during the time period that Marietta contends that its profits were lost. Generally, “to recover lost profits one must show the probable gain with great specificity as well as expenses incurred in realizing such profits.” (Citation and punctuation omitted.) Bldg. Materials Wholesale v. Triad Drywall, 287 Ga.App. 772, 776, 653 S.E.2d 115 (2007) (Where testimony showed the plaintiff’s history of profits, as a percentage of contract amounts, as well as the amount of profits lost as a result of defendant’s breach of contract, the plaintiff was nevertheless required to put up evidence of its anticipated expenses to allow recovery of lost profits for a transaction that was never completed.). Marietta’s evidence, which failed to demonstrate that its business had a proven record of profitability and lacked a showing of anticipated revenues and expenses for the restaurant it had intended to operate on the Property, was legally insufficient for it to recover lost profits as an element of damages.

The speculations, guesses, estimates of witnesses, form no better basis of recovery than the speculations of the jury themselves. Facts must be proved, data must be given which form a rational basis for a reasonably correct estimate of the nature of the legal injury and of the amount of the damages which resulted from it, before a judgment of recovery can be lawfully rendered.

(Citation and punctuation omitted.) Tri–State Systems, Inc. v. Village Outlet Stores, Inc., 135 Ga.App. 81, 85, 217 S.E.2d 399 (1975) (Witness’s assertion that his business
was damaged in the amount of $40,000 was without value in the absence of statements or records reflecting the business's previous and present profits or losses.). As the evidence of Marietta's lost profits amounted to no more than speculation, the trial court erred in denying Nateghi's motions for a directed verdict and for a judgment notwithstanding the verdict as to Marietta's claim for damages for lost profits. 6

[12] (b) Nateghi also contends that the trial court erred in denying his motion in limine to exclude lost profits evidence. We find this claim of error to be moot because we have ordered the award of damages for lost profits stricken from the judgment in Division 3, infra, and because there is no reasonable likelihood that the evidence of lost profits otherwise affected the jury's verdict. 7

[13] 2. Nateghi further contends that, because the jury's award of attorney fees was “derivative,” the trial court erred in awarding *840 attorney fees. 8 Nateghi has not cited to any legal authority to support this claim of error, and his argument does not set forth a cogent basis for reversal. Therefore, we deem it abandoned under our Rule 25 (c) (2). See Dixon v. MARTA, 2(4)2 Ga.App. 262, 266, 529 S.E.2d 398 (2000) (legal argument requires the application of the appropriate law to the relevant facts).

[14] 3. Where a motion for directed verdict is erroneously denied, the appellate court “may direct that judgment be entered below in accordance with the motion or may order that a new trial be had, as the court may determine necessary to meet the ends of justice under the facts of the case.” OCGA § 9–11–50 (e). Further, “[t]he whole judgment will not be set aside because of error as to a part thereof, where it can be determined from the record how much is erroneous.” (Citation and punctuation omitted.) Scott v. Thompson, 193 Ga.App. 487, 488, 388 S.E.2d 371 (1989). Because that portion of the jury's award attributable to damages for lost profits is ascertainable from the special verdict form, we conclude that a new trial is not required. We direct that the award of damages for lost profits in the amount of $312,286.25 be stricken from the judgment, which otherwise stands affirmed. See, e.g., **915 Norfolk & Dedham Mut. Fire Ins. Co. v. Cumbaa, 128 Ga.App. 196, 200, 196 S.E.2d 167 (1973) (ordering that the award of attorney fees and penalties, the directed verdict as to which the trial court erroneously denied, be stricken from the judgment).

*839

Judgment affirmed in part and reversed in part, and case remanded with direction.

Mercier, J., concurs. Branch, J., concurs in judgment only.

All Citations

337 Ga.App. 834, 788 S.E.2d 909

Footnotes


2. Marietta later filed a motion for summary judgment, which the trial court denied. This Court granted Marietta's application for an interlocutory appeal from the trial court's order denying its motion for summary judgment in our Case No. A14I0047. That appeal, Case No. A14A1488, was subsequently dismissed by this Court.

3. The jury also found, as damages caused by Nateghi's wrongful occupancy of the Property, $49,995.95 for unpaid rent and other contractual damages, $2,624.79 for interest on the unpaid rent and other contractual damages, and $218,309.92 for other development costs.

4. The trial court entered an order designated as its final order and judgment on July 9, 2015, and entered an amended final order and judgment on July 10, 2015. Nateghi identified only the July 9, 2015 order in his notice of appeal. Marietta contends that, because the amended order entered July 10, 2015 is the final order in the case and is not referenced in Nateghi's notice of appeal, this Court must dismiss this appeal. We disagree. “Where it is apparent from the notice of appeal, the record, the enumeration of errors, or any combination of the foregoing, what judgment or judgments were appealed from ..., the appeal shall be considered in accordance therewith notwithstanding that the notice of appeal fails to specify definitely the judgment appealed[.]” OCGA § 5–6–48. It is apparent from the notice of appeal and his enumeration of errors that Nateghi appeals from the final order entered below, and his reference to the order entered July 9, 2015, rather than the order entered July 10, 2015, does not subject his appeal to dismissal. See Bagwell v. Henson, 124 Ga.App.
Marietta contends that Nateghi's claims that the trial court erred in denying his motions for a directed verdict and for a judgment notwithstanding the verdict should be deemed abandoned because, in his appellate brief, he argues as to these claims of error only that the evidence of lost profits was insufficient because the evidence was inadmissible. However, Nateghi presented his legal and factual contentions as to the speculative nature of the lost profits evidence in arguing that the trial court erred in denying his motion in limine, and we understand those arguments to also apply to his claim that the trial court erred in denying his motions for a directed verdict and for a judgment notwithstanding the verdict.

Nateghi also references “insufficient evidence of lost profits and building costs” within his argument that the trial court erred in denying his motion in limine as to issue of informed consent. Pretermitting whether this isolated reference to “building costs” might be interpreted as an argument that the evidence was insufficient to support the jury's award of damages for development costs, such an argument, if intended, is unsupported by reference to the record or citation to legal authority, and is abandoned. See Court of Appeals Rule 25 (c) (2).

See *Harris v. Tatum*, 216 Ga.App. 607, 608 (1) (a), 455 S.E.2d 124 (1995) (finding grant of motion for directed verdict as to issue of informed consent rendered moot claim of error as to the trial court's denial of appellant's motion in limine because appellant failed to show “any fair risk exists that the jury's subsequent verdict in favor of plaintiffs was contributed to by the denial of their motion in limine as to informed consent.”).

It is unclear if Nateghi intends to challenge the award of attorney fees to both Marietta and Beauford. Nateghi does not identify the basis for either fee award. He also fails to specify the claims for which he contends the attorney fees are derivative.
Nateghi does not identify the basis for either fee award. He also fails to specify the claims for which he contends the attorney fees are to be awarded by the denial of their motion in limine as to informed consent."


On January 5, 2013, Carlisle took possession and control of the Premises and secured all the personal property on the Premises due to Tenant's violations of the Lease. Carlisle claims the Tenant began violating the lease in numerous ways shortly after the business began operation under the Lease. Carlisle alleges the Tenant violated state and local laws, as well as permitted customers to vandalize the Premises, interfered with other tenants' use and enjoyment of the Premises, and failed to pay for work performed on the Premises that resulted in a lien being filed on the title of the Premises.

**341** Robert Brian Strickland, Smith, Welch, Webb & White, for Appellant

**342** days to become compliant with the Lease or the Lease would be terminated. Broe, who acted as the agent for the Tenant, sent Carlisle correspondence on January 10, 2013, through his attorney, indicating the Tenant's desire to terminate the Lease.

On February 8, 2013, Carlisle brought the underlying action against Broe, as guarantor, seeking payment of outstanding rent, late fees, and the cost of repairs to the Premises. Broe filed an answer and counterclaim that included claims for declaratory judgment, wrongful eviction, trespass, conversion, breach of contract, punitive damages, and attorney fees. On September 22, 2014, Broe filed a motion for partial summary judgment on his claims for declaratory judgment, wrongful eviction, trespass, and

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**Court of Appeals of Georgia.**

Carlisle v. Broe.

**A16A0647**

| June 10, 2016 |

**Synopsis**

**Background:** Landlord filed an action against commercial tenant seeking outstanding rent, late fees, and the cost of repairs. The Superior Court, Spalding County, Sams, J., granted tenant summary judgment. Landlord appealed.

[**Holding:**] The Court of Appeals, Mercier, J., held that a genuine issue of material fact existed as to whether tenant was in default of lease based on payment of late fees, precluding summary judgment in tenant's counterclaim for wrongful eviction and trespass.

Vacated and remanded.

**Attorneys and Law Firms**

**341** Stephanie A. Everett, Stanton Law, James Michael Johnson, Atlanta, Sherri G. Buda, Knight Johnson, for Appellee.

**342** Opinion

Mercier, Judge.

**408** John Carlisle appeals the trial court's grant of summary judgment in favor of Mark Broe and its denial of Carlisle's motion for summary judgment, based on its finding that Carlisle is liable for wrongful eviction and trespass. We agree, and vacate.

"A de novo standard of review applies to an appeal from a grant of summary judgment, and we view the evidence, and all reasonable conclusions and inferences drawn from it, in the light most favorable to the nonmovant.” Matjoulis v. Integon General Ins. Corp., 226 Ga.App. 459, 486 S.E.2d 684 (1997) (citation omitted). Further, “summary judgment is appropriate when the moving party can show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law.” Albertson v. City of Jesup, 312 Ga.App. 246, 248, 718 S.E.2d 4 (2011) (footnote and punctuation omitted).

Viewed in this light, the evidence shows that this case arises out of a dispute over a commercial lease agreement (the “Lease”) entered into in September 2011. Under the Lease, premises located in Griffin, Georgia (the “Premises”) were leased to The Crafty Yank, Inc. (the “Tenant”) by Carlisle. Broe, The Crafty Yank’s CEO, personally guaranteed the Tenant's performance of the Lease. Carlisle claims the Tenant began violating the Lease in numerous ways shortly after the business began operation under the Lease. Carlisle alleges the Tenant violated state and local laws, as well as permitted customers to vandalize the Premises, interfered with other tenants' use and enjoyment of the Premises, and failed to pay for work performed on the Premises that resulted in a lien being filed on the title of the Premises.

On January 5, 2013, Carlisle took possession and control of the Premises and secured all the personal property within. In an email to the Tenant, Carlisle claimed he was seizing the Premises due to Tenant's violations of paragraphs 18 and 19 of the Lease. Carlisle contended that paragraph 27 of the Lease authorized him to reenter and take possession of the Premises, and Paragraph 24 authorized him to secure all personal property on the Premises. He gave the Tenant five **342** days to become compliant with the Lease or the Lease would be terminated. Broe, who acted as the agent for the Tenant, sent Carlisle correspondence on January 10, 2013, through his attorney, indicating the Tenant's desire to terminate the Lease.

On February 8, 2013, Carlisle brought the underlying action against Broe, as guarantor, seeking payment of outstanding rent, late fees, and the cost of repairs to the Premises. Broe filed an answer and counterclaim that included claims for declaratory judgment, wrongful eviction, trespass, conversion, breach of contract, punitive damages, and attorney fees. On September 22, 2014, Broe filed a motion for partial summary judgment on his claims for declaratory judgment, wrongful eviction, trespass, and

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conversion, arguing that the Lease was invalid and thus the Tenant was not subject to the terms of the Lease. Carlisle filed his own motion for summary judgment on February 13, 2015, contending that Broe's claims for wrongful eviction and trespass should be dismissed as a matter of law.

**410** The trial court entered an order on the cross-claims for summary judgment on July 17, 2015. This order consolidated the trial court's rulings on pending motions in this and several other related cases. With respect to the motions for summary judgment relevant to this case, the trial court denied Carlisle's motion for summary judgment as to Broe's claims for wrongful eviction and trespass, and awarded summary judgment to Broe, finding Carlisle liable for wrongful eviction and trespass, Broe's conversion claim was withdrawn. This appeal followed.

In his sole enumeration of error, Carlisle argues that the trial court erred in denying his motion for summary judgment and in granting Broe's motion for summary judgment, based on its finding Carlisle liable for wrongful eviction and trespass. Because there remains a genuine issue of material fact as to whether Carlisle had authority to reenter the Premises, we must vacate the judgment of the trial court.

[1] [2] [3] The first issue that must be decided is whether the Lease authorized Carlisle to reenter the Premises. We hold that paragraph 24 of the Lease did authorize reentry if the Tenant violated its terms.

When a contract is at issue, the court first determines whether the language of the agreement is ambiguous. The language is ambiguous if it is susceptible to more than one meaning. If the language is clear and unambiguous, contract construction is not necessary, and the agreement will be enforced according to its clear and unambiguous terms.


If and whenever the Tenant is in default in payment of any money, whether hereby expressly reserved or deemed as rent, or any part of the rent, the Landlord may, without notice or any form of legal process, enter upon the Premises and seize, remove and sell the Tenant's goods, chattels and equipment from the Premises.

While Carlisle's original communication to Broe cited paragraph 27 of the Lease as justification for reentry, he later asserted that he was entitled to reenter the Premises under paragraph 24 of the Lease.

**411** As a right of reentry did exist under paragraph 24 of the Lease, we must next determine whether the Tenant was in violation of paragraph 24. Carlisle contends that the Tenant was in default on payment of late fees for the month of October 2012, and therefore he had a right to reenter the Premises. Broe argues that the Tenant was not in default, and so Carlisle had no right of reentry. We find that a genuine issue of material fact exists as to whether the Tenant was in default, and so summary judgment was premature.

The Lease requires the Tenant to pay the rent on or before the first day of each month, and to pay a late fee of $25 per day for each day the rent is received after its due date.

**343** The parties agree that Broe tendered a check for the October 2012 rent to Carlisle on October 4, 2012. On October 8, 2012, Carlisle sent Broe an email informing him that the Tenant had been three days late on its October rent, and thus owed him $75 in late fees. The Tenant paid Carlisle the $75 late fee on October 10, 2012. On October 11, 2012, Broe discovered that the bank did not honor the rent check that Broe had given Carlisle for the October rent payment. When Broe discovered that his original rent check failed to clear the bank, he sent Carlisle a second rent check, along with an additional $150 for late fees. However, on October 12, 2012, the bank honored the first rent check Broe had delivered to Carlisle. The trial court found that as a matter of law the Tenant was not in default, and therefore Carlisle had no right of reentry. However, we find that there is an issue of material fact as to whether the Tenant was in default.

The trial court found that when Carlisle accepted the rent check on October 4, 2012, he “impliedly extended the time of the payment of the rent until the bank ... either paid [the
check] or returned it.” To support this finding, the trial court cited to this Court's opinion in Matlock v. Brown, 98 Ga.App. 579, 580, 106 S.E.2d 180 (1958) (physical precedent only) for the principle that “[b]y acceptance of the check the plaintiff impliedly extended the time of the payment of the rent until the bank on which the check was drawn either paid it or returned it to the bank in which it was deposited within a reasonable time from the time of issue.” This is an accurate statement of this Court's holding in that specific case, yet it is an incomplete statement of the law.

The trial court pointed out in its order, quite correctly, that the rule is a logical one. Otherwise a landlord might accept a rent check and then charge late fees for the days between the date the check was *412 tendered and the date the check cleared the bank. However, it is also true that under a blanket application of this rule a tenant could deliver a bad check to a landlord, and then avoid the payment of late fees for the days between the date the check was tendered and the date the check was dishonored. Such an outcome is as undesirable as the prospect of a landlord holding a rent check for the express purpose of assessing late fees against her tenant.

A more reasonable interpretation of the law would be that by accepting a rent check, a landlord impliedly extends the time of the payment of the rent until the bank on which the check was drawn honors the check. However, if the check is not honored by the issuing bank, then the time of the payment of the rent is not impliedly extended from the date the check was tendered, and the rent will not be deemed to have been paid until a form of payment has been honored by the issuing bank, or some other form of payment has been tendered. See generally John N. Sims & Sons v. Bolton, 138 Ga. 73, 74 S.E. 770 (1912) (check tendered in payment for a mule was not considered payment until it was actually paid by the drawee bank). This does not amount to an overturning of our decision in Matlock v. Brown. In that case, Judge Quillian concurred specially, stating: “I concur in the result, but do not agree that the landlord by accepting the check extended the time for payment of rent beyond the date on which the check was received by him.” Matlock, 98 Ga.App. at 581, 106 S.E.2d 180. Accordingly, the holding in Matlock v. Brown is not binding precedent but acts as physical precedent only. We simply clarify that holding.

Additionally, it is well-settled that the payee of a check is potentially subject to various forms of detriment should a check be dishonored.

[T]he payee might allow the giver of the check to continue in possession of rented property as a result of the representation that the check was good. The payee might very well deposit the bad check in payee's account and proceed to write checks on the account without knowledge that the check received would not be honored. There are many other acts which the payee might have performed to his own detriment as a result of a bad check being given to him.

Cobb v. State, 246 Ga. 567, 569, 272 S.E.2d 299 (1980). Accordingly, when a tenant tenders rent in the form of a check, the time of payment is impliedly extended under the assumption that the instrument will be honored. **344 Should it not be honored, the tenant loses the presumption of timely payment.

*413 In this case, the first rent check was tendered on October 4, 2012, and thus the time for payment was impliedly extended with the presumption that the check would be honored. However, the check was not honored initially, and there is no argument that the bank incorrectly dishonored it. Upon discovery that the first check was dishonored, Broe sent a second check along with additional late fees to Carlisle. The addition of the late fees to the second rent check indicates that Broe was aware that the Tenant was subject to further late fees as a result of the first check being dishonored. However, the record is unclear as to whether Broe ever actually tendered the second rent check to Carlisle, or if Carlisle accepted such a check. Further, the fact that the first rent check was resubmitted by the bank and eventually honored does not mean payment was made on October 4. The Tenant was in default when the original check was first dishonored. Thus, the rent is deemed to have been paid on October 12, 2012, the date the check was finally honored.

Carlisle's argument that the late fees accrued until the funds from the rent check were made available in his bank account is unpersuasive. The check was honored by the issuing bank on October 12, and any delay between the
time it was honored and the time it was made available in his account is an issue between Carlisle and his bank. Thus, Carlisle cannot charge the Tenant late fees for the days between the time the check was honored and the time the funds were deposited in his account.

In light of our preceding discussion, genuine issues of material fact still exist as to the amount in late fees the Tenant owed, whether or not those late fees were in fact paid, inasmuch as they relate to Carlisle's right to reenter the Premises. Accordingly, the grant of summary judgment in favor of Broe on his claims of wrongful eviction and trespass, and the denial of summary judgment as to Carlisle on the same is hereby vacated, and the trial court is ordered to make determinations consistent with this opinion.

Judgment vacated and case remanded.

Ellington, P.J., and Branch, J., concur.

All Citations

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Footnotes

1 The trial court was correct in finding that paragraph 27 did not grant Carlisle a right of reentry. The title of paragraph 27 is “Additional Rights on Reentry” and the plain meaning of the language contained in the paragraph is that the rights listed are conditional on a right of reentry established independently of paragraph 27.
787 S.E.2d 340

Thus, Carlisle cannot charge the Tenant late fees for the days between the time the check was honored and the time the funds were deposited in his account.

In light of our preceding discussion, genuine issues of material fact still exist as to the amount in late fees the Tenant owed, whether or not those late fees were in fact paid, inasmuch as they relate to Carlisle’s right to reenter the Premises. Accordingly, the grant of summary judgment in favor of Broe on his claims of wrongful eviction and trespass, and the denial of summary judgment as to Carlisle on the same is hereby vacated, and the trial court is ordered to make determinations consistent with this opinion.

Judgment vacated and case remanded.

Ellington, P.J., and Branch, J., concur.

Footnotes
1 The trial court was correct in finding that paragraph 27 did not grant Carlisle a right of reentry. The title of paragraph 27 is “Additional Rights on Reentry” and the plain meaning of the language contained in the paragraph is that the rights listed are conditional on a right of reentry established independently of paragraph 27.

West Asset Management, Inc. v. NW Parkway, LLC, 336 Ga.App. 775 (2016)
784 S.E.2d 147

Synopsis
Background: Commercial landlord sued tenant for damages under triple-net lease, seeking cost for repairs to roof and restraining order to allow landlord to enter property to repair roof. Tenant filed counterclaims for fraud, negligence, breach of contract and setoff, and sought declaratory relief. The trial court granted tenant's motion for partial summary judgment and declaratory relief that tenant had not defaulted on lease because it did not have obligation to replace roof. Landlord appealed. The Court of Appeals, 309 Ga.App. 172, 709 S.E.2d 858, reversed. The Superior Court, Cobb County, Millis, Senior Judge, thereafter granted partial summary judgment to landlord and to tenant in certain respects and denied their motions as to other issues. Parties appealed.

Holdings: The Court of Appeals, Ellington, P.J., held that:

[1] where issue had been decided in prior appeal, no jury question existed regarding whether tenant satisfied conditions for terminating lease;

[2] tenant's depositing into registry of the court an amount landlord spent on roof repairs did not cure its breach;

[3] landlord's conduct did not amount to an acceptance of tenant's surrender;

[4] tenant's obligation to pay rent necessarily ended when landlord sold the property;

[5] fact question as to whether late-charges provision in lease constituted an unenforceable penalty precluded summary judgment on claim for late fees;

[6] where issue had been decided in prior appeal, no jury question existed regarding whether tenant breached lease;

[7] fact question as to whether tenant acted in bad faith precluded summary judgment on landlord's claim for expenses of litigation;

[8] tenant would not be heard to have reasonably relied on signed acknowledgment of original lessee that the premises were in good order and repair at the beginning of the assumed lease; and


Affirmed in part and reversed in part.

Dillard, Ray and McMillian, JJ., concurred in judgment only.

McFadden, J., concurred in part, dissented in part, and filed opinion, in which Barnes, P.J., joined.

Attorneys and Law Firms

**151 Bondurant, Mixson & Elmore, M. Jerome Elmore, Timothy Scot Rigsbee, Atlanta, Caplan Cobb, Michael Adam Caplan, for Appellant.

Barnes Law Group, Roy E. Barnes, John Frank Salter Jr., for Appellee.

Opinion

ELLINGTON, Presiding Judge.

*775 NW Parkway, LLC, brought this action in the Superior Court of Cobb County against West Asset Management, Inc. (“West”) for claims arising from a commercial property lease agreement. West filed counterclaims arising out of the same lease. Both parties moved for summary judgment, which the trial court granted in part and denied in part. In Case No. A15A1830, West appeals the trial court's rulings in various respects, and in Case No. A15A1831, NW Parkway cross-appeals.
For the reasons explained below, we affirm in part and reverse in part.

[1] [2] [3] *776 Summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” OCGA § 9–11–56(c).

Summary judgments enjoy no presumption of correctness on appeal, and an appellate court must satisfy itself de novo that the requirements of OCGA § 9–11–56(c) have been met. In our de novo review of the grant [or denial] of a motion for summary judgment, we must view the evidence, and all reasonable inferences drawn therefrom, in the light most favorable to the nonmovant.

(Citations and punctuation omitted.) *777 Cowart v. Widener, 287 Ga. 622, 624(1)(a), 697 S.E.2d 779 (2010). When, as in this case, the parties file cross-motions for summary judgment, “each party must show [that] there is no genuine issue of material fact regarding the resolution of [the essential] points of inquiry and that each, respectively, is entitled to summary judgment; either party, to prevail by summary judgment, must bear its burden of proof.” Morgan Enterprises, Inc. v. Gordon Gillett Business Realty, 196 Ga.App. 112, 395 S.E.2d 303 (1990). See also Wells Fargo Bank v. Twenty Six Properties, LLC, 325 Ga.App. 662, 754 S.E.2d 630 (2014) (accord). A grant of summary judgment must be affirmed if it is right for any reason, including for an alternate ground that the trial court chose not to address in granting summary judgment, so long as the movant raised the issue in the trial court and the nonmovant had a fair opportunity to respond. Georgia–Pacific, LLC v. Fields, 293 Ga. 499, 504(2), 748 S.E.2d 407 (2013); City of Gainesville v. Dodd, 275 Ga. 834, 839, 573 S.E.2d 369 (2002); Abellera v. Williamson, 274 Ga. 324, 326(2), 553 S.E.2d 806 (2001). The relevant facts that follow are undisputed unless otherwise noted.

On July 20, 2004, NW Parkway, as lessor, and Worldwide Asset Management, LLC ("Worldwide"), West’s predecessor-in-interest, as lessee, executed the lease at issue for 70,000 square feet of office space for a 20–year term from August 1, 2004, to July 31, 2024. The lease was a so-called “triple net lease” that (in “Special Stipulation 3”) made West responsible for “all expenses for the entire property and building[ ] of any nature whatsoever during the term of this lease.” *777 including property taxes, except that NW Parkway “shall be responsible for any expense directly associated with and actually incurred with respect to the concrete walls, concrete slab, and foundation.” West “acknowledge[d] that the premises [were] in good order and repair” at the beginning of the lease and specifically agreed to maintain the premises at its own expense and to surrender the premises at the termination of the lease in as good condition as received, normal wear and tear excepted.

**152 The contract (in “Special Stipulation 4”) allowed West the option of terminating the contract at five year intervals, at the end of the fifth, tenth, and fifteenth years, provided, inter alia, that, “for said option to be valid and effective, [West] shall ... not be in default under any of the provisions of this lease” and that West shall “provide [NW Parkway] with written notice (90) days in advance of the end of the [five-year interval].” In the event of such early termination, the lease provided that West would continue to pay rent for an additional six months and vacate the premises by the end of that period. The first five-year interval ended July 31, 2009, meaning that the contract required West to give notice on or before May 2, 2009, to exercise the early-termination option, and to vacate by January 31, 2010.

In early 2008, NW Parkway obtained a professional inspection to determine whether West was maintaining the property. The inspector noted evidence of ineffective drainage and standing water in areas of the roof, as well as multiple areas that had been repeatedly patched but appeared likely to leak. The inspector concluded, “[b]ased on the number of layers of patching material and the deteriorated condition of the top layer of many patches, the roof is due for replacing” and also recommended certain other repairs. Based on the inspector’s report, NW Parkway requested in a letter dated February 27, 2008, that West “correct the[ ] deficiencies” indicated in the report, including by replacing the roof. In a letter dated June 2, 2008, West asserted that it was NW Parkway’s sole obligation to replace the roof and that West was obligated only to maintain the roof in as good condition as received. West did not replace the roof.
In a letter dated July 10, 2008, NW Parkway notified West that it was in default under the lease for failure “to perform and pay for the required roof and other repairs” and demanded that West cure the default within thirty days. After thirty days, NW Parkway notified West that it had failed to cure the default within the time allowed and that it had therefore lost its “ability to cure [its] default under the Lease” and “forfeited [its] right to terminate the Lease prior to July 31, 2024 under Special Stipulation 4.” When NW Parkway sent its *778 contractor to the property to replace the roof and perform other repairs, West denied the contractor access. In a letter dated August 15, 2008, West stated:

No permission has been granted to NW Parkway to send a roofing vendor to the premises. Unless there is an agreement to the contrary, [NW Parkway] has no right to enter upon the premises except with permission of [West]. As we have stated, West has repaired the roofs as appropriate during the lease term, and, will continue to do so. If [NW Parkway] removes the existing roof system, it will be impossible for West to make repairs. It is the tenant's role under the Lease Agreement to establish the type of repairs which are appropriate for the roofs, not [NW Parkway's] role. If [the contractor] attempts to enter the premises, it will be turned away.

In October 2008, NW Parkway filed this action, seeking damages and an emergency restraining order to compel West to allow the replacement of the roof and other necessary repairs. In November 2008, the trial court granted NW Parkway's request for a temporary restraining order (“TRO”) and enjoined West from interfering with NW Parkway or its contractors from replacing the roof and repairing the exterior of the buildings. As the trial court noted, West claimed that the roof did not need to be replaced, referring to an evaluation performed by a roofing company it had engaged, but failed to present that company's report to the court. The court found that West had failed to adduce any evidence to contradict the evidence presented by NW Parkway that the roof needed to be replaced. After the court issued the TRO, NW Parkway's chosen contractor performed the work; the cost to replace the roof and repair the property was $384,226. In December 2008, West answered NW Parkway's complaint and asserted counterclaims for fraud, negligence, breach of contract, and setoff and requested a declaratory judgment that it was entitled to exercise its right to early termination.

On December 31, 2008, West sent a letter “to constitute [its] notice of early termination” *153 pursuant to Special Stipulation 4. By letter dated January 26, 2009, NW Parkway “rejected” West's termination on the basis that West was “in breach of the lease for failing to pay expenses for the replacement of the roof and other repair expenses[,]” which prohibited West “from terminating the lease as the result of such failure.” In March 2009, West filed a motion for partial summary judgment on its request for a declaratory judgment that it was entitled to exercise its right to early termination. At the same time, while maintaining its position that it was not responsible for replacing the roof under the lease, West filed a request for leave to pay into the registry of the court the disputed amount, $384,226, which was the amount NW Parkway spent to replace the roof and repair the buildings' exteriors. In its request to pay the funds into the registry of the court, West stated that it was seeking to preserve its right to terminate the lease at the end of the first five-year interval. In April 2009, NW Parkway amended its complaint, seeking $384,226 in damages for roof-related expenses, among other relief.

The trial court heard West's motion for partial summary judgment on April 23, 2009, less than two weeks before the deadline for giving notice of termination before the end of the first five-year interval. At the hearing, NW Parkway's counsel acknowledged that there was a question of fact whether the roof needed repair or needed replacement. West's counsel asked that, because the deadline was approaching, the court accept the money into the registry of the court so that West could cure any arguable default and stated, “If there's something else that we're required to do in order to cure this default and exercise our termination right, then, ... we want to do that.”

In September 2009, the trial court granted West's motion for partial summary judgment, on the basis, inter alia, that West was not in default of the lease because it did not have an obligation to replace the roof and entered a declaratory judgment that West was entitled to exercise its right

to early termination. The trial court expressly declined to reach the issues whether West breached the lease or what damages, if any, NW Parkway could recover. NW Parkway filed a notice of appeal.

While docketing of that first appeal, Case No. A10A1781, was pending, West acted on the trial court's ruling that it was entitled to exercise its right to terminate the lease at the end of the first five-year interval by vacating the property. West tendered possession as of January 31, 2010, and NW Parkway accepted possession, in compliance with the declaratory judgment “until such time as it could be reversed on appeal.” Thereafter, NW Parkway transferred utility accounts so that it could keep the utilities active, took over contracts for custodial services and landscaping, paid property taxes, tried to find a new tenant, and listed the property for sale.

On March 24, 2011, we issued a decision in Case No. A10A1781 and reversed the September 2009 declaratory judgment, holding: “[b]ased on the plain language of the lease, the trial court erred by finding that West was not obligated to replace the roof and by basing its determination that West was not in default upon this finding.” NW Parkway, LLC v. Lemser, 309 Ga.App. 172, 177(2), 709 S.E.2d 858 (2011), cert. denied, November 30, 2011. In addition, we concluded *780 that the undisputed evidence established that, by failing to replace the roof, West failed to comply with one of the four conditions precedent for the early termination option to apply. Id. at 178(3), 709 S.E.2d 858. This failure “constituted default, which prevented West from timely complying with the terms of the optional early termination clause in order to terminate at the five-year point.” (Footnote omitted.) Id.

The trial court belatedly ruled on West's request for leave to pay $384,226 into the registry of the court and granted the request on August 29, 2012, “nunc pro tunc” April 30, 2011 (after the hearing and before the deadline for notice of early termination).

In October 2014, NW Parkway filed a motion for partial summary judgment, as to its Count 1, roof-related expenses, its Count 2, anticipatory breach of contract, and West's counterclaims (fraud, negligence, breach of contract, setoff, and declaratory relief regarding right to early termination). West also filed a motion for partial summary judgment, as to NW Parkway's Count 2, anticipatory breach of contract, and specifically disputed the components of NW Parkway's claimed damages (additional rents, late fees, and contractual attorney fees). On March 12, 2015, the trial court entered an order ruling on the parties' cross-motions for partial summary judgment. The trial court granted partial summary judgment to NW Parkway and to West in certain respects and denied their motions as to other issues, as specified below.

1. The trial court denied in part the parties' cross-motions for summary judgment on NW Parkway's Count 2, its claim for breach and anticipatory breach of the lease agreement, seeking rents accruing after January 2010, expenses, late charges, interest, and contractual attorney fees. This ruling was supported by the court's determination that material questions of fact remain regarding whether West satisfied the conditions for terminating the lease at the end of the first five-year interval. In particular, the trial court determined that there is a jury question regarding West's tender defense, that is, that West's tender of the roof-related expenses, by moving to deposit $384,226 into the registry of the court, was sufficient to defeat NW Parkway's claim that West breached the lease by failing to replace the *781 roof. An alternative basis for the denial of summary judgment on NW Parkway's Count 2 was the court's determination that material questions of fact remain regarding whether a surrender took place as of January 2010, that is, whether NW Parkway took actions incompatible with the continued existence of West's leasehold after that date. Both sides appeal.

[4] We agree with NW Parkway that, as a result of our decision in the first appeal, the issue whether West satisfied the conditions for terminating the lease at the end of the first five-year interval has been decided adversely to West. NW Parkway, LLC v. Lemser, 309 Ga.App. at 178(3), 709 S.E.2d 858. See OCGA § 9–11–60(h) (“[A]ny ruling by the Supreme Court or the Court of Appeals in a case shall be binding in all subsequent proceedings in that case in the lower court and in the Supreme Court or
the Court of Appeals as the case may be.”); IH Riverdale, LLC v. McChesney Capital Partners, LLC, 292 Ga.App. 841, 843–844, 666 S.E.2d 8 (2008) (After appellate court held that plaintiffs were not entitled to distribution of profits under an operating agreement, trial court was precluded from granting defendants' renewed motion for summary judgment as to profit distribution.); McLean v. Continental Wingate Co., Inc., 222 Ga.App. 805, 806–807(1), 476 S.E.2d 83 (1996) (After appellate court held that contractual provision was not unenforceably vague, trial court was precluded from granting defendants' renewed motion for summary judgment, on grounds that provision was too vague to be enforceable.). Accordingly, the trial court's determination that there is a jury question whether West satisfied the conditions for unilaterally terminating the lease at the end of the first five-year interval was incorrect.

[5] With regard to West's argument that it cured its breach of its obligation to replace the roof by moving to deposit $384,226, the amount NW Parkway spent on repairs, into the registry of the court, we agree with NW Parkway that such tender could not prospectively excuse West's failure to satisfy its other obligations under the lease, e.g., payment of rent, given the binding determination that West was not entitled to terminate the lease at the end of the first five-year interval. Accordingly, the trial court's determination that there is a jury question regarding West's tender defense was incorrect.

[6] In denying summary judgment on NW Parkway's Count 2, the trial court also **155 determined that material questions of fact remain regarding whether NW Parkway's conduct in January 2010 resulted in a surrender. As West contends, NW Parkway took actions that are potentially incompatible with the continued existence of West's leasehold after that date, such as paying utilities, service contracts, and property taxes, all of which were West's responsibility under the *782 triple-net lease, and listing the property for sale. 3 But NW Parkway has identified evidence, which is undisputed, that, because the trial court's declaratory judgment ruling allowed West to vacate the premises and to stop maintaining the property, NW Parkway took those actions in order to prevent damage to the property. 4 There is no evidence that NW Parkway accepted rent from another tenant or occupied the premises itself and conducted business operations there. 5 Accordingly, the trial court's determination that there is a jury question whether NW Parkway accepted West's surrender of the lease as of January 2010 was incorrect, 6 and the trial court erred in denying NW Parkway's motion for summary judgment in this regard. Circle K Stores, Inc. v. T.O.H. Assoc., Ltd., 318 Ga.App. 753, 757–758(2), 734 S.E.2d 752 (2012); Sirdah v. N. Springs Assoc., 304 Ga.App. 348, 351(1), 696 S.E.2d 391 (2010).

[7] 2. The trial court determined that NW Parkway is not entitled to any rents after December 2012, when it sold the property and expressly disclaimed the existence of any lease then in force that granted any right, title, interest or benefit in the property to any person or entity. The trial court accordingly granted West's motion for summary judgment on NW Parkway's claim for rents (Count 2) in part, as to rents accruing after December 2012. NW Parkway appeals the partial grant of West's motion.

NW Parkway contends that it is entitled to collect rent for the entire 20-year term, despite its sale of the property in the eighth year of the lease, because the lease “disclaims set-offs or deductions against rent.” Specifically, NW Parkway points to Paragraph 1, which provides that the base rent of the lease “shall be payable by [West] in monthly installments on or before the first day of each month in advance ... without any prior demand therefore, and without any deduction or setoff whatsoever, and shall be payable to [NW Parkway].” NW Parkway argues that in agreeing to base rent being due “without any deduction or setoff whatsoever” West “knowingly accepted a rent obligation for a term of twenty years” regardless of later events. Read in context with the **156 “triple-net” stipulation and provisions regarding West's obligations to pay the property taxes and other expenses associated with the property and to maintain the premises at its own expense, however, we conclude that the modifier “without any deduction or setoff whatsoever” refers to West's obligation to bear all expenses associated with the property (with the specified exception of those incurred with respect to the concrete walls, concrete slab, and foundation). We find no basis for construing the modifier “without any deduction or setoff whatsoever” to obligate West to pay rent for a period when NW Parkway lacks legal ownership of the property with the concomitant ability to provide West possession and use of the property as a tenant. 7 Because the record establishes that NW Parkway's sale of the property in December 2012 terminated its landlord-tenant relationship with West,
West's obligation to pay rent under the lease from that point to the original termination date of July 31, 2024, necessarily ended. *Noble v. Kerr, 123 Ga.App. 319, 319–320(1), 180 S.E.2d 601 (1971).* Accordingly, the trial court did not err in granting West's partial motion for summary judgment in this regard.

3. The trial court determined that there are questions of fact regarding whether the lease's late-charges provision, Paragraph 27, is an unenforceable penalty and denied West's motion for summary judgment on NW Parkway's claim for late fees as part of Count 2. West appeals the partial denial of its motion.

Paragraph 27 provides:

[T]here shall be due and payable by [West] to [NW Parkway], as of the fifth day of each month during the term [of the lease], a Late Charge in an amount equal to ten percent of all sums which are due and payable [under the lease] but have not, as of such date, been received by [NW Parkway].

Another paragraph provided for 15 percent interest to accrue on past due obligations.

OCGA § 13–6–7 provides: the parties agree in their contract what the damages for a breach shall be, they are said to be liquidated[,] and, unless the agreement violates some principle of law, the parties are bound thereby.” But a provision that is intended to deter breaches of the contract by imposing a penalty for a breach that is not a reasonable pre-estimate of damages is unenforceable under Georgia law. *Southeastern Land Fund, Inc. v. Real Estate World, Inc., 237 Ga. 227, 230, 227 S.E.2d 340 (1976); Alexander v. Steining, 197 Ga.App. 328, 329–330(2), 398 S.E.2d 390 (1990).* In order to resolve whether a provision for damages for breach amounts to “liquidated damages” under OCGA § 13–6–7, or is an unenforceable penalty clause,

the trial court at the summary judgment level must conduct a tripartite inquiry according to these standards: First, the injury caused by the breach must be difficult or impossible of accurate estimation; second, the parties must intend to provide for damages rather than for a penalty; and third, the sum stipulated must be a reasonable pre-estimate of the loss.

*Morgan Enterprises, Inc. v. Gordon Gillett Business Realty, 196 Ga.App. at 112, 395 S.E.2d 303.* At this stage, the burden is on West to show that the late charge is a penalty as a matter of law. *Id.* “In cases of doubt, the courts favor the construction [of a contract] which holds the stipulated sum to be a penalty, and limits the recovery to the amount of damage [actually shown], rather than a liquidation of the damages.” (Citation and punctuation omitted.) *Fortune Bridge Co. v. Dept. of Transp.*, 242 Ga. 531, 532, 250 S.E.2d 401 (1978).

With regard to the first factor, West apparently concedes that the actual damages caused by a late payment under the lease would be difficult or impossible to accurately estimate. *See Oami v. Delk Interchange, Ltd., 193 Ga.App. 640, 641–642, 388 S.E.2d 706 (1989).* (In reviewing a late charge in a lease which provided that any overdue rent would bear interest from the due date until paid and that the tenant would pay in addition to interest a service charge of $10 per day, we concluded that the landlord had shown that the injury that would be caused by late payments, that is, having to borrow operating funds at the then-market rate, would be difficult or impossible to accurately estimate “in a market of fluctuating interest rates over a five-year period,” the period of the lease.)

With regard to the second factor, the parties' intent to provide for damages versus a penalty, “we ascertain the intent of the parties by first looking to the language of the contract. Although the words used by the parties are not conclusive, they are a significant factor in determining the parties' intent.” (Citation and punctuation omitted.) *JR Real Estate Dev., LLC v. Cheeley Inv., L.P.*, 309 Ga.App. 250, 253(2)(b), 709 S.E.2d 577 (2011). In this case, we conclude from the words used by the parties that they could have intended Paragraph 27 either as liquidated damages or as a penalty. Because West is appealing the denial of its motion for summary judgment, we must construe all reasonable inferences in favor of NW Parkway. *Id.* at 254(2)(b), 709 S.E.2d 577.

As to the third factor, West contends that the late charge, “a one-time” 10 percent charge, cannot be deemed a
reasonable pre-estimate of the probable loss because it is not “adjusted to the length of the tardiness” of the payment. It makes sense that, where a contractual *786 obligation is the payment of money by a specified date, liquidated damages for late payment may reflect the time-value of money. See Oami v. Delk Interchange, Ltd., 193 Ga.App. at 642, 388 S.E.2d 706 (A $10 surcharge for each day of the tenant’s failure to pay rent was “adjusted to the length of tardiness” and was a reasonable pre-estimate of the probable loss.). But liquidated damages may also reflect an anticipated increase to an obligee’s transaction costs. See Krupp Realty Co. v. Joel, 168 Ga.App. 480, 481(1), 309 S.E.2d 641 (1983) (Where a lease provided for a $50 charge as “additional rent” either when a rent check was returned from the lessee’s bank without payment, which would cause the agent/ owner “additional expenses for bookkeeping and clerical services,” or when the rent due on the first of the month was received after the fifth, which would require “additional services” of the agent/ owner, the trial court erred in finding the charge was usurious.).

Based on the foregoing, we conclude that West failed to show that the late charge is a penalty as a matter of law. Accordingly, the trial court did not err in denying West’s **158 motion for partial summary judgment in this regard.

4. Based on this Court’s holding in NW Parkway, LLC v. Lemser, 309 Ga.App. 172, 709 S.E.2d 858, the trial court granted NW Parkway’s motion for summary judgment on its Count 1, as to liability only, concluding as a matter of law that West breached the lease by failing to repair or replace the roofs. West appeals the grant of NW Parkway’s motion. As NW Parkway contends, however, this issue was resolved in the first appeal.

In that decision, we noted that, although the trial court’s declaratory judgment stated that it was not “intended to resolve whether West breached the lease agreement at issue, or what damages, if any, can be recovered for any such breach[,] [n]evertheless, the legal conclusions reached by the trial court affected NW Parkway’s rights to recover under the lease.” NW Parkway, LLC v. Lemser, 309 Ga.App. at 175(1), 709 S.E.2d 858. In that decision, we determined that West was obligated under Special Stipulation 3 of the lease to replace the roof and that West “fail[ed] to comply with the third special stipulation, i.e., fail[ed] to repair the roof[,]” NW Parkway, LLC v. Lemser, 309 Ga.App. at 177(2), 178(3), 709 S.E.2d 858. Because these rulings were binding in all subsequent proceedings in this case in the lower court, see Division 1, supra, the trial court did not err in granting NW Parkway’s motion for summary judgment as to liability on its Count 1.

5. The trial court denied West’s motion for summary judgment on NW Parkway’s Count 3, attorney fees under OCGA § 13–6–11. West appeals the denial of its motion, contending that, before the first appeal, there was a genuine controversy about whether it was *787 obligated under the lease to replace the roof and that its tender of the roof replacement funds into the court registry precludes a claim of bad-faith performance.

An award of attorney fees and other expenses of litigation is authorized pursuant to OCGA § 13–6–11, where (1) the plaintiff specially pleads and prays for such an award, and (2) the finder of fact finds that the defendant acted in bad faith in the underlying transaction or that, after the transaction on which the cause of action is predicated, the defendant was stubbornly litigious or caused the plaintiff unnecessary trouble and expense. “Questions concerning bad faith under this statute are generally for the jury to decide, and the trial court may grant judgment as a matter of law on such issues only in the rare case where there is absolutely no evidence to support the award of expenses of litigation.” (Citation and punctuation omitted.) Georgia Dermatologic Surgery Centers, P.C. v. Pharis, 323 Ga.App. 181, 184(3), 746 S.E.2d 678 (2013). See Hewitt Assoc., LLC v. Rollins, Inc., 308 Ga.App. 848, 853(3), 708 S.E.2d 697 (2011) (accord).

This is not such a rare case where there is absolutely no evidence to support the award of expenses of litigation. For example, however willing West might have become later in the litigation to pay the amount for the roof replacement into the registry of the court, a jury could find that West acted in bad faith when it asserted that it was NW Parkway’s sole responsibility to replace the roof while at the same time denying NW Parkway access to the property to do so until NW Parkway obtained a TRO. The trial court did not err in denying West’s motion for partial summary judgment as to NW Parkway’s Count 3.

6. The trial court denied NW Parkway's motion for summary judgment on West's Count 1, fraud and deception. Specifically, West alleged that NW Parkway drafted the lease to include an acknowledgment by the original lessee, Worldwide, that the premises were in good order and repair at the beginning of the lease with knowledge that the roofs were in fact not in good repair and with the intention that West rely on the representation in agreeing to assume the role of tenant as part of its acquisition of Worldwide. NW Parkway appeals the denial of its motion. Under the circumstances presented here, we conclude that the trial court erred in denying NW Parkway's motion for partial summary judgment on West's fraud claim.

Under Georgia law,

> [t]he five elements of a fraud claim are: (1) false representation made by defendant; (2) scienter; (3) intention to induce plaintiff to act or refrain from acting in reliance by plaintiff; (4) justifiable reliance by plaintiff; and (5) damage to plaintiff.... [A] plaintiff asserting a fraud claim must show not only that [it] relied on some misrepresentation, but also that [its] reliance was reasonable.

(Citations and punctuation omitted.) Alvear v. Sandy Springs Toyota, Inc., 332 Ga.App. 798, 800–801(1), 775 S.E.2d 172 (2015). See also OCGA § 51–6–2(a) (“Willful misrepresentation of a material fact, made to induce another to act, upon which such person acts to his injury, will give him a right of action. Mere concealment of a material fact, unless done in such a manner as to deceive and mislead, will not support an action.”).

Concealment of material facts may amount to fraud when ... the concealment is of intrinsic qualities of the article [at issue] which the other party, by the exercise of ordinary prudence and caution, could not discover; and misrepresentation may be perpetuated by acts as well as words, and by artifices designed to mislead.

According to West's own characterization of the facts, “[t]he lease at issue in this lawsuit was not negotiated in an arms-length transaction” between NW Parkway and Worldwide. According to the West executive who led West's due diligence process relating to the acquisition of Worldwide, Frank Hanna was “ultimately” the owner of both NW Parkway, the lessor, and (along with Tye Hanna) Worldwide, the original lessee. In 2004, when Worldwide executed the lease at issue in this case, it had already been occupying the property for two years. West's executive deposed that,

> [b]ecause Worldwide was conducting its business operations in the Building. West had no reason to suspect that any defective conditions existed in the Building. West conducted its regular due diligence related to the transaction, but ... never toured the facility during a rainfall to determine whether the roof had leaking issues.

But Worldwide's facilities manager, who continued in that role after West acquired Worldwide, deposed that “[p]rior to the acquisition of Worldwide in 2004, Worldwide's leadership was aware of the significant problems affecting the low roof of the Building.” Specifically, part of the roof was replaced in July 2002, and there were a number of leaks, some “significant,” in 2002 and 2003, requiring multiple repairs.

> [20] [21] Although, as the trial court noted, reasonable reliance and due diligence are ordinarily questions for the jury, ... “[t]he law does not afford relief to one who suffers by not using the ordinary means of information, whether the neglect is due to indifference or credulity.” (Citations and punctuation omitted.) Miller v. Clabby, 178 Ga.App. 821, 823, 344 S.E.2d 751 (1986). When the means of knowledge are at hand and equally available to both parties, such as inspection of real property to be purchased, if one party does not avail itself of the means of discovery, it will not be heard to say later that it was deceived by the other party's representations or lack thereof. Id. Where a sophisticated company is in the process of acquiring another company and assuming
that company's obligations under a 20–year triple-net lease; under the lease the acquiring company will be responsible for maintenance and almost all other expenses of the subject property; the acquiring company knows that the lease was not negotiated in an arms-length transaction; and, the lease includes an acknowledgment that the property is in good repair, certainly under such circumstances the company is on notice of the need to exercise a significant degree of diligence in inspecting the premises. NW Parkway's executive deposed that West had the opportunity to inspect the property and has identified evidence that roof problems were known to West's employees before the execution of the lease. In rebuttal, West has not identified any evidence that NW Parkway prevented it from conducting any inspection it desired, nor any evidence that it would not have discovered the condition of the roof by inspecting them.

Given these facts, we conclude that the trial court erred in denying NW Parkway's motion for partial summary judgment on West's Count 1. Fowler v. Overby, 223 Ga.App. 803, 805–806(1), 478 S.E.2d 919 (1996) (The seller of a parcel of real property was entitled to judgment on the buyer's fraud claim on the basis that the buyer failed as matter of law to exercise due diligence to discover that the property had been used as a dump; after observing some trash strewn on a portion of the property, the buyer “was certainly put on notice of the possibility” that there was other debris on the rest of the property. “Due diligence in such a case would require a closer inspection than she made of the property,” and there was no evidence that she was prevented from inspecting property prior to purchase.) (citations*omitted); Ben Farmer Realty Co. v. Woodard, 212 Ga.App. 74, 77–78, 441 S.E.2d 421 (1994) (The seller of a house was entitled to judgment on the purchaser's fraud claim on the basis that the purchaser failed as matter of law to exercise due diligence to discover fire damage in the attic of the home where she knew the house was in dilapidated condition, she agreed to purchase house in its “as is” condition, such that she was obviously on notice to exercise heightened degree of diligence in inspecting house, the seller did not prevent her from inspecting the attic, and the purchaser failed to inspect the attic.); Mettner Financial, Inc. v. Jenkins, 199 Ga.App. 885, 886, 406 S.E.2d 288 (1991) (A lender could not be held liable in fraud to a buyer of a house for misrepresentations about the condition of the house, where even a cursory visual inspection of property would have revealed the construction deficiencies to the buyer and therefore there could be no justifiable reliance on any misrepresentations.);

[22] 7. The trial court denied NW Parkway's motion for summary judgment on West's Count 4, gross negligence in NW Parkway's selection of a vendor to repair the roofs and in its failure to ensure the roofs were installed properly. NW Parkway appeals the denial of its motion.

[23] [24] “Gross negligence” is defined as the absence of slight diligence, that is,

... that degree of care which every man of common sense, however inattentive he may be, exercises under the same or similar circumstances. As applied to the preservation of property, the term “slight diligence” means that care which every man of common sense, however inattentive he may be, takes of his own property....

OCGA § 51–1–4. In other words, to act with gross negligence is to lack “the diligence that even careless men are accustomed to exercise.” (Citation and punctuation omitted.) Johnson v. Omondi, 294 Ga. 74, 78, 751 S.E.2d 288 (2013). “While questions of gross negligence and slight diligence are usually to be determined by a factfinder, courts may resolve them as matters of law in plain and indisputable cases.” (Citations omitted.)

[25] [26] In this case, West has not identified any evidence that NW Parkway was indifferent to whether the roofing vendor it selected would do a good job or that it otherwise acted without even slight care when choosing the roofing contractor. In addition West has not identified any evidence that NW Parkway acted without even slight care with regard to the quality of work of its chosen contractor. West simply states, “[t]he question of whether NW Parkway was grossly negligent is ... plainly for the jury.” To oppose a motion for summary judgment, more is required than a bald statement that an issue is generally for the jury.12 Accordingly, NW Parkway is entitled to judgment as to West's Count 4, and the trial court erred in denying NW Parkway's motion for partial summary judgment in this regard.

**161 Judgment affirmed in part and reversed in part.
Because our prior opinion does not resolve the issue of West's default, I respectfully dissent in part. In the prior appearance of this case we reversed the trial court's grant of summary judgment in favor of West. The trial court had held as a matter of law that, regardless of the condition of the roofs, West had no duty to replace them. The trial court did not reach, among other things, West's defense or West's contention that the roofs could have been repaired rather than replaced. So we did not reach those issues either—nor could we have. It follows that the language in our earlier opinion to the effect that West's failure to repair the roofs constituted default and barred it from exercising the termination clause is not the law of the case.

Consequently, I concur in Division 2 (affirming the grant of summary judgment to West on NW Parkway's claim for rent after December 2012), Division 3 (affirming the denial of summary judgment to West on NW Parkway's claim for late fees), Division 5 (affirming the denial of summary judgment to West on NW Parkway's claim for OCGA § 13–6–11 attorney fees), Division 6 (reversing the denial of summary judgment to NW Parkway on West's fraud claim) and Division 7 (reversing the denial of summary judgment to NW Parkway on West's gross negligence claim). But I respectfully dissent from Division 1 (reversing the denial of summary judgment to NW Parkway on its claim for breach and anticipatory breach of the lease) and Division 4 (affirming the grant of summary judgment to NW Parkway on its claim for roof-related expenses).

1. **Law of the case.**

Because there has been an earlier appeal in this case, *NW Parkway, LLC v. Lemser*, 309 Ga.App. 172, 709 S.E.2d 858 (2011), our analysis begins with the law of the case rule. See OCGA § 9–11–60(h). *Contrary to the majority, I would hold that it is not applicable. “The ‘law of the case’ has been defined as a controlling legal rule established by a previous decision between the same parties in the same case.” Modern Roofing & Metal Works v. Owen, 174 Ga.App. 875, 875(1), 332 S.E.2d 14 (1985) (citation and punctuation omitted). Accordingly, the law of the case rule applies “only when the same issue has been actually litigated and decided.” State v. Mizell, 288 Ga. 474, 478(3), 705 S.E.2d 154 (2011) (citations omitted).*

West filed the motion for summary judgment that we reviewed in the first appearance of this case, *NW Parkway*, 309 Ga.App. at 172, 709 S.E.2d 858. It sought summary judgment on its counterclaim for a declaratory judgment seeking the resolution of “questions of law” regarding the terms of the lease. To the extent that it turned on interpretation of the lease, the matter was a question of law, not fact. See OCGA § 13–2–1 (“The construction of a contract is a question of law for the court.”); *Roswell Festival, L.L.L.P. v. Athens Intl.*, 259 Ga.App. 445, 447(1), 576 S.E.2d 908 (2003) (“The construction of the provisions of a lease, as with other written contracts, is generally a matter of law for the trial court to determine.”).

In September 2009, the trial court granted West's motion, finding that under the lease, West had no obligation to replace the roofs, and that even if West did have such an obligation, NW Parkway waived its rights under the lease by accepting subsequent rent payments from West. *NW Parkway*, 309 Ga.App. at 174–175, 709 S.E.2d 858. But as the trial court acknowledged in the ruling now before us, that September 2009 order “did not adjudicate any facts concerning necessity of replacement....” We reversed that 2009 opinion, holding that the trial court erred in both rulings. Our opinion makes clear that we were considering questions of law. We wrote, as to interpretation of the lease, “NW Parkway argues that the trial court erred by ruling that West, as a matter of law, had no obligation to repair the property's roof.” *NW Parkway*, 309 Ga.App. at 175(2), 709 S.E.2d 858 (emphasis supplied). And on the waiver issue, we wrote that ordinarily, the question of waiver is for jury resolution, but not in the matter before us. Id. at 178(3), 709 S.E.2d 858. Instead, we held that, as a matter of law, NW Parkway's acceptance of rent did not waive its right
to reject West's attempt to terminate the lease at the five-year mark. Id. at 177–178(3), 709 S.E.2d 858.

The language by which the majority finds us to be constrained comes near the end of our analysis. Having held that the grant of summary judgment to West on that issue could not be sustained on either of the grounds set out in the trial court's 2009 opinion and viewing the evidence in the light most favorable to NW Parkway as the nonmovant, we went on to write that West's “failure to repair the *793 roof[ ] constituted [a] default” that would prevent it from timely complying with the early termination clause. *NW Parkway*, 309 Ga.App. at 178(3), 709 S.E.2d 858. Read in light of the scope of the issues properly before us, that language is correctly understood to mean that the lease *could still* be in effect and that NW Parkway's acceptance of rent was not inconsistent with its intent to insist on West's compliance with the conditions precedent for early termination.

The opinion contained no analysis of whether genuine issues of material fact existed on the issue of default. That issue was not before us. “[A] review of the actual holding reveals that the ... court never resolved the issue whether” West was in default. *Hicks v. McGee*, 289 Ga. 573, 578(2), 713 S.E.2d 841 (2011). Consequently, the law of the case rule does not apply to resolve the issue of whether West was in default. Compare *Choate Constr. Co. v. Auto–Owners Ins. Co.*, 335 Ga.App. 331, 779 S.E.2d 465 (2015) (prior appellate holding regarding existence of genuine issues of material fact, which precluded summary judgment to one party, was law of the case in subsequent appeal of denial of summary judgment to another party).

I therefore turn to the trial court's grant of summary judgment to NW Parkway on its claim for roof-related expenses, the ruling at issue in the majority's Division 4, and to the trial court's denial of both parties' motions for summary judgment on NW Parkway's claim for breach and anticipatory breach of the lease, the ruling at issue in the majority's Division 1.

2. Roof-related expenses.

In its Division 4, the majority affirms the trial court's grant of summary judgment to NW Parkway as to liability on its claim for roof-related expenses. The majority holds that the issue of whether West breached the lease by failing to repair or replace the roofs was resolved in the first appeal.

As detailed above, our prior opinion did not resolve the issue of whether West breached the lease. It simply held that, under the terms of the lease, West was obligated—when necessary—to repair and replace the roof. And in the opinion now before us, the trial court acknowledged that questions of fact remained as to “whether, and to what extent the two roofs could have been repaired rather than replaced or ... whether the lower roof was defectively constructed or would have lasted to the conclusion of West's tenancy.” Accordingly, I would reverse the trial court's grant of summary judgment on this issue.


The trial court denied the parties' cross-motions for summary judgment on NW Parkway's claim for breach and anticipatory breach *794 of the lease, identifying disputed issues of material fact. In Division 1, the majority accurately summarizes the fact issues identified in the trial court's ruling.

[That] ruling was supported by the court's determination that material questions of fact remain regarding whether West satisfied the conditions for terminating the lease at the end of the first five-year interval. In particular, the trial court determined that there is a jury question regarding West's tender defense, that is, that West's tender of the roof-related expenses, by moving to deposit $384,226 into the **163 registry of the court, was sufficient to defeat NW Parkway's claim that West breached the lease by failing to replace the roof. An alternative basis for the denial of summary judgment on NW Parkway's Count 2 as the court's determination that material questions of fact remain regarding whether a surrender took place as of January 2010, that is, whether NW Parkway took actions incompatible with the continued existence of West's leasehold after that date.
Maj. op. pp. 781–81, 784 S.E.2d at 154. Notwithstanding all of that, the majority finds us constrained to reverse by the language of our prior opinion. I would affirm. Whether West breached its obligation to repair or replace the roof is a question of fact. And as detailed above, that language is not the law of the case and we are not bound by it. Even if West breached the lease, whether its tender was sufficient to cure the breach, prevent default, and allow it to invoke its right to early termination depends—as the trial court held—on disputed questions of fact.

I am authorized to state that Presiding Judge BARNES joins me in concurring in part and dissenting in part.

All Citations

336 Ga.App. 775, 784 S.E.2d 147

Footnotes

1 See Black's Law Dictionary (10th ed. 2014) (A “triple net lease” or “net-net-net lease” is one “in which the lessee pays all the expenses, including mortgage interest and amortization, leaving the lessor with an amount free of all claims.”).

2 The trial court's ruling discussed in Division 2, infra, limits NW Parkway's claim for rents to the period January 2010 through December 2012, when NW Parkway sold the property.

3 See Circle K Stores, Inc. v. T.O.H. Assocs., Ltd., 318 Ga.App. 753, 756(2), 734 S.E.2d 752 (2012) (“A surrender of a lease by operation of law may arise from any condition of facts voluntarily assumed by the parties and incompatible with the continued existence of the relation of landlord and tenant between them. Where a landlord exercises a control over the premises inconsistent with the tenant's right of occupation, he thereby discharges the tenant from liability for future rent, and a cancellation or rescission of the contract is thus effected by agreement of the parties, express or implied.”) (footnote and footnotes omitted).

4 See Circle K Stores, Inc. v. T.O.H. Assocs., Ltd., 318 Ga.App. at 757(2), 734 S.E.2d 752 (“To show a surrender, a mutual agreement between lessor and lessee that the lease is terminated must be clearly proved.”) (footnote omitted); Sirdah v. N. Springs Assocs., 304 Ga.App. 348, 351(1), 696 S.E.2d 391 (2010) (“The mere taking of the keys to the leased premises by a landlord does not give rise to an inference that the landlord accepted surrender of the premises. Likewise, the mere entry upon the premises to protect the property after abandonment by the lessee will not amount to an acceptance of a surrender of a lease.”) (citations and punctuation omitted); Erfani v. Bishop, 251 Ga.App. 20, 22(1)(c), 553 S.E.2d 326 (2001) (accord); Lawson v. Crawford, 220 Ga.App. 447, 448, 469 S.E.2d 507 (1996) (Where a tenant abandons leased premises without the consent of the landlord, “the landlord has the option of (1) terminating the lease, (2) obtaining another tenant while holding the original tenant liable for any deficiency that may occur, or (3) permitting the premises to remain vacant while collecting the agreed-upon rent from the original tenant.... A surrender of premises by a lessee has no legal effect until accepted by the lessor.”) (citation and punctuation omitted).

5 Cf. Savannah Yacht Corp. v. Thunderbolt Marine, Inc., 297 Ga.App. 104, 111(2), 676 S.E.2d 728 (2009) (where lessor forced lessee's subtenant in possession to vacate the property, occupied the property itself, and began operating its own marina and yacht repair business there, lease was terminated by operation of law).

6 As explained in Division 2, infra, the record does establish that the landlord-tenant relationship ended when NW Parkway sold the property in December 2012.

7 See OCGA §§ 44–6–102 (“The grant by one person to another of an estate for years out of his own estate, with reversion to himself, is usually termed a lease.”); 44–7–1(a) (“The relationship of landlord and tenant is created when the owner of real estate grants to another person, who accepts such grant, the right simply to possess and enjoy the use of such real estate either for a fixed time or at the will of the grantor.”); Sharpe v. Mathews, 123 Ga. 794, 797–798(2), 51 S.E. 706 (1905) (The relation of landlord and tenant arises when a party occupies the land or premises of another in subordination to the other's title and with his assent, express or implied.).

8 NW Parkway's reliance on American Med. Transport Group v. Glo–An, Inc. 235 Ga.App. 464, 466(1), 509 S.E.2d 738 (1998), is misplaced. In that case, a lease provided that in event of default, the landlord could evict the tenant and the tenant agreed to pay any damage the landlord might suffer by reason of the termination of the tenant's possession, such as by inability to relet the premises on satisfactory terms, and provided that the tenant would pay the specified rent “without deduction or set off, for the entire term [of the lease].” We held that the lease terms expressed the parties' intention to hold the tenant responsible for after-accrued rent even should an eviction take place, and, therefore, the landlord was entitled to summary judgment for rent for the lease term remaining after the tenant abandoned the premises without the landlord's consent and the landlord was unable to relet the premises. In contrast to this case, there was no
evidence that the landlord ever repudiated the continuation of the leasehold by selling the property and disclaiming the existence of any lease.

At trial the burden is on a defaulting party to show that an alleged liquidated damages provision is actually an unenforceable penalty. Id. In addition, we note that “trial courts should not ordinarily submit the issue of whether a contract provides for liquidated damages or a penalty to the jury. This issue should be decided as a matter of law, unless after applying the usual rules of contract construction, an ambiguity remains warranting submitting a factual issue to the jury.” (Citations omitted.) Roswell Properties, Inc. v. Salle, 208 Ga.App. 202, 205(2)(c), 430 S.E.2d 404 (1993), disapproved of on other grounds by Golden Peanut Co. v. Bass, 249 Ga.App. 224, 234(2), 547 S.E.2d 637 (2001).


Where a respondent who will not bear the burden of proof at trial moves for summary judgment and “point[s] out by reference to the evidence in the record that there is an absence of evidence to support any essential element of the [claimant’s] case[,]” the claimant “cannot rest on its pleadings, but rather must point to specific evidence giving rise to a triable issue.” (Citations and punctuation omitted.) Cowart v. Widener, 287 Ga. at 623–624(1)(a), 697 S.E.2d 779.
Synopsis

Background: Company brought action as successor in interest against individuals who were alleged personal guarantors of commercial lease agreement seeking to recover outstanding balance on agreement. The State Court, Gwinnett County, Brown, J., entered summary judgment in favor of company. Individuals appealed.

Holdings: The Court of Appeals, Miller, J., held that:

[1] company failed to lay proper foundation for admission of lease and guaranty as business records in its assistant general counsel's initial affidavit in support of company's summary judgment motion;

[2] company laid proper foundation for admission of records in counsel's second affidavit attached to company's reply brief in support of motion;

[3] trial court did not err in considering second affidavit even though it was not served with motion; and

[4] company was entitled to enforce guaranty.

Affirmed.

Attorneys and Law Firms

**587 Robert Carroll Newcomer, for Appellants.

Stanley, Esrey & Buckley, Marlie Anne McDonnell, Atlanta, for Appellee.

Opinion

MILLER, Judge.

*847 DDR Southeast Springfield, LLC (“DDR”), as successor-in-interest, filed suit to recover the outstanding balance on a lease **588 agreement executed by Triple T–Bar, LLC, and guaranteed by Todd and Barbara Blackwell. After the trial court entered a consent judgment against Triple T–Bar, DDR moved for summary judgment on the ground that the Blackwells were personally liable under the guaranty. The trial court granted DDR's motion, and the Blackwells appeal, contending that the trial court erred in granting DDR's motion for summary judgment because DDR failed to establish that the lease agreement and guaranty were admissible business records and there were questions of fact as to whether the guaranty was enforceable. For the reasons set forth below, we affirm.

“Summary judgment is proper when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. We review the grant of summary judgment de novo, construing the evidence in favor of the nonmovant.” (Citation and punctuation omitted.) Angel Business Catalysts, LLC v. Bank of the Ozarks, 316 Ga.App. 253, 254, 728 S.E.2d 854 (2012).

So viewed, the evidence shows that in November 2006, Triple T–Bar entered into an agreement with Inland Southeast Springfield, LLC (“Inland”), to lease a commercial property in Lawrenceville until February 2012. The lease was signed by both Blackwells as representatives of Triple T–Bar, the Blackwells were identified in the lease as the guarantors, and the Blackwells' personal guaranty was attached to the lease and incorporated therein by reference. The guaranty cross-referenced the lease agreement, again identified the Blackwells as the guarantors, and also identified Inland as the landlord and Triple T–Bar as the tenant. In February 2007, DDR acquired Inland and became the landlord of the property.

In April 2007, Triple T–Bar's rent payment check was returned for insufficient funds. Triple T–Bar then failed to pay rent for the months of April 2008 and September 2008, and it made its last rent payment in October 2008. In February 2009, Triple T–Bar closed its business operations and vacated the premises without DDR's
The Blackwells contend that the trial court erred in granting summary judgment to DDR because DDR did not lay a foundation to admit the lease and the guaranty into evidence. We discern no error.

Under OCGA § 24–8–803, business records may be admissible as an exception to the hearsay rule. The statute provides that

a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, if (A) made at or near the time of the described acts, events, conditions, opinions, or diagnoses; (B) made by, or from information transmitted by, a person with personal knowledge and a business duty to report; (C) kept in the course of a regularly conducted business activity; and (D) it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness.

Shall not be excluded by the hearsay rule. OCGA § 24–8–803(6).

In support of its summary judgment motion filed on May 24, 2013, DDR submitted the affidavit of its assistant general counsel and attached to the affidavit the lease agreement and the guaranty. In her affidavit, the assistant general counsel offered no testimony establishing her familiarity with DDR's method of keeping business records, her personal knowledge about any of the transactions, or that the lease and guaranty were made in the regular course of business. As a result, DDR's assistant general counsel failed to lay a proper foundation in her initial affidavit to admit the lease and the guaranty as business records. See, e.g., Nalley Northside Chevrolet v. Herring, 215 Ga.App. 185, 186–187(3), 450 S.E.2d 452 (1994) (records attached to affidavit should not have been admitted as business records where affiant offered no testimony establishing his knowledge with the business's method of keeping records or about the transactions, and provided no facts showing that the entries were made in the regular course of business).

Nevertheless, in a reply brief in support of its motion for summary judgment, DDR attached a second affidavit from its assistant general counsel that cured the defects in her initial affidavit. Notably, in her second affidavit, the assistant general counsel averred that she was familiar with DDR's record keeping, lease files were maintained in DDR's regular course of business, and DDR acquired the lease agreement in this case after merging with Inland. “[E]mployees of successor entities can authenticate business records of their predecessor entities that pass to them by virtue of merger.” (Citation and punctuation omitted.) Ware v. Multibank 2009–1 RES–ADC Venture, LLC, 327 Ga.App. 245, 249(2), 758 S.E.2d 145 (2014); see also Angel Business Catalysts, supra, 316 Ga.App. at 255–256(1), 728 S.E.2d 854 (holding that, when “routine, factual documents made by one business are transmitted and delivered to a second business and there entered in the regular course of business of the receiving business, such documents are admissible” as business records). This second affidavit was sufficient to lay a foundation. Therefore, the lease agreement and attached guaranty were properly admitted as business records.

The Blackwells argue that the trial court should not have considered the second affidavit because it was not timely filed.

In this case, neither party requested a hearing on
DDR's motion for summary judgment and no hearing was held. Consequently, the 30-day statutory period for filing the affidavit did not apply. See Shropshire v. Alostar Bank of Commerce, 314 Ga.App. 310, 313(2)(a), 724 S.E.2d 33 (2012).

Nevertheless, the requirement under OCGA § 9–11–6(d) that an affidavit supporting a motion be served contemporaneously with the motion “is to ensure that the other side has adequate notice of and opportunity to respond to such evidence.” (Citation and punctuation omitted.) Alcatraz Media v. Yahoo! Inc., 290 Ga.App. 882, 884–885(1)(b), 660 S.E.2d 797 (2008). However, “[t]rial courts may consider affidavits which are not filed or served within the time limits contemplated by the statutes, and it is not necessary to note the exercise of discretion on the record.” (Citations and footnotes omitted.) Kropp v. Roberts, 246 Ga.App. 497, 499, 540 S.E.2d 680 (2000).

Here, DDR submitted its second affidavit on July 29, 2013, and the trial court entered its summary judgment order on March 25, 2014. It is apparent that in granting summary judgment to DDR, the trial court considered the second affidavit because it stated that it had the briefs of the parties, all other pleadings in the case, and the record before it. Since DDR submitted the second affidavit almost eight months before the entry of the summary judgment order, the Blackwells were not surprised by its filing. In the absence of evidence *850 in the record to the contrary, we must presume the trial court acted correctly. See Shropshire, supra, 314 Ga.App. at 314(2)(a), 724 S.E.2d 33. Therefore, no error has been shown by the trial court’s consideration of the second affidavit.

The Blackwells also contend that the trial court erred in granting summary judgment to DDR because the guaranty is incomplete and the Blackwells did not intend to be personally liable for the lease. The Blackwells' claim has no merit.

“Under Georgia’s Statute of Frauds, a personal guaranty of a debt is not enforceable unless it is in writing, is signed by the party being charged as the guarantor, and identifies the debt, the principal debtor, the promisor, and the promisee.” (Citations omitted.) Lafarge Bldg. Materials, Inc. v. **590 Thompson, 295 Ga. 637, 639(2), 763 S.E.2d 444 (2014); see also OCGA § 13–5–30(2) (“A promise to answer for the debt, default, or miscarriage of another” is not binding on the promisor unless it is in writing and signed by the promisor.).

Here, the lease and guaranty both identify the Blackwells as the guarantors; the guaranty was incorporated into the lease; and the guaranty provided that it served as an inducement for Inland to enter into the lease, as Inland would not have entered into the lease with Triple T–Bar had the Blackwells not executed the guaranty. The guaranty also provided that the Blackwells absolutely, unconditionally, and irrevocably guarantees to [Inland] ... the full and punctual performance and observance by [Triple T–Bar] of all the terms, conditions, covenants, and obligations to be performed and observed by [Triple T–Bar] under the Lease ... including, without limitation, the payment as and when due, whether by acceleration or otherwise, of all Minimum Rent and Additional Rent (both as defined in the Lease) and any other sums payable by [Triple T–Bar] under the Lease[.]

The guaranty further provided that it was a continuing obligation that could not be impaired, diminished, or terminated for any reason.

The Blackwells' argument that the guaranty is unenforceable because it was not dated is meritless because the guaranty provided that it was executed contemporaneously with the lease, which was signed on November 8, 2006. The Blackwells further argue that the guaranty is not enforceable because they did not initial every page and the document was not notarized, but they point to no authority holding that these omissions render the guaranty unenforceable. The Blackwells' signatures are plainly on the guaranty and the signatures are not alleged to be forged. Therefore, the Blackwells *851 are charged with knowledge of and are bound by the terms of the guaranty. See Megel v. Donaldson, 288 Ga.App. 510, 516(5), 654 S.E.2d 656 (2007).

Given that the guaranty was in writing, it identified all of the essential parties and obligations, and the Blackwells signed the guaranty, there is no question of fact that DDR, as the successor-in-interest to the promisee, was
entitled to enforce the guaranty and hold the Blackwells personally liable for Triple T–Bar's debt. See C.L.D.F. Inc. v. Aramore LLC, 290 Ga.App. 271, 273–274(1), 659 S.E.2d 695 (2008) (concluding that the guaranty contemporaneously executed and incorporated into lease was enforceable). Accordingly, the trial court properly granted summary judgment to DDR.

Footnotes
1 The judgment against Triple T–Bar is not challenged.

No. A14A1429.
Nov. 21, 2014.

Synopsis
Background: Commercial lessee brought action against lessor alleging breach of lease. The Superior Court, Fulton County, Campbell, J., granted partial summary judgment in favor of lessee. Lessor appealed.

Holdings: The Court of Appeals, Andrews, P.J., held that:

[1] dismissal of dispossessory action did not bar, due to res judicata, subsequent breach of lease action;

[2] letter agreement between lessor and lessee did not constitute waiver or release of breach of lease action;

[3] genuine issue of material fact existed regarding whether lessor unreasonably withheld consent to assign lease; and


Affirmed in part and reversed in part.

Attorneys and Law Firms

**532** Parker, Hudson, Rainer & Dobbs, Peter Frank Busscher, Eric Jon Taylor, Atlanta, Steven Craig Rosen, for Appellants.

Bloom Sugarman Everett, Simon Howard Bloom, Stephanie A. Everett, Atlanta, for Appellees.

Opinion

ANDREWS, Presiding Judge.

*289* Watershed, Inc. entered into a commercial lease agreement with WPD Center, LLC, to operate a restaurant on premises owned by WPD. Watershed sued WPD for breach of the lease, and WPD answered and counterclaimed asserting that Watershed breached **533** the lease. WPD appeals from the trial court's order granting partial summary judgment in favor of Watershed and denying WPD's motion for summary judgment.

[1] To prevail on a motion for summary judgment, “the moving party must demonstrate that there is no genuine issue of material fact and that the undisputed facts, viewed in the light most favorable to the nonmoving party, warrant judgment as a matter of law.” Lau's Corp. v. Haskins, 261 Ga. 491, 491, 405 S.E.2d 474 (1991); OCGA § 9–11–56. The moving party on summary judgment may carry this burden by affirmatively presenting evidence which negates an essential element of the nonmoving party's claim, or by demonstrating the absence of evidence to support an essential element of the nonmoving party's claim. Lau's Corp., 261 Ga. at 491, 405 S.E.2d 474. Applying these principles to WPD's claims, we affirm in part and reverse in part.

1. WPD claims that the trial court erred by denying its motion for summary judgment on all ten counts of Watershed's complaint on the basis of defenses asserting that Watershed's suit for breach of the lease was barred by the doctrine of res judicata, or, in the alternative, by an agreement between the parties.

[2] [3] [4] [5] (a) It is undisputed that, prior to the present suit (filed in Fulton County Superior Court), WPD filed a dispossessory proceeding against Watershed in the Magistrate Court of DeKalb County; that Watershed filed counterclaims against WPD in the dispossessory seeking damages in excess of the $15,000 jurisdictional limit of the magistrate court; and that, when the dispossessory was dismissed, the counterclaims were dismissed with prejudice.

The doctrine of res judicata prevents the re-litigation of all claims which have already been adjudicated, or which could have been adjudicated, between identical parties or their privies in identical causes of action. Before res judicata applies, three
prerequisites must be satisfied—(1) identity of the cause of action, (2) identity of the parties or their privies, and (3) previous adjudication on the merits by a court of competent jurisdiction.

_setlock v. setlock_, 286 ga. 384, 385, 688 s.e.2d 346 (2010). for purposes of res judicata, a voluntary dismissal with prejudice operates as an adjudication on the merits. _fowler v. vineyard_, 261 ga. 454, 456, 405 s.e.2d 678 (1991). watershed concedes that, based on the counterclaims it filed in the prior dispossessory action, there is identity of the cause of action and the parties with respect to its present claims against wpd, and that the only issue is whether adjudication on the merits occurred in a court of competent jurisdiction.

Each magistrate court and each magistrate thereof shall have jurisdiction and power over ... [t]he trial of civil claims ... in which exclusive jurisdiction is not vested in the superior court and the amount demanded or the value of the property claimed does not exceed $15,000.00 ... [and] [t]he ... issuance of writs and judgments in dispossessory proceedings.

Ocga § 15–10–2(5), (6); _setlock_, 286 ga. at 385, 688 s.e.2d 346. “[a]lthough the magistrate court had jurisdiction over [wpd’s] dispossessory action, it did not have jurisdiction to render a binding judgment on [watershed’s] counterclaims ... which sought money damages that exceeded the $15,000 jurisdictional limit of the magistrate court.” _setlock_, 286 ga. at 385, 688 s.e.2d 346 because the magistrate court was not a court of competent jurisdiction to resolve those claims on the merits, the trial court correctly ruled that the doctrine of res judicata did not bar Watershed from reasserting the same claims in the present suit, and correctly denied WPD's motion for summary judgment on this ground. Id. at 386, 688 s.e.2d 346; Ocga § 9–11–56.

(b) The trial court also rejected WPD's claim that there was an agreement between the parties in conjunction with dismissal of the dispossessory action that resolved the dispute and barred Watershed's present claims. The record shows that the parties signed a letter agreement recognizing that the dispossessory action and the counterclaims in the magistrate court were being dismissed, and further stating that “[t]he parties hereby further agree that all obligations owed and to be owed by any party under the lease are hereby reaffirmed.” The trial court found the plain meaning of the letter (which contained no waiver or release language) was that the parties were reaffirming the enforceability of the lease, and that there was no settlement of the present claims based on the lease. In fact, WPD conceded in the trial court that the letter was an agreement between the parties “to reaffirm their obligations under the lease.” although the trial court ultimately based its ruling on other grounds, under the right for any reason rule, we affirm the trial court's denial of WPD's motion for summary judgment on this claim. _city of gainesville v. dodd_, 275 ga. 834, 573 S.e.2d 369 (2002); Ocga § 9–11–56.

(c) WPD also contends that it was entitled to summary judgment because the record shows that, when the parties dismissed the dispossessory action and counterclaims, the parties filed a “joint stipulation of dismissal” in the magistrate court. Because this claim was not asserted by WPD in the trial court as a basis for summary judgment, and was not ruled on by the trial court, it presents nothing for appellate review. _calhoun ga ng, LLC v. century bank of ga_, 320 ga.App. 472, 477, 740 s.e.2d 210 (2013).

2. WPD claims that the trial court erred by granting summary judgment in favor of Watershed on its claim that WPD breached the lease agreement by refusing to consent to a sublease of the premises requested by Watershed.

The lease contains a provision that states: “it is agreed that [watershed] may have the right to sub-lease the premises in part or in its entirety provided [wpd] is given prior written notice and [watershed] receives [wpd’s] approval (which will not unreasonably be withheld and shall be subject to the criteria set forth in paragraph 15.02).” paragraph 15.02 of the lease sets forth criteria for WPD to consider when evaluating whether or not to approve a proposed sublease, including the type of business the subtenant proposes to operate, its reputation and expertise, and adequate assurance of the subtenant's financial condition, stability, and ability to pay the rent.

[a] lease clause providing that a lessor cannot unreasonably withhold consent to assign the lease is a covenant upon the landlord ...
Under such a clause, the term “reasonable” cannot comprehend arbitrary or capricious reasons, or merely personal preferences ... [it] the term refers to considerations of fairness and commercial reasonableness. Although the question of reasonableness and unreasonableness is most often a jury issue, in plain and palpable cases the determination may be made by the court.


We find that the facts in this case present a jury issue as to whether or not WPD unreasonably withheld consent to the proposed sublease. The record shows WPD found that the proposed subtenant was financially capable and otherwise acceptable as a subtenant. But we find the record does not support the trial court's conclusion that WPD simply rejected the proposed subtenant (despite being acceptable under the criteria set forth in paragraph 15.02 of the lease) and that WPD acted unreasonably as a matter of law. The record contains evidence which could support a finding by a jury that, during negotiations with WPD, the proposed subtenant conditioned its willingness to sublease for Watershed's remaining term on WPD's willingness to extend the lease term or agree to a new lease term. Under these circumstances, **535 whether or not WPD acted unreasonably in breach of the lease was a jury issue.

Moreover, there is no evidence in the record that Watershed provided WPD with written notice of the proposed subtenant in accordance with the formal notice provisions of the lease, although there is evidence Watershed provided informal written notice, and that WPD met with the proposed subtenant. The lease contained a provision requiring that Watershed give written notice to WPD of a claimed breach in order to give WPD 30 days to perform before being deemed in default of the lease. There is no evidence that Watershed complied with this notice provision with respect to its claim that WPD breached the lease by unreasonably withholding consent to the proposed sublease. The trial court ruled, as a matter of law, that WPD waived these notice provisions by its actions. But the lease also provided that “no waiver by [WPD] of any provision of this Lease shall be deemed to have been made unless expressed in writing and signed by [WPD],” and there is no evidence that WPD made a written waiver. Although a contractual provision against waiver may itself be waived by conduct of the parties, we find the trial court erred by ruling as a matter of law that WPD waived the provisions regarding notice. See Smith v. General Finance Corp. of Ga., 243 Ga. 500, 501, 255 S.E.2d 14 (1979); Radha Krishna, Inc. v. Desai, 301 Ga.App. 638, 641, 689 S.E.2d 78 (2009). Whether under the circumstances WPD waived the notice provisions and the provision against waiver is a jury issue. Id. Accordingly, the trial court erred by granting summary judgment in favor of Watershed on its claim that WPD breached the lease agreement by refusing to consent to the sublease. OCGA § 9–11–56.

*293 3. The trial court correctly granted summary judgment in favor of Watershed on WPD's counterclaim for past due rent under the lease. OCGA § 9–11–56.

The trial court ruled that, because WPD accepted Watershed's surrender of the premises, rent obligations under the lease terminated in May 2012.

A surrender of a lease by operation of law may arise from any condition of facts voluntarily assumed by the parties and incompatible with the continued existence of the relation of landlord and tenant between them. Where a landlord exercises a control over the premises inconsistent with the tenant's right of occupation, he thereby discharges the tenant from liability for future rent, and a cancellation or rescission of the contract is thus effected by agreement of the parties, express or implied.

WPD sent Watershed a written demand for possession of the premises; that Watershed complied with the demand by surrendering possession of the premises to WPD and returning the key; and that WPD took possession and changed the locks. WPD's agent, Beak, testified that WPD understood this to be a surrender of the premises. Under these circumstances, the trial court correctly found as a matter of law that WPD accepted surrender of the premises and discharged Watershed from liability for future rent.

4. WPD contends that the trial court erred by granting summary judgment in favor of Watershed on its claims for attorney fees under the lease.

The lease provides:

In the event [WPD] or [Watershed] shall be in default in the performance of any of its obligations under this Lease, and an action shall be brought for the enforcement thereof in which it shall be finally and no further appeal determined that [WPD] or [Watershed] was in default, the party in default shall pay to the other party all attorney's fees and litigation expenses incurred or paid by it in connection therewith.

The trial court awarded attorney fees pursuant to this provision to Watershed on its claim that WPD defaulted under the lease by unreasonably withholding consent to the proposed sublease. See Division 2, supra. Because we reversed the trial court's grant of summary judgment in favor of Watershed on this claim, the trial court's award of attorney fees on this claim is also reversed.

The trial court also awarded Watershed attorney fees pursuant to the lease provision on the basis that Watershed was granted summary judgment on WPD's counterclaim for unpaid rent. The above-cited lease provision awards attorney fees to the party who successfully brings an action establishing that the other party was in default under the lease. The provision does not award attorney fees to a party for successfully defending against the other party's default claim. The trial court's award of attorney fees to Watershed for successfully defending against WPD's counterclaim is reversed.

Judgment affirmed in part and reversed in part.

McFADDEN and RAY, JJ., concur.

All Citations

330 Ga.App. 289, 765 S.E.2d 531

Footnotes

1 Additional plaintiffs in the suit were Susan B. Owens and Emily Sailers, who personally guaranteed the lease. The plaintiffs (appellees) are collectively referred to as Watershed. In addition to WPD, the suit named as defendant James B. Beak, WPD's agent and property manager. The defendants (appellants) are collectively referred to as WPD.
NAVIGATING A CHAPTER 11 BANKRUPTCY: STRATEGIES FOR REAL ESTATE LAWYERS AND THEIR CLIENTS

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I. Georgia: A Debtor's Colony With An Identity Crisis

Georgia was founded as a debtor's colony in 1733, but it didn't stay that way for long. In the 1800's, the General Assembly increasingly enacted legislation that was creditor-friendly; and Georgia remains a quite creditor-friendly state today. In Florida or South Carolina, it can take months or years to foreclose on real property. Even Alabama, which does allow non-judicial foreclosure, recognizes an equity of redemption. In Georgia, by contrast, a security deed holder can divest title to real property – finally and forever – by advertising in the legal organ for four consecutive weeks and crying a sale the first Tuesday of the following month. Every debtors' bankruptcy lawyer knows not to allow vacation time the week before Foreclosure Tuesday.

Although evictions do require judicial intervention, they too are speedy in Georgia – complaints must be answered in 7 days. And, unlike states such as North Carolina, Georgia judgment creditors have an array of remedies at their disposal, including garnishment. What this all amounts to is that bankruptcy filings are prolific in Georgia. Even the recent economic boom has indirectly driven bankruptcy filings in various ways. For example, the Atlanta commercial lease market hit bottom in 2013 and has taken a steep climb since. Many landlords found themselves sitting on long term leases executed during the Great Recession that were now significantly below market. And thus, because it is so quick and easy to
evict in Georgia, these landlords naturally lie in waiting for any breach by the tenant that would allow them to evict and re-let to a higher paying tenant. Enter Chapter 11, which allows the tenant to stop the eviction process, cure over time and assume the lease over the landlord's objection. See discussion infra.

Finally, while this presentation focuses primarily on corporate bankruptcies, it should be noted that Georgia has "opted out" of the exemption scheme set forth in Section 522 of 11 USC (the "Bankruptcy Code") and provides its own bankruptcy exemptions encoded at OCGA § 44-13-100. Consistent with its creditor friendly statutory scheme, Georgia's exemptions are relatively thin compared to other states' -- such as Florida, Texas, Kansas, Iowa and North Dakota, all of which have unlimited homestead exemptions. The author clerked for a Bankruptcy Judge in the Southern District of Florida, West Palm Beach Division. The federal courthouse in West Palm Beach was situated a stone's throw from the Intercoastal Waterway, on the other side of which was Palm Beach Island. It was relatively common in those days for debtors to file Chapter 7 cases and discharge all their debts, while keeping millions – sometimes tens of millions – of dollars of equity in a Palm Beach mansion. Not so in Georgia, which allows a debtor to exempt $21,500 in a homestead (or $43,000 if the debtor is married) -- up from $5,000 not too many years ago.
II. Bankruptcy Primer for the Real Estate Lawyer

This section will cover some basics of bankruptcy law, many of which the real estate practitioner will be familiar with. The next section will discuss how to build a strategy for your client.

There are six types of bankruptcy cases, each designated by the chapter of the Bankruptcy Code under which the case is filed. The most relevant chapters for commercial real estate practitioners are 7 and 11:

A. Chapter 7 — A Chapter 7 case is a straight liquidation, which can be filed by either a business or a consumer. Once the case is filed, a trustee is appointed from the local standing panel of trustees to administer the case. The trustee becomes the owner of all property of the Debtor, except property allowed as exempt in individual cases.

Generally, claims not secured by property receive little or no distribution. Any distribution on unsecured claims is on a pro rata basis. In individual cases, the Debtor has three choices with respect to collateral pledged to a lender: 1) reaffirm the debt and keep the collateral; 2) redeem the collateral by paying the current value of the collateral in lump sum; 3) surrender the collateral to the lender.

B. Chapter 11 — A Chapter 11 case may be filed by a business, or by an individual whose aggregate secured and/or unsecured debt exceeds the respective
II. Bankruptcy Primer for the Real Estate Lawyer

This section will cover some basic aspects of bankruptcy law, many of which the real estate practitioner will be familiar with. The next section will discuss how to build a strategy for your client.

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B. Chapter 11

A Chapter 11 case may be filed by a business, or by an individual whose aggregate secured and/or unsecured debt exceeds the respective limits for filing a Chapter 13 reorganization — currently $1,184,200.00 secured and $394,725.00 unsecured. A Chapter 11 case may be filed to attempt reorganization of the Debtor's business or to attempt an orderly liquidation. Where the Debtor is a real estate holding company, its principals will often choose Chapter 11 over Chapter 7 so as to retain control of the liquidation process and avoid fees and commissions to which a Chapter 7 trustee would be entitled upon liquidation.

Upon the filing of a Chapter 11 case, the Debtor becomes a "debtor-in-possession" and continues to operate its business through pre-petition management under court supervision, unless and until the court appoints a Chapter 11 trustee for cause. The Debtor may propose a plan of reorganization or liquidation. Creditors vote on the plan and, if confirmed, the plan becomes a new binding contract between the Debtor and its creditors. Creditors with unsecured claims may receive a pro rata distribution. Creditors with secured claims generally receive the value of the collateral paid over time under the plan.

The Debtor may also sell real or personal property free and clear of liens, with liens attaching to sale proceeds in order of priority. This option does not require confirmation of a plan, but merely one or two court hearings on 21 days notice to parties in interest. As a practical matter, sales free and clear of liens are utilized far more often than plans of reorganization and liquidation. Most Chapter
11 cases end up converting to Chapter 7 or being dismissed without confirming a plan.

Another popular exit strategy, which was recently limited by the United States Supreme Court, is the structured dismissal. See *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973 (2017). A structured dismissal allows for the Debtor to exit bankruptcy without confirming a plan, but also allows for the Debtor to maintain some of the protections that it would have had under a plan.

C. The Automatic Stay — The most basic element of bankruptcy is the automatic stay. The automatic stay can be likened to a large wet blanket being thrown on everything that is happening the moment the bankruptcy case is filed. Creditors must immediately cease all collection activities. Collection activities include any action taken to attempt to collect a debt, take possession of property or foreclose on property. Phone calls must cease. Advertisements for foreclosure must cease. Garnishments must be released. Repossessions must be halted. Demand letters must not be sent. The automatic stay applies in all bankruptcy cases, regardless of the Chapter filed. Intentional and knowing violation of the automatic stay can result in significant sanctions including punitive damages. Lenders should consult with bankruptcy counsel before taking any actions that might implicate the automatic stay. Real estate owners must file bankruptcy to invoke the automatic stay before a foreclosure sale is cried.
D. Relief From the Automatic Stay — Creditors may receive relief from the automatic stay upon motion and at least 14 days notice of hearing to parties in interest. The grounds for stay relief are set forth in 11 U.S.C. § 362(d) and include lack of adequate protection of the creditor's interest in property; or the Debtor's lack of equity in property coupled with the property's not being necessary to an effective reorganization. In Chapter 11 cases, any consent order relating to relief from stay, prohibiting or conditioning the use, sale or lease or property, providing adequate protection, etc., must be noticed to parties in interest, who will have 14 days to file objections.

E. Relief From the Automatic Stay in Single Asset Real Estate Cases — Subsection (3) of § 362(d) provides a special rule for "single asset real estate" cases, defined by the Code as real property constituting a single property or project, other than residential real property with fewer than 4 residential units, which generates substantially all of the gross income of a Debtor who is not a family farmer and on which no substantial business is being conducted by a Debtor other than the business of operating the real property and activities incidental thereto. 11 U.S.C. § 101(51B).

Section 362(d)(3) provides that a holder of an interest in single asset real estate shall be granted stay relief unless, within 90 days of the order for relief (or 30 days after the court determines the case is a single asset real estate case,
whichever is later), the Debtor either: (a) files a reorganization plan with a reasonable possibility of being confirmed within a reasonable time; or (b) commences interest payments to the creditor at the then applicable non-default contract rate. Single asset real estate cases have been much more prolific after the 2005 overhaul of the Bankruptcy Code known as the "BAPCA," which modified the definition of single asset real estate by deleting the limitation to cases with no more than $4 million in secured debt. The BAPCA also clarified that the Debtor may make the interest payments under § 362(d)(3) from rents that secure the creditor's claim, without court approval.

F. Sales Free and Clear of Liens — As noted supra, the Bankruptcy Code allows sales of property free and clear of liens, with liens attaching to proceeds of the sale in order of priority. This procedure is frequently employed to sell properties with encumbrances, such as mechanic's and materialman's liens, that would prevent their sale outside the bankruptcy setting. Section 363(f) provides the criteria for sales free and clear of liens, as follows:

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if—

1. applicable nonbankruptcy law permits sale of such property free and clear of such interest;
2. such entity consents;
(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in *bona fide* dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

**G. Leases and Executory Contracts** — One of the significant powers granted to debtors under the Bankruptcy Code is the ability to assume or reject unexpired leases and executory contracts. Unlike a security interest, a lease cannot be modified or "crammed down" in a reorganization plan, but it can be rejected outright (with limited rejection damages) or assumed. If, as per usual, there has been a default in the unexpired lease or executory contract, then the debtor or trustee may not assume it unless, at the time of assumption, the debtor or trustee:

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default other than a default that is a breach of a provision relating to the satisfaction of any provision (other than a penalty rate or penalty provision) relating to a default arising from any failure to perform nonmonetary obligations under an unexpired lease of real property, if it is impossible for the trustee to cure such default by performing nonmonetary acts at and after the time of assumption, except that if such default arises from a failure to operate in accordance with a nonresidential real property lease, then such default shall be cured by performance at and after the time of assumption in accordance with such lease, and pecuniary losses resulting from such default shall be compensated in accordance with the provisions of this paragraph;

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease. 11 USCS § 365 (b)(1).
If a lease is terminated prior to the bankruptcy filing, then it cannot be assumed.

III. Developing a Chapter 11 Strategy for Your Client: What to Ask in the Conference Room

In Georgia, most Chapter 11 cases are filed to stop a foreclosure. In the typical scenario, the Debtor is an LLC and the Debtor's principals – even in larger real estate cases – have signed personal guarantees. If a foreclosure is being advertised and there is equity in the property, then the LLC will need to work out a forbearance agreement or file a Chapter 11 case before the sale is cried. Even if there isn't equity in the property, the guarantors might want the LLC to file Chapter 11 and buy the time to find a purchaser, so as to maximize the proceeds from the property and thereby minimize their exposure on the guarantees. As explained supra, Section 363(f) of the Bankruptcy Code allows a debtor, under certain circumstances, to force a short sale over the objection of secured creditors. Section 363 sales have become the most common "exit strategy" in Chapter 11 – far more common these days than plan confirmation. Indeed, if a property has many junior liens and encumbrances, sophisticated purchasers often will insist that the seller file Chapter 11 so the sale can be consummated under 363(f). There is no "cleaner" way to purchase real property than with an order from a federal court declaring that the property is free and clear of all liens, claims and encumbrances.
There is, however, a *quid pro quo* for the 363(f) mechanism: the sale is open to competing bidders. From the standpoint of the debtor, the bankruptcy estate and the guarantors, this maximizes the value of the property being sold. But, for the "stalking horse" bidder, it presents a risk. It is customary for bankruptcy courts to grant stalking horse bidders break-up fees and overbid protections to minimize risk and compensate expenses incurred in bringing the deal to the table. But, if the stalking horse wants the property at all costs, it must be prepared to bid up if necessary.

When representing a corporate debtor, it is sometimes difficult to draw the line between your client's interests and the interests of the client's principals. This is particularly important when representing a Chapter 11 debtor-in-possession, because the lawyer has fiduciary duties to the bankruptcy estate and its creditors. In the debtor/creditor scenario – and particularly the Chapter 11 scenario – the interests of a corporate debtor and its principals often will conflict. A corporate Chapter 11 filing, for instance, frequently springs lawsuits on the personal guarantees of the debtor's non-filing principals; so, the principals will need to get their own litigation counsel to avoid entry of a judgment on the guarantees until the corporate Chapter 11 debtor has had time to get take-out financing approved or get a sale approved. The last thing a lawyer wants to do is devise a strategy for the corporate debtor that has the unintended effect of throwing its principals under the
bus. Therefore, when advising a client at the initial meeting, it is very important to understand the principals' personal financial pictures and assess the impact on them individually.

For instance, if a lender has advertised for foreclosure on a property that has little or no equity, and the client does not otherwise have a reason to save it, one option would be to forego a Chapter 11 filing and allow the lender to foreclose. Georgia has a statutory confirmation procedure that protects debtors and guarantors from a lender scheming to low-ball a credit bid to create a large deficiency. OCGA § 44-14-161. The confirmation statute was enacted in the Great Depression, and requires the foreclosing creditor to show in a judicial proceeding that it credit-bid the true market value of the property. However, in *HWA Properties, Inc., v. C&S Bank*, 746 S.E. 2d 609 (Ga. App. 2013), the Georgia Court of Appeals held that a guarantor may waive these confirmation protections in the guaranty itself. This is an exception that more or less swallows the rule, as most guarantees have this waiver language.

Another issue for the conference table is whether any principals have received debt repayment from the debtor in the past year. Section 547 of the Bankruptcy Code allows a trustee or debtor-in-possession to sue creditors who were repaid on account of antecedent debt within 90 days before the bankruptcy petition date, if such payment allows the creditor to receive more than it otherwise
would have received in a hypothetical Chapter 7 liquidation. However, if the
creditor is an insider, the look-back period extends to a year. In practice, even if
there has been such an insider preference, Chapter 11 debtors-in-possession usually
decide not to sue the debtor's principals, as the principals' assistance in the
reorganization process typically outweighs any anticipated recovery. However, if
the case ultimately is unsuccessful and converts to Chapter 7, then the Chapter 7
trustee will not be so kind.

If the lawyer can get past these concerns with the corporate debtor and its
principals, then Chapter 11 can be a versatile and highly effective tool for the real
estate owner. So long as the secured creditor is adequately protected (either by an
equity cushion or some amount of monthly payments or both), the debtor often can
buy very significant time in Chapter 11. Section 1121 of the Bankruptcy Code
provides an "exclusivity period" during which the debtor is protected from any
creditor filing a competing Plan. If the debtor can show good cause, the statute
allows the bankruptcy court to extend the exclusivity period up to 18 months after
the bankruptcy petition date. Many debtors are able to enjoy bankruptcy protection
for even longer. As we all know, timing is everything in the real estate and capital
markets. It can mean the difference in the debtor being able to sufficiently market
property, find a take-out lender, force a short-sale under Section 363 or confirm a
plan – possibly with provisions that "cram down" the lender's secured claim and
reduce the contractual interest rate. Even the threat of a bankruptcy filing can give the debtor significant leverage in negotiating a forbearance agreement. If your client is in default or even distress, it is wise to call a bankruptcy lawyer sooner rather than later.
Appendix
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