

DISPOSSESSORY AND DISTRESS WARRANTS

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There are two general procedures for the removal of a tenant and its property from leased space, whether it is residential or commercial. The more common approach is an eviction or dispossession proceeding whereby a landlord requests from a court the right to physically remove a tenant and its property from the rented space, effectively throwing them onto the street. The other action is called an action for distraint wherein the landlord seeks to take possession of the contents of the leased space for eventual sale. This process is an effective method to attempt to recover unpaid rent. Both proceedings require the intervention of the Court and are not self help remedies.

A. Self Help Limitations

Under Georgia law, although a tenant under its lease may grant to its landlord the right to re-enter and take possession of the premises without recourse to legal proceedings, such action may only be done if accomplished without a breach of the peace. *Rucker v. Wynn*, 212 Ga. App. 69, 441 S.E. 2d 417 (1994). A landlord who takes self help remedies without court order may subject itself to claims for trespass and conversion. *Teston v. Teston* 135 Ga. App. 321, 217 S.E. 2d 498(1975). There are some arguments that statutory rights concerning evictions can be contractually waived in non-residential leases, for example as discussed in *Colonial Self Storage of the Southeast, Inc. v. Concord Properties, Inc.*, 147 Ga. App. 493 (1978). Generally, however, unless the removal of the tenant is done with the consent of the tenant, self help remedies may only create problems. Self help evictions have been found to be actionable torts. An action to remove a tenant and its property without court ordered approval may be seen as a trespass. An action to evict without probable cause may also amount to malicious use of process or abusive litigation. Although certain tenant defenses can be waived in commercial leases, a landlord absolutely cannot avoid the application of these eviction statutes in residential leases. See O.C.G.A. § 44-7-52 and § 44-7-2 (b)(4). Certainly, a landlord is entitled to enter upon abandoned premises for the purpose of securing and protecting the premises. However, any self help remedy should be done with notice to all interested parties.

B. Dispossession

1. *Grounds for Action*

The sole purpose of an eviction or dispossessory proceeding is to determine the right of possession as between a landlord and its tenant. Georgia law clearly outlines the procedure for tenant eviction and removing a tenant from leased property under O.C.G.A § 44-7-50. There are three grounds for eviction under the statute: 1) tenant is holding over beyond the term; 2) tenant fails to pay rent when due and 3) owner desires possession of premises held by a tenant at will or sufferance. Holding over by a tenant is simply where a tenant holds over after the expiration of the term of the lease. Failure to pay rent is of course the tenant's failure to timely pay its rent pursuant to the terms of the lease agreement. One of the primary considerations in using this basis for an eviction is whether the landlord has waived his right to insist upon prompt payment of the rent. A landlord waiver can occur even if the lease has a time of the essence provision as well as a stipulation that no custom or practice of the landlord shall constitute a waiver of the landlord's right to insist on strict compliance of the lease terms. A landlord may reinstate his right to insist upon prompt payment of future payments by notifying the tenant that strict adherence to terms will be insisted upon in the future. O.C.G.A. § 13-4-4, see *Arnold v. Selman*, 83 Ga. App. 145, 62 S.E. 2d 915 (1950). The tender of rent to the landlord is also a defense to an action for eviction. It is well settled that if a landlord accepts rent which accrues under a lease subsequent to the commencement of a dispossessory action based upon nonpayment of rent, such acceptance serves to effectively waive the landlord's right to dispossess based upon nonpayment. A tenant at sufferance is a tenant who enters lawfully upon the premises and holds over wrongfully without the landlord's consent. For example, a tenant at sufferance may result from a foreclosure. Any payment by a tenant at sufferance accepted by the landlord will convert the tenancy to a tenancy at will. A tenant at will is a tenant who has received the landlord's express or implied consent to the occupancy. An eviction for a tenant at will must be based on the tenant holding over after its right of possession has terminated or for failure of the tenant to pay rent.

2. *Demand for Possession*

The demand for possession of the leased space is a condition precedent to the right to dispossess. No magic language is required in the notice but demand must be to pay the rent or to give up the premises. Possession must be demanded as of the date that the termination becomes effective. Demand must be made in advance of the commencement of the

dispossessory filing. There is one exception to this condition, that if the demand is unnecessary, for example, if the tenant previously notified the landlord that the premises would not be surrendered, then such a fruitless demand would not be necessary. A demand for possession notice would effectively state that "demand for possession is hereby made if payment not made by ____ (date)". It is important to remember that a landlord cannot accept rent after the termination becomes effective, else the tenancy becomes a tenancy at will.

3. *Commencement of Proceedings*

The venue for an eviction action is the location of the leased premises. *Skelton v. Hill Aircraft & Leasing Corp.*, 175 Ga. App. 144, 333 S.E. 2d 14 (1985). An affidavit is required under the statute (O.C.G.A § 44-7-50) stating under oath the grounds for the dispossessory. Once the affidavit is filed, the Court will issue a summons to the defendant and instruct the Sheriff to serve the summons and affidavit on the Tenant. Any guarantors under the lease may also be served at this time if any money judgment is sought for nonpayment of rent. All guarantors may be sued as joint and several obligors. Service of the summons may be accomplished by personal service, service "sui juris" (someone residing on the premises) or by tack and mail. Posting of the summons at the leased space is sufficient with a dispossessory action if the sheriff is unable to serve the defendant personally. However, posting is not a sufficient basis for obtaining a money judgment where there is a default judgment for failure to answer. Tack and mail service meets the service requirements only where the tenant is still in the leased premises at the time of service. It is not sufficient where the tenant is no longer in the leased premises.

4. *Answer and Counterclaim*

Once served, the tenant has seven (7) days to answer the action unless the seventh day is a Saturday, Sunday or holiday. If so, the answer can be filed on the next day. A landlord is entitled to a writ of possession on the eighth day if the summons is not answered. Also, a judge can award a default judgment for all rent due. A tenant properly served has no right to open a default in a dispossessory action.

There is no requirement for a tenant to pay disputed rent into the court registry in order to properly answer an eviction action. However, payment of rent plus the cost of the action shall constitute a complete defense to a dispossessory which is based upon the non-payment of rent. A landlord is only required to accept such a tender from a tenant after the

issuance of a dispossessory summons once in a twelve month period (O.C.G.A. § 44-7-52). The tender of rent must be made to the landlord directly. The deposit of money into the registry of the court creates no such tender defense.

A tenant defendant has a number of defenses which it may bring in response to an action for eviction such as prior payment, tender of full payment, waiver, failure to repair and, property damage. A tenant may remain in possession of the premises pending the final outcome of litigation if it pays rent and other charges allegedly owed into the registry of court at the time of its answer. The statute provides that the tenant shall be required to pay rent into court where the issue of possession cannot be finally determined within two weeks after service of the eviction summons and affidavit. This requirement applies to rent accruing subsequent to the filing of the eviction action. If a tenant fails to pay rent as it becomes due, the court will issue a writ of possession and the landlord will be placed in full possession of the premises (see O.C.G.A. § 44-7-54(a)). The failure to make the required payment does not render the tenant's answer and counterclaim defective, but only disallows the tenant from remaining in possession of the premises pending trial. A landlord is entitled to an order of the court directing the clerk of the court to pay to the landlord payments of rent made into the registry of the court by the tenant except to the extent that the tenant contests the amount owed.

5. *Trial, Judgment and Appeal*

The rules of court apply the same in an action for dispossessory as they do in the trial of any matter in controversy in the courts of Georgia, whether the matter is heard in the Magistrate or State or Superior Courts. If Judgment is entered against the tenant, the judgment will be entered against the tenant for all rents due and the court will then enter the writ of possession for the leased space. A writ of possession orders the appropriate sheriff or marshal to place the landlord in possession of the premises. A writ of possession and execution for the judgment amount are effective seven (7) days after the entry of the judgment. The actual eviction consists of the physical removal of the property from the premises. The landlord bears the cost of the eviction. The goods of the tenant once removed may be stacked in the street or sidewalk if passage is not blocked. Rent for the balance of the lease term can be accelerated as part of a money judgment for rent. An acceleration clause must discount future rent to present value. In order for an acceleration clause to be enforceable, it must meet the requirements for appropriate

liquidated damages pursuant to Georgia law.

Any final judgment is appealable as in any other case in the courts of the State. An appellant can be required to post a supersedeas bond if requested by the appellee. A tenant who appeals an adverse judgment is entitled to remain in possession provided he pays rent into the registry of the court (see O.C.G.A. § 44-7-54). If judgment is for the tenant, the tenant is entitled to remain on the premises and the landlord will be liable for all foreseeable damages shown to have been caused by its wrongful conduct.

C. Distress Warrants

1. Grounds for Action

Distrain is a right vested in a landlord allowing the landlord to cause his tenant's property to be seized to satisfy the rental obligations of the tenant. Distress proceedings apply to the action by the landlord to enforce his lien right on the property of his tenant. Distress proceedings are only beneficial to the extent the landlord is able to take advantage of the value of the tenant's property. If the goods stored are owned by a third party, are encumbered or the tenant moves the property prior to a physical seizure or levy, the distress proceeding provides the landlord with little advantage. The distress process is patterned along the lines of the statute governing personal property foreclosure and dispossessory statutes. There is no common law lien that exists over a tenant's goods to secure the payment of rent. A landlord needs a security interest, a judgment or other claim against the property in the leased space. If not, a landlord who wants to retain a tenant's goods needs to pursue a distress proceeding. The power to distrain for rent arises only if the relationship of a landlord and tenant exists. As such, such an action is available to a landlord with a recognized tenant. A tenant may even distrain his sub-tenant.

2. Demand for Possession

The statute governing distraint is O.C.G.A. § 44-7-70 and O.C.G.A. § 44-7-71. Although there are arguments concerning the inconsistency between the statutory sections, there seems to be a general consensus that for a distress proceeding to prevail, the tenant must be in arrears AND seeking to remove its property. Unlike dispossessory proceedings, there is no statutory requirement that the landlord seeking to distrain make demand for the rent prior to instituting its distress proceeding.

3. *Commencement of Proceedings*

As with a dispossessory, there is a requirement that an affidavit be given by the landlord or its agent. The affidavit must be submitted under oath, the use of a notary public not being sufficient. The affidavit needs to state the grounds for the issuance, a description of the premises and the basis for jurisdiction (the tenant either resides in the county where the application is made or the tenant has property in that county). Once the landlord's affidavit is made, the judge or magistrate must issue a summons to the sheriff. The affidavit and summons are to be served on the tenant commanding him to appear at a hearing on a day certain not less than five (5) nor more than seven (7) days from the date of service. The affidavit and summons are to be served by the marshal or sheriff for the county where the tenant resides or the tenant's property is located. Posting is inadequate for proper service in a distress proceeding. However, an acknowledgment of service would be proper service. After the allotted time to answer is passed, the courts will grant distress warrants upon default without necessarily allowing the fifteen (15) days provided under the Georgia civil practice act for a defaulting defendant to open its default. If the tenant fails to answer, the landlord is entitled to a distress warrant and default judgment for all rents due. The default judgment may not exceed the amount of the indebtedness shown on the landlord's affidavit.

4. *Answer and Counterclaim*

The tenant served with a distress summons must file its answer within time prescribed. As with dispossessory proceedings, the tenant may include in its answer all defenses allowed under the civil practice act. The tenant's answer may also include a counterclaim. Defenses can include payment, tender and waiver by the landlord of timely payment. The tenant can also assert defenses of failure to repair and constructive eviction. O.C.G.A. § 44-7-73 allows the tenant to tender to the landlord within seven (7) days of service all rents allegedly owed plus the cost of the distress warrant and such tender operates as a complete defense. An answer could then be filed asserting full tender as a defense (the payment MUST include the payment of costs). Any counterclaim which is filed converts the proceeding into a contested matter. Once a tenant files its answer, the case is set for trial.

5. *Trial, Judgment and Appeal*

If matter is contested, a trial is held. The landlord must establish a prima facia case to avoid a directed verdict. If the landlord presents a prima

facia case, the tenant is entitled to produce evidence to refute the allegations presented. The tenant may also present evidence to support its counterclaim. Until trial the tenant is entitled to remain in the premises until the final outcome of the contested dispute. However, while in the premises, the tenant may not transfer or convey the property (O.C.G.A. § 44-7-75) or must post a bond (O.C.G.A. § 44-7-76) to do so. O.C.G.A. § 44-7-75 requires that at the time the tenant files its answer, the tenant must pay into the registry of the court that portion of the rent which it admittedly owes, but is not required to pay into court any disputed amount that has accrued prior to the issuance of the summons. The tenant must pay its continuing rent into the registry of the court if it wants to retain possession of its personal property pending the outcome of the action. This is the rent that is due after the issuance of the summons. The rent due can be determined by the terms of the written rental agreement.

Since a dispossessory action can be filed at the same time of a distress action, the payment of rent on a dispossessory satisfies the obligations of the distress proceeding. Combining actions may be the best method for the landlord to recover on its judgment for unpaid rent. If rent owed is not paid, the tenant cannot retain possession of its property unless a bond is posted. The bond to be posted by the tenant must be in a sum equal to the lessor of a) the value of the property or b) the rent alleged to be due, as estimated by the judge. The bond may be in the form of cash or property or may be posted by a surety or bonding company (equal to the value of the property or the rent alleged to be due, whichever is less). Failure to post a bond or pay the rent subjects the tenant's property to seizure. Once a bond is paid, the tenant may convey, transfer or remove its property without restriction.

If the landlord prevails, the judgment would be for rent due and a distress warrant will be issued. Distress warrants may be levied by any appropriate judicial official. The levied goods are transported to a bonded warehouse and stored pending advertisement and sale. The property may be held at the leased premises if a dispossessory order is entered as well. Any property seized as a result of a distress judgment is to be held for levy and sale in order to satisfy any judgment entered in favor of the landlord at the trial of the merits of the action. Undisputed rent payments may be released to the landlord. Amounts in dispute are to be retained by the court.

If a tenant appeals a judgment, it can remain in possession of its property if payment of rent is made to court or a bond is posted. If bond or payment not

made, property is subject to seizure by the court until there is a final disposition of the case. If the judgment is for the tenant, all money and/or property is returned to the tenant. Also, the tenant is entitled to a judgment against the landlord for all foreseeable damages caused by the wrongful conduct of the landlord in pursuing its action (see O.C.G.A. § 44-7-77(b)).